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## Contraception and the Birth of Corporate Conscience

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# CONTRACEPTION AND THE BIRTH OF CORPORATE CONSCIENCE

ELIZABETH SEPPER\*

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“Conscience” was an election year catchphrase. Secular and religious businesses came forward with objections of conscience to the Affordable Care Act’s requirement that employee health insurance plans cover contraception. Going into the election season, some predicted that the Obama Administration’s refusal to exempt objecting employers—with the exception of houses of worship and a narrow array of religious organizations—from the contraception coverage benefit would cost the President votes among religious voters and Catholics in particular.<sup>1</sup> In the

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1. Erik Eckholm, *Both Sides Eager to Take Birth Control Coverage Issue to*

end, as an electoral matter, contraceptive coverage was much ado about nothing. Attacks on contraception, which Americans overwhelmingly support and use, may even have aided the Democrats.<sup>2</sup>

The controversy over conscience, however, has only just begun. Corporations—for-profit and non-profit, religiously affiliated and secular—have filed more than seventy lawsuits challenging the contraception benefit.<sup>3</sup> They claim that requiring a business to cover contraception within a comprehensive employer-based insurance plan violates the religious freedom of the business and its owners under the Free Exercise Clause of the Constitution and the Religious Freedom Restoration Act (RFRA).

I contend that a dangerous doctrine of “corporate conscience” may be born of the contraception controversy. Already, a number of courts have indicated a willingness to accept that artificial business entities have religious beliefs and consciences that excuse them from compliance with law.<sup>4</sup> In so doing, they repudiate longstanding foundations of corporate law. They transform conscience, which is inherently human, into the province of business entities.

Drawing on health law and policy, I argue that in accepting these challenges to mandated insurance benefits, courts misunderstand the nature of health benefits and the structure of the healthcare system in two fundamental ways. First, employee benefits are a form of compensation, earned by and belonging to the employee like wages. By neglecting this economic reality, courts draw incorrect conclusions about the legal and moral responsibility of employers for the contents of their employees’

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*Voters*, N.Y. TIMES (Feb. 16, 2012), <http://www.nytimes.com/2012/02/16/us/politics/both-sides-eager-to-take-contraception-mandate-debate-to-voters.html>; Rachel Zoll, *Analysis: Obama Contraceptive Mandate Has a Price*, BUSINESSWEEK (Feb. 9, 2012), available at <http://www.businessweek.com/ap/financialnews/D9SPU3MO1.htm>.

2. Ambreen Ali, *Backlash Against Birth Control Mandate Might Aid President*, ROLL CALL (Feb. 8, 2012), available at [http://www.rollcall.com/issues/57\\_92/Backlash-Against-Birth-Control-Mandate-Might-Aid-President-212204-1.html](http://www.rollcall.com/issues/57_92/Backlash-Against-Birth-Control-Mandate-Might-Aid-President-212204-1.html).

3. Becket Fund for Religious Liberty, HHS Mandate Information Central, <http://www.becketfund.org/hhsinformationcentral/> (last visited Oct. 7, 2013); Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, at A1; Julie Rovner, *Businesses Sue Government Over Birth Control Mandate*, NPR, Jan. 11, 2013, <http://www.npr.org/blogs/health/2013/01/11/169136510/businesses-sue-government-over-birth-control-mandate>.

4. See, e.g., *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at \*6 (E.D. Mich. Mar. 14, 2013); *Tyndale v. Sebelius*, 904 F. Supp. 2d 106, 116-17 (D.D.C. 2012).

insurance plans and thus about the burden that any regulation imposes. Employee use of benefits no more burdens employers than does their use of wages. Second, the Affordable Care Act functions like other social insurance schemes, which require the employer to play an administrative and funding role. Courts fail to acknowledge the social insurance function of recent health insurance reforms and, therefore, do not properly situate contraceptive challenges within the doctrinal tradition of religious objections to social insurance, which have typically failed.

Finally, I suggest that successful challenges to healthcare reform based on corporate conscience would destabilize the rights of employees and of women, in particular, beyond the context of contraception. Religiously affiliated commercial actors already assert rights to defy health and safety laws, pay women less, and fire pregnant women. If secular employers succeed in their challenge to the contraception mandate, it will open the door to their assertions of similar rights, risking gender equality and religious freedom in all workplaces.

The Article proceeds as follows. Part I describes the contraception benefit rule and the legal challenges to the rule from secular, for-profit corporations. Part II identifies a number of doctrinal and theoretical difficulties that the legal recognition of corporate conscience would create and that courts have largely elided. Part III contends that courts have relied on the mistaken premise that employers pay for employer-based insurance, ignoring that employees receive benefits as a form of compensation, or deferred wages. Part IV argues that the regulation of employer-based insurance, including the contraceptive mandate, should be understood as part and parcel of a comprehensive social insurance program, akin to worker's compensation or social security, that workers pay into in the form of deferred wages and that employers administer. A long line of precedent counsels skepticism toward religious objections to social insurance schemes. Courts should evaluate the contraception challenges within this doctrinal framework and should, accordingly, resist granting relief from the contraception benefit rule to secular, for-profit corporations in the name of religious freedom. Part IV warns that a doctrine of corporate conscience would negatively affect healthcare reform and employees' rights far beyond contraception.

#### I. CONTRACEPTIVE COVERAGE AND RELIGIOUS OPPOSITION

With the Patient Protection and Affordable Care Act (ACA) of 2010, Congress undertook to address the persistent problem of large numbers of uninsured people, improve the quality of health insurance, and confront high healthcare costs. By the time of the 2012 election, the Supreme Court had settled the primary constitutional question around the ACA, holding

that Congress had the authority to require individuals to carry insurance and, under certain circumstances, to expand Medicaid.<sup>5</sup> Nonetheless, constitutional and statutory challenges to the ACA continue. None have been as high profile as the claims that assert that requiring employer-based plans to include contraception violates the Free Exercise Clause or, somewhat more plausibly, RFRA. This Section briefly reviews the contraception benefit rule and then describes the legal challenges it faces.

#### *A. The Contraception Benefit Rule*

In addition to expanding access to insurance, the Affordable Care Act more comprehensively regulates health insurance at the federal level. It prohibits all health insurance plans from imposing lifetime and annual limits on the dollar amount of covered healthcare and from rescinding coverage, except in cases of fraud.<sup>6</sup> As is most relevant here, across health plans, preventive care services must be covered without patient cost-sharing, that is, copayments, coinsurance, or deductibles from patients.<sup>7</sup>

With the ACA, Congress also mandated preventive care and screenings specific to women.<sup>8</sup> In August 2011, based on a review of evidence-based preventive services for women's health and well-being,<sup>9</sup> the United States Department of Health and Human Services issued an interim final rule requiring insurance plans to cover contraceptives approved by the Food and Drug Administration as part of this mandate.<sup>10</sup> The contraception benefit includes a range of contraceptive methods (oral contraceptives, intrauterine devices, emergency contraception, and sterilization) and patient counseling

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5. See generally *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 130 (2010) (codified at 42 U.S.C. § 300gg-11 (2012)) (no annual or lifetime limits); Pub. L. No. 111-148, § 1001, 124 Stat. 130 (codified at 42 U.S.C. § 300gg-12 (2012)).

7. Pub. L. No. 111-148, § 1001 (codified at 42 U.S.C. § 300gg-13 (2012)).

8. *Id.*

9. The proposed services include counseling and screening for HIV, gestational diabetes, and interpersonal and domestic violence. INST. OF MED. OF THE NAT'L ACADS., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (July 19, 2011), available at [http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreport\\_brief\\_updated2.pdf](http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreport_brief_updated2.pdf). All recommended preventative health services were defined as measures "shown to improve well-being and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* All of the IOM's recommendations were subsequently incorporated into the final guidelines.

10. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621-01 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

and education about these options.<sup>11</sup>

Out of sensitivity to religious concerns about contraception, the Obama Administration proposed an initial rule that exempted those religious employers that primarily employ and serve co-adherents.<sup>12</sup> Modeled on state contraceptive coverage laws in New York and California among others, the rule would have entirely exempted those health plans established, maintained, or provided in connection with religious employers.<sup>13</sup> It included no other religious accommodations.

The rule and its religious employer exemption immediately sparked controversy. Some religiously affiliated non-profits that were not covered by the exemption, such as universities, hospitals, social service providers, and insurance companies, characterized the rule as an affront to religious liberty.<sup>14</sup> The U.S. Conference of Catholic Bishops insisted that the rule drew “a new distinction—alien to both [the] Catholic tradition and to federal law—between our houses of worship and our great ministries of service to our neighbors, namely, the poor, the homeless, the sick, the students in our schools and universities and others in need, of any faith community or none.”<sup>15</sup> After sustained outcry, the Obama Administration announced a one-year safe harbor for religiously affiliated non-profits in order to develop a broader accommodation.<sup>16</sup>

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11. *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RES. AND SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited June 19, 2013); see also FDA OFFICE OF WOMEN’S HEALTH, *Birth Control: Medicines to Help You*, <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> (last visited June 19, 2013).

12. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621-01.

13. *Insurance Coverage for Contraception Laws*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 2012), <http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx>.

14. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01, 8727 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (“These commenters included some religiously-affiliated educational institutions, healthcare organizations, and charities. Some . . . expressed concerns about paying for such services and stated that doing so would be contrary to their religious beliefs.”).

15. *United for Religious Freedom*, ADMIN. COMM. OF THE U.S. CONF. OF CATHOLIC BISHOPS (Mar. 14, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm>.

16. Press Release, The White House Office of the Press Secretary, Fact Sheet: Women’s Preventive Services and Religious Institutions (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.

In February 2013, the Administration proposed a new rule.<sup>17</sup> The rule continues to exempt “churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order.”<sup>18</sup> It also, however, accommodates a wide array of non-profit religious organizations, including hospitals and educational institutions.<sup>19</sup> Under the rule, they may exclude contraceptive coverage from their employees’ insurance plans. They need not be involved in “contracting, arranging, paying, or referring for [contraception] coverage.”<sup>20</sup> Their employees, however, will still have access to contraceptive coverage.<sup>21</sup> The obligation will fall on the employer’s insurance company to provide contraceptive coverage directly to employees (and their families for family plans) at no cost.<sup>22</sup> A final rule implementing these accommodations was released in June of 2013.<sup>23</sup>

As the rule makes clear, a wide berth has been given to religious mores related to contraception. Like other areas of statutory law, the scheme of accommodation draws lines based on both the religious aspects and the commercial nature of the employer.<sup>24</sup> Religious employers are exempted entirely; their employees need not have access to coverage for contraception. Religiously affiliated non-profit employers may exclude contraception from the plans they contract for or pay into, but their

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17. Coverage of Preventive Services Under Patient Protection and Affordable Care Act, 78 Fed. Reg. 8456 (Feb. 6, 2013).

18. *Id.* at 8461 (proposing to exempt an employer that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order).

19. *Id.* at 8462.

20. *Id.* The proposed rule achieves these same goals for self-insured non-profit religious employers as well. *Id.* at 8463-64. Under the proposed rule, the employees of a non-profit religious employer will be able to access a third party insurance plan just for contraception coverage at no cost to them. The third party insurance providers will be able to offset their additional costs by claiming an adjustment in Federally-facilitated Exchange user fees.

21. *Id.* at 8462.

22. *Id.* at 8465.

23. Press Release, U.S. Dep’t of Health & Hum. Serv., Administration Issues Final Rules on Contraception Coverage and Religious Organizations (June 28, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>.

24. See, e.g., SIDLEY AUSTIN BROWN & WOOD RELIGIOUS INSTS. PRACTICE GRP., RELIGIOUS EMPLOYER EXCEPTIONS: A STATE BY STATE GUIDE, available at [http://www.sidley.com/db30/cgi-bin/pubs/final\\_religious%20institutions%20practice%20group.pdf](http://www.sidley.com/db30/cgi-bin/pubs/final_religious%20institutions%20practice%20group.pdf) (last visited June 19, 2013) (discussing religious employer exceptions to state employment anti-discrimination laws).

employees will have access under a separate policy provided by the insurance company or, if the employer self-insures, by a third-party administrator. Finally, secular companies must comply with the contraception benefit; they may not employ religion as a shield.

### *B. Legal Challenges to the Contraception Benefit*

In response to the proposed contraception rule, corporations—for-profit and non-profit, religiously affiliated and secular—have filed over seventy lawsuits.<sup>25</sup> They claim, among other things, that the benefit violates their constitutional rights to free exercise, speech, and association.<sup>26</sup> Primarily, however, they rely on RFRA.<sup>27</sup> RFRA establishes that, even with regard to a rule of general applicability, the federal government may only substantially burden a person's exercise of religion when the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>28</sup> Thus, the initial question before courts is whether a corporation (or its shareholders on behalf of the corporation) can exercise religious freedom and bring a claim under RFRA or the Free Exercise Clause. If so, courts must consider whether the burden of the contraception benefit is substantial, and, if so, whether it can be justified as the least restrictive means of furthering a compelling government interest.

Given the safe harbor for religiously affiliated organizations, courts have almost uniformly dismissed claims by universities, dioceses, and other religious non-profits for lack of standing and ripeness.<sup>29</sup> Now, despite the accommodation granted to them, some religiously affiliated non-profit organizations have filed new suits—arguing that when the insurer separately contracts with an employer's employees to cover contraception at no charge, contraceptive coverage remains part of the employer's plan and is financed by it.<sup>30</sup> The requirement to show that the law's burden on

25. See, e.g., *Becket Fund for Religious Liberty*, *supra* note 3.

26. See, e.g., *Hobby Lobby v. Sebelius*, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012).

27. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993).

28. 42 U.S.C. § 2000bb (a)-(b).

29. See, e.g., *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissing for lack of ripeness); *Archdiocese of St. Louis v. Sebelius*, 920 F. Supp. 2d 1018, 1028 (E.D. Mo. 2013) (dismissing for lack of ripeness and lack of standing). *But see* *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (granting an injunction in favor of a religious organization admittedly covered by the proposed accommodation).

30. Bethany Monk, *Take Action: American Family Association Files Lawsuit Against HHS Mandate*, CITIZENLINK (Feb. 25, 2013),



their religious freedom is substantial, however, is likely insurmountable for this category of plaintiff. The accommodation effectively allows employers to avoid all but a *de minimis* connection to the alleged wrongdoing. Employers' contracted-for plans will not include contraception. Nor will employers pay for the additional coverage since the contraception benefit is at worst cost-neutral.<sup>31</sup> That is, a plan that covers contraception will not result in higher premiums and may in fact reduce overall plan costs.<sup>32</sup> Given the insubstantiality of any burden, courts should continue to dismiss these claims.

The bulk of the litigation has focused, not on religiously affiliated employers, but on secular, for-profit corporations. To be clear, the contraceptive challengers are not mom and pop shops. Because the ACA only applies to large employers, they are, by definition, large employers of fifty or more full-time employees. They range from food processing companies with 400 employees<sup>33</sup> to craft stores with 13,000 employees.<sup>34</sup> Some employers challenge the full scope of the contraception benefit, including oral contraceptives and sterilization.<sup>35</sup> Others accept the moral permissibility of contraception generally, but claim that emergency contraception, such as Plan B, is an abortifacient.<sup>36</sup> Advocacy organizations, such as the Alliance Defending Freedom and the Becket Fund for Religious Liberty, often represent these companies in court.<sup>37</sup> In similar fashion, the U.S. Conference of Catholic Bishops continues to criticize the proposed rule for refusing "to acknowledge conscience rights of business owners who operate their businesses according to their faith

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<http://www.citizenlink.com/2013/02/25/take-action-american-family-association-files-lawsuit-against-hhs-mandate/> ("The new proposed HHS rule misleads faith-based groups and all Americans into believing they will no longer have to violate their faith and provide objectionable insurance for birth control and abortion-inducing drugs.").

31. Alex Wayne, *Critics Want More Exemptions from U.S. Birth-Control Rule*, BUSINESSWEEK (Feb. 2, 2013), <http://www.businessweek.com/news/2013-02-01/religious-nonprofits-won-t-pay-for-birth-control-u-dot-s-dot-says>.

32. U.S. DEP'T OF HEALTH & HUM. SERV., ASPE ISSUE BRIEF, THE COST OF COVERING CONTRACEPTIVES THROUGH HEALTH INSURANCE 1-2 (Feb. 2012), <http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml>.

33. *Gilardi v. Sebelius*, No. 13-104, 2013 WL 781150, at \*1 (D.D.C. Mar. 3, 2013).

34. *Hobby Lobby v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

35. *See, e.g., Gilardi*, 2013 WL 781150, at \*2.

36. *See, e.g., Tyndale v. Sebelius*, 904 F. Supp. 2d 106, 112 (D.D.C. 2012).

37. *See* The Becket Fund for Religious Liberty, *supra* note 3; *Legal Actions Against Obamacare*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/page/ObamaCare/learn-more> (last visited June 19, 2013).

and moral values.”<sup>38</sup>

The argument made by for-profit employers boils down to this: the Affordable Care Act forces the employer to provide insurance coverage and to pay, through its insurance plan, for healthcare (in this case contraception) to which it objects as a matter of religion. Challengers argue that “they face a stark dilemma: either comply with the contraceptive coverage requirement, and violate their religious convictions, or refuse to comply, and face ruinous penalties.”<sup>39</sup> The lawsuits assert two theories: (1) the corporation exercises religion as an independent legal entity, and (2) shareholders use the corporation as an instrument to express their own beliefs, such that the corporation is indistinguishable from its owners. As RFRA requires, plaintiff corporations and shareholders contend that their exercise of religion is substantially burdened because “they must facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties.”<sup>40</sup> They further claim that the government has no compelling interest in ensuring that health plans include contraceptive coverage.<sup>41</sup> Finally, they argue, the regulation of employer-based plans is not the least restrictive means to achieve any compelling interest.<sup>42</sup>

Courts have considered dozens of motions for preliminary injunctions from these for-profit, secular corporations.<sup>43</sup> Thus far, in the majority of cases, courts have held that secular, for-profit corporations (or their owners) are likely to succeed on the merits of their religious freedom claims and have enjoined operation of the contraception benefit against them.<sup>44</sup> A circuit split has emerged between the Seventh, Tenth, and D.C.

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38. Press Release, U.S. Conference of Catholic Bishops, HHS Proposal Falls Short in Meeting Church Concerns; Bishops Look Forward to Addressing Issues with Administration (Feb. 7, 2013), <http://www.usccb.org/news/2013/13-037.cfm>.

39. *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at \*3 (W.D. Mich. Dec. 24, 2012).

40. *Gilardi*, 2013 WL 781150, at \*4. For a list of some of the for-profit companies challenging the contraceptive coverage mandate, see Katie J.M. Baker, *Meet the 18 For-Profit Companies Fighting Obamacare's Contraception Coverage*, JEZEBEL (Feb. 7, 2013, 12:05 PM), <http://jezebel.com/5982261/meet-the-12-for-profit-companies-against-obamacares-contraception-coverage?tag=pill-baby-pill>.

41. *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 993 (E.D. Mich. 2012).

42. *Legatus*, 901 F. Supp. 2d at 995; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

43. *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at \*10 (W.D. Pa. Mar. 6, 2013).

44. See, e.g., *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 WL 5, at \*2 (7th Cir. Nov. 8, 2013); *Newland*, 881 F. Supp. 2d at 1294; *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012).

Circuits, which have sided with challengers, and the Third and Sixth Circuits, which have refused to enjoin the contraception benefit.<sup>45</sup>

Generally speaking, courts granting preliminary injunctions to contraceptive challengers reason as follows. First, they admit the difficulty of finding that a for-profit company itself exercises religion. Some cite the Supreme Court's decision in *Citizens United v. Federal Election Commission*<sup>46</sup> as potential support for the "independent First Amendment right to free exercise of religion" of a for-profit company that, for example, sells power system equipment.<sup>47</sup> Alternatively, courts decline to determine that corporations have rights under the First Amendment or RFRA but, through judicial sleight of hand, find that a corporation and its owners are coextensive.<sup>48</sup> For example, regarding a for-profit corporation that publishes religious books and Bibles, one court said, "[W]hen the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes."<sup>49</sup> Having announced that the corporation is an embodiment of the owner and her beliefs, these courts decide that requiring *the corporation* to cover contraception or face financial consequences constitutes a substantial burden on the religious freedom of *the owners* of the corporation.<sup>50</sup>

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45. Korte, 2013 WL 6757353, at \*2; *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 13-1144, 2013 WL 3845365 (3d Cir. July 26, 2013); *Hobby Lobby*, 2012 WL 6930302.

46. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

47. *Beckwith Elec. Co., Inc. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at \*8 (M.D. Fla. June 25, 2013) ("[T]here is nothing to suggest that the right to exercise religion, which immediately precedes the right to free speech in the First Amendment, was intended to treat any form of the 'corporate personhood,' including corporations, sole proprietorships and partnerships, any differently than it treats individuals. To write into the text of the First Amendment such a distinction, especially when there seems to be no evidence that such a distinction mattered to the Framers, would seem to be in conflict with the Supreme Court's holding in *Citizens United*."); see also Korte, 2012 WL 6757353, at \*3. *Contra* *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Servs.*, 2013 WL 1277419, No. 5-12-cv-06744 (3d Cir. Feb. 8, 2013) (concluding that secular, for-profit corporations do not have free exercise rights).

48. Korte, 2012 WL 6757353, at \*3 (finding that corporate form is not dispositive because the individual plaintiffs would violate their religious beliefs if the corporation had to comply with the mandate); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at \*6 (E.D. Mich. Mar. 14, 2013) (adopting the alter ego theory).

49. *Tyndale v. Sebelius*, 904 F. Supp. 2d 106, 117 (D.D.C. 2012).

50. *Id.* ("[C]ourts must consider the rights of *the owners* as the basis for the [f]ree [e]xercise claim brought by the corporation, even if the regulation technically applies only to the corporation.") (emphasis in original).

Finally, some courts express skepticism that the government has compelling interests in expanding access to contraception;<sup>51</sup> others conclude that the government has not shown the contraception benefit rule is the least restrictive means to accomplish the interests.<sup>52</sup> Instead, they say, the government could directly fund and provide contraception itself.<sup>53</sup>

By contrast, other courts have refused to enjoin the contraception benefit with regard to private corporations.<sup>54</sup> They answer the question of whether any secular, for-profit corporation can exercise religion in the negative.<sup>55</sup> For example, the *Gilardi v. Sebelius* district court determined that secular companies “are engaged in purely commercial conduct and do not exercise religion.”<sup>56</sup>

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51. See, e.g., *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at \*11 (D.C. Cir. Nov. 1, 2013) (“[S]afeguarding public health’ seems too broadly formulated to satisfy the compelling interest test.”); *Beckwith Elec. Co., Inc. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at \*17 (M.D. Fla. June 25, 2013) (“The Court is not particularly persuaded by the government’s evidence to support its compelling interest. For example, there is no empirical data or other evidence . . . that would support the conclusion that the provision of the FDA-approved emergency contraceptives (in addition to the contraceptives to which plaintiffs do not object) would result in fewer unintended pregnancies.”).

52. *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (granting an injunction for a privately held and family run company with 1,148 full time employees engaged in the manufacturing vehicle safety systems in large part because the government “has not demonstrated that requiring religious objectors to provide cost free contraception coverage is the least restrictive means of increasing access to contraception”).

53. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298-99 (D. Colo. 2012) (holding that the government will need to disprove that “government provision of free birth control” is an alternative).

54. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013); *Briscoe v. Sebelius*, No. 13-CV-00285-WYD-BNB, 2013 WL 755413 (D. Colo. Feb. 27, 2013); *Gilardi v. Sebelius*, No. 13-104, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *rev’d* *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013); *Eden Foods, Inc. v. Sebelius*, No. 13-1677, 2013 WL 5745858 (6th Cir. Oct. 24, 2013); *MK Chambers Co. v. U.S. Dep’t of Health & Human Servs.*, No. 13-11379, 2013 U.S. Dist. LEXIS 47887 (E.D. Mich. Apr. 3, 2013); *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1149 (E.D. Mo. 2012).

55. See, e.g., *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Serv.*, 2013 WL 1277419, No. 5-12-cv-06744 (3d Cir. Feb. 8, 2013); *Briscoe v. Sebelius*, No. 13-cv-00285, 2013 WL 755413, at \*5 (D. Colo. Feb. 27, 2013).

56. *Gilardi*, 2013 WL 781150, at \*7, *rev’d* *Gilardi v. U.S. Dep’t of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013); *Autocam*, 2012 WL 6845677, at \*4 (expressing skepticism at the possibility that for-profit corporations could exercise religion without deciding).

Nor do these courts accept the argument that the shareholders' beliefs can be imputed to the corporation. They reason that it is well-established in corporate law that the corporation is not equivalent to its owners. One district court observed that:

[t]he mandate does not compel the [owners] as individuals to do anything. They do not have to use or buy contraceptives for themselves or anyone else. It is only the legally separate entities they currently own that have any obligation under the mandate. The law protects that separation between the corporation and its owners.<sup>57</sup>

These courts conclude that it is the corporation, not the owners, that sponsors a health plan (itself a distinct legal entity) and bears the burden of ACA regulations.<sup>58</sup> They further decide that any burden on the owners' free exercise is attenuated—separated from the contested act by the corporate form in the first instance and by the autonomous decision of the employee in the second.<sup>59</sup> Even assuming a substantial burden on the owners (or corporate entity), these courts hold that the government has compelling interests in the contraception benefit and is not required to set up a government-provided and funded contraception system to meet them.<sup>60</sup>

At heart, federal courts manifest a fundamental disagreement over whether a for-profit corporation can exercise religion, either as a constitutional or statutory matter. They further diverge over whether shareholders can employ the corporate form to exercise their own religious

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57. *Autocam*, 2012 WL 6845677, at \*7; *see also Gilardi*, 2013 WL 781150, at \*9 (“[T]he regulations are imposed on the . . . corporations, not the owners, and the corporate form cannot be disregarded on the ground that the corporations are the owners’ ‘alter egos,’ such that any burden is indirect.”); *Grote*, 708 F.3d at 858 (Rovner, J., dissenting) (“[S]o long as the business’s liabilities are not the [shareholders’] liabilities—which is the primary and ‘invaluable privilege’ conferred by the corporate form—neither are the business’s expenditures the [shareholders’] own expenditures.”).

58. *Grote*, 708 F.3d at 857 (Rovner, J., dissenting).

59. *Id.* at 858; *see also Hobby Lobby*, 2012 WL 6930302, at \*3 (“[T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by healthcare providers and patients covered by the plan, subsidize *someone else’s* participation in an activity that is condemned by plaintiffs’ religion.”); *Conestoga*, 2013 WL 140110, at \*414-15 (noting that “[a] series of events must first occur before the actual use of an abortifacient would come into play”).

60. *See, e.g., Legatus v. Sebelius*, 901 F. Supp. 2d 980, 997 (E.D. Mich. 2012) (“Plaintiffs’ alternative prospect of establishing a separate agency whose purpose would be to provide contraception to women raises a host of administrative and logistical problems, well pointed-out by the Government’s response, and does not appear practical.”).

beliefs, essentially piercing the corporate veil when it is in the shareholders' own interest. Ultimately, decisions on the contraception benefit expose a fundamental split over central questions of religious liberty and the role of the corporation in our society.

## II. THE BIRTH OF A DOCTRINE OF CORPORATE CONSCIENCE?

In the contraception context, claims of corporate free exercise are coming fast and furious. I suggest that we may be witnessing the birth of a doctrine of "corporate conscience." In this Part, I raise some concerns about what such a doctrine might mean.

Faced with contraceptive challenges, several courts now hold that a secular, for-profit corporation has a right to exercise religion under the Free Exercise Clause and RFRA, entitling it to exemptions from business regulation.<sup>61</sup> Many more dodge the ultimate question of whether corporations themselves can exercise religion, but indicate a willingness to accept that artificial business entities have religious beliefs and consciences that excuse them from compliance with law.<sup>62</sup> In so doing, these courts seem receptive to an unprecedented expansion of corporate personhood that pushes the limits of recent jurisprudential shifts toward increased institutional freedoms, as in *Citizens United v. Federal Election Commission*.<sup>63</sup> Just as *Citizens United's* establishment of a constitutional right to corporate political speech raised a host of thorny questions<sup>64</sup> (although that context at least involved the prior existence of corporate speech), so too would "corporate conscience" present perplexing legal and philosophical questions. How can a business have beliefs, religious or otherwise? What does it mean for a business to hold a faith? How, as courts now ponder, can a corporation exercise religion?<sup>65</sup> How does it show sincerity? Can a single-minded obligation to maximize profits meld

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61. See, e.g., *Hobby Lobby*, 2012 WL 6930302; *Korte v. Sebelius*, Nos. 12-3841 & 13-1077, 2013 WL 5, at \*2 (7th Cir. Nov. 8, 2013); *Beckwith Elec. Co., Inc. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498 (M.D. Fla. June 25, 2013).

62. See, e.g., *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at \*3-6 (E.D. Mich. Mar. 14, 2013); *Tyndale v. Sebelius*, 904 F. Supp. 2d 106, 117 (D.D.C. 2012).

63. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

64. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 86 (2010) (raising a number of these questions that arise because a "corporation, after all, is not a natural, Platonic entity" but a "legal arrangement").

65. See, e.g., *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012); *Autocam*, 2012 WL 6845677, at \*4 (observing that "[a] corporation cannot, for example, attend worship services or otherwise participate in the sacraments and rites of the church, as individuals do").

with religious devotion?

The federal judiciary's receptiveness to religious freedom for the for-profit business community is unprecedented. Although corporations have some constitutional rights, their rights are not coextensive with those of individuals.<sup>66</sup> In starkly rejecting corporate Free Exercise, one court explained, "[R]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution."<sup>67</sup> Nor do corporations necessarily have the same statutory rights that individuals do.<sup>68</sup> RFRA extends protection to "persons," which could be read to apply to artificial persons.<sup>69</sup> But the statute was intended to restore the constitutional strict scrutiny standard for review of religious liberty claims that the Supreme Court rejected in *Employment Division v. Smith*,<sup>70</sup> rather than expand religious liberty to for-profit businesses.<sup>71</sup> Ultimately, protecting corporate free exercise—whether directly from the corporation or indirectly from shareholders—runs counter to our intuitions that individual claims of conscience are

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66. For instance, corporations do not have a Fifth Amendment right against self-incrimination. *United States v. Kordel*, 397 U.S. 1, 5 (1970). With regard to the Fourth Amendment, the Supreme Court has determined that "[w]hile they may and should have protection from unlawful demands made in the name of public investigation . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy." *U.S. v. Morton Salt Co.*, 338 U.S. 632, 651 (1950).

67. *Conestoga*, 2013 WL 140110, at \*7.

68. See, e.g., *Fed. Comm. Comm'n v. AT&T, Inc.*, 131 S. Ct. 1177, 1177 (2011) (holding that corporations do not have a right of personal privacy for purposes of the Freedom of Information Act).

69. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (1993) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

70. *Emp't Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" ).

71. 42 U.S.C. § 2000bb(b)-1 (stating that purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"); S. REP. NO. 103-111, at 9; H.R. REP. NO. 103-88, at 5-6 (1993); 1993 U.S.C.C.A.N. at 1898 ("This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.").

morally superior to those of institutional structures. In our pluralist society, this is often the way the law approaches issues of conviction—for example, allowing individuals, but rarely institutions, to discriminate.<sup>72</sup>

In addition to equating the institution to the individual, the new corporate conscience would tear apart the distinction that constitutional and statutory law has drawn between secular for-profits and religious commercial organizations.<sup>73</sup> Although the Supreme Court's recent decision in *Hosanna-Tabor v. EEOC* seems to put institutional interests over individual rights, the decision still distinguishes between churches and secular entities.<sup>74</sup> Moreover, even religiously affiliated organizations are not generally entitled to defy employment-related laws on the ground of free exercise; only in certain circumstances may they discriminate in favor of co-adherents of their faith.<sup>75</sup>

Treating corporate free exercise as derivative of the owners' beliefs does not solidify the doctrinal move toward for-profit conscience. Corporations, as conglomerate entities, exist indefinitely and independently of their shareholders.<sup>76</sup> They carry out acts and affect individual lives, and have an

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72. Michael A. Rie, *Defining the Limits of Institutional Moral Agency in Health Care: A Response to Kevin Wildes*, 16 J. MED. & PHIL. 221, 223 (1991).

73. See, e.g., 42 U.S.C. § 2000e-1 (2010) (allowing religious organizations to “give employment preference to members of their own religion” as an accommodation to Title VII); Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789-90 (2012) (“States that currently have such [sexual orientation antidiscrimination] statutes generally have minimal religious exemptions . . . . These include exemptions for actual places of religious worship, the organizations they operate, and certain private organizations.”).

74. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 699 (2012) (“The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the *employer is a religious group* and the employee is one of the group's ministers.”) (emphasis added).

75. See, e.g., *Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (state sales and use taxes); *Alamo Found. v. Sec. of Labor*, 471 U.S. 290 (1985) (federal wage and overtime recordkeeping requirements); *U.S. v. Lee*, 455 U.S. 252 (1982) (social security); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (unemployment tax systems); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362, 1366 (9th Cir. 1986) (“While . . . religious institutions may base relevant hiring decisions upon religious preferences, religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex. Furthermore, Congress and this court have specifically rejected proposals that provide religious employers a complete exemption from regulation under the [Civil Rights] Act [of 1964].”); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1271 (Mont. 1992) (workers' compensation laws); *Victory Baptist Temple, Inc. v. Indus. Comm'n of Ohio*, 442 N.E.2d 819 (Ohio Ct. App. 1982).

76. Peter A. French, *Collective Responsibility and the Practice of Medicine*, 7 J. OF



identity that is larger than their constituent parts. Walmart is Walmart, even when Sam Walton resigns.<sup>77</sup> The very goal of the corporate form is to separate the person from the entity, shielding the person from obligation and liability and ensuring that the entity focuses on profit maximization.<sup>78</sup> As the Supreme Court has noted, “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”<sup>79</sup>

While corporate law makes clear that corporations and their shareholders are separate entities, in the current context courts advance a concept of the corporation as a means by which individuals express moral judgments about contraception. Individuals, as the argument goes, recognize that their religious beliefs may be best carried out through the corporate form, such that any regulation of a corporation represents a potential burden on the religious exercise by its shareholders.

This “corporation as shareholder alter ego” rationale deals a blow to the separateness of corporations in corporate law doctrine. As the *Conestoga Woods* court said, “[t]he owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so. The fact that one person owns all of the stock does not make him and the corporation one and the same person, nor does he thereby become the owner of all the property of the corporation. [Conestoga’s owners] chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form.”<sup>80</sup> Allowing owners to subvert the corporate form, by contrast, represents an enormous shift in corporate law. Even if the doctrine were limited to closely held or privately held

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MED. & PHIL. 65, 72-75 (1982).

77. *Id.* at 74-75.

78. *Cedric Kushner Promotions v. King*, 533 U.S. 158, 163 (2001) (concluding that under the Racketeer Influenced and Corrupt Organizations Act, the president and sole shareholder of a corporation is not the same person as the corporation and making the point that “linguistically speaking” and as a matter of corporate law “[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status”).

79. *Id.* at 163.

80. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013); *Grote v. Sebelius*, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) (“[T]he Grotes are not at liberty to treat the company’s bank accounts as their own; co-mingling personal and corporate funds is a classic sign that a company owner is disregarding the corporate form and treating the business as his alter ego.”).

corporations, between eighty percent and ninety percent of companies fall into this category; they employ sixty-two percent of all employees.<sup>81</sup>

The alter ego notion generates further practical and doctrinal complexities. Presuming the shareholders or owners share the same position on contraception use, they may not do so on all issues. Even adherents of the same religion often disagree over the application of universal rules in specific cases. Indeed, identifying the institutional position on moral questions can be difficult in those religious institutions with hierarchical structures, let alone in pluralistic, profit-seeking commercial entities.<sup>82</sup> In the case of disagreeing shareholders, whose beliefs matter? And what of employees who may not share the owners' beliefs?

Exempting employers from the contraception mandate (or other social insurance) would permit corporate owners to interfere with their employees' varied religious beliefs. Solely because they own capital, a small minority of people could effectively block access to insurance coverage for contraception, or any other healthcare it deems objectionable, for a majority of employees. Some owners, such as those of the HVAC manufacturing company Hercules, suggest that their company is openly religious, and its perspective does not unfairly surprise its employees.<sup>83</sup> In this sense, they characterize the employer-employee relationship as a voluntary association. If, however, the employees truly do share in the company's values, then the burden of covering contraception would be non-existent. Only theoretically would the insurance plan be used to purchase contraception; in practice, the employees would never use it in such a way, because they share their employer's beliefs. The employer could contract for and finance a health insurance plan that covers contraception without any risk of moral wrongdoing at all.

These difficult corporate, religious freedom, and employment law questions arise with respect to any doctrine of corporate conscience. Yet, courts have not fully considered the wide-ranging effects of this shift across

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81. WILLIAM PATTERSON UNIVERSITY CENTER FOR CLOSELY HELD BUSINESSES, THE ECONOMIC IMPACT OF CLOSELY HELD BUSINESSES, *available at* [www.wpunj.edu/CloselyHeld/EconomicImpact.dot](http://www.wpunj.edu/CloselyHeld/EconomicImpact.dot) (last visited March 27, 2013).

82. See Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. (forthcoming 2014), *available at* <http://ssrn.com/abstract=2279040> (analyzing conflict within Catholic Charities of Boston over placement of children with gay foster parents); Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1543 (2012) (discussing instances of disagreement between religious officials within the same religion over the morality of medical care).

83. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

doctrines. Just as significantly, courts have based their decisions on a misunderstanding of the employer's role in the healthcare system and the government interests at stake, which the next sections take up.

### III. MISUNDERSTANDING THE WAGE-HEALTH INSURANCE TRADE OFF AND THE INSUBSTANTIAL BURDEN OF INSURANCE REGULATION

When granting injunctions against the contraception benefit, courts typically ignore the economic reality that employee benefits are a form of compensation, like wages earned by and belonging to the employee. They thus overstate the economic burden on employees and, in turn, misunderstand the religious freedom analysis. If, as is generally agreed, employees' use of wages to purchase products of which their employers disapprove cannot constitute a substantial burden on the employer's religion, their use of benefits is similarly insubstantial. By failing to identify the tradeoff between wages and benefits in employee compensation, courts incorrectly conclude that employers bear responsibility, legal and moral, for the contents of their employees' insurance plans and consequently are burdened by regulation.

Challengers argue that the contraceptive mandate forces them, and/or the corporation they own, "to pay for, provide, facilitate, or otherwise support contraception."<sup>84</sup> These concerns range from the immediate to the mediate to the highly attenuated (the use of, purchase of, contracting for a plan that covers, and offering a plan that covers contraception). Although the Seventh Circuit described the burden as "the coerced coverage of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services,"<sup>85</sup> this description cannot be quite accurate. Having a plan that covers contraception but will never be used for contraception, such that no wrongdoing ever occurs, cannot impose a substantial burden on religious freedom. Instead, although there is some fluidity in their objections, challengers seem most concerned with the risk that the plan will be used to purchase contraception.

Irrespective of how these claims are understood, any inquiry into the burden of contraceptive coverage on the employer should consider the nature of employee benefits generally and health insurance specifically. A closer examination of employee benefits helps clarify the burden that regulating those benefits might impose and puts into perspective the

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84. *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at \*2 (E.D. Mich. Mar. 14, 2013).

85. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*3 (7th Cir. Dec. 28, 2012).

employer's responsibility for, or link to, the objectionable act—in this case, the purchase or use of contraception.

Economic theory and empirical work instructs that employees earn a total package of compensation that includes wages and benefits, ranging from vacation days to worker's compensation.<sup>86</sup> Workers trade off wages for benefits, preferring different wage-benefit mixes depending on age, health status, and other individual factors.<sup>87</sup> The wage-insurance tradeoff, also known as the "compensating wage theory," predicts a proportionate and inverse relationship between wages and health benefits.<sup>88</sup> Therefore, as courts have observed, depriving workers of employee benefits amounts to reducing their pay.<sup>89</sup>

Employer-based health insurance is no different. Workers earn benefits and wages that together constitute a total compensation package. Since 2013, employees' W-2s have made this clear: the total annual premium paid toward health insurance and wages are reported.<sup>90</sup>

Workers' wages fall as the employer's health insurance expenditures rise. Indeed, rising healthcare costs are widely viewed as the primary driver of flat—or decreasing—real wages for employees in the United States.<sup>91</sup> As one CEO explained recently in the pages of the *New York*

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86. See generally Sherwin Rosen, *The Theory of Equalizing Differences*, in HANDBOOK OF LABOR ECONOMICS 641 (Orley C. Ashenfelter & Richard Layard, eds. 1986); Walter W. Kolodrubetz, *Two Decades of Employee Benefit Plans, 1950-1970: A Review*, 35 SOC. SECURITY BULL. 10 (1972).

87. See, e.g., Richard D. Miller Jr., *Estimating the Compensating Differential for Employer-Provided Health Insurance*, 4 INT'L J. HEALTH CARE FINANCE & ECON. 27, 27 (2004) (finding a compensating differential for health insurance equal to 10% to 11% of wages); Bradley R. Schiller & Randall D. Weiss, *Pensions and Wages: A Test for Equalizing Differences*, 62 REV. ECON. & STAT. 529 (1980) (finding wage tradeoff for pension plans); Stephen A. Woodbury, *Substitution Between Wage and Nonwage Benefits*, 73 AM. ECON. REV. 166, 166 (1983) (showing that young workers, age 16-34, receive a higher percentage of salary versus nonwage benefits).

88. See generally Craig A. Olson, *Do Workers Accept Lower Wages in Exchange for Health Benefits?*, 20 J. LABOR ECON. 91, 91 (2002) ("Holding human capital and other variables influencing wages constant, workers who receive more generous fringe benefits are paid a lower wage than comparable workers who prefer fewer fringe benefits.").

89. When considering the denial of spousal benefits to same-sex domestic partners, the Alaska Supreme Court framed the issue as whether one group of workers could be paid less than their similarly situated co-workers. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005).

90. 26 U.S.C. § 6051(a)(14) (2012).

91. David Leonhardt, *How a Tax Can Cut Health Costs*, N.Y. TIMES (Sept. 29, 2009), <http://www.nytimes.com/2009/09/30/business/economy/30leonhardt.html>; Paul van de Water, *Excise Tax on Very High Cost Plans Is a Sound Element of Health*

Times, his company pays thousands of dollars in an employee's healthcare costs that might otherwise go to her salary; he continued, "From my point of view as a chief executive of a company, healthcare is just a different form of compensation."<sup>92</sup>

Although researchers disagree on the magnitude of this trade-off, studies confirm a negative relationship between wages and benefits.<sup>93</sup> As is particularly relevant, a study of Massachusetts' health insurance reform, which the ACA largely mirrors, uncovered an almost dollar-for-dollar relationship between the cost of health benefits to the employer and the corresponding fall in wages.<sup>94</sup> Employees paid almost the full cost of health insurance through lower wages (or an average of \$6,058 less, nearly exactly the cost of annual health insurance premiums).<sup>95</sup>

The origins of employer-based health insurance further confirm that it serves as compensation. During World War II, employers faced a shortage of workers and a federal freeze on wages.<sup>96</sup> With benefits exempted from the definition of wages by the War Labor Board, for the first time on a grand scale companies began to offer their employees health insurance in order to increase total compensation.<sup>97</sup> During and immediately after World War II, enrollment in private health insurance skyrocketed.<sup>98</sup> Employers' role in the healthcare system was cemented by the continued

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*Reform*, CTR. ON BUDGET AND POLICY PRIORITIES (Nov. 10, 2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2957>.

92. David Goldhill, Op-Ed, *The Health Benefits That Cut Your Pay*, N.Y. TIMES (Feb. 16, 2013), <http://www.nytimes.com/2013/02/17/opinion/sunday/the-health-benefits-that-cut-your-pay.html>.

93. See, e.g., Craig A. Olson, *Do Workers Accept Lower Wages in Exchange for Health Benefits?*, 20 J. LABOR ECON. 91, 93 (2002) (finding that the average married woman who moved from a job without health benefits to a job with health benefits accepted a wage reduction of about 20 percent); Miller Jr., *supra* note 87, at 27 (reporting that male workers between 25 and 55 who lost their employer-sponsored health benefits were compensated with roughly a 10 to 11 percent increase in wages).

94. Jonathan T. Kolstad & Amanda E. Kowalski, *Mandate-Based Health Reforms and the Labor Market: Evidence From the Massachusetts Reform*, 26 (Nat'l Bureau of Econ. Research, Working Paper 17933, Mar. 2012), available at [http://www.nber.org/papers/w17933.pdf?new\\_window=1](http://www.nber.org/papers/w17933.pdf?new_window=1).

95. *Id.* at 29.

96. Melissa A. Thomasson, *From Sickness to Health: The Twentieth-Century Development of U.S. Health Insurance*, 39 EXPLORATIONS IN ECON. HIST. 233, 240 (2002).

97. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 311 (1982) (describing employer-based insurance as "a functional substitute for social insurance, which is built on employee relations for much the same reasons" (reduction of administrative expense and focus on healthy)).

98. *Id.* at 313.

preferential tax treatment of health insurance.<sup>99</sup> Unlike wages on which employees pay taxes, employer-based health insurance is free of income taxes and subject to reduced payroll taxes.<sup>100</sup>

Therefore, each employee's actual "salary" is wages *plus* the employer share of the health insurance premium. That employers provide the structure through which financing is delivered does not change the fact that employees, not employers, ultimately pay for health insurance premiums. At present, employees who receive health insurance through work pay an average of 8.6% of their gross income for that insurance, primarily in the form of foregone wages.<sup>101</sup> Employees also pay a portion of health insurance premiums directly, essentially moving additional compensation from wages to benefits.<sup>102</sup> Some plans even involve health savings accounts, which allow employees to direct a portion of pre-tax wages to pay for healthcare not covered by their insurance.<sup>103</sup>

Why does the wage-benefit tradeoff matter for analysis of free exercise claims? The law does not accommodate every assertion of religious liberty, but rather evaluates burdens along a scale between directness and attenuation. Plaintiffs in the contraception litigation acknowledge that their employees' purchase of contraception with wages does not represent a burden on the employers' free exercise.<sup>104</sup> The burden on either the

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99. Thomas Bodenheimer et al., *How Large Employers Are Shaping the Health Care Marketplace: First of Two Parts*, 338 NEW ENG. J. MED. 1003, 1003 (1998); David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y & ETHICS 23, 25 (2001).

100. Peter Wiedenbeck, *Taxes and Healthcare*, 124 TAX NOTES 889, 891-92 (2009) (noting that employer payments under a plan are exempt from Social Security and Medicare taxes); I.R.C. § 106 (1958) ("Gross income does not include contributions by the employer to accident or health plans for compensation (through insurance or otherwise) to his employees for personal injuries or sickness."); *see also* BOB LYKE, CONG. RESEARCH SERV., RL 34767, THE TAX EXCLUSION FOR EMP'R-PROVIDED HEALTH INS.: POLICY ISSUES REGARDING THE REPEAL DEBATE 3, 7-9 (2008).

101. Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1617 n.176 (2011).

102. *Medical Expenditure Panel Survey: 2011 Survey Results*, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, available at [http://meps.ahrq.gov/mepsweb/data\\_stats/quick\\_tables\\_results.jsp?component=2&subcomponent=1&year=2011&tableSeries=-1&tableSubSeries=&searchText=&searchMethod=1&Action=Search](http://meps.ahrq.gov/mepsweb/data_stats/quick_tables_results.jsp?component=2&subcomponent=1&year=2011&tableSeries=-1&tableSubSeries=&searchText=&searchMethod=1&Action=Search) (last visited June 21, 2013) (Tables I.C.1, I.C.2, I.D.1, I.D.2).

103. *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at \*6 (W.D. Mich. Dec. 24, 2012).

104. *Id.* at \*6 ("Plaintiffs do not seek to control what an employee or his or her dependents do with the wages and healthcare dollars we provide. Our employees are free to make decisions with their money—including the funds in their personal health savings account—that we do not agree with.").

corporation or its owners is too attenuated, irrespective of how morally reprehensible the employer finds the employees' purchases. The employer's role is delinked by virtue of the employee's decision about how to use the wages.

Benefits function in much the same way. In evaluating the effect of the contraceptive mandate on free exercise, as Judge Rovner of the Seventh Circuit said, "it is worth considering whether the burden is different in kind from the burden of knowing that an employee might be using his or her [] paycheck (or money in a healthcare reimbursement account) to pay for contraception him or herself."<sup>105</sup> Courts that have rejected challenges to the contraception benefit have recognized that benefits and wages have "virtually no functional difference" and "involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from [the employer] will pay for it."<sup>106</sup> When a corporation purchases a health insurance plan that its employees (and their family members) may or may not use to buy contraception, it no more pays for contraception than it does when employees use their wages to buy it. Unless how employees spend their wages also burdens an employer's liberty, how employees use their insurance benefits must be similarly insubstantial.

One might nonetheless argue that wages do not require employers to structure and contract for coverage the way health insurance does. As the next section shows, our social insurance system regularly relies on employers to take on an administrative and contributory role, irrespective of their religious objections.

#### IV. SITUATING THE CONTRACEPTIVE LITIGATION WITHIN THE DOCTRINAL FRAMEWORK OF FREE EXERCISE CHALLENGES TO SOCIAL INSURANCE

Religious challenges to the contraception benefit take place within the context of healthcare reform and, more broadly, our social insurance system. The Affordable Care Act aims to establish near-universal access to a baseline of affordable and adequate coverage. Preventive services function as an important component of insurance access and population-wide health promotion. Yet, as a basic overview of the health insurance

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105. *Grote v. Sebelius*, 708 F.3d 850, 861 (7th Cir. 2013).

106. *Autocam Corp.*, 2012 WL 6845677, at \*6 ("[I]n neither situation do the wages and benefits earned pay—directly or indirectly—for contraception products and services unless an employee makes an entirely independent decision to purchase them."); *see also Grote*, 708 F.3d at 861 (Rovner, J. dissenting) ("[C]onsider that health insurance is an element of employee compensation. How an employee independently chooses to use that insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay.").

system demonstrates, courts have failed to recognize the similarity of the contraceptive challenges to previous objections to social insurance schemes.

Part A argues that the role the ACA ascribes to private employers bears striking resemblance to other comprehensive social insurance schemes, all of which have faced and survived challenges based on free exercise. Like other social insurance, employer-based insurance is dependent on government support, enforced through the tax system, and administered and financed through employers. Based on this analysis, as Part B shows, challenges to the regulation and structure of employer-based insurance—including the current contraceptive challenges—should be analyzed within the doctrinal framework of previous religious objections to social insurance. Part C applies this framework in light of the government's compelling interests in comprehensive insurance, public health, gender equality, and religious freedom.

#### *A. Employer-Sponsored Insurance as Social Insurance*

Characterizing employer-sponsored insurance as part of a social insurance system—like social security insurance, workers' compensation insurance, and unemployment insurance—makes sense if we look at how it is structured. After the implementation of the ACA, employment-based insurance will function as a key part of a system of national health insurance. Its regulation serves to improve coverage, both qualitatively (as, for instance, requiring preventive services) and quantitatively (expanding the pool of insured). Like other social insurance systems, health insurance requires employers to administrate funding, contribute a share, and constitute a mechanism through which employees pay in. As with social security, workers' compensation, and unemployment insurance, employees ultimately make the entirety of the premium payment in the form of deferred wages. Like other social insurance obligations, the employer's duty to offer ACA-compliant insurance is implemented through the tax system. Extensive government financing further shores up government interests in ensuring that employer-based insurance meets minimum standards.

The U.S. health system today is fragmented across public and private programs with varying levels of coverage, care, and cost. Approximately fifty-five percent of people (or 169.3 million people) access insurance through employer-based plans; another thirty-one percent do so through Medicare, Medicaid, or other public programs with five percent insured through private, non-group insurance, and the remaining sixteen percent



uninsured.<sup>107</sup> The Affordable Care Act supports and builds on this public-private system. For the uninsured, it facilitates private market mechanisms through regulation and financing.<sup>108</sup> Starting in 2014, the uninsured will be able, and in fact required, to purchase insurance and will be aided in this obligation through government subsidies and the development of state-level exchanges where insurance companies will compete for their business.<sup>109</sup> The ACA also provides incentives to states to expand Medicaid to reach a greater proportion of the poor.<sup>110</sup>

In enacting the ACA, Congress anticipated that approximately half of the population would continue to receive health insurance coverage through their employers.<sup>111</sup> The ACA encourages employers to extend insurance to their employees through the use of the so-called “employer mandate.”<sup>112</sup> If any large employer—defined as having more than fifty full-time employees—fails to offer insurance to its employees, and its employees purchase insurance through the health exchanges with subsidies, it will be subject to a \$2000 tax per full-time employee (minus the first thirty employees).<sup>113</sup> The effective cost of insuring employees will thus be the total premium minus the penalty, which may encourage employers to keep or add health insurance over time.<sup>114</sup>

The ACA also imposes new regulations and consumer protections on health insurance plans sponsored by employers. Employers that offer unaffordable or inadequate coverage will pay a \$2,500 tax for each full-

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107. Emily Smith & Caitlin Stark, *By the Numbers: Health Insurance*, CNN (June 28, 2012), <http://www.cnn.com/2012/06/27/politics/btn-health-care>.

108. See generally Kaiser Family Found., *Medicaid Expansion Under the Affordable Care Act*, 309 J. AM. MED. ASS'N 1219 (2013); Mark A. Hall, *Approaching Universal Coverage with Better Safety-Net Programs for the Uninsured*, 11 YALE J. HEALTH POL'Y L. & ETHICS 9 (2011).

109. Patient Protection and Affordable Care Act, 42 U.S.C. § 18031 (2012).

110. *Id.*

111. CONG. BUDGET OFFICE, ESTIMATE OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON HEALTH INSURANCE COVERAGE (Feb. 2013), available at [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900\\_ACAInsuranceCoverageEffects.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900_ACAInsuranceCoverageEffects.pdf) (estimating that the number of nonelderly Americans obtaining insurance through their employer will fluctuate between 154 million people and 167 million people in the next decade).

112. 26 U.S.C. § 4980H (2006).

113. 26 U.S.C. § 4980H(c)(1).

114. KAISER FAMILY FOUND., MASSACHUSETTS HEALTH CARE REFORM: SIX YEARS LATER (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8311.pdf> (“Evidence suggests employers have maintained coverage and benefit levels since the state’s implementation of health reform.”).

time employee who receives exchange subsidies.<sup>115</sup> Of particular relevance, all plans must cover preventive care, including women's healthcare like contraception, without cost-sharing.<sup>116</sup> If its plan does not meet these requirements, an employer will face a \$100 a day tax per employee and an annual tax assessment.<sup>117</sup>

The government interest in regulating employer insurance plans is bolstered by its already substantial role in subsidizing such plans. As Robert Field observes, "the government shapes, oversees, and indirectly funds the private market for employer-provided coverage" to an extent that "means that this product is not offered through a truly private mechanism."<sup>118</sup> Indeed, the federal government funds employer-sponsored insurance to the tune of \$250 billion a year, representing one-third of the aggregate amount Americans pay for employer insurance and making it the third largest government financing program after Medicare and Medicaid.<sup>119</sup>

After the ACA is fully implemented, Americans should be able to access affordable baseline coverage in a relatively uniform way, whether through employer-provided insurance or insurance purchased through an exchange. Although large employer-based plans are subject to fewer regulations than the individual and small group plans in the exchanges, the two are explicitly linked. Under the ACA, all plans offered in the exchanges must provide "minimum essential coverage" that is equal to that offered by a "typical employer plan."<sup>120</sup> The employer-based plan, therefore, acts as the baseline for what can be considered adequate coverage after healthcare

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115. 26 U.S.C. § 4980D.

116. *See supra* notes 8-14.

117. 26 U.S.C. § 4980D.

118. Robert I. Field, *Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform*, 159 U. PA. L. REV. 1669, 1709, 1712 (2011).

119. CONGRESSIONAL BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 14 (2013), available at [https://www.cbo.gov/sites/default/files/cbofiles/attachments/43768\\_DistributionTaxExpenditures.pdf](https://www.cbo.gov/sites/default/files/cbofiles/attachments/43768_DistributionTaxExpenditures.pdf); *see also* Christopher J. Conover, *Government Share of Healthcare is Far Bigger Than Advertised*, THE AMERICAN, Aug. 2, 2011, available at <http://www.american.com/archive/2011/august/the-government-share-of-health-care-is-bigger-than-advertised-health-fact-of-the-week>; Field, *supra* note 114, at 1712 (citing Thomas M. Selden & Bradley M. Gray, *Tax Subsidies for Employment-Related Health Insurance: Estimates for 2006*, 25 HEALTH AFF. 1568, 1571 (2006)) (indicating that the tax subsidy amounts to 35.8% of premiums paid to private establishments).

120. 26 U.S.C. § 5000A(f)(1)(C) (2006); *Ensuring the Affordable Care Act Serves the American People*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://cciio.cms.gov/resources/factsheets/ehb-2-20-2013.html> (last updated Aug. 1, 2013).

reform.

The regulation of employer-based insurance is characterized by gradual implementation, rather than immediate change. Although several measures took effect immediately in 2010, most were rolled out over a period of years.<sup>121</sup> Insurance plans offered to individuals and small groups will cover preventive services when the new exchanges begin to operate in 2014. From September 2010, group plans (typically sponsored by employers) also must offer cost-free preventive care, unless they are grandfathered.<sup>122</sup> Those employer-based plans that existed when the ACA was passed may be grandfathered, that is, exempted from some of the new regulations, including the preventive care requirement, until the levels of coverage provided or costs for employees change.<sup>123</sup>

Granting grandfathered status does not undermine the government's interest in comprehensive coverage, including preventive care. In determining that the government cannot impose the contraception benefit, some courts contend that, "191 million Americans belong to plans which may be grandfathered under the ACA."<sup>124</sup> This number represents those who might theoretically have been covered by grandfathered plans in 2010. In actuality, however, many plans had already lost this status in 2010.<sup>125</sup> By 2012, when the first of these courts made this assertion, 71.5 million employees were covered by grandfathered plans.<sup>126</sup> Grandfathering was purposely designed to ease the shock of rapid change, with the understanding that rates of grandfathering would decline each year.<sup>127</sup>

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121. *Health Reform Implementation Timeline*, KAISER FAMILY FOUND., <http://kff.org/interactive/implementation-timeline/> (last visited June 23, 2013).

122. Coverage of Preventive Health Services, 45 C.F.R. § 147.130(b) (2012).

123. 42 U.S.C. § 18011 (2012); *see also* Def's Resp. Br. at 26, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 405 (2013), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-114, 2013 WL 3845365 (3d Cir. July 26, 2013) ("[G]randfathering is not really a permanent 'exemption,' but rather, over the long term, a transition in the marketplace with respect to . . . the preventive services coverage provision.").

124. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (2012); *Monaghan v. Sebelius*, 931 F. Supp. 2d. 794, 804 (E.D. Mich. 2013).

125. KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS SURVEY 190 (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf> (indicating plans that could have been eligible for grandfather status either changed the coverage of the plan or had deductible, co-payment, or employee premium payments that changed too much to maintain eligibility).

126. *Id.* (noting that 48% of 149 million covered American workers were in grandfathered plans).

127. KAISER FAMILY FOUND., *supra* note 127, at 7 (reporting that loss of grandfathered status among large plans is occurring much faster than anticipated: 58%

Indeed, by 2013, the number of employees in grandfathered plans had dropped to approximately 54 million (or thirty-six percent of those who receive coverage through employment).<sup>128</sup> Most plans will eventually become subject to the preventive services mandate as they make changes and, thus, lose their grandfathered status.<sup>129</sup>

With the ACA's reforms in place, the United States will have a national health insurance system run largely by, and through, the private sector and financed through a combination of public, employer, and employee funding. Employer-based insurance will constitute the mainstay of the near universal insurance coverage that is the goal of the ACA. Together, private employer-based insurance, public programs, and the individual exchanges will ensure a more adequately insured population that is better able to withstand the shocks of ill health.<sup>130</sup> This public-private social insurance system bears striking resemblance to other social insurance schemes, all of which have withstood religious liberty challenges, as the next Part shows.

#### *B. The Contraceptive Challenge as Social Insurance Tax Resistance*

Our legal system has had little tolerance for objections to social insurance, especially when those objections come from entities or employers instead of individuals. In crafting accommodations, legislators and courts often distinguish being required to contribute to social insurance from being required to accept or use it.<sup>131</sup> Doctrine dictates that

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of firms offered a grandfathered plan in 2012, down from 72% in 2011).

128. EMPLOYER HEALTH BENEFITS SURVEY 221, KAISER FAMILY FOUND. (2013), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf>.

129. Preservation of Right to Maintain Existing Coverage, 45 C.F.R. § 147.140(a) (2012).

130. Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1596 (2011) (arguing that these three components will “distribute the risk of future healthcare costs among the U.S. population according to the share of applicable premiums and taxes paid by the subpopulations differentially assessed to finance them”).

131. See, e.g., *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982) (“We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits.”); *South Ridge Baptist Church v. Ind. Comm’n of Ohio*, 911 F.2d 1203, 1211 n.6 (6th Cir. 1990) (distinguishing employer paying into worker’s compensation from compelling “an employee of the church who entertains similar views as a matter of personal conviction to accept any of the benefits conferred by the workman’s compensation law”); *Erzinger v. Regents of Univ. of California*, 137 Cal. App. 3d 389, 392-93 (1983) (rejecting objection to student registration fee for health insurance because students were not forced “to use the student health service programs, receive pregnancy counseling, have abortions, perform abortions or indorse abortions”).

contributions to insurance fall into a zone of limited responsibility and, therefore, do not significantly burden religious freedom. The challenges to the contraceptive mandate should be understood within this framework, as an affront to the administration of the social insurance system for healthcare.

Until now, courts have consistently dismissed the burden imposed on religious objectors by insurance programs as both attenuated and justified by compelling government interests. For example, individuals contested the ACA's individual mandate on religious freedom grounds and lost. The D.C. District Court found it important that the plaintiffs had a choice, much like employers challenging the employer mandate do here: they could either pay a tax or purchase the objectionable insurance.<sup>132</sup> The court concluded that "Congress's compelling interest—reforming the healthcare market by increasing coverage—applies to Plaintiffs, just as it applies to all individuals."<sup>133</sup> The court further held that the individual mandate is the least restrictive means of furthering that interest because "[i]n the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers."<sup>134</sup>

Here too, employers have the option of paying a tax instead of offering insurance. The choice is not binary as challengers to contraceptive coverage often claim. Employers are not limited to either providing insurance coverage in violation of conscience or facing ruinous financial costs.<sup>135</sup> Rather, a company has three options: (1) refuse to cover contraception in an insurance policy and pay a substantial financial cost (amounting to \$100/day per employee and additional taxes); (2) decline to offer insurance and pay a smaller amount in the form of a tax penalty for

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132. *Mead v. Holder*, 766 F. Supp. 2d 16, 20 (D.D.C. 2011), *aff'd*, 661 F.3d 1 (D.C. Cir. 2011); *see also* *Ahmed v. Univ. of Toledo*, 664 F. Supp. 282, 288 (N.D. Ohio 1986) (rejecting foreign students' challenge to university's policy of requiring international students to carry health insurance on the grounds that it was the least restrictive means to ensure against health costs).

133. *See* *Baker*, *supra* note 130.

134. *Mead*, 766 F. Supp. 2d at 43; *see also* *Liberty Univ. v. Geither*, 671 F.3d 391, 450 (4th Cir. 2011), *vacated*, 132 S. Ct. 2566 (2012) (rejecting in brief institutional challenge that the employer mandate "compels them to violate their 'sincerely held religious beliefs against facilitating, subsidizing, easing, funding, or supporting abortions' and prohibits the University from 'providing healthcare choices for employees that do not conflict with the mission of the University and the core Christian values under which it and its employees order their day to day lives'").

135. *See* *Autocam Corp. v. Sebelius*, No 1:2-CV-1096, 2012 WL 6845677, at \*9 (W.D. Mich. Dec. 24, 2012) (noting that the plaintiffs frame the choice in this way).

employees receiving exchange subsidies (a fraction of the cost of insurance coverage); or (3) offer insurance and cover contraception. Neither of the latter two options constitutes a substantial financial encumbrance.

Arguably, challengers to the contraception rule object to the payment of a tax rather than the coverage of contraception. They neither want to pay the employer mandate taxes, nor do they accept the higher tax consequences of offering coverage without women's preventative care. Their objections appear to fall within the long line of cases rejecting religious liberty objections to "the payment of taxes or penalties imposed due to a refusal to pay taxes."<sup>136</sup> In those cases, courts note the importance of implementing a uniform and mandatory system. This system, they reason, does not prohibit exemptions, but rather leaves the responsibility with Congress to create exemptions "given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts."<sup>137</sup>

Courts have declined to create religious exemptions to nationwide programs with respect not only to income taxes, but also to the full range of insurance programs enforced through the tax code. The leading case is *United States v. Lee*, in which the Supreme Court confronted the claim of an Amish employer to be free from obligations to withhold social security tax from employees and pay the employer's share of social security taxes.<sup>138</sup> As is relevant to health insurance regulation, the Supreme Court reasoned that the government interest is apparent because the social security system is nationwide and comprehensive.<sup>139</sup> Like other insurance systems, "mandatory participation is indispensable to the fiscal vitality" of the program.<sup>140</sup> As with the employer mandate under the ACA, the employer's role is to contribute funds, collect contributions from employees, keep records, and transmit payment.<sup>141</sup> The Court left the accommodation of religious objectors to Congress, holding that "[w]hen 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 the statutory schemes

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136. *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 178 (3d Cir. 1999) (compiling these cases).

137. *Id.* at 179.

138. *United States v. Lee*, 455 U.S. 252, 252 (1982); *see also Droz v. Comm'r*, 48 F.3d 1120, 1121-23 (9th Cir. 1995) (rejecting a similar claim under RFRA by looking to *Lee*).

139. *Lee*, 455 U.S. at 258.

140. *Id.*

141. *Id.* at 254, 258.

which are binding on others in that activity.”<sup>142</sup>

Other employer-based insurance schemes generally have survived attacks by employers based on religious freedom. Note that cases tend to involve religiously affiliated non-profit employers, which have a more substantial claim to religious objection to general statutory employer obligations than do secular, for-profit corporations.<sup>143</sup> Despite this, by and large, their claims have been unsuccessful.<sup>144</sup> For example, in applying strict scrutiny to an employer’s claim that contributing to unemployment insurance constituted a substantial burden on free exercise, the Oregon Supreme Court upheld the unemployment coverage obligation.<sup>145</sup> The court underscored the importance of ensuring against “the cost that unemployment imposes on the discharged employee and on society.”<sup>146</sup> The court acknowledged the tradeoff between wages and insurance, saying, “[i]n actuality, the unemployment insurance taxes are financial burdens only in the same sense that the costs of employing paid workers at all are financial burdens.”<sup>147</sup> The fact that employers had to administer the system in the form of posting notices, filing reports, and keeping records—in addition to contributing—did not render the burden on religious freedom unconstitutional. The court found such requirements “no different in principle from a host of other secular regulatory requirements such as health inspections of cafeteria workers or kitchens, safety inspections of school buses, and licensing of drivers.”<sup>148</sup>

Worker’s compensation is perhaps the most apt comparison to employer-based health insurance. Employers may either purchase private insurance or self-insure, as with health insurance.<sup>149</sup> Worker’s compensation is

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142. *Id.* at 261.

143. *See, e.g.*, *Balt. Lutheran High School Ass’n v. Emp’t Sec. Admin.*, 490 A.2d 701, 710 (Md. 1985) (“[T]here is such an affinity between those taxes and unemployment insurance taxes as to make *Lee* dispositive.”).

144. Claims have only succeeded in rare circumstances where organizations can show they are operated primarily for religious purposes, rather than educational, administrative, or other purposes. *See Mid Vt. Christian School v. Dep’t of Emp’t & Training*, 885 A.2d 1210, 1216 (Vt. 2005) (compiling cases which almost exclusively involve religious schools).

145. *Salem Coll. Acad., Inc. v. Emp. Div.*, 298 Or. 471 (1985); *see also Koolau Baptist Church v. Dep’t of Labor & Indus. Rel.*, 718 P.2d 267 (Haw. 1986) (upholding application of unemployment compensation requirements to religiously affiliated school as an insubstantial burden on religion).

146. *Salem Coll. Acad., Inc.*, 298 Or. at 486.

147. *Id.*

148. *Balt. Lutheran*, 490 A.2d at 713.

149. PETER M. LENCISIS, *WORKERS COMPENSATION: A REFERENCE AND GUIDE* 75-82 (1998). In many states, there is a public option as well, with the state serving as

financed by premiums collected from employers, and “this cost is commonly understood to be borne in all or large part by employees in the form of foregone wages.”<sup>150</sup> It too is a form of health insurance, ensuring that risks of healthcare costs attributable to occupational injury and illness are distributed across workers.<sup>151</sup> Indeed, some anticipate that once the reforms of the Affordable Care Act are fully implemented, “workers’ compensation health benefits may be merged over time into the general employment-based health benefit system.”<sup>152</sup>

Like other social insurance programs, worker’s compensation has withstood repeated claims that it impinges on the religious liberty of religious employers. In considering one such case, the Sixth Circuit noted the government’s compelling interests in the solvency of the insurance system and the protection of workers and their dependents.<sup>153</sup> Given these interests, the court concluded, as have others, that “where [religious] beliefs clash with important state interests in the welfare of others, accommodation is not constitutionally mandated.”<sup>154</sup>

Of course, many in this long line of cases involve objections to any involvement in social insurance. By contrast, challengers to the contraception benefit would say that they actually seek to provide insurance and only object to contraception. At heart, however, as one judge stated, the objection strikes at the requirement “to fund a health

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payer. ARTHUR LARSON, *WORKERS’ COMPENSATION LAW* § 1.10 (1984).

150. Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1594 (2011); see also Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers’ Compensation Insurance* 4, 4 (National Bureau of Economic Research, Working Paper No. 3557, Dec. 1990) (“Empirical analysis of two data sets suggest that changes in employers’ costs of workers’ compensation insurance are largely shifted to employees in the form of lower wages.”); W. Kip Viscusi & Michael J. Moore, *Workers’ Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 REV. ECON. & STAT. 249, 249 (1987) (noting research showing that “workers are willing to trade off additional wage compensation for higher workers’ compensation benefits”).

151. Gruber & Krueger, *supra* note 150, at 5 (“Workers’ compensation laws require employers to secure insurance to provide a minimum level of cash payments and medical benefits in the event of work-related injuries and illnesses.”).

152. Baker, *supra* note 150, at 1595.

153. See *South Ridge Baptist Church v. Ind. Comm’n of Ohio*, 911 F.2d 1203 (6th Cir. 1990).

154. *Id.* at 1208, 1211; see also *Big Sky Colony, Inc. v. Mont. Dept. of Labor & Ind.*, 291 P.3d 1231, 1234 (Mont. 2012) (rejecting objections of colony of Anabaptists organized as a religious corporation to participating in worker’s compensation scheme); *Victory Baptist Temple, Inc. v. Indus. Comm’n*, 442 N.E.2d 819, 822 (Ohio Ct. App. 1982) (rejecting school’s challenge to maintaining worker’s compensation insurance).



insurance plan that covers many medical services, not just contraception.”<sup>155</sup> Moreover, other challenges to social insurance schemes could be characterized as focused on a particular regulation or segment of the insurance scheme. For example, the Amish employer in *Lee* also sought exemption because he objected to the particular structure mandated by legislation, rather than the notion of social assistance itself.<sup>156</sup> The Amish simply demand a right to provide for their own in a way that does not comply with federal regulations. Similarly, objectors to income taxes rarely resist the entirety of the tax system.<sup>157</sup> Any particular individual claim might not be onerous or intrusive on the government interest. Nonetheless, courts recognize that accommodating individual objections to specific budget items would destroy the system as a whole.<sup>158</sup>

Prior cases presented arguments that are virtually identical to those raised against the contraception benefit, claiming that paying into an insurance plan that covers objectionable medical care imposes a substantial burden on religion. Consider *Goehring v. Brophy* where students at a public university objected to paying student fees to the university health insurance system because it covered abortion.<sup>159</sup> The Ninth Circuit rejected the students’ RFRA claims and reasoned that “the fiscal vitality of the University’s fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds. Mandatory uniform participation by every

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155. *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting).

156. *United States v. Lee*, 455 U.S. 252, 257 (1982) (“The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.”); *see also* *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1336 (3d Cir. 1987) (“Bethel Baptist’s members oppose any governmental attempt to assume their religious responsibility of self-care or to dictate the means by which the Church shall discharge its provisional responsibilities to its members. In accordance with these beliefs, Bethel Baptist has since 1978 maintained its own private social program for care of employees.”).

157. *See, e.g., Autenrieth v. Cullen*, 418 F.2d 586, 588 (9th Cir. 1969) (reviewing the claim of federal income tax payers seeking refunds for portion of taxes that went to finance war because “[t]o finance and pay for an activity is to participate in it” and they “conscientiously object to the war in Viet-Nam and claim exemption from participation in these military activities”); *Crowe v. Comm’r of Internal Revenue*, 396 F.2d 766, 767 (8th Cir. 1968) (hearing a claim of a taxpayer objecting to income taxes that “contribute to the welfare of people who made no effort to support themselves”).

158. *See Autenrieth*, 418 F.2d at 588-89 (“If every citizen could refuse to pay all or part of his taxes because he disapproved of the government’s use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed.”).

159. *Goehring v. Brophy*, 94 F.3d 1294, 1295 (9th Cir. 1996).

student is essential to the insurance system's survival."<sup>160</sup> Similar student claims have failed elsewhere.<sup>161</sup>

Courts have disallowed other challenges to regulating the structure of insurance. A religiously affiliated school, for example, was prohibited from limiting health insurance benefits to employees who are the "head of the household," defined by the school based on its religious teachings to exclude married women.<sup>162</sup> The highest courts of New York and California, two of the most populous states, both upheld the application of state contraceptive coverage mandates to religious organizations, including Catholic Charities.<sup>163</sup> The Supreme Court of California determined that an exemption from contraceptive coverage "sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits."<sup>164</sup> Applying strict scrutiny, the court concluded that no precedent existed for exempting "a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."<sup>165</sup>

*C. The Religious Liberty Analysis in the Context of Compelling Interests in a National Health Insurance Scheme*

As current litigation percolates through the legal system, courts should consider the contraception benefit within the ACA's overarching goal of access to affordable, standardized health insurance in a non-discriminatory way. Due to the wage-insurance tradeoff, employer-based health insurance functions more like wages to compensate the employee than like a gift, or freestanding payment, from the employer. Any burden on the corporation or its owners is, therefore, mitigated. Employees' access to or use of unemployment insurance, worker's compensation, social security, vacation days, or health insurance cannot substantially burden their employers.

Moreover, the contraception benefit rule serves four compelling government interests. First, compliance with the ACA's comprehensive health insurance scheme, like other social insurance programs, is a

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160. *Id.* at 1301.

161. *Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389, 392-93 (1983) (resisting payment of student registration fee for student insurance that covered abortion or pregnancy-related counseling).

162. *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1369 (9th Cir. 1986).

163. *See Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 522 (2006); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 32 Cal. 4th 527, 566 (2004) (holding that state contraceptive mandate withstood both the rational basis and strict scrutiny constitutional tests).

164. *See Erzinger*, 137 Cal. App. 3d at 1295.

165. *Catholic Charities of Sacramento, Inc.*, 32 Cal. 4th at 564-65.

compelling governmental interest. The government's interest in these programs cannot be attained without widespread participation and compliance with this regulation. The employer mandate—which functions as an incentive for employers to offer an adequate baseline level of insurance that reaches preventive care—is the least restrictive means to accomplish this goal.

Second, increased insurance coverage for contraceptive care furthers national interests in public health. In the United States, unintended pregnancy poses a serious public health problem. Nearly half of pregnancies are unintended, a much higher rate than in comparable countries, due in part to barriers to contraceptive use.<sup>166</sup> Unintended pregnancy, in turn, has adverse health consequences for both women and their children.<sup>167</sup>

Third, ensuring women's access to preventive services addresses the healthcare inequities that confront women in the United States. Congress responded to evidence that women pay sixty-eight percent more in out-of-pocket health costs as compared to men, in large part because they bear the costs of contraception and reproduction.<sup>168</sup> Cost, however, was not the only concern. Enhancing women's control over their reproductive health was understood to allow women to pursue their professional and educational ambitions instead of having children when they are not ready.<sup>169</sup>

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166. Susheela Singh, Gilda Sedgh & Rubina Hussain, *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 *STUD. FAM. PLAN.* 241, 245 (2010) (“The unintended pregnancy rate in 2008 in North America is much higher than those of Northern, Southern, and Western Europe”—48% as compared to 29-36%); Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities*, 84 *CONTRACEPTION* 478, 484 (2011) (“[R]educing the unintended pregnancy rate requires that we focus on increasing and improving contraceptive use among women and couples who want to avoid pregnancy. Increased use of long-acting and cost-effective contraceptive methods such as the intrauterine device (IUD) could play an important role in such an effort.”).

167. See generally Jessica D. Gipson, Michael A. Koenig & Michelle J. Hindin, *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 *STUD. FAM. PLAN.* 18 (2008).

168. Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, 1 *GUTTMACHER REPORT ON PUB. POL.* 5, 5 (1998).

169. See, e.g., Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *EMORY L.J.* 815, 819 (2007) (“Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: it crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts . . .”).

Fourth, the contraceptive benefit advances a thus-far-unaddressed compelling interest in religious liberty. In analyzing and accepting RFRA claims against contraceptive coverage, courts understand religious liberty only to lie with the challengers. This obscures the fact that the contraceptive rule permits each employee to make his or her own moral decisions about reproduction and health. If the contraceptive challengers are successful, their employees effectively will not be able to access insurance that covers contraception. They will not be eligible for subsidies for the exchanges. Nor can they purchase insurance with pre-tax dollars, whereas premium payments through employment-sponsored insurance receive favorable tax treatment.<sup>170</sup> For this group of employees, private insurance, in practice, will continue to be available almost exclusively through employment,<sup>171</sup> much like social security, worker's compensation, and unemployment insurance. Due to these constraints, the contraceptive coverage mandate ensures that each employee (and his or her partners and dependents) can make decisions about contraceptive use based on his or her moral beliefs. High costs and lack of coverage will no longer impede their ability to live out their own conception of the moral life.<sup>172</sup>

In sharp contrast, legal acceptance of corporate conscience as an excuse for regulatory non-compliance subordinates the beliefs of employees to the owners of the corporation. As the Supreme Court has recognized, exempting an employer from worker-protective statutes "operates to impose the employer's religious faith on the employees."<sup>173</sup> Even with regard to religiously affiliated employers engaged in commerce, courts have been disquieted by this risk. In reviewing its state contraceptive benefit, the New York Court of Appeals noted that "many of plaintiffs'

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170. Mark A. Hall, Christie L. Hager & David Orentlicher, *Using Payroll Deduction to Shelter Individual Health Insurance from Income Tax*, 46 HEALTH SERV. RES. 348, 349 (2011).

171. See KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS SURVEY 190 (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/03/8345-employer-health-benefits-annual-survey-full-report-0912.pdf> ("Employers are the principal source of health insurance in the United States, providing health benefits for about 149 million nonelderly people in America.").

172. Simply making contraception available through the market was insufficient to accomplish these goals. More than half of all women between the ages of 18 and 34 have been unable to afford birth control, and many more women forego devices that are cost-effective in the long term, like intrauterine devices, because of the high up-front cost. *Survey: Nearly Three in Four Voters in America Support Fully Covering Prescription Birth Control*, PLANNED PARENTHOOD (Oct. 2010), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control-33863.htm>.

173. *United States v. Lee*, 455 U.S. 252, 261 (1982).

employees do not share their religious beliefs” and decided that “when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees’ legitimate interests in doing what their own beliefs permit.”<sup>174</sup> This precedent should suggest to courts that the strong public interest in “ensuring equal protection of the laws and protection of First Amendment liberties”<sup>175</sup> rests, in these cases, with the government.

There is no viable less restrictive means to carry out these compelling goals. Challengers demand that the government directly provide and pay for contraception for employees whose employers block access to contraception through employer-based insurance. Alternately, they insist that the accommodation for religious affiliated non-profits be extended to secular, for-profit businesses. As previous religious liberty challenges to social insurance show, precedent supports neither claim. Indubitably, the government could directly finance and deliver social security, worker’s compensation, unemployment insurance, and health insurance through general revenue, thus ensuring no burden on employers. But the Constitution does not so require. Similarly, the mere existence of exemptions for religious employers or non-profits does not require expanded accommodation.

Situating the contraception benefit within the doctrinal framework of social insurance makes clear that religious challenges by employers should be rejected. As courts have previously held, any accommodation of religious objections to social insurance is the responsibility of other branches. In this instance, the Executive branch has accommodated religiously affiliated organizations and religious employers, while ensuring compelling interests in comprehensive social insurance, public health, gender equality, and religious freedom are nonetheless advanced.

#### V. THE IMPACT ON HEALTH REFORM AND EMPLOYEE RIGHTS

If the challenges to the contraceptive mandate succeed on the grounds of a business interest in religious observance, it will send shock waves far beyond contraception. Most immediately, it will destabilize the reforms of the ACA. The rights of employees generally, and of women in particular,

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174. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006); *see also* *South Ridge Baptist Church v. Ind. Comm’n of Ohio*, 911 F.2d 1203, 1211 (6th Cir. 1990) (“[T]o preclude some other employee not exercising such belief from the benefits of [worker’s compensation] merely because the Church itself opposes them or prefers to provide for them in a different manner, could not escape the prospective danger of denying that employee the equal protection of the state’s law merely because of the personal religious beliefs of his employer.”).

175. *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 998 (E.D. Mich. 2012).

will be at risk.

As courts engage in an expansion of corporate rights unprecedented in constitutional and statutory precedent, they act as though contraception is uniquely morally objectionable. In crafting the contraception benefit rule, separate from other benefits that must be covered by employer-based insurance plans, the government effectively did so as well. Under the rule, religious employers will only be exempted and religious organizations only accommodated with regard to contraception. An employer will not, for instance, be granted regulatory accommodation of its resistance to other required women's preventive services, such as counseling on sexually transmitted diseases.

If an employer's free exercise is unconstitutionally burdened by the regulation of health insurance coverage, employers could successfully dispute any mandated benefits. For example, employers might contest coverage of sexually transmitted infection counseling and testing, which the ACA also requires, on the ground that only marital sex is moral. Unmarried pregnant women might similarly be denied mandated prenatal care. Many employers might oppose covering the HPV vaccine based on the incorrect belief that it causes promiscuity<sup>176</sup>—just as some employers today maintain that emergency contraception causes abortion despite all scientific evidence to the contrary.<sup>177</sup>

Although objections might be expected to center around reproductive and sexual health,<sup>178</sup> required preventive care includes other services

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176. See, e.g., Alexandra Sifferlin, *Cancer Rates Dropping, But Not for All Tumor Types*, TIME (Jan. 8, 2013), <http://healthland.time.com/2013/01/08/cancer-rates-dropping-but-not-for-all-tumor-types/> (discussing parents' objections to the so-called "promiscuity vaccine"); Robert A. Bednarczyk et al., *Sexual Activity-Related Outcomes After Human Papillomavirus Vaccination of 11 to 12 Year Olds*, 130 PEDIATRICS 798, 805 (2012) (showing no increase in promiscuity three years after HPV vaccination).

177. See, e.g., *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*4 (7th Cir. Dec. 28, 2012) (describing the plaintiffs' contention that certain drugs and devices such as the "morning-after pill," "Plan B," and "Ella" come within the Mandate's and HRSA's definition of "Food and Drug Administration-approved contraceptive methods" despite their "known abortifacient mechanisms of action"); Alastair J.J. Wood, Jeffery M. Drazen & Michael F. Green, *The Politics of Emergency Contraception*, 366 NEW ENG. J. MED. 101, 101 (2012) ("Levonorgestrel [Plan B] does not cause abortion; it does not terminate an established pregnancy."); Sheri A. Hild et al., *CDB-2914: Anti-Progestational/Anti-Glucocorticoid Profile and Post-Coital Anti-Fertility Activity in Rats and Rabbits*, 15 HUM. REPROD. 822, 830 (2000) (showing that ulipristal [Ella] has the potential to prohibit implantation in rats and rabbits but finding no evidence of terminating an existing pregnancy).

178. See Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47, 73 (2013) (noting that "questions of sexuality and reproduction—

contested by some religions, such as depression screening and vaccination for adults and children. As Judge Rovner of the Seventh Circuit said in her dissent,

[I]f an employer has this right [with regard to contraception], it is not clear to me what limits there might be on the ability to limit the insurance coverage the employer provides to its employees, for any number of medical services (or decisions to use particular medical services in particular circumstances) might be inconsistent with an employer's (or its individual owners') individual religious beliefs.<sup>179</sup>

Employers could intrude on their employees' privacy in order, for instance, to ensure that sexual assault victims, but no other women, have insurance coverage for emergency contraception.

Objections to required services would seemingly not be limited to employers. Insurance companies, religiously affiliated and secular, would appear to have a similar ability to raise religious freedom as a shield against the ACA's insurance regulations. Indeed, they play a much more direct role in the financing and provision of contraception than do employers. Such claims seem farfetched, but in some states, insurance companies have already demanded religious exemptions from state contraceptive coverage regulations.

In general, if secular employers succeed in contesting the contraception mandate, it will open the door to objections to other regulations, undermining gender equality and religious freedom in workplaces of all kinds. Religiously affiliated commercial actors already assert rights to defy health and safety laws, pay women less, and fire pregnant women.<sup>180</sup> It would be a short step from recognizing that for-profit, secular employers can deny employees the use of benefits to purchase contested medical care, and allowing them to fire employees for using such medical care.<sup>181</sup> That,

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particularly women's sexuality and reproduction—are often conflated with 'moral' or 'religious' issues").

179. *Korte*, 2012 WL 6757353, at \*7.

180. See *Forest Hills Early Learning Ctr. v. Lukhard*, 728 F.2d 230, 243-44 (4th Cir. 1984) (noting that health and safety regulations applicable to sectarian child care center do not burden free exercise rights); *Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303-05 (1985) (applying the Fair Labor Standards Act to a non-profit religious organization does not violate the free exercise clause); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320, 325 (W.D. Va. 1983) (challenging the application of Fair Labor Standards Act minimum wage and equal pay provisions).

181. See *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) (noting the government argument that accepting challengers' claims "would widen enormously . . . the scope of RFRA's protection, providing owners of secular, for-profit companies the power currently reserved for religious organizations under Title VII to claim religion-grounded exceptions to federal laws").

in fact, is precisely what we see in the context of religiously affiliated organizations. For example, a Catholic-affiliated school terminated a lay teacher for requesting time off for in vitro fertilization treatment on the basis that IVF “is an intrinsic evil . . . which means no circumstances can justify it.”<sup>182</sup> In line with several churches, some for-profit employers might determine that women should be paid less based on the belief that men are the heads of households.<sup>183</sup>

In accepting that a corporation can successfully assert free exercise against the contraceptive mandate, the Court of Appeals for the Tenth Circuit recognized the far-reaching implications of corporate conscience. The plurality opinion identified Title VII of the Civil Rights Act, the National Labor Relations Act, and the Fair Labor Standards Act as potential targets of future challenges.<sup>184</sup> As Judge Briscoe noted in the dissent,

[I]f all it takes for a corporation to be categorized as a ‘faith based business’ for purposes of RFRA is a combination of a general religious statement in the corporation’s statement of purpose and more specific religious beliefs on the part of the corporation’s founders or owners, the majority’s holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs.<sup>185</sup>

Ultimately, courts should be wary of religious freedom claims from for-profit, secular corporations. Current decisions characterizing the regulation of employment benefits as a substantial and unjustified burden on religious freedom on employers would have potentially radical consequences for employment regulation. Acceptance of corporate conscience would invite challenges to health, safety, and nondiscrimination regulations in the workplace and beyond.<sup>186</sup> It would put the institution in a legally superior

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182. Waters, *supra* note 177, at 64 (discussing *Herk v. Diocese of Fort Wayne-South Bend*, No. 1:12-cv-00122, 2012 WL 3870528 (N.D. Ind. Apr. 20, 2012)); *see also* Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1317-18 (11th Cir. 2012) (describing that female teacher was terminated from her position at a “non-denominational Christian school” because she had become pregnant prior to her marriage).

183. *See generally* Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); E.E.O.C. v. Tree of Life Christian Sch., 751 F. Supp. 700 (S.D. Ohio 1990); Russell v. Belmont Coll., 554 F. Supp. 667 (M.D. Tenn. 1982).

184. Hobby Lobby Stores, Inc., v. Sebelius, No. 12-6294, 2013 WL 3216103, \*9-\*13 (10th Cir. June 27, 2013).

185. *Id.* at \*51 (Briscoe, J., concurring and dissenting).

186. In a forthcoming paper, I refer to this development as “Free Exercise Lochnerism,” which revives business attacks on the regulatory state through religious



position to the individual and undermine the religious pluralism that we value in commercial and public life.

#### CONCLUSION

In litigation against the contraception benefit, courts have begun to accept a doctrine of corporate conscience. In so doing, they ascribe religious liberty to secular, for-profit businesses. As I have argued here, their analysis has four fundamental flaws. First, it either grants directly to a legal fiction an inherently human characteristic or indirectly transfers shareholders' beliefs to the corporation, defying a central premise of corporate law, that is, that corporations are separate from their owners and have different rights and obligations. Courts have eluded difficult corporate law, religious liberty, and employment law questions that ensue. Second, the analysis ignores the structure and function of employer-based insurance after the Affordable Care Act. Looking more deeply at the wage-benefit tradeoff informs the alleged responsibility of the employer for the use or purchase of contraception. Third, a further examination of employer-based insurance demonstrates that it shares characteristics with other social insurance schemes, like worker's compensation and unemployment insurance, all of which have withstood religious liberty challenges. Finally, any doctrine of corporate conscience risks health insurance coverage, safety regulations, and gender equality in workplaces of all kinds to the detriment of all employees.

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liberty arguments.