RESTORING THE PARAMETERS OF PUBLIC HEALTH IN A TIME OF HOBBY LOBBY AND EBOLA: THE CASE FOR A WELLNESS ACCOUNT

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The genesis of this piece lies in two seemingly unrelated events in law and public health, the governmental response to the Ebola crisis, and the U.S. Supreme Court ruling in *Burwell v. Hobby Lobby*, sparked by religious objections to certain employer mandates under the Affordable Care Act.[1] Both episodes raise issues about the behavior of government authorities in the face of public health need. The presence of Ebola in the United States raised significant questions about how health agencies should address a potential population health crisis, and do so in ways that are respectful of public need and individual liberties.[2] In *Hobby Lobby*, the use of government power to compel employers to provide eight no-cost prevention services for women was driven by large-scale public health considerations addressed in the Affordable Care Act.[3] Undoubtedly the challenges of Ebola and women's health are very different, but these matters illustrate the struggle public health regulators face in meeting population health needs, and balancing such responses with individual rights. Ebola in the United States, in particular, provides a current and dramatic example of the legal conflicts that arise when government is compelled to protect the public in ways that must incorporate group and individual liberties, together with scientific understanding as foundational elements of response. The *Hobby Lobby* case, on the other hand, demonstrates another perspective on government health policy, illustrating how other rights beyond due process and equal protection can impact current public health concerns, as this case interjects the free exercise of religion into the health discourse.

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1. 134 S. Ct. 2751 (2014).

2. *See* Mark Berman, *Reminder: Quarantines Still Can't Stop Ebola from Getting into the U.S.*, WASH. POST (Oct. 27, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/10/27/reminder-quarantines-still-cant-stop-ebola-from-getting-into-the-u-s/.

3. *Hobby Lobby,* 134 S. Ct. at 2779.

Hobby Lobby departs from more traditional controversies seen in public health contexts in which the dilemmas of balancing common good and individual liberty involve parties immediately impacted by a government action. In *Hobby Lobby*, the interests of a third party skew the balance of rights equation; the Court concerns itself with the challenges of three privately held corporations, none of whom are the recipients of the services in question.[4] The challengers, under the banner of religious liberty, defend their rights to their beliefs, as corporate persons, in a fashion that presents profound challenges to this sector moving health concerns away from the established rubric of public and private concerns.[5] In contrast to *Hobby Lobby*, the threat of Ebola in the United States, in spite of all the problems it caused, sparked debates about response focused on matters of science, and protection of individual and collective interests.[6] In the face of a potential crisis, it would have been hard to envision a response to Ebola co-opted by the interests of third parties not immediately threatened by this disease. While women's health concerns may not be equated to the threat of a deadly infectious disease, the considerations underlying prevention and wellness for more than half our population are central to public health and should first and foremost be driven by medical science, public need, and personal choice.

While this essay focuses on the *Burwell v. Hobby Lobby* case and not Ebola, its core premise is that health policy is best served when government authorities focus strategies and responses within the parameters of individual and population concern.[7] The Supreme Court, in dealing with the contraceptive mandate, opened the door to subordinating core public health interests to third party considerations by adopting a narrow concept of compelling interest that serves to confound the government role in health oversight.[8] It will be difficult in the current legal climate to overcome the ascendancy of corporate interests in *Hobby Lobby*, empowered by the force of religious exercise, not resting in First Amendment jurisprudence, but in stringent statutory interpretation. There are legal arguments to be made against the holding in *Hobby Lobby* but they are, at best, rather weak as the

4. *Id.* at 2759.

5. *See* Laura Bassett & Ryan J. Reilly, *Supreme Court Rules in* Hobby Lobby *Case, Dealing Blow to Birth Control Coverage*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/06/30/supreme-court-hobby-lobby_n_5521444.html (last updated June 30, 2014, 1:59 PM).

6. *See Testing of Potential Ebola Vaccine Begins*, COLUMBIA DAILY TRIB. (Feb. 11, 2015, 2:00 PM), http://www.columbiatribune.com/news/testing-of-potential-ebola-vaccines-begins/article_3b2bbb88-bb9c-51da-9e88-47443bae3eac.html.

7. Lena H. Sun, *Cost to Treat Ebola in the U.S.: $1.16 Million for 2 Patients*, WASH. POST (Nov. 18, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/11/18/cost-to-treat-ebola-in-the-u-s-1-16-million-for-2-patients/. As this headline suggests, the cost of addressing health care issues in traditional boundaries does not guarantee that the issue at hand will be dealt with in ways that don't fuel considerable concerns.

8. *See infra* Section 1.

core statute underpinning the case, the Religious Freedom Restoration Act ("RFRA") possesses a high bar, and politics makes it is unlikely that this law will be amended. Nonetheless, the public's health necessitates an approach to women's health that restores a balance between common good and the liberties of directly affected individuals.

This piece will propose an alternative approach to women's health promotion, a wellness account, which carves out employers from coverage decisions in the prevention area. Not only will the wellness account circumvent corporate paternalism in health, it will strengthen the promotion and prevention goals of the Affordable Care Act ("ACA") by more effectively engaging individuals and clinicians in their own health decisions, as well as provide coverage options that include a broader array of health services not routinely available under the law. The essay will be divided into four sections. Section 1 will review the U. S. Supreme Court decision in *Burwell v. Hobby Lobby*, highlighting the core findings of the majority, as well as key points made by the minority. Section 2 will present some general reflections on the *Hobby Lobby* case, focusing on the free exercise of religion issue under RFRA, as well as an exploration of the compelling interest standard as it relates to women's health. Section 3 of the article will explore possible avenues around the legal barriers of *Hobby Lobby* through legislative and judicial fixes, as well as alternative approach to the employer mandate. In Section 4 a proposal will be posited to amend the ACA to create a lockbox for prevention and wellness services that will provide a new home for women's health services including the four contraceptives that sparked the *Hobby Lobby* litigation. It will be argued that removal of the coverage mandate from employer discretion is a way to restore the parameters of public health to matters of science, public need and individual patient right.

SECTION 1: THE BASICS OF THE HOLDING

A. The Majority

Burwell v. Hobby Lobby involved a challenge by three closely held corporations against the U.S. Department of Health and Human Services ("DHHS").[9] The three corporations involved, Hobby Lobby, Mardel, and Conestoga Wood Specialties, all large, privately held, family run companies, alleged that the employer group health insurance mandate in the Affordable Care Act that required them to provide coverage of four FDA contraceptive services that were alleged to violate their religious liberty under both the First Amendment Free Exercise Clause, as well and the

9. *Hobby Lobby*, 134 S. Ct. at 2759. For a detailed overview of *Hobby Lobby* and the questions it raises for the free exercise of religion, see DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS?: HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION 42–53 (2014).

Religious Freedom Restoration Act of 1993 ("RFRA").[10] Pursuant to DHHS regulations implementing the ACA, employer group plans are required to furnish preventive care and screening for women without cost sharing.[11] Non-exempt employers must provide coverage for all twenty FDA approved contraceptive methods, including four types that were explicitly signaled out as being antithetical to the religious beliefs of the three claimants.[12] The DHHS contraceptive mandate was not in the statute, but rather was determined administratively by the Health Resources Administration ("HRSA") based on the recommendations of the Institute of Medicine.[13]

An important backdrop to the privately held corporate objections was that two broad types of exemptions to the contraceptive coverage mandates existed. By law, many large employers and unions did not have to comply with the no-cost sharing women's health coverage requirements as their plans, which existed prior to the ACA, were granted "grandfather status," making them exempt from the law's minimum essential benefits, which included the contraceptive mandates.[14] DHHS had also granted an exemption to the contraceptive mandate to religious organizations, based on state law precedents, and later, a partial exemption to non-profit religious organizations was authorized to forestall a firestorm of controversy surrounding contraceptive coverage generally.[15] In the case of the exempted organizations, their insurers and third party administrators ("TPAs") may exclude contraceptive services from health plan offerings; the coverage responsibility shifts to the insurance entity or TPA to provide the four

10. *Hobby Lobby*, 134 S. Ct. at 2759.

11. 42 U.S.C. § 300gg-13(a)(4) (2012).

12. *Hobby Lobby,* 134 S. Ct. at 2762. The corporate parties objected to four types of contraceptives; two morning after-pills, Plan B and Ella; and two types of intrauterine devices (IUDs), arguing that these four prevented implantation and as such were "abortifacients." *See* Jen Gunter, *The Medical Facts About Birth Control and* Hobby Lobby*– From an OB/GYN*, NEW REPUBLIC (July 6, 2014), http://www.newrepublic.com/article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn.

13. *Hobby Lobby*, 134 S. Ct. at 2788.

14. 42 U.S.C. § 18011(a), (e) (2010). DHHS was responsible for implementing Section 2713 of the Public Health Service Act that covers, prevention and wellness. *See Preventive Services Covered Under the Affordable Care Act*, DEP'T OF HEALTH AND HUMAN SERVS., http://www.hhs.gov/healthcare/facts/factsheets/2010/07/preventive-services-list.html (last updated Sept. 27, 2012).

15. *See* 45 C.F.R. § 147.131 (2013). There is a rather complex history of regulatory development concerning the exemption of employers from the contraceptive mandate starting with traditional religious organizations and expanding to non-profit religious employers. *See* Certain Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8,456 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 147, 148, 156). To ensure that women are covered by an exempt employer insured group health plan or self-insured plan, the no-cost coverage requirement for contraceptives was shifted to insurers and TPAs. 45 C.F.R. § 147.131(c).

challenged no cost sharing contraceptives.[16] This transference was seen as budget neutral, due to the savings sparked by these preventive services.[17]

Both the Hahn (Conestoga Wood) and Green (Hobby Lobby, Mardel) families sought injunctive relief in federal districts courts, claiming that their free exercise of religion was infringed on as a result of the DHHS contraceptive mandate, but in both cases relief was denied.[18] The Hahns appealed their case to the Third Circuit Court of Appeals, without success, as that court ruled that a for-profit corporation could not engage in religious exercise under either RFRA or the First Amendment, and that the mandate at issue was not one personally directed to the Hahns.[19] Things changed in the federal court of appeals for the Greens, however, as the Tenth Circuit reversed the lower court's denial of a preliminary injunction.[20] The court ruled that the Greens' businesses meet the definition of "persons" under RFRA, and that they had established the likelihood of success in showing that the contraceptive mandate was a substantial burden, causing them an irreparable harm.[21] The court held that DHHS did not establish that the contraceptive mandate was the least restrictive way of furthering the government's compelling interest.[22] The split in the Third and Tenth Circuits resulted in the Supreme Court's grant of certiorari.[23]

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16. 45 C.F.R. § 147.131(c).

17. *See* Coverage of Certain Preventive Health Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,877 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). The July 2, 2013 rules were the culmination of prior administrative actions in this very controversial area of rule making. *See* Tyler Hartsfield & Grace-Marie Turner, *49 Changes to Obamacare . . . So Far*, GALEN INST. (Mar. 2, 2015), http://www.galen.org/assets/49-Changes-to-ObamaCare . . . So-Far.pdf. In turn, broader modifications were made for religious non-profit employers who state their objections to contraceptives, requiring the federal government to take over management of these benefits. No longer does the objection have to be made to the insurer or TPA, but it can be made directly to the government. *See* Kaiser Health News, *Religious Employers Offered Fix on Birth Control Coverage Rules*, KAN. HEALTH INST. (Aug. 22, 2014), http://www.khi.org/news/2014/aug/22/religious-employers-offered-fix-birth-control-cove/. The July 2, 2013 rules were later amended to allow for greater accommodation to employer objections. Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147). For an interesting analysis of the difficulties faced in dealing with the religious objections in the area of contraceptives, see Emily Bazelon, *Nice Try, Obama*, SLATE MAG. (Aug. 26, 2014, 12:24 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/obama_s_new_contraception_mandate_accommodation_religious_employers_are.html.

18. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 400 (E.D. Pa. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012).

19. Conestoga Wood Specialties v. U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013).

20. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013).

21. *Id.*

22. *Id.* at 1144.

23. Conestoga Wood Specialties v. Sebelius, 134 S. Ct. 678 (2013).

The *Burwell v. Hobby Lobby* case, which joined together the Greens' and the Hahns' religious objections, was based not on a constitutional consideration of the First Amendment Free Exercise Clause, but rather was grounded in the Court's interpretation of the Religious Freedom Restoration Act of 1993.[24] Hobby Lobby, Mardel, and Conestoga corporations argued to the Court that RFRA prohibits the government from substantially burdening a person's free exercise of religion unless it is able to shown that the burden in question is both driven by a compelling interest, and constitutes the least restrictive means available to achieve the public goals at issue.[25]

In ruling in favor of the three privately held corporations, the majority opinion, written by Justice Alito, covered three significant areas. First, the Court reached several related conclusions about the feasibility of the religious infringement claim under RFRA. The majority ruled that RFRA applies to closely held for-profit corporations, rejecting the government's positions that the three companies could not sue under this law because they are for-profit entities, and that the owners could not challenge the regulations, at issue, as they applied only to companies, and not individuals.[26] The Court reasoned that the DHHS position on the viability of the RFRA challenges placed these merchants in a very difficult situation, forcing them to give up their rights to seek judicial protection of their religious liberty or forego the benefits of operating as a corporation. Additionally, the majority held that nothing in RFRA forced a departure from the Dictionary Act definition of "person" including corporations.[27] The Court rejected the DHHS position that a for-profit corporation could not seek protection under RFRA, as the government had conceded that non-profits could be considered "persons" under the Act.[28]

The *Hobby Lobby* majority reasoned that state laws authorized corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owner's religious principles.[29] The Court further reasoned that First Amendment jurisprudence was not reversed by RFRA to a time when corporate rights in the religious context had not been addressed, rather this law, and its progeny, created independent religious rights that could clearly include for-profit corporations within its ambit.[30]

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24. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2759 (2014).

25. *Id.* at 2779; 42 U.S.C. § 2000bb-1 (2012).

26. *Hobby Lobby*, 134 S. Ct. at 2759.

27. *Id.* at 2768.

28. *Id. See* Dictionary Act, 1 U.S.C. §§ 1–8 (2014). *See also* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006), in which the Court allowed a RFRA claim of a non-profit to proceed.

29. *Hobby Lobby*, 134 S. Ct. at 2771.

30. *Id.* at 2772–74. RFRA was enacted in 1993 in reaction to the Supreme Court decision in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990). RFRA is often viewed as a statute, which rolls back the law in this area to the pre-Smith era in which for-profit corporations did not make claims for First Amendment Free

The Court rejected the government's claim that it could not ascertain the sincerity of corporate (religious) beliefs, reasoning that in other contexts (i.e., prisoners religious liberty claims) such determinations are made by federal courts, and that here too, the Court reasoned that state law affords guidance as to the limits of acceptable corporate governance.[31] DHHS did not question the sincerity of the Greens' and Hahns' religious beliefs that life begins at conception, nor their religious opposition to the highlighted four contraceptives, but the agency called into question how such beliefs could be determined in a corporation, guided by a leadership structure that may have conflicting views on such matters.[32]

The second major element in the *Hobby Lobby* ruling concerned the question of whether the three companies' religious liberty was "substantially burdened" by the contraceptive mandate. In order for a successful RFRA claim to be brought the complaining parties must demonstrate that the government action, at issue, is a substantial burden on the free exercise of religion.[33] The Court in *Hobby Lobby* was persuaded that the burden was substantial, based on the size of the statutory fines that Hobby Lobby, Mardel, and Conestoga would face if they offered health insurance that failed to provide the four contraceptive services.[34] Amici in the case raised the argument that the three companies could avoid the fines by dropping health insurance and paying a $2,000 penalty per employee; a payment obligation resulting from employees purchasing their own health insurance on government exchanges.[35] The government, however, never mounted the argument that the three companies could have circumvented their religious objections by forcing their employees onto public exchanges, thus mitigating their burden.[36] Nonetheless, the Court did note that using the exchanges, as a way to reduce the companies' substantial burden would have been unpersuasive.[37] According to the Court, the plaintiffs offered health insurance for both religious reasons, as well as for conventional business considerations, and the decision to offer health coverage was a long standing one made by the three companies prior to the Affordable Care Act.[38] The *Hobby Lobby* majority expressed doubt that the Congress, either

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Exercise protection. The Court rejected this premise as they pointed out in *Hobby Lobby* that in the pre-*Smith* era, Gallagher v. Crown Kosher Super Markets of Massachusetts, Inc., 366 U.S. 617 (1961) demonstrates that for-profit corporations can exercise religion. *Id.* at 2772.

31. *Hobby Lobby*, 134 S. Ct. at 2774–75.

32. *Id.* at 2774.

33. 42 U.S.C. § 2000bb-1(a) (2012).

34. The Court estimated that the fines would be annually $475 million for Hobby Lobby, $15 million for Mardel, and $33 million for Conestoga. *Hobby Lobby*, 134 S.Ct. at 2776.

35. Brief of Religious Organizations as Amici Curiae Supporting the Government at 22, *Hobby Lobby*,134 S. Ct. 2751 (2014) (No. 13-354).

36. *See Hobby Lobby,* 134 S. Ct. at 2776.

37. *Id.*

38. *Id.* The Court never explained its conclusion that the three companies saw religion, in and of itself, as a motivating factor to offer employee health benefits.

through RFRA or the ACA, would place privately held corporations in a situation where they had to choose between violating sincerely held religious principles and forcing their employees to lose existing health care coverage.[39]

The Court also rejected a key government argument that the connection between the religious beliefs and actual use of the four contraceptives was too attenuated.[40] Rather, the Court characterized the Greens' and the Hahns' perception that their religion and moral philosophy was violated by the contraceptive mandate as sincere; according to the Court, characterizing this belief as insubstantial or minimal in its practical import, was not within the purview of the federal courts.[41] As such, the Court found a direct link between the religious objections of the parties to the mandate, and the possible eventuality that it could lead to the actual use of one of the four objectionable contraceptives.

The third key element in the Court's decision concerns whether the government was able to justify the substantial burden on religious liberty under RFRA,[42] and consideration of the viability of the DHHS justifications. Under the dictates of RFRA, based on constitutional jurisprudence, DHHS was required to demonstrate that the contraceptive mandate was motivated by a compelling interest, and that the regulatory approach taken, constituted the least restrictive means of achieving the goal in question.[43] Although there is overwhelming evidence underpinning the value of women's access to contraceptives, the Court never dealt with the public health, or gender equity, arguments made by DHHS in considering the "compelling interest" question, but rather characterized these defenses as far too broad.[44] The Court's opinion focused more extensively on determining whether mandating employers to provide health insurance, that included the four contraceptives at issue, was the least restrictive means available to achieve this goal of offering these services.[45] Under the ACA, large numbers of employers, through grandfathering provisions, and subsequent administrative exemptions for religious entities, had been carved out of the contraceptive mandate.[46] DHHS had created an exemption for non-profit religious employers that transferred the no-cost coverage responsibility to insurance issuers and third-party administrators.[47] The Court identified this type of exemption as a model, which was less restrictive than the one proposed for the challengers.[48] The government

39. *Id.* at 2777.
40. *Id.* at 2777–78.
41. *Id.* at 2779.
42. *Hobby Lobby,* 134 S. Ct. at 2779.
43. *Id.* at 2761 (quoting 42 U.S.C. § 2000bb-1(b) (2012)).
44. *Id.* at 2779.
45. *Id.* at 2780–83.
46. *Id.* at 2763–64. *See* § 18011(a), (e) (2012).
47. 45 C.F.R. § 147.131(c) (2013).
48. *Hobby Lobby,* 134 S. Ct. at 2782.

countered with the argument that enforcement of RFRA could not serve as a justification for new expenditures to create a less restrictive enforcement scheme.[49] The Court strongly rejected the expenditure argument, holding that both RFRA, and its sister statute, RLUIPA (Religious Land Use Institutionalized Persons Act), could, in the interests of the free exercise of religion, require the expenditure of additional public funds, and such position was in compliance with Congressional intent.[50] While the majority did not specify an exact approach that would meet the "least restrictive means test," it did reject the strategy of having employers drop health insurance as a way to avoid religious conflict; in the eyes of the Court, this would constitute a greater impediment to a woman seeking contraceptive services.[51]

In crafting its ruling in *Burwell v. Hobby Lobby*, the majority was careful to frame its opinion narrowly by limiting its decision under RFRA to privately held corporations.[52] But, as pointed out in the minority opinion, it is not entirely clear that the same reasoning applied in *Hobby Lobby* could not be adopted in a similar, future RFRA challenge, brought by a publically traded corporation.[53] The majority was quite adamant that there was no boundary in RFRA that limited its application to a natural person, but rather the term "person" appears to permit claims by a wide array of actors, including for-profit corporations.[54] The Court stressed that the decision only applied to the religious challenge against the contraceptive mandate, and was not to be read as opening the door to free exercise objections to other public health measures such as mandatory vaccines, or as a ruse to sanction employment discrimination.[55] The Court noted that the RFRA compelling interest test was robust enough to act as a litmus test to balance religious liberty claims against competing interests more generally.[56] But the existence of a balancing test, no matter how artful it maybe, does not preclude other claimants from pursuing their free exercise claims, spurred on by the success of the three parties in *Hobby Lobby*.

B. The Minority

Justice Ginsburg authored a bitter dissent, illustrating how badly divided the Court was along political and gender lines.[57] Several key points

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49. *Id.* at 2781.
50. *Id.*
51. *Id.* at 2783.
52. *Id.* at 2785.
53. *Hobby Lobby,* 134 S. Ct. at 2797 (Ginsburg, J., dissenting).
54. *Id.* at 2759.
55. *Id.* at 2783–84.
56. *Id.* at 2784–85.
57. The decision was a 5–4 split with the dissent representing the liberal factions of the Court, in addition to reflecting a gender divide as all three women on the Court joined in the dissenting opinion.

were stressed in the dissent starting with a much more careful articulation and support for the Women's Health Amendment that had acted as the catalyst of the contraceptive mandate.[58] The dissent did not characterize RFRA as a starting point in the exploration of the legal analysis of government burdens on free exercise, but rather viewed it as a point of return to the body of constitutional jurisprudence that existed prior to this statute.[59] Justice Ginsburg argued that not only had a compelling interest standard been in existence before RFRA, but so too had the least restrictive means requirement.[60] The dissent took issue with the majority's conclusion that a religion-based exemption could be expanded to a for-profit corporation.[61] The pre-*Smith* rulings, relied on by the majority, make no mention of such a dramatic expansion to for-profit entities, and according to Justice Ginsburg, had that been Congress' intent, it would have been clarified in the RFRA statute.[62] The dissent also voiced concern that there is no way to limit the expansion of "person" to only closely held corporations, but the logic of the ruling extends to corporations of any size, public or private.[63] Additionally, Justice Ginsburg noted that placing the courts into the role of deciphering the validity of particular religious objections made by for-profit corporations would be venturing into a judicial minefield, and could run afoul of the other pillar of religious freedom, the Establishment Clause.[64]

The dissent was troubled by the viability of the connection between the Greens' and Hahns' religious objections to the contraceptive mandate and the nature of the burden placed on them.[65] Justice Ginsburg noted that the obligation placed on the challengers was to direct money to undifferentiated funds that finance a wide array of benefits under comprehensive health plans.[66] The actual decision to use a contraceptive is one between an employee and her physician, making the religious objection of the three closely held corporations less than a substantial burden. The

58. *Hobby Lobby,* 134 S. Ct. at 2787–89 (Ginsburg, J., dissenting).

59. *Id.* at 2791. In the eyes of the dissent, RFRA and the RLUIPA amendment to RFRA, restored free exercise jurisprudence to a time before *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *Smith* abandoned earlier free exercise jurisprudence holding that when government regulations impacted religion, such impact, if it was incidental to a regulation that was generally applicable, and otherwise valid, was permissible. Earlier Court rulings such as Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963) required the government to justify any substantial burden on religion by a compelling state interest and by adopting means narrowly tailored to reach that interest. RFRA and RLUIPA restored the pre-*Smith* test and allowed federal courts to rely on earlier jurisprudence for guidance. *See id.* at 2772–74.

60. *Id.* at 2792–93.

61. *Id.* at 2793–96.

62. *Id.* at 2796.

63. *Hobby Lobby,* 134 S. Ct. at 2797.

64. *Id.* at 2805.

65. *Id.* at 2799.

66. *Id.*

dissent argued that the third-party nature of the claim was one not envisioned by Congress under RFRA; the decision in question was made by an individual and was not a direct issue that arose in the relationship between the three corporations and the government.[67] Even if the burden on Hobby Lobby, Mardel, and Conestoga was found to be substantial, the dissent was persuaded that the compelling public health interest outweighs the employer objections, and that no prior decision has allowed a RFRA based exemption to harm the interests of others, particularly those whom the law is designed to protect.[68] The dissenters rejected alternative payment mechanisms for contraceptives, endorsed by the majority, arguing that the ACA scheme for preventive services rested on the employer health insurance system and that moving away from that structure would impede women's access to health services.[69]

SECTION II: REFLECTIONS

A. The Corporatization of Religion

Undoubtedly the legal heart of the *Burwell v. Hobby Lobby* case concerns the free exercise of religion, claimed by the three corporate challengers, versus the right of the government to be able to regulate employer health plans to achieve public health goals. While free exercise jurisprudence, unlike due process and equal protection, is not the daily fodder of constitutional concerns in public health law policy formation, it is nonetheless an area that has been the subject of long-standing and frequent concern.[70] Generally disputes that occur at the intersection of health and constitutional law pit parties who claim individual rights, such as religion, against government authorities acting in the interests of the public. Individuals and religious organizations, under the banner of the First Amendment, and more recently RFRA, argue that their right to engage in certain conduct, or their exemption from various public mandates, be protected by their right to exercise their religious freedom.[71]

Most often, there are three types of challenges that can be found in health care contexts that typify the nature of religiously based disputes: challenges that involve regulations, proscriptive directives, and compulsory

67. *Id.*

68. *Hobby Lobby,* 134 S. Ct. at 2799–2801.

69. *Id.* at 2802.

70. *See* Breitta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 641 (2003).

71. Such challenges can also be brought under state law, as state constitutions recognize the free exercise of religion and all states have enacted their own versions of RFRA. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103 (2013).

actions, respectively. There exists a wide array of subject matter disputes; from objections to mandatory vaccines, disease testing and reporting, to blood transfusions, bans on polygamy, etc., which populate this area. Of particular note are the commonly encountered controversies involving third-party health care institutions or individual health professionals, who as a matter of conscience, driven by a religious or moral objection, refuse to provide certain types of care, typically, those involving women's health services (contraception, artificial insemination, sterilization, and termination of pregnancy). The ability of individuals and institutions to refuse to provide services, based on religious beliefs, has been underpinned by the passage of state statutes in the area, along with the issuance of federal regulations to that effect.[72] From the rights of providers to limit services, issues of conscience have expanded into payment matters as employers, primarily religiously sponsored, have argued that specific employee health benefits that require contraceptives to be covered must be excluded if they conflict with religious doctrine.[73] The Obama Administration adopted contraceptive coverage exclusion, first developed in the states, as a special concession to religiously based corporations that primarily employ and serve those of the same faith.[74] The corporate exclusions for religious organizations fit within the framework of free exercise jurisprudence, but when exclusions are sought by for-profit companies, that espouse strong religious values, like Hobby Lobby, the law concerning freedom of religion enters into a previously unprecedented arena.

What makes the ruling in *Burwell v. Hobby Lobby* feasible is that the case is brought within the parameters of RFRA, as opposed to a First Amendment challenge. The Court in *Hobby Lobby* may have been able to frame its decision on precedent but it would have had to reject the rational basis test of *Employment Division v. Smith*, and reconfirm the strict scrutiny

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72. *See* Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779 (2007); *see also* Maria Cirincione, *Maryland's Conscience Clause: Leaving a Woman's Right to Health Care Provider's Choice*, 13 J. HEALTH CARE L. & POL'Y 171 (2010). Federal regulations concerning religious and moral refusal to treat can be found at 45 C.F.R. §§ 88.1–88.2 (2011); 42 U.S.C. § 300a-7 (2000); 42 U.S.C. § 238n (1996); Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 2209 (2007). These references are to conscience clauses that are directed toward abortion services. Conscience clauses have been issues of contention pitting more conservative religious interests against liberal policy makers. *See* Kelleen Patricia Forlizzi, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*, 44 NEW ENG. L. REV. 387 (2010).

73. Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 304 (2014).

74. *Id.* at 307. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

analysis it had developed in *Sherbert*. RFRA, however, gave the Court a statutory avenue to avoid such judicial rationalizing, and through this law, the *Hobby Lobby* majority was able to follow an alternative pathway.

Two key factors stand out in the RFRA analysis. First, the Court found that RFRA was not restricted to individuals and religious entities, but that corporations, operating under the color of state law, could pursue profits in conformity with the religious values of their owners.[75] Thus Hobby Lobby, Mardel, and Conestoga, as for-profit corporations, were protected by RFRA, and as such, had the opportunity to make the case, that as covered entities, their religious rights were illegally burdened by having to meet a mandate that was an affront to those beliefs. Even more significant than recognition of the three businesses as RFRA persons, was the fact that their claim was placed in a pre-*Smith* context that required the application of a strict scrutiny test.[76] Second, the Court accepted the Greens' and the Hahns' expression of faith and reiterated it without question, as the judicial role requires only a finding of an "honest conviction."[77] The sincerity of the religious claim, coupled with the economic harm suffered by the challengers' free exercise, combined to infringe on the religious liberty of the parties.[78] Once a substantial burden was demonstrated, the onus under a RFRA claim shifts to the government to show that the regulation at issue is supported by a compelling interest, and that the regulatory approach followed is the least restrictive means available.[79] RFRA supplants the rational basis test adopted in *Smith*, one that would have been easier for DHHS to meet in making the public health case for contraceptives. Under the less stringent rational basis test, the exercise of religion can be impacted by the government action at issue, provided this action is neutral; its object is not the suppression of religion, or religious conduct, and the particular action is generally applicable.[80] But under the strict scrutiny standard of RFRA, a compelling interest has to be

75. *Hobby Lobby*, 134 S. Ct. at 2779.

76. *Id.* at 2772–74.

77. *Id.* at 2778. A couple of curious matters have been identified in the commentary on the Hobby Lobby case that raise questions about the sincerity of the challengers religious beliefs and suggests that the religious convictions of the Hahns and the Greens may be somewhat new found. Both Hobby Lobby and Conestoga Wood covered the morning after pills that the parties objected to in their employee health benefit plans; it was only after the passage of the Affordable Care Act that these employers objected to providing such coverage. An article in *Mother Jones* magazine noted that the employee 401(k) retirement plan, which Hobby Lobby contributed to, held more than $73 million in mutual funds with investments in companies that produce emergency contraceptive, intrauterine devices, and drugs commonly used in abortions. Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (Apr. 1, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers.

78. *See Hobby Lobby*, 134 S. Ct. at 2759.

79. *Id.* at 2751.

80. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

demonstrated that goes beyond a general public health case in support of women's health prevention and wellness.[81] Rather, a compelling interest standard requires an explicit demonstration that placing a burden on the free exercise of religion of the three specific corporations was necessary to solve the public health problem at issue, something the government failed to do in *Hobby Lobby*.[82]

Compounding the difficulty in demonstrating a specific compelling interest was the further legal requirement that DHHS must show that its approach to the matter of contraceptives, that burdened the parties' freedom of religion, was the least restrictive means available to deal with this matter.[83] Here, the Agency was confronted with a major challenge, as the ACA allowed existing employer and union plans to be grandfathered out of minimum essential benefit requirements, including the provision concerning cost free contraceptives.[84] Equally significant was the fact that, by regulation, an expanded number of organizations, starting with religious employers, were exempted from the contraceptive mandate.[85] These exemptions were further expanded through a temporary safe-harbor; accommodations extended the range of exempted organizations to include a wide array of non-profit religious entities, such as hospitals and educational institutions. For these exempted employers, their workers are afforded alternative access to contraceptive services, as the no cost coverage contraceptive mandate was passed on to the employer's insurers and third party administrators, who become responsible for this obligation.[86] The many exemptions, waivers, and accommodations made it difficult for DHHS to convincingly argue that the contraceptive mandate could not be accommodated in a fashion similar to what was done for a wide swath of employers. The Court concluded that a least restrictive approach required the government to assume the cost of providing contraceptives, and that RFRA, and its companion statute RLUIPA, posed no barrier to an additional expenditure that would protect religious liberty.[87]

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81. *Hobby Lobby,* 134 S. Ct. at 2779.

82. *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738 (2011); Gonzales v. O Centro Espirita Beneficiente Unia do Vegetal, 546 U.S. 418, 424 (2006).

83. City of Boerne v. Flores, 521 U.S. 507, 515–16 (1997).

84. 42 U.S.C. § 18011(a), (e) (2012); 45 C.F.R. § 147.140(c) (2010).

85. *Women's Preventive Services Guidelines*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., http://www.hrsa.gov/womensguidelines/ (last visited Feb. 21, 2015).

86. Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,462 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 147, 148, 156).

87. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781–82 (2014). The Court did not rely on its conclusion that additional funding would be appropriate to further religious rights under RFRA but rather was persuaded that a least restrictive means existed based on the DHHS policy that allowed religious organizations to opt out of the contraceptive mandate by a process of self-certification. *Id.* at 2782 (citing 45 C.F.R. § 147.131(b)(4), (c)(1) (2014); 26 C.F.R. § 54.9815–2713A(a)(4), (b) (2014)).

B. Recapturing the Compelling Interest

Lost in the haze of religious objections and the jurisprudence of RFRA was the underlying public health imperative that underpinned the contraceptive mandate.[88] As noted the Court never seriously dealt with the DHHS position that the contraceptive mandate promoted public health, and gender equity, as it concluded that such arguments were too broad and lacked the requisite specificity demanded by RFRA. But in passing, the Court conceded that it was likely the government had a compelling interest in providing no cost contraceptives, but that assumption was short lived, as it faltered on the second prong of RFRA, the least restrictive means test.[89] The majority, in zealously protecting the RFRA religious rights of the Hahns' and the Greens', relegated the interests of women's health to the status of a lesser concern, and in the process willingly compromised the employer based structure of the ACA.

The minority opinion, on the other hand, is rooted in its support for public health and women's well being as a compelling interest that drives its legal reasoning and colors its arguments in support of the contraceptive mandate. As noted by the minority, the Women's Health Amendment, which led to the contraceptive mandate, was an addition to the ACA, in recognition that cost barriers impeded many women from obtaining necessary medical care.[90] The so-called Mikulski Amendment, expanded one of the ACA's core areas of focus, preventive services, broadly requiring new insurance plans to include coverage, without cost sharing, for women's preventive care and screening services, a position taken by the Health Resources and Services Administration ("HRSA") of DHHS.[91] HRSA based its women's preventive health services coverage policies on the conclusions of field experts from the Institute of Medicine ("IOM") who recommended that the full range of FDA approved contraceptives methods be provided, under the ACA, without cost.[92] The IOM in its detailed study of women's preventive health needs, pointed out that for purposes of medical care, women were under greater financial strain than men, and that an employer's failure to provide cost free access to contraceptives could have adverse health consequences.[93] Adopting HRSA

88. *See id.* at 2799 (Ginsburg, J., dissenting).

89. *Id.* at 2779–80 (majority opinion).

90. 155 CONG. REC. 28,841 (2009). *See also* Colleen Connell et al., *Religious Refusals Under the Affordable Care Act: Contraception as Essential Health Care*, 15 DEPAUL J. HEALTH CARE L. 1, 7–8 (2013).

91. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

92. INST. OF MED., CLINICAL PREVENTION SERVICES FOR WOMEN: CLOSING THE GAPS 109–10 (2011).

93. *Id.* at 19.

guidelines, the three agencies—DHHS, Treasury, and Labor—issued regulations requiring group health plans to include coverage, without cost sharing, for contraceptives, sterilization procedures, patient education, and counseling.[94] It was quite clear from the minority opinion, and the twenty-three amicus briefs in support of the government, that the contraceptive mandate was seen both as a major pillar of public health and a matter of gender rights.[95] Justice Ginsburg stressed that the compelling interest of the government was met, even if the concern at issue involved only four of twenty contraceptive methods.[96] Ginsburg emphasized that the cost considerations in obtaining the four contraceptives, particularly in the case of intrauterine devices (IUDs), posed a deterrent to access.[97] In the debate surrounding the Women's Health Amendment, the Senate had rejected a conscience rider to these amendments that would have allowed any employer, or health insurer, the ability to deny contraceptive coverage on the basis of religious beliefs or moral convictions;[98] this rider was characterized as an inappropriate interference with the practice of medicine.[99]

While there is a fair amount of detail interlaced throughout the *Hobby Lobby* decision that supports a compelling case for public health, albeit unsuccessfully in the eyes of the majority, the medicine underpinning the challengers' objections to the four contraceptives never received its day in court. The Hahns and the Greens narrowed their religious objections to four contraceptives: two so-called morning after pills (Plan B and Ella) and two IUDs, labeling them as abortifacients.[100] The medical community has taken issue with the conclusion of the three corporations in *Hobby Lobby*, arguing that the four contraceptives in question don't prevent implantation or fertilization, but rather prevent ovulation, thus not constituting abortion-inducing devices.[101] In the Amicus Brief of nine medical societies, including the American College of Obstetricians & Gynecologists, it was pointed out that the characterization of the four birth control devices as anything but contraceptives did not comport with the weight of scientific

94. *Women's Preventive Services Guidelines*, *supra* note 85.

95. *See, e.g.*, Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae in Support of the Government, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356).

96. *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting) (expressing the opinion that the Court's reasoning could permit commercial enterprises to refuse to provide all contraceptives).

97. *Id.*

98. 158 CONG. REC. S539 (daily ed. Feb. 9, 2012).

99. 158 CONG. REC. S1127 (daily ed. Feb. 29, 2012) (statement of Sen. Mikulski).

100. *Hobby Lobby*, 134 S. Ct. at 2759.

101. Joerg Dreweke, *Contraception Is Not About Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise*, GUTTMACHER POL'Y REV., Fall 2014, at 14, 15.

evidence.[102] The science, however, was not at issue in the case, as paradoxically, the only related point of legal inquiry rested on the sincerity of the corporate challengers,[103] and the stance taken by the parties seemed to suffice; the fact that the operative religious beliefs were based on faulty medical information had no relevance to the Court in its deliberations of the RFRA claim.

C. Hobby Lobby in a Broader Context

While the Court may not have needed to probe the scientific underpinnings of the religious beliefs of the owners of Hobby Lobby, Mardel, or Conestoga, it would be odd to imagine that these large employers were not aware of the tenuous nature of their medical claims that the four contraceptives at issue are abortifacients. As such, it is plausible that the motivations driving the parties in the *Hobby Lobby* case may be found in a deeper opposition to contraception and abortion generally, or perhaps the case is better understood in the context of broad employer opposition to the Affordable Care Act, and is part of a legacy of actions that attack key provisions of this law. As far as the wider abortion debate, it has been suggested that anti-abortion groups are no longer solely focused on issues of "personhood," but have broadened their strategy to include opposition to contraceptives as being abortifacients.[104] The assault on contraceptives does not go so far as to support an argument that existing abortion laws should be expanded to cover contraceptives generally. It does, however, open the possibility that targeted contraceptive methods, such as IUDs or the morning after pill, will be treated under the umbrella of abortion, adding additional layers of bureaucratic complexity that could dissuade women from obtaining these services.[105]

Burwell v. Hobby Lobby is an assault on one of the core pillars of the ACA, the employer mandate. While *Hobby Lobby* contests only a small and discrete obligation of group insurance coverage, nonetheless, it represents a challenge to the integrity of the employer-based scheme. This successful challenge has not been a death nail to health reform, but sets a precedent that weakens the public commitment to women's health, and invites future coverage challenges by third-party employers along similar grounds.[106] The case can be viewed in conjunction with two other Supreme

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102. Brief of *Amici Curiae* Physicians for Reproductive Health et al, in Support of Petitioners at 11, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

103. *See Hobby Lobby*, 134 S. Ct. at 2774.

104. Dreweke, *supra* note 101, at 18.

105. *Id.*

106. There are now a number of challenges that are likely to be heard. *See Challenges to the Federal Contraceptive Coverage Rule*, AM. CIVIL LIBERTIES UNION (Mar. 13, 2015), https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule. For example, in *Newland v. Sebelius*, a Colorado federal district court permanently enjoined the federal government from enforcing contraceptive coverage regulations in the case of

Court challenges, as an accidental or deliberate strategy, which further erodes foundational principle of the ACA.[107] In *National Federation of Independent Business v. Sebelius*, the best-known challenge to the ACA, a coalition of businesses attacked the law's individual mandate as being in violation of the commerce clause, and the ACA expansion of Medicaid as being at odds with the federal spending power, both areas constituting key features of health reform.[108] While the Court upheld the individual mandate under the taxing power, the ACA was damaged by the finding that the Medicaid expansion was coercive and constituted an abuse of the Congress's spending power.[109] A third major case, emerging from four federal court actions brought by employers and individual taxpayers, *King v. Burwell*, was heard by the Supreme Court in the 2015 spring term; the case concerns the legality of an IRS rule that allows premium subsidies for individuals purchasing health insurance on Federally Facilitated Marketplaces.[110] At its root the *King* case is an Administrative Procedure Act dispute, concerning agency abuse of discretion in the implementation of the ACA tax credit provisions.[111] The challengers in *King* argue that the plain meaning rule must dictate the interpretation of ACA language as limiting health insurance subsidies only to state run insurance marketplaces.[112] If the Court rules in favor of the challengers, it is estimated that health insurance could become unaffordable for many of the 7.3

Hercules Corporation, a privately held family-run corporation, similar to Hobby Lobby. 881 F. Supp. 2d 1287, 1290 (D. Colo. 2012). The permanent injunction does not, however, prevent the government from applying modified regulations in this area.

107. MaryBeth Musumeci & Laurie Sobel, *The Federal Courts' Role in Implementing the Affordable Care Act,* HENRY J. KAISER FAMILY FOUND. (Sept. 12, 2014), https://kaiserfamilyfoundation.files.wordpress.com/2014/09/8630-the-federal-courts-role-in-implementing-the-affordable-care-act.pdf.

108. NFIB v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

109. *Id.* at 2608–09.

110. King v. Burwell, 759 F.3d 358, 365 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (2014). *See also* Musumeci & Sobel, *supra* note 107 (analyzing the potential consequences).

111. Michael F. Cannon, *Seven Myths About King v. Burwell,* SCOTUSBLOG (Nov. 10, 2014, 5:06 PM), http://www.scotusblog.com/2014/11/symposium-seven-myths-about-king-v-burwell/.

112. *King*, 759 F.3d at 368. *But see* Halbig v. Burwell, 758 F.3d 390, 399 (D.C. Cir. 2014) (holding that the language of the ACA did not authorize tax credits for the federally funded exchange). *Halbig* was decided initially by a three-judge panel of the D.C. Court of Appeals and the initial ruling stood in contrast to the Fourth Circuit Court of Appeals decision in *King*. *Id.* The Fourth Circuit in *King* held that the language at issue concerning health insurance subsidies was ambiguous, giving the IRS flexibility to interpret the statute in a reasonable fashion. 759 F.3d at 375. Interestingly enough the full appeals court in the D.C. Court of Appeals vacated their three judge order but nonetheless the Court agreed to hear this case, leading to widespread speculation about motives. *See, e.g.*, Abbe R. Gluck, *King v. Burwell Isn't About Obamacare*, POLITICOMAGAZINE (Feb. 27, 2015), http://www.politico.com/magazine/story/2015/02/king-v-burwell-states-rights-115550.html#.VR6x8DvF8YI.

million who are expected to receive federal subsidies in 2016.[113] In addition, without subsidies, healthier individuals may decide to drop coverage leaving federal exchanges with sicker and costlier enrollees. As such, a ruling in *King* that strikes down agency discretion would seriously cripple the ACA's goal of expanding health insurance coverage and further subject the reform scheme to the idiosyncrasies of federalism.[114] While each of the three cases noted present distinct challenges to the ACA, to date, collectively, they constitute the most significant legal challenges against the reform law and represent a body of cases underpinned by very strong corporate opposition to key elements of Obamacare.

SECTION III: GOING FORWARD

Whatever the motivations underlying *Hobby Lobby*—abortion politics, opposition to the ACA, or the corporatization of religious liberty—the impacts of the decision on women's health and the employer mandate are troubling. Perhaps the most disturbing implication of *Hobby Lobby* is that it elevates the interests of a third party to a level of import that confounds the abilities of government to craft public health policy within the traditional framework that balances individual liberties against population need. As previously noted, the Ebola outbreak was a stark reminder that public health policy is urgent, and in the chaos of the moment a clear understanding of legal power, the legitimate role of science, and the parameters of public and private interests are critical for effective governance.[115] In this regard, the Ebola outbreak, for all of its messiness, serves as a reminder that a focus, on the noted core elements, is what should drive health policy. One would be hard pressed in the Ebola context to argue that a philosophical or moral concern should impede authorities from taking whatever actions are necessary to protect the common good. Unquestionably religion is a core liberty that must be respected, but that liberty rests with an individual's free exercise, and to embellish this right for the benefit of an artificial structure, a for-profit business, is problematic for both the law and population health. The fact that public accommodations can be found to appease the interests of a third-party employer is not a necessary or appropriate compromise, but rather weakens the government's role at a time when public health threats are ever present, expanding and potentially cataclysmic. In addition, the Court does a grave

113. Adrianna McIntyre, *Halbig: Obamacare's Big, New Legal Challenge, Explained*, VOX, http://www.vox.com/2014/7/22/5821600/obamacare-halbig-subsidies-illegal-most-states (last updated July 22, 2014, 11:30 AM).

114. *Id.* A ruling against the IRS in *King* could lead to a growing number of states adopting their own health insurance exchanges as a way to avoid widespread abandonment of coverage because of premium increases. For a discussion concerning various strategies that could be employed in light of a Court ruling against the legality of subsidies on federal exchanges, see Musumeci & Sobel, *supra* note 107.

115. *See* Berman, *supra* note 2.

disservice to women's health, sacrificing this critical arena of public health to the vicissitudes of belief, rendering medicine and professional judgment secondary to convictions based on principles outside the realm of evidenced based analyses.

Given the dire implications of *Hobby Lobby* for public health, the questions arise about what can be done to restore appropriate governance in this area. To this end, three possible approaches come to mind, none of which will be easily accomplished, but all of which deserve consideration as possible avenues around this holding. The first approach involves a legislative fix through statutory amendments to RFRA. The Court was quite adamant that in its interpretation of the Dictionary Act that the term "person" in RFRA was not limited to natural persons, but could include an array of entities including corporations, leaving the impression that any business entity would qualify for protections afforded by this law.[116] The Court reasoned that if the Congress wanted to limit the scope of RFRA, it would have done so in the statutory language.[117] The concession by DHHS that "person" within the RFRA context encompassed a non-profit corporation placed the government in a difficult position, making an argument that the RFRA person was restricted an unlikely conclusion.[118] While the notion that a for-profit corporation can exercise religious freedom in a way that trumps a public program seems odd, RFRA is silent on this point and the judicial interpretation of inclusiveness, in the absence of specific language to the contrary, is hard to overcome. Narrowing the scope of RFRA to include only natural persons, as the minority suggests, is an end that could only be achieved by amending the language of this statute.[119] It would appear based on the expansive nature of RFRA that a roll back of the law to limit its application to natural persons and non-profit religious organizations would be politically unfeasible.[120]

A second approach to changing the ruling in *Hobby Lobby* would be for the Court to alter its approaches to RFRA and the free exercise clause generally. Two possible avenues emerge; one would be the return to the jurisprudence of *Smith*, and the other would be the re-adoption of a balancing test for deciding questions of government infringement on religious rights. Such judicial alterations in the RFRA context would be rather difficult in lieu of the fact that a core purpose of the law was to override *Smith*, returning to an earlier jurisprudence that utilized a compelling interest standard. To turn the clock back on RFRA, without amending this law, would require the Court to adopt a much narrower view

116. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2768–69 (2014). Interestingly, Hobby Lobby was a company that was held in a management trust and in effect the Court expanded the status of RFRA person to the trust as well. *Id.* at 2765 n.15.

117. *Id.* at 2768.

118. Reply Brief for the Petitioners, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), at 7–8.

119. *Hobby Lobby*, 134 S. Ct. at 2792 (Ginsburg, J., dissenting).

120. The politics of RFRA don't seem favorable to a narrowing of the law.

of the statute than was the case in *Hobby Lobby*.[121] For a pure First Amendment constitutional challenge, independent of RFRA, it would be more plausible, though unlikely, for the Court to continue the *Smith* decision seeing that the case still holds precedential value.[122] Use of the *Smith* balancing test, that saves neutral and generally applicable laws from strict scrutiny, would be an easier bar for the government to meet in support of employer coverage mandates. Under a balancing test only laws directly targeting religious beliefs would be in jeopardy, and laws that place a burden on religion, as a secondary impact, could stand.[123] Based on the reasoning of the minority opinion in *Hobby Lobby*, that found a compelling interest in the government's case under RFRA, it seems reasonable to conclude that the necessary elements of the *Smith* rational basis standard could be satisfied, in support of a broad, generic women's health mandate, should such a standard be revised.

The fusing of RFRA and the First Amendment, as demonstrated by *Hobby Lobby*, makes it unlikely that the Court, in light of its current jurisprudence, will return to a rational basis test followed in *Smith*.[124] As such, the question arises as to whether there is another possible way for the Court to reach a different result, using the three elements of RFRA, resting on the long-standing *Sherbert* test, but following the reasoning voiced by Justice Ginsburg. Outside of federal courts, guidance for a different interpretation of the three-part rational basis test can be found in consideration of state court free exercise jurisprudence. States have adopted a more stringent view of the freedom of religion, using federal law as a floor on which to build stricter free exercise policies, resting on the idiosyncrasies of a given state's constitution.[125] For example, Article 1, Section 11 of the Washington State Constitution provides a more affirmative protection of the freedom of religion than the First Amendment.[126] Washington State's constitutional law broadly limits government power that both directly, and indirectly, impacts the free

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121. RFRA clearly requires that before the Government can impose a substantial burden on free exercise rights, there needs to be a showing of compelling interest and least restrictive means. 42 U.S.C. § 2000bb-1(a) (2012).

122. City of Boerne v. Flores, 521 U.S. 507, 512 (1997). *See also* Thomas C. Berg, *Free Exercise of Religion*, THE HERITAGE GUIDE TO THE CONSTITUTION, http://www.heritage.org/constitution/#!/amendments/1/essays/139/free-exercise-of-religion (last visited Feb. 23, 2015).

123. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

124. This is not to suggest that the federal courts will categorically reject a *Smith* analysis, as that possibility still exists. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).

125. *See* Linton, *supra* note 71, at 84.

126. "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state." WASH. CONST. art. I, § 11.

exercise of religion, subjecting challenged actions to a strict scrutiny analysis.[127] Interestingly Washington State rejected the balancing approach of *Smith*, and adopted the older *Sherbert* test for state constitutionality purposes in *Munns v. Martin*, a standard that mirrors the federal RFRA law.[128] But unlike the federal application of strict scrutiny, driven by a narrow, targeted, compelling interest, Washington State courts have been more accommodating than their federal counterparts, allowing laws that promote medical services to stand in the interests of the public's health, provided that they are narrowly tailored.[129] It appears in the Washington situation that the state police power function, that broadly drives health regulation, may serve as a motivating variable, and even in the face of strict scrutiny, religiously based objections can be set aside in the face of health needs. While police power is rooted in the concept of federalism,[130] the goals of governments at all levels is to promote population interests,[131] and in that vein courts may give deference to those efforts yielding to legitimate public health purposes, even in the face of strict scrutiny analysis. State jurisprudence, such as that noted in Washington State, may prove helpful in crafting a middle pathway between the poles of *Smith* and RFRA, but the need for such compromises may not as yet be apparent to federal jurists.

The third possible avenue for altering the *Hobby Lobby* decision can be addressed through changes in the employer mandate.[132] There are some who have suggested that the *Hobby Lobby* decision shines a light on the inadequacy of a system that relies on employer coverage, and by giving employers power to alter services delineated in essential benefits, it erodes the integrity of the health reform scheme.[133] As such, it has been argued that a national health insurance structure needs to move away from a dependency on employer coverage, and adopt a single payer approach.[134] While there may be merit in the larger idea of abandoning employer based health insurance, the reality is that the Affordable Care Act, as presently constituted, could not exist without integration of the current employee health benefit scheme, and attempts to move away from such a structure would require a considerably different health reform architecture. It seems unlikely that the current federal and state health insurance marketplaces

127. Noel E. Horton, *Article I, Section 11: A Poor "Plan B" for Washington's Religious Pharmacists*, 85 WASH. L. REV. 739, 756 (2010).

128. *Id.*

129. *Id.* at 757.

130. *See* LEE G. STRANG, FEDERAL CONSTITUTIONAL LAW: FEDERALISM LIMITATIONS ON STATE AND FEDERAL POWER 184 (2011).

131. *See* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 113–144 (2d ed. 2014).

132. *See generally* 26 U.S.C. § 5000A(a)–(f) (2014).

133. Uwe E. Reinhardt, *The Illogic of Employer-Sponsored Health Insurance*, NEW YORK TIMES (July 1, 2014), http://www.nytimes.com/2014/07/03/upshot/the-illogic-of-employer-sponsored-health-insurance.html.

134. *Id.*

have the ability, in the short term, to absorb the pressure of millions of transferred enrollees who would be dependent on exchanges should employer based coverage be abandoned. In addition, there is widespread general support for employer based health plans that makes a retreat from this pillar of ACA coverage even less likely.[135]

If abandonment of the employer mandate is not feasible, the question arises as to whether this mandate can somehow be changed. The Hobby Lobby, Mardel, and Conestoga push back on contraceptive coverage occurred in the context of an employer mandate littered with exceptions. As noted, so-called grandfathered plans fell out of the minimum essential benefits requirements. In addition, DHHS authorized its Health Resources Administration (HRSA) to establish exemptions for an array of religious employers, instead requiring insurers and TPAs to offer no cost coverage options for contraceptive services.[136] In essence, the mandate became a veritable swiss cheese requirement, and the government's regulatory action presented the Court with a less restrictive alternative option, which conditioned the contraceptive coverage obligation in a manner that rendered it highly compromised. The most logical avenue to follow, for the sake of women's public health interests, and the integrity of the law, would be to reinvigorate the employer coverage mandate for contraceptives services, refusing exemptions from this obligation for any reason. In effect, the health mandate could be seen as an absolute legal requirement, which trumps the odd notion that corporations have the same personal rights as individual citizens. Both for-profit and non-profit entities enjoy considerable benefits under federal and state laws, and corporate legal status, of all types, is a privilege that comes with commensurate rights and obligations; one of which should entail an obligation to meet the minimum essential benefit requirements of the ACA.

The reality is, however, that in the face of religious objections in areas involving women's health and reproduction, the government has capitulated and waivered from its commitment to prevention and wellness, granting a far too wide array of actors exemption from the contraceptive mandate.[137] It is a slippery slope, as the voices against the mandate have served to push the boundaries beyond the concession of allowing third parties a government financed opt out, to a point where even a required filing of an objection to the mandate has been characterized as a violation

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135. Sally Pipes, *Employer Health Insurance: A Bargain Compared to Government-Sponsored Coverage*, FORBES (July 28, 2014, 8:00 AM), http://www.forbes.com/sites/sallypipes/2014/07/28/employer-health-insurance-a-bargain-compared-to-government-sponsored-coverage.

136. 45 C.F.R. § 147.131(c) (2013).

137. Alan E. Garfield, *The Contraceptive Mandate Debate: Achieveing a Sensible Balance*, 114 COLUM. L.REV. SIDEBAR 1, 17 (2014), http://columbialawreview.org/wp-content/uploads/2014/01/Garfield-114-Columbia-Law-Review-Sidebar-1.pdf.

of free exercise.[138] What seemed to be the least restrictive way of approaching women's public health needs in *Hobby Lobby* was quickly turned on its head, as the endorsed workaround requiring submission of a form to insurers (TPAs) was temporarily enjoined by the Court, giving credence to an argument that formally invoking the exemption to the mandate, in and of itself, violated free exercise rights.[139] In such a climate it seems unlikely that the government will find the resolve to withstand the firestorm of religious objections to bolster the public health mission of the ACA and reinvigorate the mandate as a much more broader based obligation for all employers to meet, without exception.

SECTION IV: RESTORING PUBLIC HEALTH: A WELLNESS ACCOUNT

As noted, none of the three avenues highlighted, statutory amendment, judicial reversal, or reinvigoration of the employer mandate can be achieved easily. But the need to find a way forward to rebalance public health governance within the parameters of population need, and individual right, remains a strong imperative, particularly as it relates to women's access to contraceptives. One possible way of proceeding in the face of the *Hobby Lobby* ruling, and the growth of third-party voices in the contraceptive area, is to reconsider whether the goals of wellness and prevention can be balanced with employer coverage in ways that are not focused on just achieving government accommodation to corporate interests. Two key elements, the employer mandate, and the goal of women's health via prevention and wellness, need to remain paramount as drivers of any solution to the public health barrier created by *Hobby Lobby*. Any change in the contraceptive mandate area will entail amendments to

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138. *HHS Issues Two New Contraceptive Coverage Rules Under ACA*, CALIFORNIA HEALTHLINE (Aug. 25, 2014), http://www.californiahealthline.org/articles/2014/8/25/hhs-issues-two-new-contraceptive-coverage-rules-under-aca. The ink was barely dry on the *Hobby Lobby* case when three days later the Court in *Wheaton College v. Burwell* granted the religious college a preliminary injunction that is now pending appeal. The conditions of the injunction are such that the applicant need not use the Government prescribed form nor send copies to the health insurance issuers and third-party administrators. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014). *See also*, Jonathan H. Adler, Hobby Lobby *is Decided, But the Fights Over Religious Accommodation are Not*, WASH. POST (July 2, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/02/hobby-lobby-is-decided-but-the-fights-over-religious-accommodation-are-not/.

139. *See Wheaton College*, 134 S. Ct. at 2807 (2014). More recently in *Michigan Catholic Conference v. Burwell*, the MCC petitioned the U.S. Supreme Court, arguing that the self certification requirement, applied to religious employers, as modified by *Wheaton College*, is a violation of RFRA. Petition for Writ of Certiorari at 24, Michigan Catholic Conference v. Burwell, No. 14-701 (U.S. Dec. 12, 2014). In response the government is arguing that the MCC objections do not concern notification, but post objection events, namely the actions of third party insurers. Brief for the Respondents in Opposition at 13, Michigan Catholic Conference v. Burwell, No. 14-701 (U.S. Mar. 19, 2015). The government argues that the MCC position extends beyond RFRA and constitutes a type of "religious veto." *Id.*

the ACA; in order to be feasible, such alterations of the law must be relatively minimal, not alter the basic structure of the reform scheme, and be politically doable. In addition, a way forward must proceed without the expectation that there will be changes in free exercise jurisprudence, either constitutional or statutory, for, as noted, such possibilities are unlikely.

Taking into account the three conditions above, a solution that would restore the playing field can be achieved by removing wellness and prevention services from the framework of the current, minimum essential benefits scheme.[140] In lieu of mandating wellness and prevention as one of the ten minimum essential benefits in the ACA, the 15 required, cost-free prevention services, could be culled out, together with women's health care, and placed in a distinct bundle of services.[141] This new service cluster could be referred to as a wellness account, following a format similar in conception to a health savings account.[142] The wellness account would act as a type of health care lockbox, supported by a small percentage of insurance premium dollars, but primarily financed with current federal funds, already allocated to prevention and wellness.[143] These new accounts would be established for women, and could conceivably expanded to include special male health needs at some point; they would enable individuals, with support of their physicians, to select from a menu of no cost, preventative health benefit offerings. All insurance policies would be required to include wellness accounts, including individual, small business, and group policies; employers would have no control over either the complement of services or an individual's use of these wellness accounts. In addition to "traditional" wellness and prevention services, that would include all FDA approved contraceptives, other, additional wellness options could also be added. In effect, the health insurance offered under the ACA (including ERISA plans) becomes a type of public/private hybrid product, with the wellness account being the public component of the offering, a mandatory rider include in all policies. While the government will need to subsidize wellness accounts, it is conceivable that utilization of a carefully

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140. *The Affordable Care Act and Wellness Programs*, U.S. DEP'T OF LABOR (Oct. 17, 2014), http://www.dol.gov/ebsa/pdf/fswellnessprogram.pdf.

141. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727–28 (Feb. 15, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

142. An HSA is a health savings account that forms the basis of an individual or family health plan when linked to a high deductible health plan (HDHP). It is likely the best known of several products that allows individuals to invest pretax dollars into a health account that can be used to pay for qualified medical expenses. Other types of medical savings accounts include flexible spending accounts (FSA) and health reimbursement arrangements (HRA). For a good overview of the various types of medical savings accounts see Internal Revenue Service, *Health Savings Accounts and Other Tax-Favored Health Plans*, PUB. 969 (2013), *available at* http://www.irs.gov/pub/irs-pdf/p969.pdf.

143. U.S. DEP'T OF LABOR, *supra* note 140.

designed package of preventative services could foster individual health maintenance, and stave off costly health insurance expenditures.

A wellness account approach is a carve out that removes the ability of an employer to object to the purchase of health insurance that covers contraceptive services that clash with religious beliefs, falling outside the ambit of employer coverage. Access to contraceptives fits within a supplemental lockbox, and the choice to use the included prevention and wellness services in such a lockbox, including various methods of contraception, is a matter of personal selection and individual right, removed from the free exercise scruples of third-party corporations. The wellness account would do more than restore the matter of women's health to the more characteristic parameters of employee health benefit choice and privacy, but holds the potential to enhance the health promotional goals of the ACA. More broadly, the wellness account is compatible with Obamacare's foci on patient centric care, as well as team based medicine and service coordination, and could provide a valuable tool in the Administration's quest to build new delivery models.[144]

While the ACA advances a number of no cost preventative health measures as a core feature of the law's minimum essential benefits and Women's Health Amendments, the scheme could do more to affirmatively support utilization of these services. A core principal of health wellness is the need for patient engagement, as experience in this area has demonstrated that individual cooperation is a key variable in prevention.[145] While providing certain services without cost sharing incentivizes patients to seek care, additionally, a wellness account shifts responsibility and choice to individuals, as its use requires patients to be actively engaged in charting key aspects of their own health care. The account could be structured to provide additional services to individuals, and afford financial rewards for the insured that utilize this service package. A wellness account would require the individual to work with a clinician who would assist with selection and coordination of given services. The provider, in turn, could be incented to coordinate the wellness package, and a pay for performance arrangement, seen in various ACA demonstrations, could be extended into this arena.[146] In the matter of contraceptives, coverage would be placed in the wellness account lockbox and incentives would be provided to women and their caregivers to select these services based on health factors and a woman's choice.

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144. *HHS Secretary Announces $840 Million Initiative to Improve Patient Care and Lower Costs*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Oct. 23, 2014), http://www.hhs.gov/news/press/2014pres/10/20141023a.html.

145. Judith H. Hibbard & Jessica Greene, *What the Evidence Shows About Patient Activation: Better Health Outcomes & Care experiences*, HEALTH AFF., Feb. 2013, at 207, 211.

146. *See* Julia James, *Health Policy Briefs: Pay for Performance*, HEALTH AFF. (Oct. 11, 2012), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_78.pdf.

The wellness account, proposed herein, is shaped on the more conventional formats of medical savings accounts but departs from these models, as it is not a tax savings vehicle.[147] It may, however, be structured in ways that recognize utilization of preventative services by offering individuals expanded coverages in the next calendar year, provided wellness services had been used, and could further reward individuals for the creation of a coordinated care plan to augment their wellness accounts. As noted, the wellness account would also be expanded to include men and their particular health needs. This template also affords the opportunity to explore more routine insurance coverage for non-traditional, licensed therapies and provide a forum in which to vet the efficacies of an array of complimentary treatment modalities.[148] In addition, the rather complex rules involving non-discrimination in wellness plans would not apply to the idea being posited here.[149] Practically speaking, details concerning a wellness account would need to be carefully evaluated in reference to potential discrimination, as well as an array of other applied legal matters such as employment law, tax issues, and insurance regulations. As noted, the creation of a wellness account would require amendments to the Affordable Care Act and commensurate regulatory and bureaucratic development to allow for the implementation of this new supplemental insurance vehicle.

SECTION V: CONCLUDING OBSERVATIONS

If the recent past is a guide, the field of public health holds many diverse and profound challenges, and government actors will be hard pressed to meet demands from areas as complex as pandemics to global warming as they attempt to strike a balance with more traditional core functions in health monitoring, assessment, and treatment.[150] The Ebola threat in the U.S. (and around the globe) is a dramatic example of the types of pressures that await health authorities, and an illustration of how the parameters of health decision making need to be coalesced around science, population protection, and individual liberties. While the stakes in public health policy generally may not be as high as those faced in Ebola,

147. *See* Internal Revenue Service, *supra* note 142.

148. Under § 2706 of the ACA licensed CAM therapies are required to be covered, but enforcement of this non-discrimination provision has not been forthcoming. 42 U.S.C. § 300gg-5 (2014).

149. The discrimination rules are directed to employers, requiring them to structure wellness programs in ways that do not result in disparate treatment based on health status. Lisa Guerin, *Final Rules for Wellness Programs Under Obamacare*, NOLO, http://www.nolo.com/legal-encyclopedia/final-rules-wellness-programs-under-obamacare.html (last visited Jan. 27, 2015).

150. *See The Public Health System and the 10 Essential Public Health,* CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nphpsp/essentialServices.html (last updated May 29, 2014).

nonetheless the exercise of government police power across all key areas of this critical role of government should not be compromised in ways that detract from the work at hand.

Health promotion is an essential, long-standing arena of public health concern, driven by individual and population considerations, and now by the access, cost, and quality goals of the Affordable Care Act. Within the framework of wellness a critical area of focus is women's health, and within the panoply of services that classification covers, none is more critical than the availability of contraceptives.[151] The public health obligations to women's health promotion, and all that entails, including access to contraceptive services, are central goals of health policy, and those goals must be pursued with the same ardor and urgency as other more immediate public health challenges.[152] This is not to suggest that health policy making in women's health or other arenas of health promotion can occur without a keen awareness of legal and moral parameters, and that compromises must be made to advance public welfare. In particular, individual liberties must not be seen as extraneous to public health policy formation, but are integral considerations in development and execution of these endeavors. To argue against the inclusion of matters such as the

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151. *Guaranteeing Contraceptive Coverage in All New Health Insurance Plans*, NAT'L WOMEN'S LAW CTR. (Nov. 18, 2010), http://www.nwlc.org/sites/default/files/pdfs/guaranteeing_cont_covg_in_all_new_health_insurance_plans_081312.pdf.

Contraception is Critical Preventive Health Care for Women

- Contraceptive use is nearly universal among women of reproductive age in the United States. Most women have the biological potential for pregnancy for over 30 years of their lives, and for approximately three-quarters of her reproductive life, the average woman is trying to postpone or avoid pregnancy.
- Planned pregnancies—which for most women require contraception—improve women's health. The ability to determine the timing of a pregnancy can prevent a range of pregnancy complications that can endanger a woman's health, including gestational diabetes, high blood pressure, and placental problems, among others.
- An unintended pregnancy may have significant implications for a woman's health. A preexisting health condition such as diabetes, hypertension, reflux esophagitis, lower extremity or lumbar arthritis, and coronary artery disease, may be worsened by a pregnancy.
- Contraception is critical to helping women achieve healthy pregnancies. Women who wait for some time after delivery before conceiving their next child lower their risk of adverse perinatal outcomes, including low birth weight, preterm birth, and small-for-size gestational age. And a planned pregnancy affords women an opportunity to make behavioral changes that lead to better birth outcomes.
- Many contraceptives have significant preventive benefits beyond their contraceptive benefits. Oral contraceptives, for example, lower rates of pelvic inflammatory disease, cancers of the ovary and endometrium, recurrent ovarian cysts, benign breast cysts, and fibroadenomas.

152. *Women's Health Under the Affordable Care Act*, NURSING 360 (Nov. 16, 2012), http://www.nursing360.com/womens-health-under-the-affordable-care-act/.

freedom of religion defies our legal tradition, but religious rights must be appropriately invoked by those who legitimately possess them, and should not inappropriately coopt legitimate concerns of governance.

The Supreme Court decision in *Hobby Lobby* upends the field of public health by allowing the free exercise rights of unrelated third parties to trump population health goals and the individual liberty concerns of women who are directly impacted by the contraceptive mandate.[153] The minority opinion in *Hobby Lobby* reflects the nature of the push back against this decision generally, and provides a skillful articulation of the reasons why, in both legal and public health terms, the government's position should have been viewed as compelling. While the Court found a less restrictive pathway to meet the government's goals for women's health, ironically it was DHHS that opened this door as a result of its liberal grant of exemptions to the contraceptive mandate. While such appeasement may have been viewed as a practical necessity, it was not compelled by law, and in retrospective, only served to weaken the government's public health objectives. It is not outside the realm of possibility that a future court may view the RFRA statute as less empowering, and not so expansive as to include a corporation within its scope. But, for the present, it must be conceded that it will be difficult to overcome the *Hobby Lobby* interpretation of RFRA, and its narrowly tailored approach to compelling interest presents a very high bar to regulators. Rather, in the wake of *Hobby Lobby*, it seems that the expansive view of "person" articulated by the Court under RFRA is likely to be expanded beyond the scope of privately held corporations to other for-profit corporate actors, posing even greater problems.

Public health challenges, whether they be the threat of Ebola, or the critical needs of women to access contraceptives will persist, and so it is essential that our legal system facilitate, and not hamper, how policy makers craft responses in these areas. In the face of *Hobby Lobby*, and its embellishment of corporate religious rights as of primary import, alternative strategies to public health must be developed to circumvent this new status quo. The wellness account recommended herein, is not a bold legal plan, but rather a mild alteration of the ACA that seeks to remove employers from the arch of decision making in the health prevention area. It is, however, not just an accommodation, but rather a measure rooted in public health, allowing for reproductive health decisions to be matters of health care treatment and individual choice. While *Hobby Lobby* may serve to meet the interests of religious rights for a new group of actors, it does a disservice to the public's health, and as such, underscores the need for immediate and practical regulatory solutions; a wellness account is one such solution.

153. INST. OF MED., *supra* note 92, at 19.