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Employer-Sponsored Reproduction

Valarie K. Blake & Elizabeth Y. McCuskey

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DRAFT ARTICLE

EMPLOYER-SPONSORED REPRODUCTION

forthcoming in COLUMBIA LAW REVIEW (2023-2024)

*Valarie K. Blake & Elizabeth Y. McCuskey**

ABSTRACT

This Article interrogates the current and future role of employer-sponsored health insurance in reproductive choice, revealing the magnitude of impact that employers' insurance coverage choices have on Americans' access to reproductive care, as well as the legal infrastructure that prioritizes employer choice over individual autonomy.

Over half the population depends on employers for health insurance. The laws regulating those plans grant employers discretion in what services to cover, with exceptionally wide latitude for employers' choices about reproductive care services, like abortion, contraception, infertility, and pre-exposure prophylaxis (PrEP). In their role as health care funders, employers pursue their own economic interests, which often conflict with employees' interests. Employers tend to be antinatalist because childbearing, birthing, and rearing are costly to them both as employers and insurers. Even ostensibly pronatalist employers who object to covering contraception and abortion, upon closer examination, likewise have economically self-interested motivations. The legal infrastructure validating employers' choices subordinates individuals' interests in reproductive autonomy to their employer's economic interests.

Decoupling health care access from employers thus is necessary to bolster reproductive autonomy. But the most effective means of decoupling – public-option or single-payer public benefits – prompt some tough questions about reproductive exceptionalism. Shifting the third-party payment role from employers to governments does not truly remove the threat to reproductive autonomy in these funding decisions, so progressive health reform risks sacrificing reproductive autonomy to the cause of universal benefits. Confronting these tough questions illuminates ways that vigilantly centering reproductive autonomy in single-payer reforms can make those efforts both more feasible and more durable.

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INTRODUCTION

In the summer of 2022, as proponents for reproductive rights mourned the demise of the right to abortion with *Dobbs v. Jackson Women's Health*,[1] Walmart and other nationwide corporations announced they would cover abortion services and related travel under their health plans.[2] Walmart's actions seem like a victory for reproductive freedom. Walmart is the largest private employer in 21 states[3] and employs 1.6 million people,[4] not including their spouses and dependents. The corporation is based in Arkansas – a state that, after *Dobbs*, bans abortions with exceptions only to save the mother's life, and with no exceptions for rape or incest.[5] Its actions could well save lives.

Walmart's decision was all the more a pleasant surprise, given the company's significant financial contributions to state legislators responsible for enacting trigger laws, which became abortion bans after *Dobbs* enabled their enforcement.[6] Walmart until recently had also resolutely opposed providing insurance for its hourly employees, relying on state Medicaid programs to cover its lower-waged employees.[7] Only after the Affordable Care Act implemented a nationwide mandate for large

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[1] 597 U.S. ___ 142 S. Ct. 2228 (2022).

[2] *Walmart Expands Abortion Coverage for Employees*, PBS (Aug. 19, 2022), *https*://www.pbs.org/newshour/economy/walmart-expands-abortion-coverage-for-employees. Walmart's expansion of its employee health plan covers abortion services for its employees "when there is a health risk to the mother, rape or incest, ectopic pregnancy, miscarriage or lack of fetal viability." Walmart's plan also covers "travel support" for employees and dependents who must travel more than 100 miles to access those services. For a discussion of legal issues raised by such abortion policies, *See generally* Brendan S. Maher, *Pro-Choice Plans*, __ GEO. WASH. L. REV. __ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172420.

[3] Nick Routley, *Walmart Nation: Mapping America's Biggest Employers*, VISUAL CAPITALIST (Jan. 24, 2019), https://www.visualcapitalist.com/walmart-nation-largest-employers/.

[4] USA Today, *Here's a List of the Largest Employer in Every State*, CHICAGO SUN TIMES (Mar. 30, 2019), https://chicago.suntimes.com/2019/3/30/18395895/here-s-a-list-of-the-largest-employer-in-every-state.

[5] Micah Wilson, *Washington County Could Lead the Way in Adding Exceptions to Arkansas Abortion Law*, 5 NEWS (Oct. 4, 2022), https://www.5newsonline.com/article/news/politics/washington-county-exceptions-arkansas-abortion-law/527-787d0a8f-bd8e-4c3d-b855-237469920934.

[6] *See* Janet Burns, *Dear AT&T, Boeing, Pfizer, Comcast, Walmart, Etc: Stop Funding Abortion Attackers*, FORBES (Aug. 21, 2019).

[7] Katie Sanders, *Alan Grayson Says More Walmart Employees on Medicaid, Food Stamps than Other Companies*, POLITIFACT: THE POYNER INST. (Dec. 6, 2012), https://www.politifact.com/factchecks/2012/dec/06/alan-grayson/alan-grayson-says-more-walmart-employees-medicaid-/. *See also Federal Social Safety Net Programs: Millions of full-Time Workers Rely on Federal Health Care and Food Assistance Programs*, U.S. GOVT. ACCOUNTABILITY OFF. (Nov. 18, 2020), https://www.gao.gov/products/gao-21-45.; Michael Barbaro, *Appeals Court Rules for Wal-Mart in Maryland Health Care Case*, N.Y. TIMES (Jan. 18, 2007), https://www.nytimes.com/2007/01/18/business/18walmart.html; Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. PA. L. REV. 389, 424-25 (2020).

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employers to offer health benefits or else pay a tax, did Walmart begin offering health benefits.[8]

If Walmart used its position to stand with reproductive choice, then Hobby Lobby did the opposite when it refused to cover contraception under its employer health plan, instigating *Burwell v. Hobby Lobby Stores*.[9] A private for-profit craft store chain with over 43,000 employees operating in 47 states,[10] Hobby Lobby is owned by David and Barbara Green, evangelical Christians who object to abortion. Because the Greens believed that two FDA-approved oral contraceptives and two forms of intrauterine devices (IUDs) effectively promoted abortion, they objected to covering those in the health plan they offered their employees. The ACA required group plans to cover these contraceptives as "preventive health services,"[11] so the Greens challenged the enforcement of this provision. Justice Alito decided in favor of a closely-held corporation's right to exercise its religious beliefs and exempted Hobby Lobby from providing federally mandated contraception coverage.[12] A similar challenge is currently pending from employers who object to covering Pre-Exposure Prophylaxis (PrEP) medication to prevent HIV infection, based on the company owners' beliefs that PrEP encourages sexual behavior they consider immoral.[13]

Reproductive rights advocates might laud Walmart and loathe Hobby Lobby. But this Article exposes the real villain as the legal and regulatory infrastructure of health insurance in the U.S., which grants employers wide latitude over access to reproductive care, and by virtue, the reproductive freedom of their employees. When Walmart wants to expand abortion access for its employees, the law allows it. And when Hobby Lobby wants to avoid federal law requiring contraception coverage for its employees, the law allows that, too. This is a problem for reproductive freedom.

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[8] Clare O'Connor, *Report: Walmart Workers Cost Taxpayers $6.2 Billion in Public Assistance*, FORBES (Apr. 15, 2014), https://www.forbes.com/sites/clareoconnor/2014/04/15/report-walmart-workers-cost-taxpayers-6-2-billion-in-public-assistance/?sh=6f1ba22a720b.

[9] 573 U.S. 682 (2014).

[10] *Our Story*, HOBBY LOBBY, https://www.hobbylobby.com/about-us/our-story, (last visited Feb. 20, 2023).

[11] 42 U.S.C.A. § 1395l(a)(1); *see ACA-Covered Preventative Health Services for Women*, AGENCY HEALTHCARE RSCH. QUALITY, https://www.ahrq.gov/ncepcr/tools/healthier-pregnancy/fact-sheets/preventive-health-services.html (last visited Feb. 20, 2023).
See, e.g., *Health Benefits & Coverage: Preventative Health Services*, HEALTHCARE.GOV https://www.healthcare.gov/coverage/preventive-care-benefits/ (last visited Feb. 20, 2023).

[12] Mary Agnes Carey, *Hobby Lobby Ruling Cuts Into Contraceptive Mandate*, NPR (June 30, 2014, 4:35 PM), https://www.npr.org/sections/health-shots/2014/06/30/327065968/hobby-lobby-ruling-cuts-into-contraceptive-mandate.

[13] *See generally* Michelle M. Mello & Anne Joseph O'Connell, *The Fresh Assault on Insurance Coverage Mandates*, 388 N ENGL J. MED. 1–3 (Jan. 5, 2023), https://www.nejm.org/doi/full/10.1056/NEJMp2213835#:~:text=10%3A57)%20Download-,Braidwood%20Management%20Inc.,access%20to%20important%20health%20services__(discussing *Braidwood Management v. Becerra*.

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We detail employer discretion over coverage of reproductive care in Part I.[14] Due to the prohibitively high cost of health care services in the U.S., employer-sponsored insurance is practically the gatekeeper for over 100 million people's access to all kinds of health care, including reproductive care. Employer-sponsored insurance varies widely in coverage of reproductive services based on the size and type of the employer institution, and also its plan design choices. The variation reflects a complex legal infrastructure that mostly insulates employers' freedom to choose coverage for reproductive care. Statutory accommodations for religion widen the holes in coverage by exempting religious institutions – and even secular for-profit businesses such as Hobby Lobby – from certain coverage mandates. Federal antidiscrimination statutes and state and local laws constrain discretion but in limited ways. Public-sector employers, responsible for covering 37 million people in the U.S., have even wider latitude to choose what to cover. The reproductive exceptionalism[15] that infuses insurance and anti-discrimination laws gives both public and private employers even greater leeway to restrict coverage for reproductive care.

Employers' coverage of reproductive benefits is informed by their business and personal interests, not employees' reproductive choices, as explored in Part II. Corporations' incentives frequently misalign with the robust coverage of reproductive services, giving employers a marked antinatalist bend. Companies perceive pregnancy as costly and disruptive, pointing to lost productivity and the requirement to accommodate pregnant workers. As a benefits provider, pregnancy hits employers' insurance premiums, childbirth being one of the costliest medical procedures for employers annually and resulting in more dependents for the plan to cover. Even ostensibly pronatalist companies like Hobby Lobby may be motivated by business decisions in their opposition to reproductive services. Although employers' interests may at times align with some employees' choices, this interest convergence is fragile, subordinating individuals' choices to the dominant forces of an entity's commercial interests. This subordination contradicts reproductive autonomy.

Part III offers tough but essential considerations for the future of health reform if it is to better safeguard reproductive freedom. Reforms that would decouple health care from employment promote reproductive autonomy by removing the influence of employer control over the financial dimensions of individual decisions. But the public-option and single-payer reforms that would most directly achieve that uncoupling place the coverage choice in the hands of government officials. An examination of how governments already act as employers and insurers previews how government might function in this role. The outlook is frankly not good for reproductive choice. As an employer, the federal government has long excluded abortion from coverage.

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[14] *See Health Insurance Coverage in the United States: 2020*, U.S. CENSUS BUREAU (Sept. 14, 2021), https://www.census.gov/library/publications/2021/demo/p60-274.html (stating that 54.4% of the population received ESI for a total of nearly 178 million people).

[15] *E.g.,* Courtney Megan Cahill, *Reproductive Exceptionalism in and Beyond* Birth Rights, 100 B.U. L. REV. ONLINE 152 (2020); *see also, e.g.*, I. Glenn Cohen, Judith Daar, & Eli Y. Adashi, *What Overturning* Roe v. Wade *May Mean for Assisted Reproductive Technologies in the U.S.*, 328 JAMA 15 (2022).

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As an insurer, the federal government through the Hyde Amendment has for almost fifty years avoided paying any federal funds towards abortions. Though some states reject Hyde and cover the full range of reproductive care for their employees, others enacted their own Hyde-style restrictions. Any plan that places funding discretion in the hands of the government – or any third-party payer – must contend with this reality.

Using the framework of confrontational incrementalism, we conclude by observing that the political economy of government-funded care leaves some narrow openings for eroding reproductive exceptionalism and advancing reproductive autonomy.

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