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Recommended Citation

Linda C. McClain, *Corporate Conscience and the Contraceptive Mandate: A Dworkinian Reading*, No. 14-17 Boston University School of Law, Public Law Research Paper Series (2015).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/228

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**CORPORATE CONSCIENCE AND THE CONTRACEPTIVE
MANDATE: A DWORKINIAN READING**

Essay forthcoming in 30:1 *Journal of Law and Religion* 136-160 (May 2015)
Boston University School of Law Public Law & Legal Theory Research Paper No. 14-75
(December 17, 2014)
Revised May 15, 2015

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Corporate Conscience and the Contraceptive Mandate: A Dworkinian Reading

Linda C. McClain*

Introduction: “What Would Dworkin Do?”

When this essay appears in print, it will be two years since the death of legal philosopher and constitutional law scholar Ronald Dworkin. One recurring reminder of the magnitude of that loss is the absence of Dworkin’s regular, insightful essays for the *New York Review of Books* analyzing significant U.S. Supreme Court decisions. Thus, when, last term, a closely-divided (5-4) Court released its much-anticipated decision in *Burwell v. Hobby Lobby*, upholding a challenge by three for-profit corporations to the contraceptive coverage provisions (the so-called “contraceptive mandate”) of the Patient Protection and Affordable Care Act of 2010 (“ACA”),¹ sadly missing in the flurry of commentary was Dworkin’s assessment of the case.² Readers of this journal may perhaps appreciate the allusion when I say that the decision prompted me to wonder, “What would Dworkin do?” That same question arose again when, on July 3, 2014, in *Wheaton College v. Burwell*, over a strong dissent by Justices Sotomayor, Ginsburg, and Kagan,

*Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law; Faculty Fellow, BU School of Theology, 2010-2014. I thank M. Christian Green for her insightful comments and editorial suggestions, BU Law student Jessica Lees for her excellent research assistance on this essay, and Stefanie Weigmann, Assistant Director for Research Faculty Assistance, and Technology, Pappas, Law Library, for valuable help with citations.

¹*Burwell v. Hobby Lobby Stores, Inc., et al.*, 573 U.S. ___, 134 S. Ct. 2751 (2014) [hereinafter *Hobby Lobby*].

²Dworkin published essays in the *New York Review of Books* on the constitutionality of ACA and on the Court’s 5-4 decision upholding it in *National Federation of Independent Business et al v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2102), but not on ACA’s contraceptive coverage provisions. Ronald Dworkin, “Why the Mandate is Constitutional: The Real Argument,” *New York Review of Books* (May 10, 2012), 4-8; Ronald Dworkin, “A Bigger Victory Than We Knew,” *New York Review of Books*, August 16, 2012, 6-12.

the Court granted the emergency request of Wheaton College to be relieved from complying with ACA's accommodation procedure for religious nonprofit organizations who object to contraceptive coverage on religious grounds, even before the lower courts had ruled on the merits of the college's claim.³

Asking "What would Dworkin do?" were he evaluating these two cases seems particularly apt given Dworkin's proposal, in his final book, *Religion Without God*, to abandon a "special right to religious freedom" in favor of a "more general right to ethical independence." (*Religion Without God* [RwG], 132).⁴ Indeed, Dworkin criticized Congress's enactment of the Religious Freedom and Restoration Act ("RFRA") (RwG, 132-35),⁵ the statutory basis for the majority's ruling in favor of Hobby Lobby's challenge to ACA.⁶ Dworkin also briefly raised, but did not resolve, the question of what place exemptions from general laws would have in the reorientation he proposed. (RwG, 133-37)

The question of exemptions is timely and pressing. On the one hand, the *Hobby Lobby* majority cited the ACA's "accommodation for nonprofit organizations with religious objections" as evidence that the federal government could find a way – by extending that exemption to companies like Hobby Lobby – to advance its interests in women's health without impinging on the religious beliefs of Hobby Lobby and similar corporations.⁷ On the other hand, the majority

³Wheaton College v. Burwell, 573 U.S. ___, 134 S. Ct. 2806 (2014). [hereinafter *Wheaton College*].

⁴Ronald Dworkin, *Religion Without God* (Cambridge: Harvard University Press, 2013). I have written a longer article evaluating that work, but raised the exemption issue only in the concluding pages. Linda C. McClain, "Can *Religion Without God* Lead to Religious Liberty Without Conflict?," 94 *Boston University Law Review* 1273 (2014). [hereinafter "Religious Liberty Without Conflict"]

⁵The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-1(a).

⁶*Hobby Lobby*, 134 S. Ct. at 2754-2755.

⁷ *Ibid.* at 2781-2782. The other two corporations were Conestoga Wood Specialties and

also said that it was not deciding whether the exemption approach would, in fact, satisfy RFRA's requirements.⁸ Soon after, the Court granted emergency relief to Wheaton College, which argued, as have numerous other religious institutions, that even filing the form certifying its status as a religious nonprofit and its objection to providing contraceptive services “makes it complicit in grave moral evil” by “triggering the obligation for someone else to provide the services to which it objects.” Wheaton College argued this substantially burdened its free exercise of religion under RFRA.⁹ Reading the tea leaves, Justice Sotomayor (joined by the other two female members of the Court) strenuously argued that granting Wheaton College that relief “does not square with the Court’s reasoning in *Hobby Lobby*,” further, Wheaton College’s substantial burden claim did not meet the “indisputably clear” standard for relief.¹⁰ Numerous challenges by religious nonprofit organizations to ACA’s accommodation provisions as not accommodating enough continue to wend their way through the federal courts.¹¹ At this writing, three federal circuits have rejected these challenges, and the Supreme Court may eventually weigh in on the issue.¹² Moreover, although the *Hobby Lobby* majority emphasized that the for-

Mardel. Unless discussing facts specific to one corporation, this essay will refer to the three corporate plaintiffs as “Hobby Lobby” to avoid cumbersome references in text.

⁸Ibid. at 2782.

⁹*Wheaton College*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting) (joined by Justices Ginsburg and Kagan).

¹⁰Ibid. at 2808-2809, 2813.

¹¹ For example, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F.Supp.3d 1225 (D. Colo. 2013) *injunction granted* 134 S.Ct. 1022 (2014) is currently pending before the 10th circuit on this issue. There are numerous lower court decisions pending in other circuits. For an overview see <http://www.becketfund.org/hhsinformationcentral>.

¹² See *Priests For Life v. U.S. Dep't of Health & Human Servs.*, ___ F.3d ___, No. 13-5368, 2014 WL 5904732, *40 (D.C. Cir. Nov. 14, 2014) (rejecting “all of Plaintiffs’ challenges to the regulations”); *Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372 (6th Cir. 2014) (affirming district court denial of preliminary injunction); and *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) (affirming district court’s denial of preliminary

profit corporations before it were closely-held, family owned corporations, the dissenters questioned whether that distinction would make a difference in future religious freedom challenges brought by corporations.

In this essay, I will evaluate the recent *Hobby Lobby* litigation through the lens of *Religion Without God's* call for a reorientation away from a special right of religious freedom to a general right of ethical independence. Is a corporation, for example, possessed of a right of ethical independence? Does it have a conscience? In Part I, I will briefly recap Dworkin's proposed reorientation, focusing on *Religion Without God's* brief discussion of exemptions. Because the *Hobby Lobby* litigation involved for-profit corporations, I will augment this discussion by recounting Dworkin's sharp criticism¹³ of Justice Kennedy's majority opinion in *Citizens United v. Federal Election Commission*,¹⁴ in which the Court held that corporations were persons for purposes of exercising First Amendment rights in political campaigns and struck down federal laws limiting corporate spending for certain forms of political speech.

In Part II, bearing in mind *Religion Without God's* suggested framework for handling the issue of exemptions, I examine some of the arguments made in briefs filed by the parties and in amicus briefs on both sides of the *Hobby Lobby* case. In Part III, I evaluate the different opinions in *Hobby Lobby*, focusing particularly on the different conclusions about whether a for-profit corporation has a right to the free exercise of religion. I contrast the majority's and Justice Kennedy's concurring opinions with Justice Ginsburg's dissent on the idea of using the for-profit

relief). The Supreme Court denied the petition for certiorari in *Priests for Life*, 82 U.S.L.W. 3457 (U.S. March 3, 2014) (No. 13-891) and a petition is pending in the *University of Notre Dame* case, 83 U.S.L.W. 3220 (U.S. Oct. 3, 2014) (No. 14-392).

¹³See Ronald Dworkin, "The 'Devastating' Decision," *New York Review of Books* (Feb. 25, 2010) 39; Ronald Dworkin, "The Decision that Threatens Democracy," *New York Review of Books* (May 13, 2010) 63-67.

¹⁴*Citizens United v. Federal Election Commission*, 558 U.S. 301 (2010).

corporate form to live out religious beliefs. Here, I draw on Dworkin's prior criticisms of Kennedy's opinion in *Citizens United* and ask whether Dworkin would have been similarly critical of corporate personhood when a business was family-owned and closely held.

Ginsburg's *Hobby Lobby* dissent

"Dignity" was a central principle in Dworkin's work;¹⁵ it is also prominent in the jurisprudence of Kennedy,¹⁶ including his *Hobby Lobby* concurrence. Strikingly, in explicating the right to ethical independence in *Religion Without God*, Dworkin drew on the Court's famous articulation of a right to self-definition as being at "the heart of liberty," first made in the joint opinion in *Planned Parenthood v. Casey* in the context of women's reproductive liberty and later repeated by Kennedy in his majority opinion *Lawrence v. Texas*, affirming the right of intimate association of gay men and lesbians. (*RwG*, 121-122) Dworkin sharply disagreed with Kennedy's recognition of corporate personhood in *Citizens United*, but he would likely have shared the concern for women's reproductive liberty at the core of Justice Ginsburg's *Hobby Lobby* dissent. In Part IV, I conclude by returning to the question, "What would Dworkin do?," with respect to the question *Hobby Lobby* did not address that is now percolating in the courts: is ACA's accommodation of those with religious objections to the contraceptive mandate not

¹⁵I discuss the role of dignity in several of Dworkin's works in McClain, "Religious Liberty Without Conflict." Elsewhere, I have examined how, in Dworkin's magisterial *Justice for Hedgehogs* (Cambridge: Harvard Univ. Press, 2011), human dignity is the basic concept from which flow conceptions of authenticity, self-respect, and responsibility. See "Linda C. McClain, "Justice and Elegance for Hedgehogs – In Life, Law, and Literature," 90 *Boston University Law Review* 862 (2010).

¹⁶See Linda C. McClain, "From *Romer v. Evans* to *United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act," 20 *Duke Journal of Gender Law & Policy* 351, 463-64 (2013) (observing that one aspect of Justice Kennedy's opinion in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), is his "characteristic appeal to 'dignity' as he explains the injury that DOMA inflicts on lawfully married same-sex couples").

accommodating enough? What insights does Dworkin's work shed on what is at stake, in this appeal for further opt-out from the health care law, for these institutions and for women?

I. *Religion Without God and Religious Accommodation*

In *Religion Without God*, Dworkin enlists the principle of ethical independence to protect one core part of what he calls the “religious attitude” that unites believers and “religious atheists”—namely, the conviction that human life has “objective meaning or importance,” and that “each person has an innate and inescapable responsibility to try to make his life a successful one.” This means “living well, accepting ethical responsibilities to oneself as well as moral responsibilities to others . . . because it is in itself important whether we think so or not.” (*RwG*, 10) Each person has an “innate, inalienable ethical responsibility to try to live as well as possible in his circumstances.” (*RwG*, 24) This responsibility “includes a responsibility of each person to decide for himself ethical questions about which kinds of lives are appropriate and which would be degrading for him.” (*RwG*, 114) Political liberty, Dworkin argues, includes this general right to “ethical independence,” which limits the reasons government may restrict freedom. It “must never restrict freedom just because it assumes that one way for people to live their lives . . . is intrinsically better than another” or assume “that one variety of religious faith is superior to others in truth or virtue.” (*RwG*, 130, 134) Ethical independence also protects “religious conviction” by “outlawing” a constraint that is neutral on its face, but “whose design covertly assumes some direct or indirect subordination.” (*RwG*, 134) Such independence, however, does not bar government from “interfering with people’s chosen ways of life” for other reasons, such as protecting other people from harm, protecting “natural wonders,” or the general welfare. (*RwG*, 130-131)

Dworkin argues that, if “we treat religious freedom as part of ethical independence, then the liberal position” on abortion rights, as well as on “gender equality in marriage,” becomes “mandatory.”¹⁷ Dworkin observes that “[o]pponents of homosexuality and abortion very often cite a god’s will as warrant;” by contrast, he argues, “few men or women who want choice in these matters conceive their desire as grounded in religion.” (*RwG*, 144) A focus on ethical independence, in a sense, levels the playing field so that religious freedom is no longer a “special right” that places on government the burden of showing a “compelling” interest for any law that burdens religion.

Dworkin is, thus, critical of the Religious Freedom and Restoration Act, which was “in effect, a declaration that religion needs more protection than general ethical independence offers.” (*RwG*, 135) Congress enacted RFRA to reverse the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (the “peyote case”),¹⁸ which held that neutral laws of general application need not be subject to a compelling state interest test. Dworkin asserts that while RFRA was “wildly popular,” Congress was “wrong” as “a matter of political morality,” and the Court, in *Smith*, was “right.” Dworkin elaborates, “If we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that do not display less than equal concern for them.” (*RwG*, 135-136)

“Equal concern” is a signature Dworkin concept, dating back to *Taking Rights Seriously*,

¹⁷ For arguments that elaborate on this “summary statement,” Dworkin directs readers to his other work. (*RwG*, 144 and n.19)

¹⁸ 494 U.S. 872 (1990).

where he put forth as “postulates of political morality” that: “Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.”¹⁹ Moreover, “[g]overnment must not only treat people with concern and respect, but with equal concern and respect;” for example, it may not distribute “goods or opportunities’ or “constrain liberty” on the ground either that some citizens are “more worthy of concern” or that “one citizen’s conception of the good life of one group is nobler or superior to another’s.”²⁰ Dworkin’s subsequent work developed this conception of political morality around principles of dignity and responsibility.

Immediately following *Religion Without God’s* discussion of the obligation to obey general, nondiscriminatory laws that show “equal concern,” Dworkin provides a brief hint of how his framework might address the explosion of seeming conflicts between religious liberty and other rights and the question of exemptions. Government, he says, must “notice whether any group regards the activity it proposes to prohibit or burden as a sacred duty,” and if so, “must consider whether equal concern for that group requires an exemption or other amelioration,” if giving one can be done “with no significant damage to the policy in play.” Contrary to what actually happened in Massachusetts, for example, Dworkin writes that “financing Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, might be justified in that way, provided that enough of the latter are available so that neither babies nor same-sex couples seeking a baby are injured.” But Dworkin also argues for the “priority of nondiscriminatory collective government over private religious

¹⁹Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 272.

²⁰*Ibid.* at 272-273.

exercise” as “inevitable and right.” For example, government may refuse an exemption when giving one “would put people at a serious risk that it is the purpose of the law to avoid.” (*RwG*, 136-137)

I leave for analysis elsewhere the evident clash between religious liberty and marriage equality, and more generally, the issue of religious accommodation as new political majorities expand protection of persons from discrimination based on sexual orientation.²¹ My focus here is how Dworkin’s framework would apply to the numerous challenges brought to ACA by religious institutions and, as in *Hobby Lobby*, even for-profit corporations? What if the “group” appealing to a “sacred duty” threatened by ACA’s requirements is the owner of a for-profit corporation? Should that corporation be eligible for accommodation? And if government is willing to accommodate it, suppose it then argues that even requiring it to comply with the process for receiving that accommodation denies it equal concern and forces it to be complicit in moral evil? What is at stake on the other side for female employees for whom health insurance is tied to employment? By what is “at stake,” I mean to include not only the issue of those employees’ own “ethical independence,” but also the goals the underlying laws seek to achieve, such as fostering women’s health, including preventive reproductive health.

²¹Questions include: if framed as a right to ethical independence, rather than a special right, does a religious person have a right to refuse goods and services to a same-sex couple because to do so, he or she argues, compromises the ability to define ethical values and live by those values? If a religious person is a public official, may he or she be free to refuse to issue a marriage license due to the burden on ethical independence? Might Dworkin support, as the Catholic Charities example suggests (*RwG*, 136), accommodation if providers of goods and services or even clerks exist in sufficient supply that LGBT persons or same-sex couples would not experience injury? For a sketch of how the constitutional liberalism I advance would approach these conflicts, see James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Cambridge: Harvard University Press, 2013), 146-177.

Some clues may be available from Dworkin's sharp critique²² of Justice Kennedy's majority opinion in *Citizens United*. Corporations, Dworkin insisted, "have no ideas of their own." Aligning himself with Justice Stevens's lengthy dissent, Dworkin insisted that the concerns for "status, dignity, and moral development" that – on some views – ground free speech simply do not apply to corporations.²³ The majority's contrary interpretation of the First Amendment "undermines" a basic purpose of free speech, "to protect democracy." Dworkin elaborated: "The nerve of [Justice Kennedy's] argument – that corporations must be treated like real people under the First Amendment – is in my view preposterous. Corporations are legal fictions. They have no opinions of their own to contribute and no rights to participate with equal voice or vote in politics."²⁴

In a follow-up essay, Dworkin submitted that the majority's opinion, which "repealed a century of American history and tradition" about limits on corporate spending on elections, lacked any "principled account of the First Amendment's point."²⁵ Characteristic of his "moral reading" approach to constitutional interpretation, Dworkin insisted that the First Amendment, "like many of the Constitution's most important provisions, is drafted in the abstract language of political morality;" therefore, interpretations by justices must be "guided by principles" – "by some theory of why speech deserves exemption from government regulation in principle." None of those theories, Dworkin argued, supported the majority's decision in *Citizens United*, which, instead, inflicted "damage" on "our politics." Dworkin reiterated that "[c]orporations have no ideas of their own;" instead, corporate-funded ads will "promote the opinions of their managers,"

²²See Dworkin, "The 'Devastating' Decision," Dworkin, "The Decision that Threatens Democracy."

²³Dworkin, "The Decision that Threatens Democracy," 64.

²⁴Dworkin, "The 'Devastating' Decision," 39.

²⁵Dworkin, "The Decision That Threatens Democracy," 63.

using stockholder money to do so. The public may be misled by this corporate advertising because the volume of the ads may suggest “more public support that there actually is” for the opinions the ads express; in reality, “[m]any of the shareholders who will actually pay for the ads, who in many cases are members of pension and union funds, will hate the opinions they pay to advertise.”²⁶

Dworkin also critiqued *Citizens United* through the lens of another important theory of why free speech matters” – “to protect the status, dignity, and moral development of individual citizens as equal partners in the political process.” For that theory, Dworkin quoted Stevens’ observation in his *Citizens United* dissent that “one fundamental concern of the First Amendment is to ‘protec[t] the individual’s interest in self-expression.”²⁷ Justice Kennedy attempted to enlist this justification on behalf of corporate free speech by arguing that “by taking the right to speak from some and giving it to others, . . . the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice,” but Dworkin found this to be “bizarre,” explaining:

The interests the First Amendment protects, on this second theory, are only the moral interests of individuals who would suffer frustration and indignity if they were censored. Only real human beings can have these emotions or suffer those insults. Corporations, which are only artificial legal inventions, cannot. The right to vote is surely at least as important a badge of equal citizenship as the right to speak, but not even the conservative justices have suggested that every corporation should have a ballot.²⁸

Dworkin returns to the distinction between individuals and corporations and to who can possess dignity later in the essay, when he observes that: “Individuals speak and spend for

²⁶Ibid.

²⁷Ibid. at 64 (quoting *Citizens United*, 466 (Stevens, J.) (concurring and dissenting)).

²⁸Ibid. at 64.

themselves, together or in association with other individuals, while corporations speak for their commercial interests and spend other people's money, not their own." Further: "Individuals have rights, on which their dignity and standing depend, to play a part in the nation's government; corporations do not."²⁹ Once again, Dworkin observes, "no one thinks corporations should vote, and their rights to speak as institutions have been limited for over a century" – until *Citizens United*.

Given Dworkin's strenuous critique of *Citizens United*, what would he say about *Hobby Lobby*? Is a family-owned closely held for-profit corporation, such as Hobby Lobby, distinct from a publicly owned corporation? Does this distinction make a difference? Do family members who own such a corporation suffer frustration and indignity when ACA requires them to fund insurance plans for their employees that includes forms of contraception they find morally objectionable? Does ACA threaten their ethical independence? If a Dworkinian approach would answer either of those questions yes, then should corporations like Hobby Lobby be exempt from ACA? Or do the interests at stake on the other side, including the ethical independence and reproductive health of female employees and government's powerful interest in providing preventive health care for women, argue against such accommodation? Can accommodation be offered without "injuring" these women? And, finally, is the accommodation process itself forcing religious companies to be, in their view, "complicit" in evil?

II. The *Hobby Lobby* Briefs: Rights in Conflict?

In this part, I consider how the parties and friends of the court presented to the Court, in their legal briefs, the rights of the corporations challenging ACA, the rights and needs of the

²⁹Ibid. at 66.

female employees, and the governmental interests at stake in ACA.³⁰ A procedural point may be helpful: the owners of Hobby Lobby and of the other two corporations sued the Department of Health and Human Services and other federal agencies and officials under RFRA and the First Amendment to enjoin application of ACA's contraceptive mandate to them with respect to four FDA-approved contraceptive methods that they believed "may operate after the fertilization of an egg."³¹ The female employees of these companies were not official parties in the case; their interests would be affected by the lawsuit's outcome, and so many briefs addressed those interests. In canvassing these briefs, I bear in mind Dworkin's proposed shift from a special right to religion to a general right to ethical independence.

Ethical independence, as explained earlier, requires that government not favor a specific way of life, including the religious beliefs of one group. The shift from a special right to religious freedom to a more general right to ethical independence also levels the playing field. As applied to this conflict, female employees who wish to use certain forms of contraception may be exercising their ethical independence, just as their corporate employers who object to providing such contraceptives do so out of an ethical belief that such contraceptive methods are tantamount to abortion. Protecting ethical independence requires that government leave individual citizens

³⁰All party and friend of the court briefs filed in *Burwell v. Hobby Lobby Stores, Inc.* (No. 13-354) and *Conestoga Wood Specialties Corp v. Sebelius* (No. 13-356), 134 S. Ct. 678 (2014)(granting cert.) referred to in this Essay may be found at this website: http://www.americanbar.org/publications/preview_home/13-354-13-356.html. Unless otherwise indicated, the briefs are from the "merits" phase, not on the petition for certiorari. This Essay samples, rather than exhaustively discusses, the 84 amicus briefs filed in *Hobby Lobby*. For a helpful website gathering and classifying these briefs, see, e.g., The Becket Fund for Religious Liberty, "Amicus History: Hobby Lobby Amicus Briefs Among Record Levels," <http://www.becketfund.org/hobbylobbyamicus/>. Another useful website is <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/>.

³¹*Hobby Lobby*, 134 S. Ct. at 2765.

to decide their way of life for themselves, rather than restricting their freedom on the assumption that one way is “intrinsically better than another” or that “people who live that way are better people.” Government may, nonetheless, restrict freedom for other reasons, such as protecting other people from harm and advancing the general welfare. (*RwG*, 130-131) How does ACA look when measured against these requirements?

In Support of Religious Free Exercise by For-profit Corporations

Friend of the court briefs (amicus briefs) submitted in favor of Hobby Lobby³² argued for broad and deferential protection of religious rights and sought protection for the right of conscientious objection. They argued that religious exercise should include “all activities or policies grounded in sincerely held religious beliefs,”³³ and that the test for whether an activity constitutes a religious belief should be “whether the specific activity or policy furthers a sincerely held religious purpose or belief of the organization.”³⁴ The Council for Christian Colleges and Universities argued that corporations can pursue profit while simultaneously exercising religion because protected beliefs and conduct must only “be rooted in religious belief.”³⁵ So long as conduct is so motivated, then it “must be at least presumptively protected by the Free Exercise Clause.”³⁶

Amici for Hobby Lobby also argued against a restrictive definition of “religious

³² As noted earlier, I use “Hobby Lobby” here, unless otherwise specified, to refer to all three corporations challenging ACA.

³³ See Brief for the Azusa Pacific University et al. as Amici Curiae Supporting Neither Party at 15.

³⁴ *Ibid.* at 19.

³⁵ Brief for the Council for Christian Colleges & Universities et al. as Amici Curiae Supporting Respondents Hobby Lobby, Mardel, and Petitioners Conestoga at 10.

³⁶ Brief for the Reproductive Research Audit as Amicus Curiae Supporting Hobby Lobby, et al., and Conestoga, et al. at 8.

organizations” that focused only on the relationship between houses of worship and their clergy members, which would exclude most religious employers like hospitals, homeless shelters, and schools.³⁷ Moreover, they challenged the constitutional significance of the distinction between the for-profit and nonprofit corporate form: given that Americans “routinely exercise their constitutional rights in the corporate form . . . discriminating against those who choose to do so in the for-profit context has no constitutional foundation.”³⁸ Prominent church-state scholar Michael McConnell filed a brief on behalf of the Christian Booksellers Association and other for-profit Christian enterprises, arguing that the understanding of the Free Exercise Clause at the time of the founding was that it protected “acts of religious exercise by institutions as well as individuals,” evidenced by the fact that, in drafting the First Amendment, “Congress deliberately replaced protection for individual ‘conscience’ with the concept of free ‘exercise’ of ‘religion.’”³⁹ Although the “modern business corporation” had not yet come into being, “from the very founding of the colonies, it had been well understood that a corporate charter can combine religious and profitable purposes.”⁴⁰

These briefs stressed that religion cannot be cabined, that is, “confined to the four walls of a church or to the private life of a believer.”⁴¹ Rather, religious individuals will incorporate – or integrate -- their beliefs and principles into all aspects of their personal and professional lives,

³⁷ See Brief for the Association of Gospel Rescue Missions et al. as Amici Curiae Supporting Granting the Petitions (for certiorari) at 16-18.

³⁸ See Brief for the Pacific Legal Foundation et al. as Amici Curiae Supporting Non-Government Parties at 3.

³⁹ Brief of the Christian Booksellers Association et al. as Amici Curiae Supporting Hobby Lobby and Conestoga at 4-5.

⁴⁰ Ibid. at 5.

⁴¹ Brief for the United States Conference of Catholic Bishops, et al. as Amicus Curiae Supporting Hobby Lobby and Conestoga, et al at 11-12.

including forming businesses to embody and promote the values central to their faith.⁴² Amici further argued that, recognizing that “an individual may ‘exercise’ religion in virtually every phase of life,” the Supreme Court “has declined to cabin free exercise rights to any particular activity.”⁴³

Following from this image of infusing religion into all spheres of daily life is the argument that, when religious believers use the corporate form, the resulting corporate entities exercise an institutional conscience, and their activities should be viewed as forms of religious exercise. For example, the Pacific Legal Foundation asserted that a corporation’s shareholders and directors “consider it important for the corporation to as an institution act in accordance with their moral values, just as they find a value in the institution expressing an opinion or owning property in its own name.”⁴⁴ Charles E. Rice, a scholar of issues of constitutional law and morality at the University of Notre Dame, argued that a corporation or business is ultimately a means – a tool – to achieve an end, and, thus, the person guiding a corporation must be responsible for any immoral end achieved through that corporation, just as that person would be responsible for the use of a gun, car, or other person.⁴⁵

Hobby Lobby invoked conscience in making the same argument about responsibility for immorality, insisting: “the Greens cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would ‘facilitate

⁴² Brief for the J.E. Dunn Construction Group, Inc. et al. as Amici Curiae Supporting Hobby Lobby Corp., et al. and Conestoga Wood Specialties Corp. at 8.

⁴³ See Brief for the Cato Institute as Amicus Curiae Supporting the Hobby Lobby Respondents and the Conestoga Petitioners, et al at 3.

⁴⁴ Brief of Pacific Legal Foundation, Reason Foundation, and Individual Rights Foundation at 19.

⁴⁵ See Brief of Professor Emeritus of Law Charles E. Rice, et al. as Amici Curiae Supporting Hobby Lobby Stores, et al. and Conestoga Wood Specialties Corp., et al. at 20 [hereinafter Rice Brief].

harms against human beings.”⁴⁶ Hobby Lobby also contended that ACA’s financial penalties for noncompliance with the contraceptive mandate, “like threats against one’s home, bank account, or unemployment check – can obviously impose unbearable pressure” on its business, thus directly burdening the Greens’ religious exercise.⁴⁷ In support of Hobby Lobby, the Thomas More Law Center emphasized the need to avoid the forced “sacrifice” of faith and conscience for livelihood, contending that “[t]he Mandate requires religiously objecting employers . . . to choose – they can follow their conscience and accept financial ruin, or they can obey the government and risk eternal consequences.”⁴⁸ The premise of these arguments is that because religious belief pervades every decision of corporations like Hobby Lobby, the right to choose not “to use, purchase, and facilitate contraception and abortion” is essential to avoid this forced sacrifice. Moreover, as the Pacific Law Foundation contended, “any effort to distinguish” between “for profit” and “not for profit” corporations with respect to which entities “can assert Free Exercise rights” is “unsupportable;” rather, “individuals who participate in a corporation often direct their business conduct – or seek to influence corporate conduct – in accordance with religious values,” and, in so doing, “their corporations exercise First Amendment rights.”⁴⁹

Amici also argued that, through ACA, government is legislating a contested and controversial morality. The ACA controversy presents, the Thomas More Center argued, a “clash between anti-discrimination principles and the First Amendment” that “is particularly volatile when a morally controversial practice is protected and religious persons or groups are swept

⁴⁶See Brief for Respondents at 30-31.

⁴⁷ Ibid.

⁴⁸See Brief for the Thomas More Law Center as Amici Curiae Supporting Hobby Lobby and Conestoga, et al. at 14, 16.

⁴⁹ Brief of Pacific Legal Foundation at 25.

within the ambit of the law.” The Center asserted: “Government has no right to legislate a particular view of sexual morality and compel religious institutions and individuals to facilitate it.”⁵⁰ Dworkin argues, in *Religion Without God*, that government may not legislate based upon a view of the superiority or inferiority of particular ethical views (*RwG*, 130-131), but, as he elaborated elsewhere, government *may* legislate morality, that is, *political* morality, in ways that restrict freedom, subject to the requirements of equal concern and respect.⁵¹ Given that he argues that the liberal position on abortion rights “becomes mandatory” if one accepts this general right to ethical independence, how might a Dworkinian respond to this charge that ACA legislates morality?

Consider, in this regard, a related theme in many briefs filed in support of Hobby Lobby—namely, that allowing corporations to exercise their conscience through their business decisions is consistent with the strong American tradition of protecting conscientious objectors.⁵² Notably, Dworkin discusses the Supreme Court precedents about conscientious objection to the Vietnam War in illustrating recognition of a “religious attitude” not confined to religious beliefs. (*RwG* 119-121)⁵³ Amici appealed to a long history of protecting conscientious objectors to war, capital punishment, assisted suicide, and abortion,⁵⁴ including, more recently, a 2012 federal appropriations law forbidding agencies from denying funding to health care entities that refuse to

⁵⁰ Brief for the Thomas More Law Center as Amici Curiae Supporting Hobby Lobby and Conestoga, et al. at 12

⁵¹ A full treatment of Dworkin’s conception of the relationship between personal ethics and political morality is beyond the scope of this Essay, but see Dworkin, *Justice for Hedgehogs*, 327-350, 377-401.

⁵² See Brief of Democrats for Life et al. as Amici Curiae Supporting Hobby Lobby and Conestoga, et al. at 4.

⁵³ Dworkin discusses *U.S. v. Seeger*, 380 U.S. 163 (1965).

⁵⁴ Brief of Democrats for Life; see also The Brief of Constitutional Law Scholars, et al. as Amici Curiae Supporting Hobby Lobby and Conestoga, et al. at 4.

provide services related to abortions.⁵⁵ In contrast, the Brief of the Public Policy Women’s Groups asserted: “By forcing conscientiously opposed individuals and organizations to participate in abortion, the Mandate transforms abortion ‘culture wars’ into abortion ‘conscience wars.’”⁵⁶ In doing so, the “Mandate” prefers some women over others, advancing “the interests of only that subset of women who value free abortion drugs above public goods such as religious freedom and limited government,” while “work[ing] against the interests of those free-minded, independent women whose personal, moral, and political values lead them to support a different balance of policy considerations.”⁵⁷

In sum, these briefs argue for a broad definition of religion and religious activity that allows Hobby Lobby to follow its corporate conscience. Such protection of conscience is a value that, implicitly, must be favored more highly than government’s interest in providing reproductive health care to Hobby Lobby’s female employees because, otherwise, religious employers risk losing their ability to live their lives and run their business most in line with their religious beliefs. The federal mandate to provide for certain health care services, in other words, must lose in this hierarchy of values. In terms of Dworkin’s ethical independence framework, these arguments protest government imposing a controversial “morality” on them, but fail to address the costs to women and their health if they prevail in insisting that Hobby Lobby and similar corporations must be free to exercise their conscience in the public sphere, or rather, in the sphere of employment and commerce.

⁵⁵ Brief of the Catholic Medical Association as Amicus Curiae Supporting Respondents at 12.

⁵⁶ Brief of Women’s Public Policy Groups et al. as Amici Curiae Supporting Non-government Parties at 5-6.

⁵⁷ Ibid. at 3, 18.

In Support of Women's Right to Reproductive Health Services

In line with Dworkin's concept of "ethical independence," parties who filed friend of the court briefs in support of HHS (and, thus, the contraceptive mandate) argued that even assuming that corporations could have religious beliefs, how far government should go to protect those beliefs must factor in the importance of woman's reproductive liberty and choice and the role access to contraception plays in that liberty.⁵⁸ For example, the State of California filed a brief emphasizing the importance of women's "personal dignity and autonomy" and professional and economic equality.⁵⁹ Access to contraception is an essential health care service, amici insisted, and any accommodation of companies like Hobby Lobby must not be at the expense of that access. For example, a brief submitted by experts in foreign and comparative law argued that both the health of a woman and her family and a woman's future autonomy depend upon her access to reproductive health services. Offering examples from other legal systems, they argued that protection for conscientious objectors must pair with a guarantee that patients can nonetheless access essential health care services.⁶⁰

Briefs filed in support of HHS expressed worry that the costs of accommodating Hobby Lobby's religious beliefs would be borne by its female employees, who would either be forced to pay the out-of-pocket costs for the excluded contraceptive methods or forgo access to them.⁶¹

⁵⁸ See Brief of the Ovarian Cancer National Alliance as Amicus Curiae in Support of Petitioners at 7-10 [hereinafter Ovarian Cancer National Alliance Brief] (emphasizing women's health and ability to prevent diseases such as ovarian cancer).

⁵⁹ Brief of California, et al. as Amici Curiae in Support of Petitioners at 14-15.

⁶⁰ See Brief for Foreign and Comparative Law Experts Lawrence O. Gostin, et al., supporting Petitioners in No. 13-354 and Respondents in No. 13-356 at 8, 16.

⁶¹ See Brief for Church-State Scholars, et al. as Amici Curiae Supporting the Government at 6, 22.

To allow such burden-shifting, s brief filed by church-state scholars asserted, would “privilege religion, and the religion of the particular owners, over the rights of those who do not share those beliefs. Such discrimination has no place in the United States.”⁶² A health organization similarly argued that a woman’s right to choose and seek preventative health care must not be “skewed by the religious views of the for-profit employer providing the woman’s health coverage, which may deny coverage for these potentially life-saving treatments.”⁶³

In its brief, HHS argued that ACA did not violate RFRA, since the Green family, the owners of Hobby Lobby, were not required (as individuals) directly to provide health insurance to Hobby Lobby’s 13,000 employees. RFRA, it explained, does not prevent *indirect* burdens on religious exercise arising “when one’s money circuitously flows to support the conduct of other free-exercise wielding individuals who hold religious beliefs that differ from one’s own.”⁶⁴ This formulation captures the idea that Hobby Lobby’s female employees also have – to use Dworkin’s frame – a right to ethical independence, and exercising it may require access to contraception. Amici supporting HHS agreed with its reading of RFRA, stressing that ACA, in requiring that insurance be made available, was not “taking sides” in favor of or promoting its use. As Lambda Legal Defense and Education Fund, Inc. explained, “[i]nstead of endorsing or promoting any particular choice of treatment for particular health conditions, inclusion of coverage for multiple care options simply allows employees to pursue wellness with medical guidance based on individual needs, past experiences, and their own life goals.”⁶⁵

⁶² Brief for the Center for Inquiry et. al. at 17-18.

⁶³ Ovarian Cancer National Alliance Brief at 10.

⁶⁴ Petition for a Writ of Certiorari at 27 (quoting *O’Brien v. HHS*, 894 F.Supp.2d 1149, 1159 (E.D. Mo. 2012)).

⁶⁵ Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting the

This formulation links health and wellness to a woman’s broader view of how to exercise her responsibility to live her life well. (*RwG*, 2) Dworkin argues that a “paradigm” religious value uniting believers and “religious atheists” is that “it matters objectively how a human life goes and . . . everyone has an innate, inalienable ethical responsibility to try to live as well as possible in his circumstances.” (*RwG*, 24) The problem with this Dworkinian argument, from the perspective of Hobby Lobby and its supporters, is that precisely because it matters how a human life goes, *once begun*, an employer opposed to contraception who provides wages that may be used to pay for abortifacients has enabled an immoral outcome. Professor Rice, thus, asserted that, while “[i]t is not reasonable to say that an employer who pays his employees wages has any specific intent regarding how the employees spend those wages,” “it is . . . reasonable to say that the employer who provides a means to pay specifically for abortifacients is acting specifically to assist his employees to pay for, and thus obtain, abortifacients” and has an “intent” to enable them doing so.⁶⁶

Briefs filed in support of HHS offered two lines of argument that respond to this idea of corporate responsibility. First, they insisted that protecting *employees’* conscience and faith required limits to the reach of an employer’s control. Thus, the Brief of Religious Organizations asserted:

Just as an employer may not control how employees use their wages, an employer may not supervise employees’ use of their health-benefits compensation. . . [w]hether to buy or use birth control is an employee’s own decision, using her own compensation, in consultation with her own physician, and guided by her own religious beliefs.⁶⁷

Government at 20.

⁶⁶ Rice Brief at 29-30.

⁶⁷ See Brief of Religious Organizations as Amici Curiae Supporting the Government at 34.

The emphasis, in this quoted passage, on the female employee as decision maker echoes the Supreme Court’s formulation of the constitutional protection of a woman’s right to decide whether to terminate her pregnancy, in consultation with her physician,⁶⁸ and, as we shall see, also features in Justice Ginsburg’s *Hobby Lobby* dissent. As with the abortion debate, some women supporting Hobby Lobby challenged the premise that contraceptive access is an indispensable element of women’s health and equality. Thus, a brief submitted by law professor Helen Alvaré, a prominent critic of the right to abortion, on behalf of Women Speak for Themselves asserted: “To agree with HHS that contraception and ECs [emergency contraceptives] are indispensable to women’s equality is to deny that society could find another way to assure respect for women’s innate equality while simultaneously accommodating their aspirations both to be mothers *and* to be economically and politically integrated into society.”⁶⁹ This group charged that it is “demeaning to women to suggest that women’s fertility and their bearing and rearing of children, are ‘barriers’” to women’s opportunity and workplace participation.⁷⁰

A second argument supporters of ACA made about corporate responsibility was that certain consequences flow from the decision by religiously-motivated, for-profit corporations to participate in the market and commercial activity, including compliance with laws like ACA. Some briefs framed this in terms of the collision between employer conscience and employee-protective laws: “When followers of a particular sect enter into commercial activity as a matter

⁶⁸Roe v. Wade, 410 U.S. 113 (1973).

⁶⁹See Brief of Women Speak for Themselves as Amicus Curiae in Support of Hobby Lobby Stores, Inc. and Conestoga Wood Specialties, et al. at 38-39.

⁷⁰ Ibid.

of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”⁷¹

In sum, arguments in favor of HHS insisted that Hobby Lobby’s religious exercise rights should not outweigh women’s access to reproductive health care services. Relating this back to Dworkin’s proposed frame of ethical independence, the case for ACA’s mandate would stress that government is not restricting Hobby Lobby’s freedom out of a view that “one conception of how to live, of what makes a successful life, is superior to others,” but out of a conviction that providing employees access to a full range of preventive health services, including contraception, is essential to promoting health. The policy leaves the choice whether to use contraception in the hands of individual women. Hobby Lobby’s supporters, nonetheless, would counter that the view that contraception is a component of health care prefers certain ethical views over others, but Dworkin, most likely, would argue that ACA protects ethical independence by not withholding or compelling use of contraception, but leaving it to individual employee choice.

Central themes in Dworkin’s legal and political philosophy are the hedgehog’s “value holism” and integration.⁷² Thus, he insisted that people cannot readily leave their deepest convictions behind when they enter into the political realm.⁷³ Might he, given these commitments, be sympathetic to the argument that when religious people enter the market, they wish their business practices to reflect their deepest values? If Dworkin accepted this rejection of a limited sphere for exercising religion – or living out one’s view of what makes for a

⁷¹ Center for Inquiry Brief at 13 (quoting *United States v. Lee*, 455 U.S. 252 (1982)).

⁷² See generally Dworkin, *Justice for Hedgehogs*. For my engagement with these ideas, see McClain, “Justice and Elegance for Hedgehogs;” McClain, “Religious Liberty Without Conflict.”

⁷³ See, e.g., Ronald Dworkin, “Foundations of Liberal Equality, Lecture at the Tanner Lectures in Human Values,” in 11 *The Tanner Lectures on Human Values* (Grethe B. Peterson, ed.) (Salt Lake City, Utah: University of Utah, 1990).

successful life -- and found persuasive the argument that Hobby Lobby's participation in ACA made its owners complicit in immorality, his framework would support accommodation "if an exception can be managed with no significant damage to the policy in play."⁷⁴ As it turns out, the Supreme Court made precisely this assumption about accommodation in ruling for Hobby Lobby, even as it did not reach the question of whether the accommodation provision was itself a threat to religious liberty under RFRA.

III. The *Hobby Lobby* Opinions: On Corporate Conscience and Women's Reproductive Health

The legal commentary on *Hobby Lobby* is already extensive.⁷⁵ My focus here is limited to considering how the various opinions by member of the Court fare when examined through the lens of Dworkin's proposed shift from a special right to religious freedom to a more general right to ethical independence. Does a corporation have such a general right? If so, how far should that right be protected? Themes articulated in the party and amicus briefs, discussed in Part II, appear in the various opinions. Left unaddressed in *Hobby Lobby* is the question wending its way through the lower federal courts and which the Court may ultimately address: whether the accommodation that ACA affords religious institutions survives under RFRA.⁷⁶

⁷⁴ Dworkin, *Religion Without God*, 136.

⁷⁵For a few insightful examples, see Ira C. Lupu, "*Hobby Lobby* and the Dubious Enterprise of Religious Exemptions," 38 *Harv. J. Law & Gender* (forthcoming); Frederick Mark Gedicks and Andrew Koppelman, "Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause," 67 *Vanderbilt Law Review En Banc* 51 (2014).

⁷⁶ For further discussion, see Part IV. For an overview of pending federal litigation, see <http://www.becketfund.org/hhsinformationcentral>.

The Hobby Lobby Majority: A For Profit Corporation Has Free Exercise Rights

To begin with the conclusion: a five-member majority of the Court, in an opinion written by Justice Alito, holds that ACA's requirement that "three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies owners" violates RFRA, "which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."⁷⁷ For purposes of its analysis, the Court assumes (while expressing some doubt) that the government did have a compelling interest in guaranteeing that all women have access to all FDA-approved contraceptives without cost sharing, including the four challenged contraceptive methods.⁷⁸ The flaw under RFRA, the Court holds, was that the federal government could have furthered this end in a "less restrictive" way: by offering Hobby Lobby the accommodation it offers "nonprofit organizations with religious objection." Under the federal regulations, if an organization certifies that it "opposed providing coverage for particular contraceptives services," then the organization's insurer or third party administrator "must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.'"⁷⁹

The real action in the Court's opinion is its conclusion that RFRA protects for-profit corporations and that ACA's requirements constitute a substantial burden on their religious

⁷⁷*Hobby Lobby*, 134 S.Ct. at 2759.

⁷⁸*Ibid.* at 2779-2780.

⁷⁹*Ibid.* at 2781-2782 (quoting 45 CFR § 147.131 (b) (4), (c) (1), (c) (2)).

exercise. Since Dworkin believed RFRA was wrong as a matter of political morality, he would likely be critical of the Court's reliance on it. Further, given his emphatic disagreement with the Court's ruling, in *Citizens United*, that for-profit corporations are "persons" possessed of First Amendment rights of free speech, he would likely be sharply critical of the *Hobby Lobby* majority's expansive reading of RFRA to protect free exercise rights of such corporations. Does the fact that Hobby Lobby and the other companies before the Court were family-owned and closely-held, rather than public, make a difference? Can such corporations have a conscience?

The majority, in effect, dissolves the corporate form to reach the devout Christian people behind it, telling the story of Norman and Elizabeth Hahn and their three sons, "devout members of the Mennonite Church," who began what grew to be the Conestoga Wood Specialties. So, too, it traces the origins of Hobby Lobby to David and Barbara Green and their three children, "Christians" who first started out with one arts-and-crafts store that has grown "into a nationwide chain" of 500 stores and 13,000 employees.⁸⁰ Both families seek to conduct business in ways that reflect their religious commitments, the majority observes, quoting Hobby Lobby's statement of purpose committing the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles" and the Hahns' belief that "they are required to run their business 'in accordance with their religious beliefs and moral principles.'"⁸¹ Thus, the Conestoga board adopted a "Statement on the Sanctity of Human Life," asserting that "human life begins at conception" and that it is "against [their] moral conviction to be involved in the termination of life" after conception, which is a "sin against God to which they are held

⁸⁰Ibid. at 2764-2767.

⁸¹Ibid. at 2764, 2766.

accountable.”⁸² So, too, the Greens believe life begins at conception and that “it would violate their religion to facilitate access to” the four contraceptive methods at issue since they “operate after [the] point” when life begins.⁸³

The majority reasons, thus, that when RFRA and the First Amendment protect “the free-exercise rights of corporations like Hobby Lobby [and] Conestoga,” they protect “the religious liberty of the humans who own and control these companies” or are “associated with a corporation in one way or another.” A corporation is simply a “fiction to provide protection for human beings,” a “form of organization” used by “human beings” to achieve certain ends. Separate from the human beings who “own, run, and are employed by them,” the Court sums up, corporations “cannot do anything at all.”⁸⁴ Strikingly, this vision of the corporation includes not only the owners but the employees – whose rights under ACA were at issue in the case. By analogy to *Citizens United*, Dworkin would likely have agreed with Justice Ginsburg, in dissent, that such employees may not share their employers’ religious vision and yet are, in effect, bound by it.

The majority rejects the distinction between nonprofit and for-profit corporations, with respect to the “principle” the dissent argued undergirded protecting the religious “autonomy” of the nonprofit corporation: that such protection “often furthers individual religious freedom as well”; it contended that principle applies equally to for-profit corporations.⁸⁵ The fact that a for-profit corporation makes money does not mean it cannot have other purposes, the Court argues, pointing to how for-profit corporations support “a wide variety of charitable causes” and also

⁸²Ibid. at 2765.

⁸³Ibid. at 2766.

⁸⁴Ibid. at 2768.

⁸⁵Ibid. at 2769.

“further humanitarian and other altruistic objectives” through choices about how to operate. Why not, then, include furthering religious values and beliefs among those other “worthy” objectives?⁸⁶ The majority fends off HHS’s argument that Congress could not have intended RFRA to apply to for-profit corporations, given the difficulty of determining the “sincere ‘beliefs’ of a corporation,” short of “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporation such as IBM or General Electric.”⁸⁷ The majority states that there is no precedent of a publicly-traded corporation asserting RFRA claims, and it seems “improbable” that, in such a corporation, “unrelated shareholders – including institutional investors with their own set of stakeholders – would agree to run a corporation under the same religious beliefs.” Before it, the majority stresses, were three closely held corporations, owned and controlled by members of a single family, the sincerity of whose religious beliefs was not in dispute.⁸⁸ It was precisely this mixture of stakeholders in a large public corporation that Dworkin emphasized as a reason *not* to recognize corporations as persons with free speech rights, since that speech would likely reflect only the views of the managers, and some in that that complex mix would “hate” the speech.⁸⁹ Dworkin might answer the majority that, while the sincere beliefs of the corporate owners of a for-profit closely held corporations were not at odds with those of their shareholders, they might well be at odds with their employees, who wish access to the contraceptives the owners find morally objectionable.

Turning briefly to the issue of burden, the majority rejects HHS’s argument that the link between requiring the health insurance and the morally objectionable act – a woman employing a

⁸⁶Ibid. at 2771.

⁸⁷Ibid. at 2774.

⁸⁸Ibid.

⁸⁹ See discussion in Part I.

method of contraception that destroyed an embryo – was too attenuated to burden religious exercise.⁹⁰ The Court observes that the corporate owners’ belief that HHS’s rules would involve them in immorality raised a “difficult and important question of religion and moral philosophy” – “the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.”⁹¹ The majority insists that it was not the province of HHS or the Court to resolve this question or tell plaintiffs “their beliefs” about the correct answer are “flawed.” Instead, the relevant point is that, given their convictions that ACA’s requirements violate their beliefs and that the only alternative – providing health care consistent with their beliefs – would involve a financial penalty, there is a substantial burden on religious exercise. HHS could avoid that burden, the majority concludes, by extending to these for profit companies the same exemption it provides to nonprofit religious institutions.⁹² What would Dworkin do, using an ethical independence frame, in evaluating the majority’s putting to the side the “difficult” question of “religion and moral philosophy” and focusing instead on the ease of accommodating Hobby Lobby and relieving the “substantial” burden on its free exercise? He would likely find that Congress’s reasons for enacting the contraceptive mandate – ensuring women’s access to preventive health care – did not violate employers’ ethical independence. If he accepted the proposition that that mandate nonetheless burdened what Hobby Lobby’s owners felt was a “sacred duty,” then he would likely consider whether “equal concern” for them required an exemption *if* it could be managed “with no significant damage to the policy in play,” (*RwG*, 136), an “if” about which Justice Ginsburg, in dissent, expresses doubt.

⁹⁰*Hobby Lobby*, 134 S.Ct. at at 2775.

⁹¹*Ibid.* at 2778.

⁹² *Ibid.* at 2759-2760.

Dignity, Self-Definition, and the For-Profit Corporation

Justice Kennedy's concurring opinion is striking not only for its characteristic appeal to "dignity – also a central theme in Dworkin's work – but also for its conception of the spheres in which religious persons seek to live out their religious beliefs. In *Religion Without God*, Dworkin challenges the idea that a particular account of divine creation (the "science" part of religion) tells us anything about the best way to live (the "value" part of religion). (*RwG*, 24-25) Many religious people and traditions, I have argued elsewhere, will disagree with his distinction, instead viewing the existence and work of a divine creator as highly relevant to the source and content of religious norms and laws and how to live life well.⁹³ Thus, Justice Kennedy also connects the two, arguing: "In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts."⁹⁴

Kennedy further argues, "Free exercise . . . implicates more than just freedom of belief. . . . It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community."⁹⁵ Kennedy's language here resonates with Dworkin's emphasis on dignity, self-definition, and the integration of all our convictions with the exercise of our responsibility to live lives well. Self-definition, Kennedy insists, takes place in all the different spaces of society; this passage resonates with

⁹³McClain, "Religious Liberty Without Conflict," 1300-1309.

⁹⁴*Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

⁹⁵*Ibid.*

arguments by religion scholars and religious leaders (and Hobby Lobby's amici) who argue against marginalizing religious people by confining the proper exercise of religion to a church or synagogue. And yet, Kennedy continues, in a "complex society," where government regulation is "pervasive," "defining the proper realm for free exercise can be difficult."⁹⁶ Here, as the majority assumes, the regulation at issue "furthers a legitimate and compelling interest in the health of female employees." The problem, Kennedy concludes – echoing the majority opinion – is that HHS could still achieve this end without burdening religious liberty by accommodating these for-profit companies. Kennedy insists that RFRA does not support "distinguishing between different religious believers – burdening one while accommodating the other- when it may treat both equally by offering both of them the same accommodation."⁹⁷

What would Dworkin say about this appeal to equal treatment of religious believers, or, to use his frame, of persons exercising their right to ethical independence? Given his sharp critique of Kennedy's recognition of corporate personhood in *Citizens United*, would he support treating for profit corporations as the same, for purposes of religious exercise, as not for profits? *Religion Without God* suggests accommodating religious entities would be appropriate, in certain circumstances; would that apply to Hobby Lobby? Dworkin, recall, argued that, in a case where providing an exemption would "put people at a serious risk of harm that it is the purpose of the law to avoid," refusing an exemption "does not deny equal concern." Rather, this "priority" of "nondiscriminatory collective government over private religious exercise seems inevitable and right." (*RwG*, 136-137)

What, then, might Dworkin make of Kennedy's argument that attempts to balance the

⁹⁶Ibid.

⁹⁷Ibid. at 2786,

interests at stake? On the one hand, Kennedy states, “among the reasons that the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government for exercising his or her religion.” On the other hand, “neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.” Dworkin might well support this formulation. Then Kennedy concludes that these two priorities may be “reconciled” through “the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here” – the exemption process made available to not for profit religious institutions. Would Dworkin support this conclusion? If he did, would he, nonetheless, be wary of the majority’s caveat that, in proffering the accommodation provision as a less restrictive alternative, it was not ruling on whether that accommodation would survive review under RFRA? The dissent advances our understanding of those, and other, issues.

Health Care Choice Must be in the Hands of Women

In a lengthy dissent joined by justices Sotomayor, Breyer, and Kagan, Justice Ginsburg vigorously objects to the majority’s expansive reading of RFRA and its disregard of the line between profit and not for profit corporations.⁹⁸ The “startling breadth” of the majority’s decision, she begins, “holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge

⁹⁸Justice Breyer and Justice Kagan did not join Part III-C-1 of Justice Ginsburg’s dissent. They agreed with her that the plaintiffs’ “challenge to the contraceptive coverage requirements fails on the merits,” and thus, “we need not and do not decide whether either for-profit corporations or their owners may bring claims under” RFRA. *Hobby Lobby*, 134 S. Ct. at 2806 (Breyer, J. and Kagan, J., dissenting).

incompatible with their sincerely held religious beliefs.”⁹⁹ Given Dworkin’s argument that, if one accepts a general right to ethical independence, the “liberal position” on the constitutional right to early abortion becomes “mandatory,” it is notable that Ginsburg leads with the famous language from the *Planned Parenthood v. Casey* joint opinion (of which Kennedy was a co-author) that: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁰⁰ With this framing, the dissent’s narrative is not about devout business owners, but about how Congress remedied a “large gap” in ACA’s coverage – “preventive services that ‘many women’s health advocates and medical professionals believe are critically important’” – through introduction and passage of the Women’s Health Amendment.¹⁰¹ Ginsburg details that subsequent coverage in ACA grew out of recommendations of a group of independent experts convened by the Institute of Medicine; the report “noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing.”¹⁰²

Another significant part of Ginsburg’s recounting of how ACA came to include such preventive health care for women is the unsuccessful effort to include a “so-called ‘conscience amendment,’ which would have enabled any employer or insurance provider to deny coverage based on its asserted ‘religious beliefs or moral convictions.’” Salient for Dworkin’s broader reading of protection of ethical independence, Ginsburg observes in a footnote: “Separating

⁹⁹*Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

¹⁰⁰*Ibid.* at 2787-2788 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)).

¹⁰¹*Ibid.* at 2788.

¹⁰²*Ibid.* at 2789.

moral convictions from religious beliefs would be of questionable legitimacy.”¹⁰³ In rejecting this “conscience amendment,” Ginsburg argues, Congress “left health care decisions – including the choice among contraceptive methods – in the hands of women, with the aid of their health care providers.”¹⁰⁴ Intentionally or not, Ginsburg references the classic “who decides?” argument for women’s reproductive liberty, but in this instance the choice is between women and their religious employers or insurers rather than between women and the state.

How to resolve the conflict between female employees and their employers is a focus of Ginsburg’s analysis of Hobby Lobby’s claim, first under existing Free Exercise jurisprudence (*Smith*) and then under RFRA. Under *Smith*, ACA’s contraceptive coverage requirement is a generally applicable law that “trains on women’s wellbeing, not on the exercise of religion,” and its effect, if any, on such exercise, is “incidental.”¹⁰⁵ Even without *Smith*, she argues: “Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties;” the exemptions sought here would do so by “deny[ing] legions of women who do not hold their employers’ religious beliefs access to contraceptive coverage that the ACA would otherwise secure.” Ginsburg observes that, “[w]ith respect to free exercise claims no less than free speech claims, ‘[y]our right to swing your arms ends just where the other man’s nose begins.’”¹⁰⁶

This analogy between free speech and free exercise is apt. As with *Citizens United*, protecting First Amendment rights of corporations comes at the expense of persons connected to

¹⁰³Ibid. at 2789 and n. 6 (citing *Welsh v. United States*, 398 U.S. 333, 357-358 (1970) (Harlan, J., concurring in result).

¹⁰⁴Ibid. at 2790.

¹⁰⁵Ibid.

¹⁰⁶Ibid. at 2790-2791 (quoting Chafee, “Freedom of Speech in War Time,” 32 *Harv. L. Rev.* 932, 957 (1919)).

the corporation who do not share the beliefs of the corporate managers – in this case the female employees who have different convictions about the use of certain contraceptive methods. Rejecting the Court’s RFRA analysis, Ginsburg strenuously insists that the correct answer to the question, “Do for-profit corporations rank among ‘person[s]’ [under RFRA] who ‘exercise . . . religion,’” must be no.¹⁰⁷ Invoking Justice Stevens’ partial dissent in *Citizens United* (which Dworkin, too, found so persuasive), she asserts: “Corporations . . . ‘have no consciences, no beliefs, no feelings, no thoughts, no desires.’”¹⁰⁸ Her analysis differentiates the spheres and manner in which religion may be exercised. Thus, the “shelter” that the Free Exercise Clause affords “churches and other nonprofit religion-based organizations” often furthers “*individual* religious freedom as well” because “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community.”¹⁰⁹ In contrast to the Court’s “special solicitude” for the “rights of religious organizations,” there has been – appropriately – no comparable “solicitude” for “commercial organizations” and “religious exemptions had never been extended to any entity operating in the ‘commercial, profit-making world.’”¹¹⁰ The logic for this distinction, Justice Ginsburg insists, relates to the respective purposes and compositions of religious organizations – “to foster the interests of persons subscribing to the same religious faith” — and for-profit corporations – “workers who sustain the operations of those corporations commonly are not drawn from one religious community.” Indeed, federal antidiscrimination law does not permit a *for-profit* corporation to use “religion-based criterion” to restrict its work force. While “religious organizations exist to serve a community of believers,” for-profit corporations

¹⁰⁷Ibid. at 2793.

¹⁰⁸Ibid. at 2794 (quoting *Citizens United*, 558 U.S. at 466 (Stevens, J.)).

¹⁰⁹Ibid.

¹¹⁰Ibid. at 2794-2795.

employ “‘labor to make a profit,’ rather than to ‘perpetuate [the] religious value[s] shared by a community of believers.’”¹¹¹

But even assuming Hobby Lobby and Conestoga are “persons” under RFRA, Justice Ginsburg argues that ACA’s requirements do not “substantially burden” their religious exercise because the “connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated.”¹¹² Requiring companies to “direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans” does not require these companies to “purchase or provide” the objectionable contraceptives; it is the “covered employees” who decide whether to “claim benefits under the plan.”¹¹³ Certainly, employees who share their employers’ religious beliefs are “under no compulsion to use the contraceptives in question.” By the same token, an individual employee who, informed by her physician, decides to use contraception covered by the plan is making an “autonomous choice” that is not “in any meaningful sense” Hobby Lobby’s decision.¹¹⁴ Here Ginsburg invokes autonomous choice to emphasize the interruption of any linkage between the corporations and the contraceptive use, while earlier she emphasized the choice must be *the woman’s* to make.

Again arguing in the alternative, Ginsburg asserts that, even if the corporations meet the “substantial burden” requirement, the federal government’s interests in “public health and women’s well being” are “compelling:”

[T]he mandated contraceptive coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children . . . helps safeguard the health of women for whom

¹¹¹Ibid. at 2796-2797 (citation omitted).

¹¹²Ibid. at 2799.

¹¹³Ibid.

¹¹⁴Ibid.

pregnancy may be hazardous, even life threatening . . . and secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.¹¹⁵

She adds that the fact that the corporations object to “only 4 of the 20 FDA-approved contraceptives” does not make government’s interests less compelling; IUDs, for example, are “significantly more effective, and significantly more expensive than other contraceptive methods” – “nearly the equivalent to a month’s full-time pay for workers earning the minimum wage.”¹¹⁶

Given these compelling interests, Ginsburg reiterates that the Court must consider the burden accommodating Hobby Lobby and Conestoga would pose for their employees, adding that: “no tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others – here, the very persons the contraceptive coverage requirement was designed to protect.”¹¹⁷ Again, Ginsburg returns to a clash or rights or collision of liberties analysis: limitations on religious freedom “begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”¹¹⁸ Dworkin, recall, argues that it is does not violate equal concern to refuse an exemption where granting it would “put people at a serious risk that it is the purpose of the law to avoid,” because this “priority of nondiscriminatory collective government over private religious exercise seems inevitable and

¹¹⁵Ibid. (sources omitted).

¹¹⁶Ibid. at 2800. This effectiveness is a key reason that Brookings Institution Senior Fellow and economist Isabel Sawhill has recently urged greater access to and more widespread use of the IUD and other Long Acting Reversible Contraceptives (LARC) to address the high rate of unintended (and often) unwanted pregnancies and births among young women in the United States. See Isabel V. Sawhill, *Generation Unbound: Drifting Into Sex and Parenthood Without Marriage* (Washington, D.C.: Brookings Institution Press, 2014) 122-26.

¹¹⁷*Hobby Lobby*, 134 S. Ct. at 2801; see also Geddicks and Koppelman, “Invisible Women,” 51 (arguing that “‘religious liberty’ does not and cannot include the right to impose the costs of observing one’s religion on someone else, especially in the for-profit workplace”).

¹¹⁸*Hobby Lobby*, Ibid. (citation omitted).

right.” (*RwG*, 136-137).

Critical of the majority’s holding that “the contraceptive coverage requirement fails to satisfy RFRA’s least restrictive means test,” Ginsburg counters that the federal government has shown “that there is no less restrictive, equally effective” alternative that would provide insurance coverage for the contested contraceptive methods and ensure that women receive them “at no cost to them.”¹¹⁹ Once again, Ginsburg uses a clash of liberties or conflict of rights analysis, drawing on prior Supreme Court precedents to insist that “one person’s right to free exercise must be kept in harmony with the rights of her fellow citizens, and ‘some religious practices [must] yield to the common good.’”¹²⁰ As applied to the present context: “A ‘least restrictive means’ cannot require employees to relinquish benefits accorded to them by federal law in order to ensure that their commercial employers can adhere undeservedly to their religious tenets.”¹²¹ Ginsburg criticizes the two alternatives the Court puts forth: first, it floats the idea that the federal government could “assume the cost” of providing coverage, and second, it concludes that the government can simply offer for-profit corporations with religious objections the accommodation already provided to religious institutions. With respect to the latter, she astutely points out the Court “hedges” on this “proposal,” since it does not decide “today” whether the very approach it says would provide a less restrictive alternative “complies with RFRA.”¹²² Nor, for example, would counsel for Hobby Lobby commit to whether that “accommodation” was “acceptable.” As Ginsburg observes, Hobby Lobby and *Conestoga* “barely addressed” this possible solution, perhaps because religious nonprofit organizations were already challenging the

¹¹⁹*Ibid.* at 2801-2802.

¹²⁰*Ibid.* at 2802 n. 25 (citing *United States v. Lee*, 455 U.S. 252, 259 (1982)).

¹²¹*Ibid.*

¹²²*Ibid.* at 2803.

adequacy of the accommodation.¹²³

In her conclusion, Ginsburg returns to the premise that the context of commercial activity matters in determining the scope of religious exercise. Drawing upon the Court’s “pre-*Smith*” jurisprudence that, she argues, “RFRA preserved,” she highlights “two key points” that should apply to the instant case. First, “When followers of a particular sect enter into commercial activity as a matter of choice . . . the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.” Second, “allowing a religion-based exemption to a commercial employer would ‘operat[e] to impose the employer’s religious faith on the employees.’”¹²⁴ She translates: “the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraception in question,” but “[w]orking for Hobby Lobby or Conestoga . . . should not deprive employees of the preventive care available to workers at the shop next door” – certainly, she adds, not as a result of a judicial ruling, rather than clear guidance from the legislative or executive branch.¹²⁵ I believe Dworkin would likely concur with this part of Ginsburg’s analysis, given his concerns over the consequences of *Citizens United*’s recognizing corporate personhood and his insistence of the “priority” of “nondiscriminatory general government.” (*RwG*, 137)

Ginsburg ends by observing that Hobby Lobby and Conestoga “do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs.” She illustrates with historical examples as well as present-day ones, such as the widely-discussed case of *Elane Photography, LLC v. Willock*, in which a “for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s

¹²³Ibid. at 2803 and n. 27.

¹²⁴Ibid. at 2804-2805 (citing *United States v. Lee*, 455 U.S. 252 (1982)).

¹²⁵Ibid. at 2804.

commitment ceremony based on the religious beliefs of the company's owners."¹²⁶ To avoid venturing into a "minefield" of future RFRA claims by for-profit corporations based on ACA or other statutory schemes, Ginsburg urges that religious exemptions under RFRA be confined to "organizations formed 'for a religious purpose,' 'engage[d] primarily in carrying out that religious purpose,' and not 'engaged in the exchange of goods and services for money beyond nominal amounts.'"¹²⁷

What Would Dworkin Do?

To return to this essay's opening question, "What would Dworkin do?," if writing about *Hobby Lobby*, there are reasons to conclude that, as with *Citizens United*, he would write critically about the flaws of the majority opinion. Just as he found Justice Stevens' partial dissent in that *Citizens United* more persuasive, it is likely he would praise features of Justice Ginsburg's dissent in *Hobby Lobby*. Dworkin might reject any distinction between public and privately-owned corporations, insisting that corporations – as artificial creations – had no ethical independence. But if he did accept that distinction, then, applying the ethical independence frame would certainly support treating the rights and interests of for profit corporations' employees in reproductive self-determination at least as seriously as the religious convictions of the corporations' owners. If such for-profit corporations, then, might warrant accommodation, a Dworkinian analysis would turn, much as Ginsburg's dissent argued, on whether such

¹²⁶Ibid. at 2805. In *Elane Photography, LLC. V. Willock*, 309 P.3d 53 (N.M. 2013), the photography business owner lost her appeal of a ruling that her refusal violated state antidiscrimination law, which included a public accommodations provision barring discrimination in provision of goods and services.

¹²⁷*Hobby Lobby*, 134 S. Ct. at 2805-2806 (citation omitted).

accommodation could be done without injury to the public purposes advanced by the law and to the rights and interests of the third parties affected by the accommodation.

IV. Unfinished Business: Is Accommodation Accommodating Enough?

If Dworkin were evaluating the likely import of *Hobby Lobby* for future challenges to ACA, perhaps like Ginsburg and other dissenters, he might have alerted readers that what the majority in *Hobby Lobby* seemed to give --- female employees could obtain contraceptive coverage without burdening their employers by using the exemption process – it might well take away, since it declined to reach the issue of whether the exemption provisions satisfied RFRA. Indeed, the proverbial other shoe dropped just a few months after *Hobby Lobby*, when the Court took the unusual step of granting an application of Wheaton College, a nonprofit liberal arts college, to enjoin the federal government from enforcing the exemption provisions against it, even before there was a lower court ruling on its legal challenge that the exemption violates its free exercise of religion under RFRA.¹²⁸ Wheaton College was clearly eligible for the religious-nonprofit exemption, but objected to having to undertake the exemption process itself, which required that it sign a form “certifying that it is a religious nonprofit that objects to the provision of contraceptive services,” and provide “a copy of that form to its insurance issuer or third-party administrator.”¹²⁹ It argued that this made it “complicit in grave moral evil,” since it was “religiously opposed to emergency contraceptives because they may act by killing a human embryo.” This argument, readers should appreciate, is made by numerous Catholic nonprofits

¹²⁸ *Wheaton College*, 134 S.Ct. 2806 (2014).

¹²⁹ *Ibid.* at 2807.

challenging ACA with respect to *all* forms of contraception and sterilization.¹³⁰ The majority of the Court gave that emergency relief over a lengthy dissent by Justice Sotomayor, joined by Justices Ginsburg and Kagan (perhaps not coincidentally the three female members of the Court).

Sotomayor argued that granting such emergency injunctive relief was “as rare as it as extreme,” and also inappropriate in the instant case, where “no one could credibly claim Wheaton’s right to relief is indisputably clear.”¹³¹ The dissent also castigated the majority for its retreat from the position in *Hobby Lobby* that ACA’s accommodation provision was a way to protect religious liberty while ensuring contraceptive access, asserting: “Those who are bound by our decisions usually believe they can take us at our word. Not so today.”¹³²

Sotomayor also spoke critically of the merits of Wheaton College’s claim, asserting that its argument that simply filing a “self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects” was not viable.¹³³ This accommodation process is “the least restrictive means of furthering the Government’s compelling interests in public health and women’s well-being.”¹³⁴ Invoking Ginsburg’s *Hobby Lobby* dissent, Sotomayor emphasized that it is *courts* that must decide which religious burdens are too substantial to be borne, not the affected religious organizations (such as Wheaton College); simply “*thinking* one’s religious beliefs are

¹³⁰ *Priests for Life*, 2014 WL 5904732, *1 (quoting Catholic doctrine that contraception is a “grave sin”); *Little Sisters of the Poor*, 6 F.Supp.3d at 1128 (reporting testimony that all forms of contraception are “gravely contrary to moral law” and “intrinsic evils”).

¹³¹ *Wheaton College*, 134 S.Ct. at 2808.

¹³² *Ibid.*

¹³³ *Ibid.* at 2809.

¹³⁴ *Ibid.*

substantially burdened – no matter how sincere or genuine that belief may be – does not make it so.”¹³⁵ Therefore, although Wheaton may be troubled by the fact that it must participate in a larger process that results in providing contraceptives to its employees, this is not sufficient to constitute a substantial burden on its free exercise of religion.

To help explain “why Wheaton’s complicity theory cannot be legally sound,” Sotomayor employed an analogy used by the Seventh Circuit in its rejection of the University of Notre Dame’s similar claim.¹³⁶ If, during wartime, “there is a draft, and a Quaker is called up” and “tells the selective service system that he’s a conscientious objector,” suppose, on being told “you know this means we’ll have to draft someone in place of you,.” he “replies indignantly that if the government does this, it will be violating his religious beliefs.” Does his refusal “trigger” drafting that replacement such that RFRA “would require a draft exemption for both the Quaker and his non-Quaker replacement”?¹³⁷ Writing for the Seventh Circuit, Judge Posner noted that counsel for Notre Dame said that “drafting a replacement indeed would substantially burden the Quaker’s religion,” but that it was a “fantastic” suggestion.¹³⁸ Sotomayor explains that “the obligation to provide contraceptive services, like the obligation to serve in the Armed Forces, arises not from the filing of the form but from the underlying law and regulations.” Thus, Wheaton’s religious rights are not substantially burdened by larger requirements that *someone* provide contraceptive coverage for its employees and students. Wheaton may object to a third party providing contraceptives to them, but the ACA requires that “*some* entity provide contraceptive coverage.” Therefore, such provision “would not result from any action by

¹³⁵ Ibid. at 2812 (citing *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsberg, J., dissenting)).

¹³⁶ Ibid. (discussing *Notre Dame*, 743 F.3d at 556).

¹³⁷ Ibid.

¹³⁸ *Notre Dame*, 743 F.3d at 556.

Wheaton.” The dissent reasons: “A religious nonprofit’s choice not to be that entity may leave someone else obligated to provide coverage instead – but the obligation is created by the contraceptive coverage mandate imposed by law, not by the religious nonprofit’s choice to opt out of it.”¹³⁹

Moreover, as the circuit courts have elaborated, ACA’s process “fastidiously relieves” objecting religious nonprofits from contraceptive provision and disassociates them from such provision.¹⁴⁰ The circuit courts emphasize that “[r]eligious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out.”¹⁴¹ As the Seventh Circuit put it, “at bottom,” what religious nonprofits object to is Congress’s passing of ACA and the contraceptive mandate; however, under RFRA, they “have no right to ‘require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens’” or to “prevent other institutions, whether the government or a health insurance company,” from engaging in acts they find offensive.¹⁴²

Arguably, under a Dworkinian frame of ethical independence, the conscience rights and ethical independence of Wheaton College and similar religious nonprofits cannot be analyzed in a vacuum: ACA accommodates them with a minimally burdensome requirement of filling out a one-page form,¹⁴³ while also protecting the ethical independence and reproductive health of

¹³⁹ *Wheaton College*, 134 S.Ct. at 2812.

¹⁴⁰ *Priests for Life*, 2014 WL 5904732 at *16.

¹⁴¹ *Ibid.* at *10.

¹⁴² *Notre Dame*, 743 F.3d at 552, 559.

¹⁴³ All the circuit court opinions emphasize that this is a “de minimis” burden. See also *Little Sisters of the Poor*, 6 F.Supp.3d at 1235 (estimating it would take 50 minutes for an employer to fill out the form).

female students and employees. To find the accommodation itself too burdensome puts in jeopardy ACA's objectives and the rights of those women to receive essential reproductive health care. Justice Ginsburg's *Hobby Lobby* dissent emphasized the importance of these rights. Drawing on the legislative record, the federal appellate courts elaborate on how cost-free, "seamless contraceptive coverage" furthered government's compelling twin interests in public health and women's wellbeing. By contrast, evidence suggests that "contraceptive use is highly vulnerable to even seemingly minor obstacles," and so alternatives to ACA's "seamless" accommodation process that imposed costs and delays could hinder women's contraceptive access.¹⁴⁴ Given high rates of unintended pregnancies, as one circuit court put it, "Permitting women to control the timing and spacing of their pregnancies improves the health and welfare of women, children, and infants."¹⁴⁵

Dworkin did not write about the contraceptive mandate, but, after the Court upheld most of ACA, he observed that the United States "has finally satisfied a fundamental requirement of political decency that every other mature democracy has met long ago."¹⁴⁶ Recall that *Religion Without God* lists promoting the general welfare as a reason that government may restrict freedom. Almost assuredly, given his prior writing both on health care and on women's reproductive liberty, Dworkin would have found that a compelling part of that general welfare was ensuring women's access to preventive health care with respect to their reproductive lives. To invoke a classic Dworkinian idea, the legislative record and the jurisprudence on the contraceptive mandate demonstrate that, given the previous gaps in the health care system and the disproportionate burdens women experienced under that system, for government to *treat*

¹⁴⁴ Priests for Life, 2014 WL 5904732 at *29.

¹⁴⁵ Ibid. at *26.

¹⁴⁶ Dworkin, "A Bigger Victory Than We Knew."

women as equals with respect to mandating the provision of preventive health care, that preventive health care must meet women's distinctive health care needs.¹⁴⁷

At this writing, numerous challenges brought to nonprofit religious institutions (including Wheaton College) are making their way through the federal courts. Although the Supreme Court has not yet accepted such a case for review, it seems likely that it will do so eventually. Perhaps *Hobby Lobby* will also encourage more for-profit corporations to challenge ACA as well. And, so, the Court's religion jurisprudence will continue to evolve. As that happens, *Religion Without God's* argument for a new approach in that jurisprudence, along with the larger body of Dworkin's work, will continue to be instructive.

¹⁴⁷ Dworkin, *Taking Rights Seriously*, 227.