7

Costs of Corporate Conscience: How Women, Queers, and People of Color Are Paying for Hobby Lobby's Sincerely Held Beliefs

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Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.

First Amendment to the Constitution of the United States

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure . . .

In sum, with respect to free exercise claims no less than free speech claims, "your right to swing your arms ends just where the other man's nose begins."

Justice Ruth Bader Ginsburg, dissenting on *Burwell v. Hobby Lobby*

In June 2014, the US Supreme Court favored closely held corporations' scientifically inaccurate but sincerely held beliefs over the federal government's compelling interest in securing American women access to cost-free contraception—as well as over their women employees and dependents' right to all contraceptive methods approved by the Food and Drug Administration (FDA), guaranteed by the Patient Protection and Affordable Care Act (ACA; colloquially known as Obamacare). In her dissent to *Burwell v. Hobby Lobby*, Justice Ginsburg alleged that the Court conflated the sincerity of these corporations' beliefs with the substantiality of the burden placed on closely held conservative Christian corporations by requiring those corporations to facilitate access to legal contraceptives for their employees. That is, the Court valued the protection of corporations' free exercise of religion over the bodily autonomy of its women laborers and employees' women dependents.[1] Limiting women employees and dependents' access to contraception not only compromises the agency of adult women, but also places a disproportionate burden on employees and dependents of color.[2]

One of *Burwell*'s most significant precedents is its successful deployment of the Religious Freedom Restoration Act (RFRA) in defense of for-profit conservative Christian conscience. In addition to undermining the ACA's contraceptive mandate, *Burwell* ignited a firestorm of state-level religious freedom proposals attempting to "protect" for-profit Christian businesses that sincerely believe they should not have to serve queer people. *Burwell*'s legacy, then, is not merely the Court's preference for corporate religious exercise over women's bodily agency—which, as I will show, adversely affects women of color to a disproportionate degree—but also executive and legislative attempts to leverage for-profit corporate conscience against the rights and full personhood of LGBTQ Americans.

Constitutional protections for American religious liberty are few in number and often elusive in intent. The Constitution of the United States enshrines only three protections for religion. The first, Article VI Paragraph 3, ensures that no religious test may be required to qualify for any American "office or public trust." The second and third reside in the First Amendment, which begins "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first clause forbids the establishment of religion, preventing the federal government from endorsing or financially supporting one religious tradition to the exclusion of others. The second clause, disallowing the prohibition of free exercise, is the subject of this chapter. *Burwell v. Hobby Lobby* is remarkable in its extension of "free exercise" to for-profit corporations.

In "a decision of startling breadth," *Burwell* extended the constitutional protections of religious freedom to the "familiar legal fiction" of corporations-as-people—and specified that the people those corporations represent are their shareholders, officers, and employees, in that order.[3] In doing so, the Court effectively valued for-profit religious conscience—and financial interests—over the bodily agency of corporations' women workers and employees' women dependents. In regarding conscience over contraception, this decision ensures disproportionate weight on women of color.[4] And Burwell's legislative aftermath has seen state-level RFRAs weaponize for-profit Christian conscience against LGBTQ Americans. Thus, in this article, I propose that *Burwell* defines religion not simply in terms of mainstream Christianity, but as white heterosexual male religio-capitalist commitments—at the expense of the bodily autonomy, livelihoods, and lives of American women, queers, and people of color.

How much does free exercise cost? Religious conscience and the Sherbert Test[5]

Among these three vulnerable and intersecting populations, women's disenfranchisement is perhaps most historically linked to the Court's understanding of religious free exercise. Indeed, the definition of the free exercise of religion has been written on the bodies of American women. Denials of women's bodily agency bookend the Supreme Court's history of free exercise: the earliest definition of the clause denied women lawful entrance into plural marriages; the most recent prioritizes the sincerely

held beliefs of closely held corporations over the federal government's compelling interest in providing comprehensive reproductive health care to American women.[6]

Burwell also represents a significant departure from the Court's historic regulation and frequent defense of the free exercise of minority religious practices. Of the roughly seventy cases heard by the Court in its ongoing assessment of the boundaries of free exercise, the majority were brought for or against practices and practitioners of American minority religions, which is to say religious traditions (like Judaism and Islam) and Christian denominations (like Seventh-day Adventists and Latter-day Saints [LDS]) that fall outside the purview of mainstream, predominantly white Christianity. Nineteen of these cases pertain to the Watch Tower Bible and Tract Society, better known as Jehovah's Witnesses, alone. Until the late twentieth century, Supreme Court free exercise case law as consistently, almost exclusively focused on the adjudication of minority religious practices.[7]

Burwell's most significant judicial free exercise antecedents—*Reynolds v. United States* (1879) and *Employment Division of Oregon v. Smith* (1990)—both involve minority religious parties. The latter directly contributed to the passage of the federal RFRA (1993)—the grounds upon which the Court found the ACA's contraceptive mandate unconstitutional for closely held for-profit corporations with sincerely held (though, again, scientifically inaccurate) beliefs about contraceptive methods. Through *Burwell*, the Roberts Court reinvigorated *Smith*'s trajectory away from the use of free exercise arguments to protect minority religious practices and toward the constitutional provisions for "religious freedom" as protecting conservative Christian beliefs.

The Court first defined free exercise in *Reynolds v. United States* (1879), ruling that the religious duty of the LDS to enter into plural marriages did not outweigh federal laws prohibiting bigamy.[8] The plaintiff, George Reynolds, testified that

> it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and, among others, the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.[9]

His Mormon faith, in short, encouraged him to enter into polygynous marriage.

In response, the Court acknowledged that the First Amendment guaranteed free exercise, but insisted that the Constitution only guarantees free exercise of "mere opinion." Congress, the Court maintained, "was left free to reach actions which were in violation of social duties or subversive of good order," even those actions justified by faith. In a unanimous opinion, Justice Waite wrote that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[10] Allowing religious beliefs to excuse otherwise-illegal practices "would make the professed doctrines of religious belief superior to the

law of the land, and, in effect, to *permit every citizen to become a law unto himself*."[11] The first definition of free exercise, then, is freedom to believe. Religious practice cannot flout secular law, and individual conscience may not be allowed to countermand governmental authority.

According to the opinion, the survival of the American state required the sublimation of religious allegiance to federalism.[12] "Government could exist only in name" if individual citizens were allowed to flout federal and state laws based on their private religious beliefs.

While the justices agreed with Thomas Jefferson's insistence upon "a wall of separation between church and State," the practice of polygamy was so "odious" as to be impermissible.[13]

The Court justified its interference with the LDS's religious practices on behalf of the "pure-minded women" who were "to be the sufferers" of this presumably barbaric practice.[14] It is ironic, then, that *Reynolds* and three subsequent Supreme Court cases denied women the right to enter into plural marriages and disenfranchised the adult women of the Utah Territory.[15] This is to say that the judicial provenance of free exercise definitions originates with forbidding adult women from entering into unconventional family structures and denying them the vote.[16] The Court's understanding of free exercise is inextricably rooted in both the limitation of women's bodily agency and the sublimation of individual religious conscience to governmental authority.

Despite this beginning, the Supreme Court tended toward making space for practical religious difference through most of the twentieth century.[17] The clearest defense for permitting religious conscience to supersede government regulations occurred in *Sherbert v. Verner* (1963), in which the Court ruled unconstitutional the denial of unemployment benefits to a Seventh-day Adventist woman, Adeil Sherbert, who was fired for refusing to work on Saturdays, the Adventist sabbath.[18] This case instituted the Sherbert Test, which requires the government to prove it has a *compelling interest* in infringing upon free exercise and that that infringement constitutes a *substantial burden* on the religious party in question. If there is a compelling interest in the requirement that constitutes a substantial burden on that religious party, the government must pursue the *least restrictive means* of fulfilling that interest. The Sherbert Test informed all Court definitions of free exercise until *Employment Division of Oregon v. Smith* (1990).

Prior to Smith, the post-*Sherbert* Court had grown increasingly liberal in its allowance for religious obligations to displace governmental authority in the name of free exercise. *Smith* sharply reversed that direction. The Rehnquist Court ruled that "general laws of neutral application"—in this case, anti-narcotics regulations—motivated by a compelling government interest may be constitutional even if they present a substantial burden upon religious exercise, effectively doing away with the Sherbert Test.[19]

Noting that a number of states permitted the sacramental use of peyote, Justice Antonin Scalia asserted that "to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[20] That other states had accommodated the Native American Church by making

exceptions for members' use of peyote in ritual did not make otherwise-neutral narcotics regulations unconstitutional, nor should the Court necessarily determine whether such accommodations were appropriate. *Smith* prioritized compelling government interest in laws that do not specifically target religious actors or institutions over the substantiality of the burden those laws might impose upon said religious parties.

Writing for the majority, Scalia noted that the *Smith* opinion might well disadvantage members of minority religions:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system *in which each conscience is a law unto itself* or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[21]

Smith, like *Reynolds*, weighed the considerations of unlawful practices motivated by religious conscience against compelling government interests and decided in favor of the latter. Scalia went so far as to note that the decision specifically disadvantages "those religious practices that are not widely engaged in"—which is to say practices more common in minority religions like the Native American Church—but failed to acknowledge that members of such movements are also often racial minorities and thus doubly disenfranchised by the decision.

The *Smith* opinion met with widespread disapproval and public censure, particularly among religious communities. A politically and religiously diverse coalition of more than sixty religious groups successfully lobbied Congress to pass the RFRA (1993) to countermand *Smith*.[22] RFRA observes that a generally applicable and otherwise neutral law can substantially burden religious actors "as surely as laws intended to interfere with religious exercise" and that in *Smith*, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[23] To this end, RFRA mandates that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless there is a compelling government interest in seeing the law enforced. If such a compelling interest exists, the government must find the least restrictive means of enforcing said law. In essence, then, RFRA restored the Sherbert Test.

With the Religious Land Use and Incarcerated Persons Act (RLUIPA; 2000), RFRA has extended considerations of free exercise beyond the designations of the First Amendment and has been explicitly invoked to protect vulnerable religious minority populations. Since their passage, the RFRA and RLUIPA have primarily functioned to secure members of minority religions—including Wicca, Islam, Buddhism, Santeria, and Centro Espírita Beneficente União do Vegetal (a group that uses ayahuasca sacramentally)—rights to practice freely.

Though the Act was found unconstitutional at the state level in *City of Boerne v. Flores* (1997), RFRA still has bearing on federal matters—including President Obama's ACA (2010). *Burwell v. Hobby Lobby* successfully used RFRA—passed in large part to correct the disenfranchisement of minority religious practice—to argue for exceptions

to ACA federal mandates on the basis of broad protections for conservative Christian conscience.

As Sullivan notes in "The World That Smith Made," *Smith* and its legislative and judicial aftermath represent a departure from free exercise adjudication as seeking limited exceptions to secular law toward suing for broad "jurisdictional demands for church autonomy or even church sovereignty."[24] This trend is clear in the adjudication of free exercise during the Obama administration.

Only fifteen of the seventy-one free exercise cases heard from 1878 to 2017 involved mainstream Christian appellants or defendants; a third of these cases were brought during the Obama presidency.[25] Four of the five free exercise cases brought before the Court since Obama's inauguration involve mainstream Christian parties, and with the exception of *Christian Legal Society v. Martinez*, all were decided in favor of those parties. And among these cases involving mainstream Christian parties, *Burwell* has done the most to steer the purview of free exercise from the protection of minority religions toward reinforcing Christian primacy within the American body politic.

Conscience versus contraception

The history of American women's struggle for reproductive autonomy has always been entwined with battles of Christian conscience, but Christian conscience with regard to contraception and abortion has shifted dramatically since Margaret Sanger said that "the greatest sin in the world" was to bring unwanted children into it.[26]

The history of Christian conscience with regard to contraception is complicated. The hierarchy of the Catholic Church has consistently opposed "artificial" birth control and abortion, and Protestant attitudes toward both have changed dramatically in the past 150 years.[27] In the mid-nineteenth century, 75–90 percent of women seeking abortion were married Protestants who did not want more children—which ignited nativist anxieties about Catholic children eventually overwhelming the US population.[28] In her *Good Catholics: The Battle over Abortion in the Catholic Church*, journalist Patti Miller identifies 1930 as the tipping point for Christians and birth control: in this year, the Anglican Church—the most influential western Christian church of its time—officially permitted married couples to use contraception.[29] Other Protestant denominations followed suit, "signaling that contraceptives had gained moral and social legitimacy," Miller observes.[30] For much of the twentieth century, contraception was not an especially fraught issue for most non-Catholic Christians.[31]

How, then, does allowing employees and their dependents cost-free access to contraception become such a grave matter of conscience for closely held for-profit Protestant companies?

I would suggest that the answer lies, in part, on what I call the catholicization of public morality, or the adoption of Roman Catholic sexual morality as the justification for and articulation of national values.[32] The 1970s saw the consolidation of disparate Protestantisms into a powerful and politically cohesive interest group, the New Christian Right, who joined with Roman Catholic bishops to decry national moral decay—which both groups saw as most clearly evidenced in non-normative sexual

and gender practices. Unmarried contraception use and abortion were high among the list of symptoms of America's "moral decline," which directly threatened national integrity.[33]

While much has been made of the influence of Protestant sexual ethics in shaping American public morality, less scholarly attention has been paid to the ways Roman Catholicism has helped shape normative American sexuality. As Tracy Fessenden notes in her 2008 "Sex and the Subject of Religion," the Church put forward its twentieth-century sexual ethics in universal terms—indeed, the regulation of sex and gender became the primary, if not only, means through which modern Catholicism attempted universality and absolutism.[34] Catholic sexual ethics were presented as universal because they were ostensibly grounded in natural law, and thus applied equally to the faithful and non-faithful alike. This universality politicized Catholic pronouncements on sexual practices, leading to Church arguments that contraception, abortion, and homosexuality were best understood as moral (rather than specifically religious or purely political) matters.[35]

Especially in the wake of the 1968 papal encyclical *Humanae Vitae*, best known for its condemnation of artificial birth control, the Church emerged as an arbiter not merely of Roman Catholic sexual ethics, but of American morality writ large. The Magisterium's firm public stance embracing conservative sexual ethics aided unprecedented alliance building with American evangelicals and arguably contributed to Catholics' increased political influence in the 1970s and 1980s.[36] At its political height, the so-called Moral Majority included evangelical Protestants, antiabortion/contraception Catholics, some orthodox Jews, and the LDS.[37]

The Moral Majority's acceptance of Catholic natural law as an articulation of national values becomes particularly pertinent to *Burwell* when we consider Pope John Paul II's consistent, even "militant," conflation of contraception with abortion.[38] John Paul II warned against a "contraceptive mentality" that valued independence and personal pleasure over allegiance to God, and attributed societal decline to women's selfishness, as manifest in their desire for reproductive autonomy.[39] Under Reagan, Roman Catholic sexual ethics increasingly informed domestic and foreign policy.[40] Leaders from both sides formalized the political alliance among conservative Protestants and Roman Catholics in March 1994 with the signing of the "Evangelicals and Catholics Together" declaration.[41] Likewise, George W. Bush made overtures to the Roman Catholic electorate as part of his "compassionate conservatism" platform.[42] This last cemented the political union among Roman Catholics, conservative evangelicals, and the Republican Party.[43]

Far right antiabortion activists began adopting Catholic rhetoric conflating abortion and contraception.[44] By the mid-1990s, social conservatives—including the US Catholic Conference, the National Right to Life Committee, and the Christian Coalition—had begun targeting access to contraception through legislative opposition to Title X, which provides federal support to young and low-income women in need of contraception and family planning counseling.[45] Miller attributes intensified religiopolitical opposition to contraception to an increased viability of contraceptive equity measures attempting to ensure that health coverage plans covered birth control pills like any other prescription medication.[46] Though almost all women use

contraceptives at some point in their lives, insurance companies had largely omitted contraceptive coverage—making women's out-of-pocket medical expenses 70 percent higher than men's.[47] Once insurers began covering Viagra in 1998, however, arguments against paying for "lifestyle choices" fell short and contraceptive coverage measures increasingly passed state legislatures.[48]

Conservative Christian opponents, Protestant and Catholic alike, rallied around arguments that intrauterine devices (IUDs) and newly approved emergency contraceptive pills were abortifacients because these could prevent a fertilized egg from implanting on the uterine wall.[49] This claim countermands the American Medical Association's definition of pregnancy as beginning at implantation. Nevertheless, early twenty-first century Catholic bishops and their allies increasingly opposed insurance coverage for emergency contraception (EC) and IUDs, claiming that requirements for contraceptive coverage would violate the religious freedom of both insurers and employers morally opposed to abortion.[50]

Miller attributes this conflation of contraception and abortion directly to the efforts of US bishops, but notes that the argument was quickly adopted by other conservative Christian interests—including Walmart's famous refusal to carry EC in its stores.[51] By 2004, the president of the Southern Baptist Theological Seminary, Albert Mohler, was urging evangelicals to reject the "contraceptive mentality" and quoting John Paul II's assertion that widespread use of birth control had decoupled sex from reproduction and led to "near total abandonment of Christian sexual morality."[52] That same year, "Catholics and Evangelicals Together" declared a "new pattern of convergence and cooperation" on a "culture of life" increasingly opposed to contraception.[53] This convergence carried political weight as well: the Republican Party abandoned its longstanding support for contraception and increasingly attacked family planning funding.[54]

In 2005, George W. Bush signed an appropriations bill that included the first federal conscience clause, exempting health care entities from providing services in contradiction of their religious obligations.[55] By 2008, the Bush administration had passed provisions allowing almost any health worker to opt out of providing services to which she was morally or religiously opposed.[56] Advocates for women's health vocally protested such measures, not only because they compromised patients' access to care, but because the language codifying these "conscience exceptions" explicitly conflated abortion and contraception.[57]

The Obama administration steered sharply away from conscience exemptions while noting that federal law still allowed providers to refuse to provide abortions.[58] In August 2011, the Department of Health and Human Services (HHS) determined that all employer-based health plans should be required to provide cost-free access to all contraceptive methods approved by the FDA as part of HHS's proposed rules for the ACA's preventative services.[59] Despite extraordinary legislative obstruction to affordable access to contraception, 98.2 percent of US women who have had sex had used at least one method of birth control by 1998.[60] After the ACA mandated coverage for cost-free contraception, women's out-of-pocket expenses for oral contraceptive pills dropped from 20.9 percent to 3 percent, accounting for two-thirds of the drop in spending for retail drugs from 2012 to 2014.[61] The contraceptive mandate is also a

considerable cost saver for the 70 percent of reproductively capable women currently using some form of birth control.[62]

Which is why the inclusion of a contraceptive mandate in the ACA was, to borrow the unforgettable words of former vice president Joe Biden, "a big fucking deal."[63]

By providing cost-free access to contraception, the ACA has arguably done more to prevent abortions than any other legislation in US history.[64] A study by the Guttmacher Institute attributes the United States' historically low abortion rate to increased use of contraception among American women—particularly the use of IUDs to prevent pregnancy.[65] With EC, IUDs are precisely the contraceptive methods to which the defendants in *Burwell*—Hobby Lobby Stores, Inc., Mardel, and Conestoga Wood Specialities Corporation—object to so strenuously on the grounds of sincerely held Christian belief.

Conestoga, Mardel, and Hobby Lobby's sincerely held belief that EC and IUDs are abortifacients lacks credible medical or scientific substance, but religion is protected by the Constitution in ways that scientific and medical knowledge are not. Writing for the majority, Justice Samuel Alito offers that "the Hahns and the Greens and their companies [Hobby Lobby/Mardel and Conestoga respectively] sincerely believe that providing the insurance coverage demanded by the HHS regulations [i.e., contraceptive mandate] lies on the forbidden side of the line [between religious beliefs and work found morally objectionable] and it is not for us to say that their religious beliefs are mistaken or insubstantial."[66] For this reason, Alito maintains, "the mandate clearly imposes a substantial burden" on the beliefs of the owners of the three companies.[67] Given the provenance of conservative Christian conflation of contraception and abortion, it is not surprising that the owners of these companies would object to the use of birth control methods they consider to be abortifacients.

What is surprising is the Court's recognition of for-profit corporations as entitled to the protections of free exercise guaranteed by the RFRA. Alito notes that the Court has already recognized corporations as religious plaintiffs and defendants, as in *Braunfeld v. Brown* (1960) and *Gallagher v. Crown Kosher Supermarket* (1960); the justice does not stress that—unlike *Burwell*—both cases involved members of a minority religion (i.e., Orthodox Judaism) but does glancingly mention that the Court found against blue laws being religiously discriminatory.[68] *Braunfeld* and *Gallagher* both establish a precedent for the "familiar legal fiction" of recognizing corporations as persons. The Court further fails to recognize distinctions between for-profit and nonprofit corporations, and notes that HHS has already made accommodations for nonprofit corporations that object to the contraceptive mandate on religious grounds.[69] For these reasons, the ACA's contraceptive mandate cannot be the least restrictive means of enforcing the government's compelling interest in providing cost-free access to contraception—meaning *Burwell* fails the Sherbert Test, and is thus unlawful under the RFRA.

Refuting arguments that *Burwell*'s precedent for overly broad objections of religious conscience to federal law, Alito responds that the decision pertains *only* to the contraceptive mandate and not other medical procedures contraindicated by religious belief—such as blood infusions for Jehovah's Witnesses, or psychiatric treatment for Scientologists—specifically because the latter have been traditionally covered by

private insurance plans.[70] That is to say that *Burwell* can safely decide against women's entitlement to cost-free contraceptive access because private insurance companies have historically impeded women's access to contraception.

Alito further emphasizes that the Court is deeply concerned for corporations' "full participation in the life of the nation"; for this reason, the Court is eager to accommodate the sincerely held beliefs of closely held corporations like Hobby Lobby.[71] "Protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of *the humans who own and control those companies*."[72] The opinion conjectures that the impact of the *Burwell* decision on the thousands of women who work for Hobby Lobby, Mardel, and Conestoga will be "precisely zero," because the government can—and should—absorb the cost of the corporations' conscientious abstentions.[73]

There are two significant assumptions in the Court's opinion: first, that the "people" these corporations represent are not the workers of the corporations in question, many of whom do not share the Greens and Hahns's belief system; and that the American taxpayers—including the women disenfranchised by this decision—should subsidize said corporations' religious objections despite a compelling government interest to the contrary. Here we see the Court's articulation of religion as the religio-capitalist commitments of conservative Christians, and the weighting of those religio-capitalist commitments heavily over the bodily autonomy of women employees and dependents.

Justice Ruth Bader Ginsburg's scathing dissent focuses at length on the extent to which the majority opinion overextends RFRA, conflates the defendants' sincerity of belief with the substantiality of the burden placed upon their beliefs by the ACA's contraceptive mandate, and fails to propose a less restrictive means of carrying out the government's compelling interest in securing American women cost-free access to all FDA-approved methods of birth control.

With the majority, Ginsburg reiterates the government's compelling interest in women's health care. Her dissent begins by quoting *Planned Parenthood of Southeastern PA v. Casey* (1992): "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." Ginsburg notes that women of childbearing age paid 68 percent more for health care before the ACA, and that costs prevented many women from accessing reproductive health care at all—some 17 million women were left uninsured. The contraceptive mandate furthers a compelling government interest in "public health and women's well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence."[74] The dissent further emphasizes that the methods to which Hobby Lobby et al. object, specifically IUDs, are both more expensive and more effective than other methods of contraception.[75] *Burwell* directly affects thousands of Hobby Lobby, Mardel, and Conestoga's women employees and dependents, many of whom do not share the beliefs of the Greens or the Hahns.

It is for this reason, she insists, that Congress vetoed a conscience amendment to the ACA, and why she argues that *Burwell* represents a massive overextension of RFRA.[76] Congress intended a "far less radical purpose" in passing the RFRA, and could never have meant its definition of free exercise to be "so extreme."[77] RFRA was, Ginsburg insists, meant to reinstate the Sherbert Test, not to "unsettle other areas of law."[78]

She writes, "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."[79] Ginsburg is explicit: the Court's definition of free exercise in *Burwell* comes at the expense of American women's bodily autonomy and full civil participation.

Free exercise, Ginsburg asserts, must "yield to the common good" of fellow citizens.[80] Citing *United States v. Lee* (1982), in which the Amish defendant claimed social security violated his community's commitment to caring for their elderly, Justice Ginsburg quotes: "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."[81] Ginsburg further observes that many state-level religious freedom cases have been based on racist and homophobic beliefs, and wonders if this extension of RFRA now exempts those biases.[82]

Burwell's grossest overreach, according to Ginsburg, is the "passing strange" extension of free exercise protections to for-profit corporations.[83] Religion is for "natural persons, not artificial legal entities," she emphasizes, and citing Justice Stephens in *Citizens United* (2010), observes that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires."[84] For-profit corporations are sustained by their workers, who by law cannot be hired on basis of religion, nor should the Court assume that those workers share the religious commitments of the corporations' owners or shareholders.[85] Ginsburg warns that "the Court's expansive notion of corporate personhood . . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."[86] Justice Ginsburg's warning bore out, as I will discuss in the next section.

Ginsburg ultimately insists that *Burwell* does not require the Court to assess the sincerity of for-profit corporations' beliefs, but rather to assess whether the requested accommodation of those beliefs deprives others of their lawful rights.[87] While confirming the sincerity of said beliefs, Ginsburg asserts that the connection between those beliefs and the acquisition of birth control by an employee or her dependent is "too attenuated" a connection "to rank as substantial."[88] The corporations are not required to purchase or provide contraception, and should an employee or her dependent share the Hahns and Greens's beliefs, she need not purchase contraception.[89] "Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults."[90] Justice Ginsburg finds women's entitlement to bodily agency more substantial than the burden placed on Hobby Lobby et al. and its incorporate beliefs.[91]

Ginsburg adamantly denies that a less restrictive means exists than ACA's contraceptive mandate as written. "A 'least restrictive means' cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets," she maintains.[92] By privileging for-profit corporate Christian conscience over women's bodily autonomy, Ginsburg observes that the Court has consigned the American taxpayers to "pick[ing] up the tab."[93] The tab is considerable: by 2014, publicly funded

family planning programs will save the federal government over $13 billion dollars a year.[94]

Burwell redefined free exercise by extending the protections of the RFRA to for-profit corporations. In doing so, the Court lent momentum toward adjudication of free exercise privileging Christian primacy in the American body politics, and signaled its willingness to pass along the cost of that privilege to the taxpayers disenfranchised by the decision.

The cost of Christian conscience: Who pays and how

Winnifred Sullivan, Sarah Imhoff, and other religious studies scholars have demonstrated that the American legal system in general and the Supreme Court specifically understands "religion" in emphatically Christian terms.[95] This is certainly the case in *Burwell*, both in Alito's opinion and in Ginsburg's dissent. This should be enough to concern scholars of American political religions, as *Burwell* has made significant inroads toward eroding RFRA as protection for minority religions in favor of shoring up conservative Christian rights of conscience. This decision marks an important shift toward increased constitutional protections for conservative Christians, who increasingly perceived themselves as embattled during Obama's two presidential terms—a sense of religious embattlement not unrelated to increased white racial anxiety, as reflected in the outcome of the 2016 election.[96]

Justice Ginsburg's insistence that women's full participation in the American body politic requires reproductive agency is spot on. Not only does reproductive bodily agency increase women's personal earning potential, effective family planning programs that include access to contraception benefit the nation's economy and decrease poverty.[97] Unexpected pregnancies are costly and can be detrimental to the health of both mother and child.[98]

However, Ginsburg's dissent fails to consider the extent to which *Burwell* particularly affects women of color. Recent surveys suggest that 69 percent of pregnancies among black women and 54 percent of pregnancies among Hispanic women are unintended, compared to 40 percent among white women; women of color possessing lower socioeconomic status were more likely to experience unintended pregnancy in each of these racial groups.[99] Less access to contraception ensures more unintended pregnancies, which can result in increased abortion rates or, in cases when abortion is financially unfeasible, unintended pregnancies carried to term. (The latter disproportionately affects black women.)[100] Women of color, particularly young women of color, have demonstrated difficulties in accessing high-quality contraceptive services and in using their preferred methods of contraceptive consistently and effectively over time.[101] Poor women of color experience unintended pregnancy at disproportionately high rates, placing them at higher health risks over the course of their lives.[102] Ginsburg is right to note the substantial burden placed on American women by *Burwell*, but she falls short of considering the imbalance of that burden with respect to women of color—15 million of whom are of reproductive age and covered by private insurance.[103]

Burwell's successful use of RFRA to defend conservative Christian morality also inspired an eruption of religious freedom legislation at the state level: whereas nineteen states had RFRAs before the 2015 legislative session, an additional seventeen states put RFRAs on their 2015 legislative agendas.[104] Arkansas signed its "Conscience Protection Act" into law in April 2015. Though Governor Asa Hutchinson refused to sign it as written, the bill as passed by the state's congress originally included language that extended the definition of "person" to include corporations, allowing for-profit businesses to claim entitlements to religious freedom.[105] Then-governor Mike Pence signed Indiana's infamous RFRA into law in March 2015, allowing individuals and corporations to assert the right to free exercise of religion.[106] Both bills as written included explicit protections for for-profit businesses owned by conservative Christians opposed to serving LGBTQ persons, though Indiana's legislation faced such national backlash that Pence was forced to amend the act to explicitly prohibit discrimination against queer people.[107] *Burwell* sparked widespread legislative movement toward lending the protection of the state to conservative Christian sexual ethics.

Burwell's reification of religio-corporate personhood entitled to free exercise protections has done much to embolden conservative Christian appellants to the Court. The case and its aftermath demonstrate a broad and politically potent anxiety among conservative white Christians, expressed through attempts to "protect" for-profit Christian businesses by regulating public sexuality: both through restricting women's access to FDA-approved contraceptive methods and by disincentivizing public expressions of queer identity, specifically but not exclusively expressions related to same-sex marriage.[108]

This is to say that by privileging for-profit corporate Christian conscience over women's bodily autonomy, *Burwell* has passed the cost for the nation's health back onto the taxpayers. In *Good Catholics*, Patti Miller proposes that conservative Christian opposition to women's reproductive agency is rooted in the conviction that women who have sex—particularly unmarried women who have sex—and "control their fertility [are] doing something fundamentally illicit and shouldn't expect anyone else to pay for it."[109] But if Congress is to fulfill its compelling interest in public health and women's well-being, the taxpayers will pay for corporate Christian conscience.

Beyond *Burwell*

The death of Antonin Scalia, the remanding of *Zubik v. Burwell* to lower courts, and the appointment of Neil Gorsuch have left the judicial future of reproductive rights uncertain.[110] The forty-fifth president's administration has signaled its allegiance to corporate Christian conscience and a "culture of life."[111] The president's mostly insubstantial Executive Order "Promoting Free Speech and Religious Liberty" explicitly promised further considerations of "conscience protections with respect to preventive-care mandate."[112] The current secretary of the HHS is a vocal opponent of the contraceptive mandate, going so far as to say that it "trampl[es] on religious freedom and religious liberty in this country."[113] Price has also insisted that no woman, "not one," has struggled to afford birth control, despite evidence to the contrary.[114] The

woman overseeing Title X for HHS, Teresa Manning, insists that contraception doesn't work, and has publicly said that "family planning is what occurs between a husband and a wife and God."[115] At the same time, progressive Congressmen Joe Kennedy and Bobby Scott reintroduced the "Do No Harm" Act in July 2017, intended to amend RFRA to "clarify that no one can seek religious exemption from laws guaranteeing fundamental civil and legal rights."[116]

With the Senate's recent—and dramatic—failures to repeal and replace (or merely repeal) "Obamacare," the future of the contraceptive mandate and free exercise is murky. As it stands, we can only note that the Court's first definition of free exercise demanded surrender of individual Christian conscience to federal law, while its most recent definition requires the surrender of federal law to individual (corporate) Christian conscience.