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## Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications

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# CONTRACEPTIVE COVERAGE UNDER THE AFFORDABLE CARE ACT: DUELING NARRATIVES AND THEIR POLICY IMPLICATIONS

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*I think there is in this country a war on religion . . . . They gave it a lot of thought and they decided to say that in this country that a church—in this case, the Catholic Church—would be required to violate its principles and its conscience and be required to provide contraceptives, sterilization and morning after pills to the employees of the church . . . . We are now all Catholics. -Mitt Romney<sup>1</sup>*

*If Mitt Romney and a few Republican senators get their way, employers could be making women's health care decisions for them. -Obama for America<sup>2</sup>*

Guaranteeing coverage of birth control in most new health insurance plans, the Obama Administration's contraceptive coverage rule is one of the greatest advances in women's health policy in decades. The ink was barely dry on the regulation, however, before a vocal minority unleashed an unrelenting campaign to dismantle it. Opponents urged the Administration to reverse course and rescind the policy, pressed Congress to pass legislation that would override it, and took to the courts, filing over eighty lawsuits—asserting in each instance that the rule is an unprecedented erosion of religious liberty.<sup>3</sup>

The debate over the contraceptive coverage rule can be characterized by two narratives: either the contraceptive coverage rule is part of a “war on religion,” as its detractors claim, or the objectors are waging a “war on women.” Each narrative has its own logic. One (to which I subscribe) sounds in women's health and equality, and flows from the notion that the government has a responsibility to ensure equal treatment. The other sounds in the primacy of religion and draws on the notion that religion confers a virtually unfettered right to avoid fundamental legal obligations.

Given the outpouring of support for the contraception benefit, the prevalence of the “war on women” rhetoric in the Democrats' victorious 2012 campaign efforts, and the fact that thus far the contraceptive coverage rule has emerged mostly intact, it would be easy to assume that the

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1. David Edwards, *Romney: Obama Wants to 'Establish a Religion Called Secularism'*, THE RAW STORY (Apr. 3, 2012, 9:03 EST), <http://www.rawstory.com/rs/2012/04/03/romney-obama-wants-to-establish-a-religion-called-secularism>.

2. *Employer Authorization for Contraception*, ORG. FOR ACTION, <http://barackobama.tumblr.com/post/18551756110/if-mitt-romney-and-a-few-republican-senators-get> (last visited Mar. 11, 2013) (depicting a mock permission slip for employees who want to use contraception to submit to their employees).

3. *Challenges to the Federal Contraceptive Coverage Rule*, AM. CIV. LIBERTIES UNION (Nov. 19, 2013, 4:40 PM), <https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule>.

women's rights narrative has carried the day. This Article argues that even in the wake of these gains, we should not underestimate the resilience behind the war on religion narrative. Its ongoing vitality continues to impact reproductive rights policy and whether and how claims sounding in religion override women's equality and access to care.

We can see this in two developments with respect to the contraceptive coverage rule itself: (1) the Administration's modifications to the rule to accommodate religiously affiliated non-profits that object to including contraception in employee health plans and (2) claims by secular businesses—through legislation and litigation—that they too should be exempt from the rule. In other words, there is ample reason for women's rights advocates to keep our antennae up.

Part I of this Article traces the development of the contraceptive coverage rule from its inception to its form as of July 1, 2013.<sup>4</sup> Part II briefly explains how this controversy came to be understood as a largely Catholic one. Part III introduces the war on women and war on religion narratives, and in particular their interaction over the rule. Part IV looks at the accommodation the Administration created for non-profits with religious objections as a sign that the war on religion frame has traction, and explores what that might mean for other equality-advancing policies and laws. Part V does the same with respect to challenges to the contraceptive coverage rule by for-profit companies. Finally, this Article concludes with some questions to consider going forward.

In brief, although the contraceptive coverage rule thus far remains a victory, there is much work left to be done to ensure that reproductive rights protections are not overtaken by misleading claims about religious liberty.

#### I. THE EVOLUTION OF THE CONTRACEPTIVE COVERAGE RULE

Even before it was signed into law, the Affordable Care Act ("ACA")—or "Obamacare," as it is now affectionately called—was the subject of much discord. From the town hall meetings of the summer of 2009, to the abortion coverage question in the Stupak Amendment standoff, to the individual mandate litigation in the Supreme Court, the ACA has been the vehicle through which we have addressed some of our most heated social conflicts: the role of government, abortion, and taxes.

Throughout those early controversies, the ACA's preventive services provision remained a sleeper issue, only to later become home to one of our

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4. This story has taken many twists and turns since the rule was first issued in 2011. No doubt it will continue to unfold, perhaps in unexpected ways, well after this article goes to press.

deepest social tensions: the intersection between one person's equality and another's religious beliefs.<sup>5</sup> The preventive services provision requires insurance plans to cover a range of preventive health care—from colonoscopies to diabetes screening—without cost-sharing measures (i.e., deductibles, co-pays, etc.).<sup>6</sup> For certain categories, the statute referenced pre-existing medical guidelines to determine what services would be covered.<sup>7</sup> When it came to women's health, however, there were no such guidelines in place, so the statute, via a provision dubbed the Women's Health Amendment ("WHA"), directed the Department of Health and Human Services ("HHS") to develop a list of services to be covered.<sup>8</sup> Although the exact list was to be determined through an administrative process, contraception was always intended to be on it; senator after senator discussed family planning as one of the expected benefits when arguing in favor of adopting the amendment.<sup>9</sup>

The Women's Health Amendment was designed to address longstanding gender discrimination in health care.<sup>10</sup> Women routinely pay more than

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5. Some flagged this issue earlier. See, e.g., Helen Alvaré, *How the New Health Care Law Endangers Conscience*, PUB. DISCOURSE (June 29, 2010), <http://www.thepublicdiscourse.com/2010/06/1402/> (noting that "preventive services" could be construed "to include medical services objectionable to a wide swath of individuals and institutions"). See generally Protect Life Act, H.R. 358, 112th Cong. (2011) (making the ACA subject to state laws that permit entities to refuse to cover reproductive health services).

6. See Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (proposed July 19, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

7. See Patient Protection & Affordable Care Act of 2010, Pub. L. No. 111-148, § 2713, 124 Stat. 119, 131 (2010) (to be codified at 42 U.S.C. § 300gg-13).

8. See *id.* at § 2713(a)(4).

9. See, e.g., 155 CONG. REC. S12,271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("[u]nder [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as . . . family planning"); *id.* at 12,274 (statement of Sen. Murray) ("[w]e have to make sure we cover preventive services, and [the WHA] takes into account the unique needs of women . . . . Women will have improved access to . . . family planning services."); 155 CONG. REC. S12,025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("[t]hese health care services include . . . family planning services."); *id.* at S12,027 (statement of Sen. Gillibrand) ("[w]ith [the WHA], even more preventive screening will be covered, including . . . family planning.").

10. See, e.g., 155 CONG. REC. S12,026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) (noting that the amendment was a response to "punitive practices of insurance companies that charge women more and give [them] less in a benefit."); see also *id.* at S12,030 (statement of Sen. Dodd) ("I support the effort by Senator Mikulski on her efforts to see to it that women are treated equally, and particularly in preventive

men in health care costs due to discriminatory coverage. In particular, costs associated with reproductive health care contribute to that disparity. As Senator Kirsten Gillibrand noted, “[N]ot only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men . . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.”<sup>11</sup> The problem here was not just the cost of care but the fundamental inequity of excluding services, unique to women, from insurance coverage.<sup>12</sup>

After the ACA was signed into law, HHS asked the Institute of Medicine (“IOM”) to undertake a comprehensive study to determine which health care services should be covered as essential preventive care for women.<sup>13</sup> Each of these steps (first assigning the task to HHS and then to the IOM) was taken in an effort to depoliticize the issue. After an extensive process, the IOM released a list of eight services to be covered, including all FDA-approved methods of contraception and contraceptive counseling.<sup>14</sup> On August 1, 2011, HHS adopted the IOM’s recommendations.<sup>15</sup> Women’s

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care.”).

11. 155 CONG. REC. S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); *see also* 155 CONG. REEC. at S12,272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) (“Women of childbearing age pay on average 68 percent more for their health care than men do.”).

12. *See* 155 CONG. REC. S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (“Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it.”).

13. *See* INST. OF MED., CLINICAL PREVENTIVE SERVS. FOR WOMEN: CLOSING THE GAPS 1 (2011) (explaining that the HHS asked IOM “to conduct a review of effective preventive services to ensure women’s health and well-being.”).

14. *See id.* at 109-10. The other services are well-woman visits, screening for gestational diabetes, human papilloma virus testing, counseling for sexually transmitted infections, counseling and screening for human immune-deficiency virus, breastfeeding support, supplies, and counseling, and screening and counseling for interpersonal and domestic violence. *See Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RES. AND SERV. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERV., available at <http://www.hrsa.gov/womensguidelines/> (last visited Mar. 11, 2013) [hereinafter *Women’s Preventive Services*].

15. *See* DEP’T. OF HEALTH & HUMAN SERV., *Affordable Care Act Ensures Women Receive Preventative Services at No Additional Cost*, (last visited Oct. 9, 2013), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html> [hereinafter *Affordable Care Act Ensures Women*].

health advocates celebrated the announcement as a historic advance.<sup>16</sup>

That same day, HHS also promulgated a rule exempting a narrow set of institutions—churches and their integrated auxiliaries, conventions and associations of churches, and religious orders (when conducting exclusively religious activities)—from the coverage requirements. HHS used a four-factor test<sup>17</sup> modeled after the exemptions in the California and New York state contraceptive equity laws—each of which was previously upheld against religious liberty challenges in the high courts of those states.<sup>18</sup> HHS termed this the “religious employer” exemption.

In addition to California and New York, twenty-six other states have contraceptive equity requirements in place, many with similarly crafted exemptions.<sup>19</sup> In the years before the federal rule was issued, the twenty-

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16. See, e.g., Lois Uttley, *HHS Makes Historic Advance for Women’s Health*, RAISING WOMEN’S VOICES (Aug. 1, 2011, 2:41 PM), <http://www.raisingwomensvoices.net/rwvoices/2011/8/1/hhs-makes-historic-advance-for-womens-health.html>; Press Release, Planned Parenthood Fed’n of Am., *Victory for Women’s Health: HHS Announces that Birth Control Will Be Covered with No Co-Pays* (Aug. 1, 2011), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/victory-womens-health-hhs-announces-birth-control-will-be-covered-no-co-pays-37522.htm> (“[t]oday is a historic victory for women’s health and women across the country,” said Cecile Richards, president of Planned Parenthood Federation of America. “The decision by HHS is monumental for millions of women who have struggled with the cost of birth control and other essential health-care services such as cervical cancer and HIV screening.”); Press Release, Nat’l Fam. Planning & Reprod. Health Ass’n, *Nation’s Leading Advocate for Publicly Funded Family Planning, Celebrates Start of Women’s Health Preventive Benefits Coverage* (Aug. 1, 2011), <http://www.nationalfamilyplanning.org/page.aspx?pid=794> (“[t]he new coverage benefit is a victory for women.”); Press Release, Am. Civ. Liberties Union, *HHS Ensures Affordable Contraception* (Aug. 1, 2011), <http://www.aclu.org/reproductive-freedom/hhs-ensures-affordable-contraception> (“[t]oday’s landmark decision means affordable, effective contraception will no longer be out of reach for millions of women.”).

17. To qualify for the exemption, an employer had to meet all of the following criteria: “(1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.” *Group Health Plans and Health Insurance Issuers: Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 76 Fed. Reg. 46,626 (Aug. 3, 2011).

18. See generally *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

19. See *Insurance Coverage of Contraception*, GUTTMACHER INST. STATE POLICIES IN BRIEF, (Mar. 1, 2013), available at <http://www.guttmacher.org/statecenter/>

eight state laws requiring contraceptive coverage generated only two lawsuits.<sup>20</sup> In other words, these state laws—although important in terms of birth control access<sup>21</sup>—caused merely a ripple in our national discourse about religious liberty.<sup>22</sup> Many expected the same result here.<sup>23</sup>

The new federal rule, however, met with a drastically different response—in part because it took place on the federal stage, in part because sensitivities about Obamacare were already heightened, and in part because tensions about the relationship between government authority and religious authority—were on the rise in some quarters. Opponents argued that the rule was an affront to religious liberty because it conscripted unwilling employers into violating their faith by facilitating access to contraception.<sup>24</sup> They objected to what they perceived as an unjustly narrow carve out for the exempted “religious employers.” What’s more, public discussion about the rule regularly elided the fact that there was an exemption for houses of worship at all, with opponents claiming the rule would force churches to provide contraception. Many reproductive rights advocates, by contrast,

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spibs/spib\_ICC.pdf [Hereinafter *Insurance Coverage*]. Some exemptions are broader, while other state laws have no exemptions.

20. See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 67; *Catholic Charities v. Serio*, 859 N.E. at 459; *Insurance Coverage*, *supra* note 19.

21. Contraceptive equity laws require insurance plans that cover prescription drugs to cover contraception. Most of these laws were passed in the late 1990s and early 2000s. They are not as comprehensive as the federal rule, do not guarantee the coverage without cost-sharing, and do not reach self-insured plans because of limits on state insurance regulations.

22. To be sure, they did not go unnoticed. See, e.g., Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL’Y, 741, 745 (2005). But the intensity of the opposition was different in kind.

23. A number of stories point out this discrepancy—that state laws had required contraceptive coverage for years, and that many religiously affiliated institutions had complied. See, e.g., Michelle Goldberg, *Catholics’ Enraged Response to Obama Birth-Control Policy is Misplaced*, THE DAILY BEAST (Feb. 8, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/02/07/catholics-enraged-response-to-obama-birth-control-policy-is-misplaced.html>.

24. See, e.g., Mary Ann Glendon, *Why the Bishops are Suing the U.S. Government*, WALL ST. J., (May 22, 2012), <http://online.wsj.com/article/SB10001424052702303610504577418201554329764.htm>. Some opposed the rule on the premise that it facilitated access to abortifacients by covering emergency contraception. See, e.g., Press Release, Catholic Med. Ass’n, CMA Criticizes HHS Mandate of Abortifacients and Contraception (Aug. 5, 2011), [http://www.cathmed.org/issues\\_resources/publications/press\\_releases/cma\\_criticizes\\_hs\\_mandate\\_of\\_abortifacients\\_and\\_contraception/](http://www.cathmed.org/issues_resources/publications/press_releases/cma_criticizes_hs_mandate_of_abortifacients_and_contraception/) (asserting that the contraception rule requires coverage of abortifacients). That premise is flatly wrong on the science.



took the position that there should not be an exemption at all.<sup>25</sup>

By fall 2011, national attention had turned to the rule. Some religious liberty scholars proposed “compromise” policies that would have absolved a wide swath of religiously affiliated institutions from compliance, denying employees and their dependents equal coverage with their counterparts at similar institutions.<sup>26</sup> Groups such as the U.S. Conference of Catholic Bishops (“USCCB”) and the Family Research Council pressed the Administration to withdraw the federal rule altogether, arguing that no employer should be required to make such coverage available, and that birth control is not properly understood as health care.<sup>27</sup>

In November 2011, the President held a personal meeting with Archbishop Timothy Dolan, then-head of the USCCB.<sup>28</sup> Press accounts suggested that the president was sensitive to the USCCB’s concerns and that Dolan felt buoyed by the meeting.<sup>29</sup> There were reports that the

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25. See, e.g., Letter from the Nat’l Women’s Law Ctr. to Ctrs. for Medicare & Medicaid Servs., Dept. of Health and Human Servs., Group Health Plans and Health Insurance Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, CMS-9992-IFC2 (Sept. 30, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB44a-14697.pdf> [hereinafter Nat’l Women’s Law Ctr. Comments].

26. See Melissa Rogers, *Seeking a Win-Win Solution for HHS*, WASH. POST (Oct. 7, 2011, 9:25 AM), [http://www.washingtonpost.com/blogs/on-faith/post/seeking-a-win-win-solution-for-hhs-regulations/2011/10/07/gIQAff6eSL\\_bl](http://www.washingtonpost.com/blogs/on-faith/post/seeking-a-win-win-solution-for-hhs-regulations/2011/10/07/gIQAff6eSL_bl).

27. See, e.g., Press Release, U.S. Conference of Catholic Bishops, USCCB Urges Rescission of HHS Contraceptive Mandate, Criticizes ‘Inexplicably Narrow’ Definition of Religious Freedom (Aug. 31, 2011), <http://www.usccb.org/news/2011/11-168.cfm> (“[o]nly rescission will eliminate all of the serious moral problems the mandate creates.”); Letter from U.S. Conference of Catholic Bishops to Ctrs. for Medicare and Medicaid Servs., Dept. of Health and Human Servs., Interim Final Rules on Preventive Services File Code CMS-9992-IFC2 (Aug. 31, 2011), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf> [hereinafter USCCB Comments] (stating that contraceptives “are not ‘health’ services, and they do not ‘prevent’ illness or disease”); Press Release, Family Research Council, FRC Opposes HHS Mandated Coverage of Abortifacients Under Obamacare (Aug. 1, 2011), <http://www.prnewswire.com/news-releases/frc-opposes-hhs-mandated-coverage-of-abortifacients-under-obamacare-126523823.html>.

28. Dolan has since been elevated to Cardinal and holds both titles.

29. See, e.g., Irin Carmon, *Will Obama Cave to Catholic Bishops on Birth Control Coverage?*, SALON (Nov. 18, 2011, 9:00 AM), [http://www.salon.com/2011/11/18/will\\_obama\\_cave\\_to\\_catholic\\_bishops\\_on\\_birth\\_control\\_coverage/singleton/](http://www.salon.com/2011/11/18/will_obama_cave_to_catholic_bishops_on_birth_control_coverage/singleton/); David Gibson, *After Obama-Dolan Meeting, Bishops Welcome Dialogue as Concerns Remain*, RELIGION NEW SERVICE (Nov. 14, 2011, 10:09 PM), [http://www.huffingtonpost.com/2011/11/14/obama-dolan-dialogue\\_n\\_1093679.html](http://www.huffingtonpost.com/2011/11/14/obama-dolan-dialogue_n_1093679.html); Laurie Goodstein, *Bishops Open Religious Liberty Drive*, N.Y. TIMES, Nov. 14, 2011, <http://www.nytimes.com/2011/11/15/us/bishops-renew-fight-on-abortion-and-gay->

president's senior advisors were at odds over whether to retain the policy or expand the exemption.<sup>30</sup> Women's health and rights advocates were concerned that the Administration might change course.<sup>31</sup>

On January 20, 2012, the Administration announced that it was standing by the original rule, but it would provide a one-year delay for certain institutions with religious objections.<sup>32</sup> Women's health advocates celebrated; opponents of the rule went into overdrive. Some pundits typically considered progressive criticized the rule for failing to treat religiously affiliated hospitals and universities differently than their not-so-affiliated counterparts.<sup>33</sup> The story was in headlines day after day and was a frequent topic on the news shows.<sup>34</sup> Everyone had an opinion.<sup>35</sup>

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marriage.html?\_r=0.

30. See, e.g., Jennifer Epstein, *Joe Biden on Birth-Control Furor: "We Can Work It Out"*, POLITICO (Feb. 9, 2012, 6:09 PM), <http://www.politico.com/news/stories/0212/72701.html>.

31. See, e.g., Carmon, *supra* note 29, at 1 (“[P]ro-choicers cheered when the Department of Health and Human Services agreed that birth control is preventative care . . . . But this week there’s fresh concern that the Catholic bishops are lobbying the Obama Administration hard to capitulate—and to keep birth control coverage away from as many people as they can get away with.”); Jodi Jacobson, *Obama and the Bishops: Is the White House Caving on Birth Control Coverage?*, RH REALITY CHECK (Nov. 16, 2011, 12:32 PM), <http://rhrealitycheck.org/article/2011/11/16/obama-and-the-bishops-is-the-white-house-caving-on-birth-control-coverage/> (writing that in the wake of Archbishop Dolan’s meeting with Obama, Catholics for Choice, the National Women’s Law Center, Physicians for Reproductive Choice and Health, Feminist Majority Foundation, Emily’s List, Planned Parenthood Federation of America, and NARAL Pro-Choice America were urging citizens to “take action”); Ashley Lopez, *Catholics Pressure Obama on Contraception Coverage*, THE COLO. INDEP. (Nov. 24, 2011, 5:45 AM), available at <http://coloradoindependent.com/106547/catholics-pressure-obama-on-contraception-coverage> (“With the final decision on whether the Obama Administration will keep its original policy requiring health insurers to cover contraception without co-payments looming, women’s health advocates fear the president will capitulate to the demands of one of the biggest opponents to the policy: Catholic bishops.”).

32. See *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, DEP’T OF HEALTH & HUMAN SERVS. (Jan. 20, 2012), available at <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

33. See, e.g., E.J. Dionne, *Obama’s Breach of Faith Over Contraceptive Ruling*, WASH. POST (Jan. 29, 2012), [http://articles.washingtonpost.com/2012-01-29/opinions/35438029\\_1\\_contraception-affordable-care-act-catholic-institutions](http://articles.washingtonpost.com/2012-01-29/opinions/35438029_1_contraception-affordable-care-act-catholic-institutions); Amy Sullivan, *The Contraception Coverage Debate Isn’t Just About the Bishops*, THE ATLANTIC (Feb. 9, 2012, 10:10 AM), <http://www.theatlantic.com/politics/archive/2012/02/the-contraception-coverage-debate-isnt-just-about-the-bishops/52780/> (calling the rule an “unforced error”).

34. See, e.g., *Morning Joe* (MSNBC television broadcast Feb. 8, 2012); *This Week* (ABC television broadcast Feb. 5, 2012); *Fox & Friends* (Fox News television

On February 10, 2012, after a barrage of negative media coverage over several weeks, President Obama held a press conference to announce that his Administration would now be crafting a new “accommodation” for non-profits with religious objections to contraception, separate from, and in addition to, the exemption already in place for houses of worship.

[F]rom the very beginning of this process, I spoke directly to various Catholic officials, and I promised that before finalizing the rule as it applied to them, we would spend the next year working with institutions like Catholic hospitals and Catholic universities to find an equitable solution that protects religious liberty and ensures that every woman has access to the care that she needs . . . . Today, we’ve reached a decision on how to move forward.<sup>36</sup>

The President proposed that non-profits with religious objections could opt out of contributing to coverage and instead employees would get coverage for contraception directly from insurance companies.<sup>37</sup>

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broadcast Jan. 25, 2012); Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES, Jan. 20, 2012, at A17; Laurie McGinley, *Religious Institutions’ Health Plans Must Offer Birth Control*, L.A. TIMES (Jan. 20, 2012), <http://articles.latimes.com/2012/jan/20/nation/la-na-obama-birth-control-20120121>.

35. Despite the perception of controversy generated in the media, support for the rule far outpaced objections. See Samantha Holquist, *New PRRI/RNS Poll: Religious Liberty and the Contraception Mandate Debate*, PUB. RELIGION RES. INST. (Mar. 15, 2012), <http://publicreligion.org/2012/03/new-prri-rns-poll-religious-liberty-and-the-contraception-mandate-debate/> (“[W]ith the single exception of churches or other places of worship, majorities of Americans believe that employers should be required to provide their employees with health care plans that cover contraception at no cost.”); Press Release, Planned Parenthood Fed’n of Am., *New Research Shows Yet Again that Americans Overwhelmingly Support Access to Affordable Birth Control* (June 20, 2012), [www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-shows-yet-again-americans-overwhelmingly-support-access-affordable-birth-control-39719.htm](http://www.plannedparenthood.org/about-us/newsroom/press-releases/new-research-shows-yet-again-americans-overwhelmingly-support-access-affordable-birth-control-39719.htm) (“nearly three in four voters (73 percent) . . . agreed that all women should have access to affordable prescription birth control and that cost should not be a barrier to using the most effective form of birth control”).

36. President Barack Obama, *Remarks by the President on Preventive Care* (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>.

37. That same day, HHS put out guidance on the temporary safe harbor for non-profit employers. It provided that in order to qualify for the safe harbor, an entity must be a non-profit, have not provided contraceptive coverage consistent with state law, provide notice to their employee that contraceptive coverage would not be provided, and keep a self-certification as to those factors on file for inspection. See Ctr. for Consumer Info. and Ins. Oversight (CCIIO) and Ctrs. for Medicare & Medicaid Services (CMS), *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement*

For a moment it seemed as if the chapter might be closing on this controversy. Multiple commentators pointed to the fact that both Cecile Richards, president of Planned Parenthood Federation of America, and Sister Carol Keehan, the head of the Catholic Health Association (the umbrella organization for Catholic hospitals) came out in support of the new announcement.<sup>38</sup> Media commentators who had been regularly castigating the president voiced their approval.<sup>39</sup>

However, many were not swayed. Opponents of the rule described the proposal as an accounting trick and chafed at the notion that a religiously affiliated university or hospital would be treated differently than a house of worship. The Becket Fund, one of the organizations leading the charge in litigating cases challenging the rule, called it a “false compromise.”<sup>40</sup> Anti-choice leaders in Congress such as Representative Chris Smith said the proposal was merely “the discredited old policy, dressed up to look like something else.”<sup>41</sup> One archbishop called it “too little, too late,”<sup>42</sup> while the

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Income Security Act, and § 9815(a)(1) of the Internal Revenue Code (Feb. 10, 2012). The guidance was later updated.

38. See Jake Tapper, *Both Catholic Health Ass’n and Planned Parenthood Say They’re Pleased With Contraception Rule Announcement*, ABC NEWS (Feb. 10, 2012, 11:05 AM), <http://abcnews.go.com/blogs/politics/2012/02/both-catholic-health-assn-and-planned-parenthood-say-theyre-pleased-with-contraception-rule-announcement/>; Press Release, Planned Parenthood Fed’n of Am., Statement by Cecile Richards, President of Planned Parenthood Fed’n of Am., on Obama Administration Announcement on Birth Control Coverage Benefit (Feb. 10, 2012), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/statement-cecile-richards-president-planned-parenthood-federation-america-obama-administration-38755.htm>; Press Release, Catholic Health Ass’n, Catholic Health Association Is Very Pleased With Today’s White House Resolution that Protects Religious Liberty and Conscience Rights (Feb. 10, 2012), [http://www.chausa.org/Pages/Newsroom/Releases/2012/Catholic\\_Health\\_Association\\_is\\_Very\\_Pleased\\_with\\_Todays\\_White\\_House\\_Resolution\\_that\\_Protects\\_Religious\\_Liberty\\_and\\_Conscience\\_Rights/](http://www.chausa.org/Pages/Newsroom/Releases/2012/Catholic_Health_Association_is_Very_Pleased_with_Todays_White_House_Resolution_that_Protects_Religious_Liberty_and_Conscience_Rights/); Laurie Goodstein, *Obama Shift on Contraception Splits Catholics*, N.Y. TIMES (Feb. 14, 2012), [http://www.nytimes.com/2012/02/15/us/obama-shift-on-contraception-splits-catholics.html?\\_r=0](http://www.nytimes.com/2012/02/15/us/obama-shift-on-contraception-splits-catholics.html?_r=0).

39. See, e.g., E.J. Dionne, *Obama Does the Right Thing on Contraception*, WASH. POST (Feb. 10, 2012, 12:54 PM), [http://www.washingtonpost.com/blogs/post-partisan/post/dionne-obama-contraception-compromise-women-white-house-does-the-right-thing/2012/02/10/gIQAcCWK4Q\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/dionne-obama-contraception-compromise-women-white-house-does-the-right-thing/2012/02/10/gIQAcCWK4Q_blog.html).

40. See *Obama Compromise Angers Pro-Life Activists; USCCB Response Muted*, CATHOLIC WORLD NEWS (Feb. 10, 2012), <http://www.catholicculture.org/news/headlines/index.cfm?storyid=13292> [hereinafter *Obama Compromise*]. When the president announced the accommodation, the Becket Fund already had two lawsuits pending in federal court on behalf of religiously affiliated colleges. *Id.*

41. *Id.*

42. *Id.*

USCCB went further, maintaining its position that total rescission of the rule remained the “only complete solution.”<sup>43</sup>

One year later, on February 1, 2013, the Obama Administration released a proposed rule implementing the previous announcement.<sup>44</sup> It provided that a non-profit that “holds itself out as religious” could refuse to contract, arrange, pay, or refer for insurance coverage for contraception, and employees and dependents would instead get that coverage directly from the insurance company. Importantly, the proposed rule stated that the accommodation would not apply to for-profit companies.<sup>45</sup>

The response to the accommodation was largely the same as to the initial announcement a year earlier. The Catholic Health Association (which had, in June 2012, retreated from its initial approval)<sup>46</sup> indicated tentative renewed support.<sup>47</sup> Others continued to criticize the accommodation as a

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43. Press Release, U.S. Conference of Catholic Bishops, *Bishops Renew Call to Legislative Action on Religious Liberty* (Feb. 10, 2012), <http://www.usccb.org/news/2012/12-026.cfm>.

44. The Administration had previously issued an advance notice of proposed rulemaking in March 2012.

45. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54) (reasoning that “[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for profit [sic] secular organizations”).

46. See David Gibson, *Catholic Health Association Rejects Obama’s Birth Control Compromise*, RELIGION NEWS SERV. (June 17, 2012, 8:21 AM), [http://www.huffingtonpost.com/2012/06/17/catholic-health-association-obama\\_n\\_1601808.html](http://www.huffingtonpost.com/2012/06/17/catholic-health-association-obama_n_1601808.html).

47. See Louise Radnofsky, *Catholic Health Ass’n. Sees ‘Progress’ in Contraception Proposal*, WALL ST. J. (Feb. 13, 2013, 6:49 PM), <http://blogs.wsj.com/washwire/2013/02/13/catholic-hospital-assn-sees-progress-in-contraception-proposal/>; Press Release, Catholic Health Ass’n, *Catholic Health Association Seeks Members’ Input on HHS Proposed Rule for Contraceptive Services* (Feb. 13, 2013), [http://www.chausa.org/CHA\\_Seeks\\_Members\\_Input\\_On\\_HHS\\_Proposed\\_Rule\\_for\\_Contraceptive\\_Services.aspx](http://www.chausa.org/CHA_Seeks_Members_Input_On_HHS_Proposed_Rule_for_Contraceptive_Services.aspx) (calling the proposed rule “substantial progress”). In this reaction, the CHA acknowledged that it had distinct institutional interests from the USCCB. See *id.* (“Throughout this sometimes challenging period, CHA has remained in constant dialogue with the leadership of the United States Conference of Catholic Bishops, individual Bishops who had concerns and suggestions and the Administration. We believe that our commitment to dialogue to an acceptable solution is matched by all parties and we are committed to completing resolution of this issue. CHA is also aware that the issues that we have as a ministry are narrower than the broader concerns of the Bishops’ Conference. Our mutual efforts to resolve the issues affecting our ministries are our contribution to the overall process. CHA looks forward to working with our members, the leadership of the Bishops’ Conference and the Administration to complete this process.”).

“mere parlor trick,”<sup>48</sup> with the USCCB asserting that the rule continued to force people “to violate their morally well-informed consciences.”<sup>49</sup> Shortly after the proposed rule was issued, several groups pressed Congress to use negotiations over the federal budget to insert sweeping loopholes into the contraception benefit.<sup>50</sup>

In addition to filling in the details on the accommodation, the Administration also modified the exemption. The original version used a four-prong test:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.<sup>51</sup>

The new version eliminated the first three prongs to rely solely on a provision in the tax code, which exempts churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order from filing certain forms with the Internal Revenue Service. Describing this as “simplifying”<sup>52</sup> the

48. Michael Gerson, *Obama’s New Contraception Rules Try to Fool Catholics*, WASH. POST (Feb. 4, 2013), [http://articles.washingtonpost.com/2013-02-04/opinions/36743431\\_1\\_contraceptive-coverage-religious-liberty-religious-employers](http://articles.washingtonpost.com/2013-02-04/opinions/36743431_1_contraceptive-coverage-religious-liberty-religious-employers).

49. Press Release, U.S. Conference of Catholic Bishops, *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>.

50. Letter from Archbishop William Lori to Members of Congress (Feb. 13, 2013), available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf>; Press Release, Susan B. Anthony List, *Pro-life Groups Launch Call2Conscience.com Campaign, Urge Congress to Protect Constitutional Rights* (Feb. 25, 2013), <http://www.sba-list.org/newsroom/press-releases/pro-life-groups-launch-call2consciencecom-campaign-urge-congress-protect-con> (describing anti-choice advocacy group, Susan B. Anthony List’s efforts “to urge Congress to include language to protect conscience rights in any upcoming continuing resolutions to fund the government”); Sam Baker, *GOP Lawmakers Say Spending Bill Should Target Contraception Mandate*, HILL (Mar. 5, 2012, 11:49 AM), <http://thehill.com/blogs/healthwatch/abortion/286217-gop-lawmakers-say-spending-bill-should-target-contraception-mandate#ixzz2U4AF58Gu> (describing letter from fourteen anti-choice members of Congress).

51. *Group Health Plans and Health Insurance Issuers: Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 76 Fed. Reg. 46,626 (Aug. 3, 2011).

52. *Women’s Preventive Services Coverage and Religious Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVS., DEP’T OF HEALTH & HUMAN SERVS., (Feb. 1, 2013), <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven>

exemption, the Administration explained that it “was never [their] intention” to “exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school.”<sup>53</sup>

One of the initial prongs—that the organization primarily serve persons who share the religious tenets of the organization—had become a focal point of criticism over the previous year. Opponents asserted that not even “Jesus himself” could meet such a test.<sup>54</sup> That prong allowed the opposition to focus on the good works that many non-profits do, and to downplay the effect that an exemption would have on employees at those institutions, as well as the fact that religiously affiliated hospitals, for example, are a multi-billion dollar industry.<sup>55</sup> Because the first three prongs of the original test were in large part catch-all measures intended to hone in on institutions such as houses of worship,<sup>56</sup> it is likely that when it modified the test, the Administration chose to quash something it considered to have become a distraction.<sup>57</sup>

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02012013.html [hereinafter *Women’s Preventative Services Coverage*].

53. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54).

54. See, e.g., Jeanne Monahan, *Contraception Mandate a Profound Violation of Religious Freedom*, U.S. NEWS & WORLD REP. (Feb. 9, 2012), <http://www.usnews.com/debate-club/should-catholic-and-other-religious-institutions-have-to-cover-birth-control/the-uproar-over-obamas-choice-has-to-do-with-more-than-contraception>; Jeremy Kryn, *Cardinal: Not Even Jesus Would Qualify for HHS Contraceptive Mandate Religious Exemption*, LIFESITENEWS (Sept. 29, 2011, 10:07 AM), <http://www.lifesitenews.com/news/cardinal-not-even-jesus-would-qualify-for-hhs-religious-exemption-on-contra/>; William McGurn, *The Church of Kathleen Sebelius*, WALL ST. J. (Sept. 13, 2011), <http://online.wsj.com/article/SB10001424052970203518404577094631979925326.html>.

55. See BARBRA MANN WALL, *AMERICAN CATHOLIC HOSPITALS* 5 (Rutgers University Press, 1st ed. 2010); see also CATHOLICS FOR A FREE CHOICE, *THE FACTS ABOUT CATHOLIC HEALTH CARE IN THE UNITED STATES*, available at <http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare.pdf>.

56. The initial August 2011 rule explained that the Administration created the exemption because it was concerned with “the unique relationship between a house of worship and its employees in ministerial positions.” Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,623 (Aug. 3, 2011).

57. Query whether the reaction might have been slightly more muted if the original rule had referred to “exempted institutions” instead of “religious employers.” It seemed that a not insignificant segment of the opposition to the rule came from the notion of labeling some institutions “religious” and others not. You can see this in the Administration’s defense of these distinctions. See *Certain Preventive Services Under*

Women's health advocates in large part supported the Administration's plan as the best way to ensure that women receive coverage under the political circumstances.<sup>58</sup> In particular, they supported strong implementation of the accommodation to ensure that as many women as possible receive coverage, while reiterating that the accommodation is unnecessary and contraception should not be treated differently than other health care.<sup>59</sup> Other reproductive rights advocates criticized the rule as bowing to the Catholic lobby. Jon O'Brien, president of Catholics for Choice, put it in stark terms:

It's obvious that once again, the [A]dministration listened to the lobbyists for the Catholic bishops and their big business interests like Catholic healthcare, instead of Americans of every faith and of none who support the separation of religion and state and believe that public policy should not impose or privilege any religious viewpoint.<sup>60</sup>

The rule finalizing the exemption and accommodation was released on June 28, 2013.<sup>61</sup>

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the Affordable Care Act, 77 Fed. Reg. 16,502 (Mar. 21, 2012) ("Whether an employer is designated as "religious" for these purposes is not intended as a judgment about the mission, sincerity, or commitment of the employer, and the use of such designation is limited to defining the class that qualifies for this specific exemption."). To be sure, semantics would not have cured what is a deep disagreement, but semantics may have helped at the margins.

58. See, e.g., Press Release, Planned Parenthood Fed'n of Am., Planned Parenthood Says New Regulations Ensure Women Can Get Birth Control at No Cost (Feb. 1, 2013), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-says-new-regulations-ensure-women-can-get-birth-control-no-cost-40886.htm> ("This policy delivers on the promise of women having access to birth control without co-pays no matter where they work . . . This policy makes it clear that your boss does not get to decide whether you can have birth control."); Press Release, NARAL Pro-Choice Am. Statement on Obama Admin. Next Step to Implement Contraceptive Coverage (Feb. 1, 2013), [http://www.prochoiceamerica.org/media/press-releases/2013/pr02012013\\_hhs.html](http://www.prochoiceamerica.org/media/press-releases/2013/pr02012013_hhs.html) ("Today's draft regulation affirms yet again the Obama [A]dministration's commitment to fulfilling the full promise of its historic contraception policy.").

59. See Sarah Lipton-Lubet, *Birth Control: A Game Changer for Women*, ACLU BLOG OF RIGHTS (Apr. 8, 2013), <http://www.aclu.org/blog/reproductive-freedom/birth-control-game-changer-women> (describing the ACLU's comments to HHS on the accommodation and noting that "although we don't believe that the [A]dministration needed to create special rules for non-profit institutions that 'hold themselves out as religious,' we urged the [A]dministration to make sure it implements this plan in a way that ensures that women working at those institutions receive seamless coverage for contraception, and suggested ways to improve it.").

60. Press Release, Doing "The Right Thing the Wrong Way," CATHOLICS FOR CHOICE (Feb. 1, 2013), <http://www.catholicsforchoice.org/news/pr/2013/doingtherightsthingthewrongway.asp>.

61. Coverage of Certain Preventive Services Under the Affordable Care Act, 78



## II. CATHOLIC INSTITUTIONS AND THE CONTRACEPTION FIGHT

The broad issues at stake in the debates over the contraceptive coverage rule are not faith-dependent. This point can be obfuscated, however, because Catholic voices dominated so much of the debate. Those dynamics were due in part to the fact that Catholicism holds a prominent theological opposition to contraception, that the bishops have used their national platform to champion this cause, that the network of Catholic hospitals and social service agencies is more substantial than others, and that several significant Catholic institutions already had a complicated relationship with the Affordable Care Act.

The USCCB railed against the ACA in 2010, even after winning concessions that erected burdensome and unnecessary restrictions on abortion coverage.<sup>62</sup> The USCCB claimed that the Act still involved government subsidization of abortion care and therefore they could not support it.<sup>63</sup> When the contraception rule came out a year later, the landscape was already fraught.<sup>64</sup> By contrast, the Catholic Health Association had come out in support of the health reform law,<sup>65</sup> which many saw as crucial to the Act's passage. Out of that grew the notion that the Administration owed a debt of gratitude to CHA—gratitude that some argued should have led them to carve out the Catholic hospital industry from the scope of the contraceptive coverage rule.<sup>66</sup> One commentator

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Fed. Reg. 39,870 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156).

62. The debate over abortion insurance coverage in the ACA was heated. The USCCB supported a policy known as the Stupak Amendment that would have banned insurance from covering abortion care in plans sold on the new health insurance marketplaces created by the ACA. The final version of the ACA rejected the Stupak Amendment, but it did include a set of unnecessary and burdensome restrictions known as the Nelson Amendment, which allow insurance companies to decide whether or not to include abortion; preclude federal premium subsidies from going toward abortion coverage; and require cumbersome processes for insurance companies to segregate premium funds that go toward abortion coverage from premium funds for all other care.

63. James Tillman, *USCCB Reiterates Opposition to Pro-Abortion Health Care Bill*, LIFESITENEWS.COM (Mar. 15, 2010, 11:15 AM) <http://www.lifesitenews.com/news/archive/ldn/2010/mar/10031505>.

64. Laurie Goodstein, *Bishops Were Prepared for Battle Over Birth Control Coverage*, N.Y. TIMES (Feb. 9, 2012), [http://www.nytimes.com/2012/02/10/us/bishops-planned-battle-on-birth-control-coverage-rule.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/10/us/bishops-planned-battle-on-birth-control-coverage-rule.html?pagewanted=all&_r=0).

65. Press Release, Catholic Health Ass'n of the U.S., Catholic Health Association Congratulates Nation's Leaders for Enacting Historic Health Reform, (Mar. 21, 2010), <http://www.chausa.org/newsdetail.aspx?id=2147484842>.

66. There is also an argument to be made that the Administration owed gratitude to the reproductive rights community for supporting the ACA despite its abortion

urged the Administration to “do[] right by the brave Catholics who made his health reform law . . . possible in the first place.”<sup>67</sup> She reasoned that

[w]ithout the work of women like Sister Carol Keehan, president of the Catholic Health Association, and Sister Simone Campbell of the Catholic social justice group NETWORK, there would be no health reform and therefore no contraception coverage mandate to argue over—not just for the employees of Catholic hospitals and universities, but for the estimated 24 million other women who will benefit from this aspect of the law. So, yes, a little gratitude from women’s health advocates and other liberals would be appropriate.<sup>68</sup>

That view was echoed in the progressive Catholic press.<sup>69</sup>

The focus on Catholic institutions organic to this particular context obscures the fact that there is a much deeper set of issues at play about the relationship between religiously affiliated institutions and public life. What do we do when equality-advancing laws and norms conflict with religious views? Although Catholic institutions may stand out most starkly in this particular debate, the larger questions are emphatically not Catholic, nor Baptist, nor Jewish. As we have seen over time, virtually any set of religious beliefs can be the basis for discrimination: individuals and institutions have objected to integration, equal pay laws, and child labor prohibitions on the basis of various religious beliefs.<sup>70</sup> When Mitt Romney

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restrictions. See Lisa Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women’s Health*, 55 HOW. L.J. 731, 756 (2012).

67. Amy Sullivan, *The Contraception Coverage Debate Isn’t Just About the Bishops*, THE ATLANTIC (Feb. 9, 2012, 10:10 AM), <http://www.theatlantic.com/politics/archive/2012/02/the-contraception-coverage-debate-isnt-just-about-the-bishops/52780/>.

68. *Id.*

69. See Michael S. Winters, *J’ACCUSE! Why Obama Is Wrong on the HHS Conscience Regulations*, NAT’L CATHOLIC REP. (Jan. 21, 2012), <http://ncronline.org/blogs/distinctly-catholic/jaccuse-why-obama-wrong-hhs-conscience-regulations>.

70. See, e.g., *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F. 2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968) (detailing that a restaurant owner asserted that racial integration conflicted with his religious beliefs); *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (reviewing a university’s assertion that interracial dating conflicted with its religious beliefs); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (recounting that a religiously identified school asserted that religious beliefs justified paying men more than women); *Equal Employment Opportunity Commission v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (deciding the same issue as *Dole*); *Brock v. McGee Bros. Co.*, 867 F.2d 196, 198-99 (4th Cir. 1989). Indeed, adherents of different religious traditions come out in different places on different issues. The trial court in *Loving v. Virginia* ruled against the Lovings, asserting that “Almighty God created the races white, black,

asserted, while criticizing the contraception rule, that “we are all Catholics now,”<sup>71</sup> it was more than a political cliché. The question of whether religious beliefs should insulate institutions from laws promoting equality—even where such insulation harms third parties—has broad implications. Going forward, the rules and norms we develop here will be the backdrop for the next set of conflicts.

### III. DUELING “WARS:” FRAMING THE CONTRACEPTIVE COVERAGE RULE

Looking at the political discourse, there were two dominant ways of understanding the disagreements over the contraception rule: that the coverage requirement was part of a war on religion, or alternatively, that objectors were waging a war on women. Each of these frames predates the contraception controversy, but the rule fit neatly into them while raising the profile and intensity of each. While these narratives were by no means coextensive with political parties,<sup>72</sup> because of the partisan nature of our politics, they did correlate strongly. Although these worldviews are far deeper and more enduring than the particular politics of any given election, the 2012 election season amplified the disagreements.

When the war on religion frame is ascendant, opponents of the rule have

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yellow, malay and red, and he placed them on separate continents . . . . The fact that he separated the races shows that he did not intend for the races to mix.” *Loving v. Virginia*, 388 U.S. 1817, 1819 (1967) (quoting *Loving v. Com.*, 206 Va. 924, 147 S.E.2d 78 (1966) *rev'd sub nom. Loving v. Virginia*, 388 U.S. 1 (1967)). However, a dozen prominent Catholic bishops, coming from a different faith perspective, submitted an amicus brief to the Supreme Court in that same case, arguing that anti-miscegenation statutes should be declared unconstitutional. See Brief for John J. Russell, Bishop of Richmond, et al., as *Amici Curiae*, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113296, at \*3. In other words, noting that religious beliefs can be the basis for discrimination is not intended to pigeon-hole or label any one faith as “discriminatory” or not, but rather a recognition that this phenomenon has occurred in many contexts over time, and continues to do so.

71. David Edwards, *Romney: Obama Wants to ‘Establish a Religion Called Secularism,’* RAW STORY (Apr. 3, 2012, 9:03 AM), <http://www.rawstory.com/rs/2012/04/03/romney-obama-wants-to-establish-a-religion-called-secularism/>; see also Mary Ann Glendon, *Why the Bishops are Suing the U.S. Government*, WALL ST. J. (May 22, 2012), <http://online.wsj.com/article/SB10001424052702303610504577418201554329764.html> (noting that former Arkansas Governor Mike Huckabee, a Baptist minister, made the same statement).

72. See, e.g., Byron Tau, *Bill Daley’s Contraception Maneuvering*, POLITICO (Feb. 10, 2012, 6:46 AM), <http://www.politico.com/politico44/2012/02/bill-daleys-contraception-maneuvering-114103.html> (discussing the White House chief of staff’s opposition to the contraception rule); Donna Casata, *Obama Birth Control Policy Divides Democrats*, ASSOCIATED PRESS (Feb. 9, 2012, 8:58 PM), <http://news.yahoo.com/obama-birth-control-policy-divides-democrats-223832993.html> (discussing the views of anti-choice democrats).

an advantage. In that frame, requirements that all employers comply with the rule are seen as an infringement on the freedom of institutions and individuals to order their lives in accordance with their religious beliefs. When the war on women frame is dominant, the rule is understood as synonymous with women's equality and basic fairness, and its detractors are seen as trying to turn back the clock on women's rights and autonomy.

#### A. *The Terms*

Opposition to reproductive rights is hardly a new phenomenon. The war on women meme, however, represented amplification in the public's awareness of and focus on this fight. And for good reason. In the wake of the 2010 election, anti-choice legislative proposals skyrocketed. Historic numbers of abortion restrictions passed in state legislatures—ninety-two in 2011 and forty-three in 2012.<sup>73</sup> The previous annual high was thirty-four.<sup>74</sup> In the 112th Congress, the House of Representatives took at least fifty-eight anti-choice floor votes.<sup>75</sup> Even more alarming to some was the fact that access to contraception was coming under attack in multiple ways. Until then, many assumed that unlike abortion, birth control was politically uncontroversial.<sup>76</sup>

The particular phrase “war on women” started gaining prominence in early 2011. Legislators in the House pushed new abortion restrictions like the No Taxpayer Funding for Abortion Act, which, on February 9, 2011, Representative Jerry Nadler called “an entirely new front in the war on women and their families.”<sup>77</sup> Several weeks later, Cecile Richards,

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73. 2012 Saw Second Highest Number of Abortion Restrictions Ever, GUTTMACHER INST. (Jan. 2, 2013), <http://www.guttmacher.org/media/inthenews/2013/01/02/index.html>.

74. States Enact Record Number of Abortion Restrictions in 2011, GUTTMACHER INST. (Jan. 5, 2012), <http://www.guttmacher.org/media/inthenews/print/2012/01/05/endofyear.html/>.

75. CENTER FOR REPRODUCTIVE RIGHTS, UNDER ATTACK: REPRODUCTIVE RIGHTS IN THE 112TH CONGRESS (2013), available at [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/crr\\_GR\\_wrapUp\\_3.13.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/crr_GR_wrapUp_3.13.pdf).

76. In October 2011, for example, presidential candidate Rick Santorum broadly criticized birth control: “One of the things I will talk about, that no president has talked about before, is I think the dangers of contraception in this country . . . It’s not okay. It’s a license to do things in a sexual realm that is counter to how things are supposed to be.” Irin Carmon, *Rick Santorum is Coming for Your Birth Control*, SALON (Jan. 4, 2012, 1:30 PM), [http://www.salon.com/2012/01/04/rick\\_santorum\\_is\\_coming\\_for\\_your\\_birth\\_control/](http://www.salon.com/2012/01/04/rick_santorum_is_coming_for_your_birth_control/) (discussing Santorum’s opposition to *Griswold v. Connecticut*, the U.S. Supreme Court case protecting our right to contraception, as well as the fact that five presidential candidates supported so-called personhood measures that could make some widely used forms of contraception illegal).

77. David Weigel, *The “War on Women” Is Over*, SLATE (Apr. 12, 2012, 6:37

president of Planned Parenthood Federation of America, was quoted in a Washington Post article describing the House budget proposal (which would have eliminated Title X, the federal family planning program, and defunded Planned Parenthood), as “a war on women’s health.”<sup>78</sup> The attacks on Planned Parenthood continued and so did the meme.<sup>79</sup>

The phrase was used by some advocacy groups and pro-choice members of Congress to describe ongoing threats to women’s health and rights, including the campaign against the contraception rule. In November 2011, for example, the Huffington Post ran a piece highlighting the bishops’ influence in Washington with the headline “The Men Behind the War on Women.”<sup>80</sup> It addressed issues from the abortion restrictions in the Affordable Care Act to the contraception rule, to a bill that would allow hospitals to refuse emergency abortion care to women in need. Over time, the war on women frame would encompass everything from Virginia’s forced ultrasound bill<sup>81</sup> to the fight for pay equity.<sup>82</sup>

The war on religion narrative also extends well beyond objections to the contraception rule.<sup>83</sup> For example, in October 2011, the House Judiciary

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PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/04/hilary\\_rosen\\_ann\\_romney\\_the\\_birth\\_adolescence\\_and\\_death\\_of\\_the\\_democrats\\_war\\_on\\_women\\_talking\\_point\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/04/hilary_rosen_ann_romney_the_birth_adolescence_and_death_of_the_democrats_war_on_women_talking_point_.html).

78. Cecile Richards, *What’s Lost in the House Budget Cuts*, WASH. POST (Feb. 27, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022505887.html>.

79. In addition to defunding efforts by Congress and state legislatures, the Susan G. Komen Foundation barred funding for Planned Parenthood in late 2011. That policy was later withdrawn after Planned Parenthood supporters engaged in a social media campaign decrying the decision. See *Timeline of Key Events in the Komen Controversy*, WASH. POST (Feb. 7, 2012), [http://articles.washingtonpost.com/2012-02-07/national/35444734\\_1\\_karen-handel-mollie-williams-founder-nancy-brinker](http://articles.washingtonpost.com/2012-02-07/national/35444734_1_karen-handel-mollie-williams-founder-nancy-brinker). This episode also played a key role in creating the “war on women” narrative.

80. Laura Bassett, *The Men Behind the War on Women*, HUFFINGTON POST (Nov. 1, 2011, 7:06 PM), [http://www.huffingtonpost.com/2011/11/01/the-men-behind-the-war-on\\_n\\_1069406.html](http://www.huffingtonpost.com/2011/11/01/the-men-behind-the-war-on_n_1069406.html).

81. See, e.g., Tobias B. Wolff, *The Republican War on Women: Invading the Vagina in Virginia*, HUFFINGTON POST (Feb. 15, 2012, 10:31 PM), [http://www.huffingtonpost.com/tobias-barrington-wolff/virginia-ultrasound-bill\\_b\\_1278832.html](http://www.huffingtonpost.com/tobias-barrington-wolff/virginia-ultrasound-bill_b_1278832.html).

82. See, e.g., Tamara Keith, *Senate Republicans Block Paycheck Fairness Act*, NAT’L PUBLIC RADIO (June 5, 2012, 3:00 PM), <http://www.npr.org/2012/06/05/154377271/senate-republicans-block-paycheck-fairness-act>.

83. Notably, the litany of supposed attacks on religion rarely featured any mention of what many believe to be the greatest threat to religious freedom in the U.S., namely, Islamophobia and the brazen efforts to deny Muslims basic religious freedom and equality. See, e.g., *Protecting the Religious Freedom of Muslims*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/protecting-religious-freedom-muslims> (last visited June 7,

Committee Subcommittee on the Constitution held a hearing on the “State of Religious Liberty.”<sup>84</sup> Contraception was just one among the issues raised by those who asserted that religious liberty was at risk. Colby May, Senior Counsel at the American Center for Law and Justice, invoked university speech codes, sex education curriculums, and nondiscrimination laws.<sup>85</sup> Then-Bishop William Lori, head of the USCCB’s recently formed Ad Hoc Committee on Religious Liberty, laid out the following items: the contraceptive coverage rule, the Justice Department’s decision not to defend the Defense of Marriage Act in federal court, HHS’s decision to assure that programs for victims of human trafficking provide access to the full range of reproductive health care services that survivors may need, USAID’s decision to require contractors to provide comprehensive HIV prevention activities in programs intended to halt the spread of AIDS, and state laws that prohibit social services agencies from discriminating against LGBT individuals.<sup>86</sup> He posited that these concerns comprised a larger trend:

These are serious threats to religious liberty, and as I noted previously they represent only the most recent instances in a broader trend of erosion of religious liberty in the United States. The ultimate root causes of these threats are profound, and lie beyond the scope of this hearing or even this august body to fix—they are fundamentally philosophical and cultural problems that the bishops, and other participants in civil society, must address apart from government action. But we can—and must—also treat the symptoms immediately, lest the disease spread so quickly that the patient is overcome before the ultimate cure can be formulated and delivered.<sup>87</sup>

### *B. Their Interaction*

In early 2012, the war on women and the war on religion narratives

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84. See *The State of Religious Liberty in the United States: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 112th Cong. 1 (2011).

85. See *The State of Religious Liberty in the United States: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 112th Cong. 47-48 (2011) (statement of Colby May, Director & Senior Counsel, American Center for Law & Justice), available at [http://judiciary.house.gov/hearings/printers/112th/112-63\\_70913.PDF](http://judiciary.house.gov/hearings/printers/112th/112-63_70913.PDF).

86. See *The State of Religious Liberty in the United States: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 112th Cong. 11-13 (2011) (statement of Most Reverend William C. Lori, Bishop of Bridgeport). Lori was later elevated to Archbishop.

87. *Id.*

collided in the controversy over the contraception rule. On Capitol Hill, anti-choice members saw the President's January 20, 2012 reaffirmation of the rule as a moment of opportunity. House Speaker John Boehner quickly weighed in, saying "I think this mandate violates our Constitution . . . . I think it violates the rights of these religious organizations."<sup>88</sup> Religious liberty was the phrase of the day, and one after another, anti-choice members of Congress added their voices to the choir.<sup>89</sup> Multiple congressional hearings were held on the rule, each employing the war on religion frame. They had titles like "Do New Health Law Mandates Threaten Conscience Rights and Access to Care?"<sup>90</sup> and "Executive Overreach: The HHS Mandate Versus Religious Liberty."<sup>91</sup> Multiple bills were introduced seeking to undermine the rule using the same framing.<sup>92</sup>

On February 16, 2012, Representative Darrell Issa held a hearing in the House Committee on Oversight and Government Reform that would come to be seen as a turning point. It was styled in the war on religion frame,

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88. Ricardo Alonso-Zaldivar, *Boehner: Feds Should Back off Birth Control Order*, SAN DIEGO UNION-TRIB. (Feb. 2, 2012, 8:51 AM), <http://www.utsandiego.com/news/2012/feb/02/boehner-feds-should-back-off-birth-control-order/>.

89. See, e.g., Steven Ertelt, *154 Members of Congress Object to Pro-Abortion Obama Mandate*, LIFE NEWS (Feb. 7, 2012, 2:06 PM), <http://www.lifenews.com/2012/02/07/154-members-of-congress-object-to-pro-abortion-obama-mandate/>; Pete Kasperowicz, *Sen. Rubio Pushes for Faith Exemption from Birth-Control Mandate*, THE HILL (Jan. 31, 2012, 10:42 AM), <http://thehill.com/blogs/floor-action/senate/207601-rubio-looks-to-ovetern-obamas-birth-control-regulations>; John Parkinson, *Boehner Calls HHS Contraception Mandate an 'Attack on Religious Freedom,' Pledges Congressional Action*, ABC NEWS (Feb. 8, 2012, 1:39 PM), <http://abcnews.go.com/blogs/politics/2012/02/boehner-calls-contraception-rule-an-attack-on-religious-freedom-pledges-congressional-action/>.

90. *Do New Health Law Mandates Threaten Conscience Rights and Access to Care?: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 112th Cong. 1 (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75050/pdf/CHRG-112hhrg75050.pdf>.

91. *Executive Overreach: The HHS Mandate Versus Religious Liberty: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 1 (2012), available at [http://judiciary.house.gov/hearings/printers/112th/112-101\\_73101.pdf](http://judiciary.house.gov/hearings/printers/112th/112-101_73101.pdf).

92. See Religious Freedom Restoration Act of 2012, S. 2043, 112th Cong. (2012) (introduced Jan. 30, 2012); Religious Freedom Restoration Act of 2012, H.R. 3897 (2012) (introduced Feb. 3, 2012); Religious Liberty Protection Act of 2012, H.R. 3982, 112th Cong. (2012) (introduced Feb. 8, 2012); Religious Freedom Protection Act of 2012, S. 2092, 112th Cong. (2012) (introduced Feb. 9, 2012); S. Amdt. 1520 to S. 1813 (Blunt Amendment), 112th Cong. (2012) (introduced Feb. 9, 2012); see also Respect for Rights of Conscience Act of 2011, H.R. 1179 (2011) (introduced Mar. 17, 2011); Respect for Rights of Conscience Act of 2011, S. 1467, 112th Cong. (2011) (introduced Aug. 2, 2011).

titled “Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?”<sup>93</sup> The hearing, however, ended up elevating the war on women narrative.

The hearing featured a panel of all-male clergy and theologians, each testifying against the coverage requirement. Notably absent from that first panel was a woman’s voice. The Democratic minority had proposed Georgetown law student Sandra Fluke as their witness.<sup>94</sup> She would have testified about the importance of coverage and how she and her peers had been harmed by their university’s refusal to allow contraceptive coverage in the student insurance plan.<sup>95</sup> Chairman Issa, however, denied her permission to participate, determining that Ms. Fluke was not “appropriate” or “qualified.”<sup>96</sup> His explanation perfectly encapsulated the way in which the war on religion frame attempts to read women out of these policy debates. In his view, this was “not a hearing on the policies or the details related to the single issue of ObamaCare [sic] and this particular mandate. This hearing is about religious freedom.”<sup>97</sup> He went on to note that the men on the panel were from a number of religious denominations and were there “to speak about a broad question.”<sup>98</sup> The panelists were Catholic, Lutheran, and Orthodox Jewish clergy, a Baptist theologian, and a professor of moral philosophy from Union University. They all testified about the contraceptive coverage rule.<sup>99</sup>

In excluding Fluke from the panel, Issa ended up advancing the war on women narrative rather than downplaying it. Representative Carolyn Maloney captured the response by asking, “What I want to know is, where are the women?” before walking out of the hearing in protest.<sup>100</sup> Fluke similarly told ABC News, “I can understand that [the issue] is connected to

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93. *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight & Reform*, 112th Cong. 1 (2012), available at <http://oversight.house.gov/wp-content/uploads/2012/06/02-16-12-Full-Committee-Hearing-Transcript.pdf> [hereinafter *Lines Crossed*].

94. *Id.* at 3.

95. *Id.* at 3-4.

96. *Id.* at 35 (statement of Representative Darrell Issa).

97. *Id.*

98. *Id.* at 35-36.

99. *Id.* at 44, 59, 65-67, 95.

100. See Laura Bassett & Amanda Terkel, *House Democrats Walk Out of One-Sided Hearing On Contraception Calling It An ‘Autocratic Regime,’* HUFFINGTON POST (Feb. 15, 2012, 2:00 PM), [http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out\\_n\\_1281730.html](http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out_n_1281730.html). Representative Mike Quigley and Del. Eleanor Holmes Norton also walked out. *Id.*



religion, but I don't understand how you can have an open conversation without hearing from the women who have been personally affected by this."<sup>101</sup> A photo of the all-male panel quickly became iconic; it was widely circulated on social media<sup>102</sup> and was still being referenced a year later.<sup>103</sup> Admonitions to "let Sandra speak" and queries of "where are the women" were a regular feature on Facebook walls and Twitter feeds.<sup>104</sup>

Soon thereafter, conservative radio talk-show host Rush Limbaugh weighed in. He was baffled that Fluke would want to testify before Congress about the importance of access to affordable contraception. He concluded that the only reason Fluke would be so intent on giving such testimony must be that she and her friends were "having so much sex that they're going broke."<sup>105</sup> In true Limbaugh fashion, he did not mince words.

What does it say about the college co-ed [Sandra] Fluke, who goes before a congressional committee and essentially says that she must be paid to have sex, what does that make her? It makes her a slut, right? It makes her a prostitute. She wants to be paid to have sex. She's having so much sex she can't afford the contraception. She wants you and me and the taxpayers to pay her to have sex. What does that make us? We're the pimps.<sup>106</sup>

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101. Tom Shine, *Rep. Darrell Issa Bars Minority Witness, a Woman, on Contraception*, ABC NEWS (Feb. 16, 2012, 9:56 AM), <http://abcnews.go.com/blogs/politics/2012/02/rep-darrell-issa-bars-minority-witness-a-woman-on-contraception-2/>.

102. Within two hours of being posted, the image had 20,000 shares. See Remarks of Amy Taylor, Planned Parenthood Fed'n of Am., Political Director, YCWA What Women Want Conference (June 7, 2013).

103. See Cecile Richards, *Birth Control Works . . . But Only When Women Have Access to It*, HUFFINGTON POST (Feb. 15, 2013, 11:47 PM), [http://www.huffingtonpost.com/cecile-richards/birth-control-worksbut-on\\_b\\_2695975.html](http://www.huffingtonpost.com/cecile-richards/birth-control-worksbut-on_b_2695975.html). This was not the first time Congress had held hearings on contraception with no female voices. In 1970, Sen. Gaylord Nelson held hearings on the safety of the birth control pill; women's rights activists "were struck by the complete absence of any testimony from women based on their experiences." Amy Bloom, *The Pill Hearings (1970)*, NETWORK NEWS, Jan/Feb 1995, available at [https://www.nwhn.org/pill\\_hearings](https://www.nwhn.org/pill_hearings). Indeed, it was the fact that this image harkened back decades that resonated so deeply with women around the country.

104. Cf. *Did Social Media Take Down Rush Limbaugh?*, SLATE (Mar. 5, 2012, 5:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/im/2012/03/rush\\_limbaugh\\_sandra\\_fluke\\_did\\_twitter\\_and\\_facebook\\_ruin\\_the\\_radio\\_host\\_s\\_career\\_.html](http://www.slate.com/articles/news_and_politics/im/2012/03/rush_limbaugh_sandra_fluke_did_twitter_and_facebook_ruin_the_radio_host_s_career_.html).

105. Todd Gregory & Chelsea Rudman, *Limbaugh Launched 46 Personal Attacks On Fluke; He Apologized For Two Words*, MEDIA MATTERS FOR AM. (Mar. 5, 2012, 7:08 PM), <http://mediamatters.org/research/2012/03/05/limbaugh-launched-46-personal-attacks-on-fluke/184269>.

106. Carolyn Lochhead, *Rush Limbaugh Sends Nancy Pelosi to the Barricades*, S.F. CHRONICLE (Mar. 1, 2012, 1:41 PM), <http://blog.sfgate.com/nov05election/2012/03/01/rush-limbaugh-sends-nancy-pelosi-to-the-barricades/>. The next day he continued: "So,

This moment played a key role in solidifying the war on women narrative. It was not just that Limbaugh's comments were offensive or inflammatory. What made the difference was that they showcased a theme underlying much of the opposition to the contraception rule: uneasiness with women's sexual agency and the ability to separate sex from procreation. Claims about the purpose of sex and women's relationship to it have both secular and religious dimensions. Professor Helen Alvaré argues that the birth control culture "immiserates" women, and posits that "separation of the idea of sex from the idea of procreation . . . leads to a market in which sex becomes the price women pay for even casual relationships with men; women are drawn into this market against their preferences, feeling they have no choice."<sup>107</sup> Alvaré then ties that position to Catholic Church teachings:

The underlying reason that the Church opposes the IOM's recommendations is its opposition to the trivialization of sex. At bottom, the Church seeks to preserve the idea that 'sex makes babies.' Such a formulation indicates on its face that there is something unique, even sacred, about sex, and that sex is intrinsically associated with committed adult relationships.<sup>108</sup>

Limbaugh's attack on Fluke and her exclusion from the hearing helped elevate the larger debate from the particular health care services that were being threatened by various proposals to an issue that went to the core of women's dignity. It put into stark relief the ways in which these issues are about women qua women, despite Representative Issa's efforts to characterize them as about religion qua religion. Fluke's response honed in on this theme:

I guess my reaction is the reaction a lot of women have when they've been called these names. Initially you're stunned but then, very quickly, you're outraged because this is, historically, the kind of language that is used to silence women, especially women who stand up and say that these are their reproductive health care needs and this is what they need. And what's been amazing to me today is the outpouring of support. Everyone from members of Congress to Georgetown faculty to so many

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Ms. Fluke and the rest of you feminazis, here's the deal: If we are going to pay for your contraceptives and thus pay for you to have sex, we want something for it. And I'll tell you what it is. We want you to post the videos online so we can all watch." *UPDATED: Limbaugh's Misogynistic Attack on Georgetown Law Student Continues with Increased Vitriol*, MEDIA MATTERS FOR AM. (Mar. 1, 2012, 3:26 PM), <http://mediamatters.org/blog/2012/03/01/updated-limbaughs-misogynistic-attack-on-george/184248#february29>.

107. Helen Alvaré, *Contracepting Conscience*, PUB. DISCOURSE (July 25, 2011), <http://www.thepublicdiscourse.com/2011/07/3577/>.

108. *Id.*

women who've contacted me, and I think it's clear from what they've said that they're not going to be silenced by this.<sup>109</sup>

The President carried this message about women's equal citizenship forward when he reached out to Fluke to support her. He thanked her for speaking out about an issue affecting so many women, and told her that her parents should be proud of her.<sup>110</sup> He later explained that he was thinking of his daughters when he called Fluke.

One of the things I want them to do as they get older is engage in issues they care about, even ones I may not agree with them on . . . I want them to be able to speak their mind in a civil and thoughtful way. And I don't want them attacked or called horrible names because they're being good citizens.<sup>111</sup>

After this episode, those opposed to the rule based on genuine religious beliefs became less able to make claims about religious liberty that could be heard separately from the din of Limbaugh's chauvinism. The war on religion narrative was thereby somewhat muted while the war on women narrative continued to grow louder. Fluke went on to become a regular presence on the political media circuit and a campaign trail staple for the President.<sup>112</sup> By the end of election season, the war on women—and in particular contraception—was an integral part of Democratic campaign

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109. Alex Alvarez, *Georgetown Student Sandra Fluke Responds to Being Called 'Slut,' 'Prostitute,' by Limbaugh*, MEDIAITE (Mar. 1, 2012, 8:51 PM), <http://www.mediaite.com/tv/georgetown-student-sandra-fluke-responds-to-being-called-slut-prostitute-by-limbaugh/>.

110. Lucy Madison, *Obama Calls Sandra Fluke to Offer Support over Limbaugh Comments*, CBS NEWS (Mar. 2, 2012, 3:41 PM), [http://www.cbsnews.com/8301-503544\\_162-57389692-503544/obama-calls-sandra-fluke-to-offer-support-over-limbaugh-comments/](http://www.cbsnews.com/8301-503544_162-57389692-503544/obama-calls-sandra-fluke-to-offer-support-over-limbaugh-comments/).

111. Nina Mandell, *Obama: I was thinking about Sasha, Malia, when I called Sandra Fluke*, N.Y. DAILY NEWS (Mar. 6, 2012, 5:04 PM), <http://www.nydailynews.com/news/politics/obama-thinking-sasha-malia-called-sandra-fluke-article-1.1034100>.

112. See, e.g., Kate Pickert, *Who Should be Time's Person of the Year? The Candidates: Sandra Fluke*, TIME (Nov. 26, 2012), [http://www.time.com/time/specials/packages/article/0,28804,2128881\\_2128882\\_2129176,00.html](http://www.time.com/time/specials/packages/article/0,28804,2128881_2128882_2129176,00.html) (noting that Fluke “weathered the attention with poise and maturity and emerged as a political celebrity. Democrats gave her a national-convention speaking slot as part of their push to make reproductive rights a central issue in the 2012 presidential campaign—one that helped Barack Obama trounce Mitt Romney among single women on Election Day”); Laura Bassett, *Sandra Fluke Continues Busy Campaign Tour in Ohio, New York*, HUFFINGTON POST (Oct. 1, 2012, 5:50 PM), [http://www.huffingtonpost.com/2012/10/01/sandra-fluke-campaign-ohio-new-york\\_n\\_1930417.html](http://www.huffingtonpost.com/2012/10/01/sandra-fluke-campaign-ohio-new-york_n_1930417.html); Christi Parsons, *Sandra Fluke Hits the Campaign Trail with Obama*, L.A. TIMES (Aug. 8, 2012), <http://articles.latimes.com/2012/aug/08/news/la-pn-sandra-fluke-hits-the-campaign-trail-with-obama-20120808>.

rhetoric. The Democratic National Convention featured no fewer than ten speakers talking about women's reproductive rights, including Sandra Fluke herself.<sup>113</sup>

The war on women narrative was of course not limited to the contraception rule or to issues that intersect with claims about religious liberty. But throughout, contraception remained a hallmark—in part because the opposition to it remained vocal and constant, and in part because the policy achievement was so significant from the women's health and rights perspective.

The war on religion frame also continued to play out in campaign efforts as Mitt Romney picked up the theme.

I think there is in this country a war on religion . . . . I think there is a desire to establish a religion in America known as secularism. . . . They gave it a lot of thought and they decided to say that in this country that a church—in this case, the Catholic Church—would be required to violate its principles and its conscience and be required to provide contraceptives, sterilization and morning after pills to the employees of the church . . . . We are now all Catholics. Those of us who are people of faith recognize this is [. . .] an attack on one religion is an attack on all religion.<sup>114</sup>

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“War on women” and “war on religion” are just handy phrases—shorthand for larger and older controversies. Despite the fact that President Obama was reelected on the war on women message with the largest gender gap in history,<sup>115</sup> and that the contraceptive coverage rule came out

113. See Representative Debbie Wasserman Schultz, Member, U.S. House of Representatives, Remarks at the Democratic Nat'l Convention (Sept. 6, 2012); Caroline Kennedy, Remarks at the Democratic Nat'l Convention (Sept. 6, 2012); Joe Biden, Vice President of the U.S., Remarks at the Democratic Nat'l Convention (Sept. 6, 2012); Cecile Richards, President, Planned Parenthood Fed'n of America, Remarks at the Democratic Nat'l Convention (Sept. 5, 2012); Sandra Fluke, Remarks at the Democratic Nat'l Convention (Sept. 5, 2012); Nancy Pelosi, Minority Leader of the U.S. House of Representatives, Remarks at the Democratic Nat'l Convention (Sept. 5, 2012); Michelle Obama, First Lady of the U.S., Remarks at the Democratic Nat'l Convention (Sept. 4, 2012); Nancy Keenan, President, NARAL Pro-Choice America, Remarks at the Democratic Nat'l Convention (Sept. 4, 2012); Representative Barbara Lee, Member, U.S. House of Representatives, Remarks at the Democratic Nat'l Convention (Sept. 4, 2012); Kathleen Sebelius, U.S. Sec'y of Health & Hum. Servs., Remarks at the Democratic Nat'l Convention (Sept. 4, 2012).

114. David Edwards, *Romney: Obama Wants to 'Establish a Religion Called Secularism'*, RAW STORY (Apr. 3, 2012, 9:03 AM), <http://www.rawstory.com/rs/2012/04/03/romney-obama-wants-to-establish-a-religion-called-secularism/>.

115. Jonathan Easley, *Gallup: 2012 Election had the Largest Gender Gap in Recorded History*, HILL (Nov. 9, 2012, 3:17 PM), <http://thehill.com/blogs/blog-briefing-room/news/267101-gallup-2012-election-had-the-largest-gender-gap-in->

mostly intact, we can see both themes continue to play out in tensions over the contraception rule. These tensions concern the way that two sets of institutions—(1) non-profits that assert a religious identity and (2) for-profit businesses—are understood when measures pitting women’s rights against religious belief are considered. These institutions are discussed in Parts IV and V, respectively.

Religious freedom is a sacred principle in America, but it has never been—and should not be—absolute. We have the right to hold religious beliefs, and to act on them, but not to the detriment of others. Without that limiting principle, other values—like equality—would always be secondary to claims sounding in religion. Professor Leslie Griffin has noted that “religions are comprehensive doctrines that govern all aspects of adherents’ lives,” and therefore we cannot give special treatment to all “religiously motivated conduct [no matter how attenuated]” because that would put “religious citizens and corporations completely outside of the orbit of law.”<sup>116</sup>

This question is squarely presented in claims over the contraception rule. Opponents argue that it infringes on their religious freedom by requiring them to facilitate, if indirectly, someone else’s use of birth control that they considered sinful.<sup>117</sup> Advocates of an expansive coverage rule counter that introducing loopholes would impose a set of religious beliefs on women who do not hold them and restrict women’s access to reproductive health care, thereby undermining their health and equality.<sup>118</sup> Moreover, if such indirect facilitation crosses the line into protected religious activity, claims of religious liberty could override important protections in many spheres of life.

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history.

116. Leslie Griffin, *Misunderstanding the Mandate*, ACS BLOG (Jan. 8, 2013), <http://www.acslaw.org/acsblog/misunderstanding-the-mandate>; see also Richard Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 3-4 (2013) (arguing for such an outcome: “[t]he desire (if not the obligation) to live one’s life in a manner wholly consistent with one’s faith generates a yearning on the part of many to form, join, and/or patronize associations that reflect such faith—including business associations. To the extent that law hinders the fulfillment of such desires, law inhibits the realization of the free exercise of religion.”).

117. See Frederick Geddicks, *With Religious Liberty for All: A Defense of the Affordable Care Act’s Contraception Coverage Mandate*, ACS ISSUE BRIEF (Oct. 18, 2012), available at [http://www.acslaw.org/sites/default/files/Gedicks\\_-\\_With\\_Religious\\_Liberty\\_for\\_All\\_1.pdf](http://www.acslaw.org/sites/default/files/Gedicks_-_With_Religious_Liberty_for_All_1.pdf).

118. See Sarah Lipton-Lubet, *Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule*, ACLU USING RELIGION TO DISCRIMINATE BRIEFING PAPER (Oct. 2012), available at [http://www.aclu.org/files/assets/promoting\\_equality\\_\\_an\\_analysis\\_of\\_the\\_federal\\_contraceptive\\_coverage\\_rule.pdf](http://www.aclu.org/files/assets/promoting_equality__an_analysis_of_the_federal_contraceptive_coverage_rule.pdf).

## IV. WHY THE ACCOMMODATION MATTERS

Although the contraception rule remains a major victory, its current iteration is a departure from its original content. That departure is a result of the political resonance of the war on religion narrative. The original rule appropriately treated secular and religiously affiliated non-profit institutions alike. It was fully in line with constitutional and statutory religious liberty protections.<sup>119</sup> As discussed in Part I, however, this resulted in claims that the Administration was attacking religion by imposing a generally applicable requirement on institutions that attest a religious identity. The Administration responded with a proposal that it hoped would quell the criticism while keeping the rule mostly intact.

The accommodation was met with a wave of approval from liberal—leaning commentators who had been squeamish about the original rule. Their thinking seems to go: institutions are protected and women get coverage—everyone is happy, no harm no foul. But that thinking obscures the consequences down the line from treating religiously affiliated institutions that operate in the public sphere differently than their secular counterparts. Equally important, it ignores the dignitary harms to women from the continuing stigmatization of reproductive health care.

*A. The Status of Institutions that Hold Themselves Out as Religious Organizations*

In promulgating the accommodation, the Administration explained that it is intended to reach “nonprofit religious institutional health care providers, educational institutions, and charities.”<sup>120</sup> Religiously affiliated hospitals, universities, and social service agencies are all institutions that operate in the public sphere and typically by public rules.<sup>121</sup> They employ individuals of many faiths and no faith, and those employees deserve no fewer protections than their counterparts at institutions with no religious affiliation.<sup>122</sup> Most of these institutions take a significant number of

119. See Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. Rev. 151, 164 (2012); Geddis, *supra* note 117; Lipton-Lubet, *supra* note 118.

120. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54).

121. See ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002), available at <http://www.aclu.org/files/FilesPDFs/ACF911.pdf> (laying out the principle that institutions that operate in the public sphere should play by public rules).

122. Title VII of the Civil Rights Act—the federal law barring employment discrimination—allows a certain set of religious organizations to discriminate in hiring on the basis of religion (i.e. to favor members of a certain faith). That exception applies only to hiring and firing—not to discrimination in benefits—and only to religion. It does not permit these institutions to discriminate on the basis of sex or race.

government dollars to help fund their operations (although the lack of government funding should certainly not make institutions immune from the need to comply with general laws). Treating them differently, as the accommodation does, risks setting a bad precedent.<sup>123</sup> What's more, while some may see a bright line separating religiously affiliated hospitals, universities, and social service agencies from other institutions and businesses, for others the lines are blurred. The plaintiffs in the more than forty lawsuits brought by for-profit businesses challenging the contraception rule insist that there is no valid distinction between a religiously affiliated social service agency and a mining company owned by a devout individual.<sup>124</sup>

We can already see the danger of this approach in the response to the accommodation from some liberal-leaning commentators. Washington Post columnist E.J. Dionne, who severely criticized the original rule, declared with relief that "America's big religious war ended [with the publication of the proposed accommodation]. Or at least it should have."<sup>125</sup> Dionne's commentary throughout the debate was representative of a common trope—that while he supports contraception, religiously affiliated institutions should not be imposed upon.<sup>126</sup> In other words, the

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See 42 U.S.C. § 2000(e).

123. The Administration has stated that it will not use the eligibility criteria for the exemption or the accommodation in any other context. Both proponents and opponents of contraceptive coverage agree with that approach, although for opposite reasons.

124. See *infra* Part V.

125. E.J. Dionne, *From Obama, an Olive Branch to the Catholic Church on Contraception Coverage*, WASH. POST (Feb. 1, 2013), [http://articles.washingtonpost.com/2013-02-01/opinions/36679960\\_1\\_contraception-requirement-contraception-coverage-religious-liberty](http://articles.washingtonpost.com/2013-02-01/opinions/36679960_1_contraception-requirement-contraception-coverage-religious-liberty).

126. Many point to Dionne's critiques of the rule when discussing the accommodation and how the Administration should treat institutions like religiously affiliated non-profits. See, e.g., *Catholic Bishops, Conservatives Reject White House Contraception Compromise*, FRONTRUNNER (Feb. 13, 2012) ("E.J. Dionne, whose criticism of the initial HHS ruling was widely noted, says in the Washington Post [] that it is 'hard to comprehend why President Obama, who has been a critic of culture wars for so long, did not try to defuse this explosive question from the beginning.'"); *Obama's Breach of Faith*, BELLEVILLE NEWS-DEMOCRAT (Feb. 4, 2012) ("Even the liberal Catholics like Washington Post columnist E.J. Dionne, an Obama supporter, are appalled by his effrontery."); *Obamacare Rules Violate Religious Liberty*, TAMPA TRIB. (Dec. 8, 2011), <http://www2.tbo.com/news/opinion/2011/dec/08/meopino1-obamacare-rules-violate-religious-liberty-ar-332217/> ("As Washington Post columnist E.J. Dionne pointed out, 'a broader exemption would be a modest concession, honoring the rights of religious institutions that liberals and Obama have long respected.'"); Patricia O'Donovan, *Church Rails against Rule as an Affront to Religious Liberty*, BOS. GLOBE (Feb. 7, 2012), <http://www.bostonglobe.com/opinion/letters/2012/02/07/church-rails-against-rule-affront-religious-liberty/xKgRe>

accommodation reaffirmed the notion that creating loopholes for these institutions is the best course of action.

Dionne's characterization of the debate highlights how ingrained the impulse toward accommodation can be where women's health issues are involved, and therefore how important it is to fight against it. He blames the Obama Administration for a "bitter and unnecessary clash with the Roman Catholic Church."<sup>127</sup> He then goes on to say that the bishops erred in describing their claim as one of "religious liberty."<sup>128</sup> By that he appears to mean that the claim does not rise to the level of constitutional (or presumably statutory) law, and that voicing it in that register goes too far. But at the same time, he argues that as a prudential matter—as a matter of values—the bishops had both the upper hand and the truer claim. That as a society we should choose to insulate religiously affiliated institutions from compliance with the laws that apply to the rest of us. Dionne is in essence positing that although no religious freedom rights are infringed, we should

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LCwPCRBnDYDGogHMJ/story.html ("Dionne goes on to describe a compromise policy under a current Hawaii law that allows insurers to let employees purchase their own contraceptives at a modest cost outside of the Catholic institution's plan if they wish."); Mark Trumbull, *Can Obama's Health-Care Law Force Catholics to Support Birth Control?*, CHRISTIAN SCI. MONITOR (Jan. 30, 2012), <http://www.csmonitor.com/USA/Politics/2012/0130/Can-Obama-s-health-care-law-force-Catholics-to-support-birth-control> ("Washington Post political columnist E.J. Dionne argued that the White House has blundered on an issue, church-state relations, on which the president has in the past shown considerable sensitivity."); Kathryn Lopez, *White House Mandate Ignites Firestorm*, TOWNHALL (Feb. 13, 2012), [http://townhall.com/columnists/kathrynlopez/2012/02/13/white\\_house\\_mandate\\_ignites\\_firestorm/page/full/](http://townhall.com/columnists/kathrynlopez/2012/02/13/white_house_mandate_ignites_firestorm/page/full/) ("George Weigel, the conservative biographer of Pope John Paul II, and E.J. Dionne, a progressive columnist—Catholics on opposing sides of the political aisle—recently sat side by side."); Andrew Sullivan, *How Obama Set a Contraception Trap for the Right*, THE DAILY BEAST (Feb. 13, 2012, 12:00 AM), <http://www.thedailybeast.com/newsweek/2012/02/12/andrew-sullivan-how-obama-set-a-contraception-trap-for-the-right.html> ("Suddenly no-drama Obama was neck deep in the kind of religious warfare he vowed to avoid. Many pundits—led by older white Catholic men, such as Joe Scarborough and my friend Chris Matthews and even the fair-minded liberal Washington Post columnist E.J. Dionne—declared his decision on contraception as not only morally wrong but a politically disastrous violation of religious freedom.").

127. E.J. Dionne, *From Obama, an Olive Branch to the Catholic Church on Contraception Coverage*, WASH. POST (Feb. 1, 2013), [http://articles.washingtonpost.com/2013-02-01/opinions/36679960\\_1\\_contraception-requirement-contraception-coverage-religious-liberty](http://articles.washingtonpost.com/2013-02-01/opinions/36679960_1_contraception-requirement-contraception-coverage-religious-liberty).

128. *See id.* ("The church made a mistake in arguing its case on the grounds of 'religious liberty.' By inflating their legitimate desire for accommodation into a liberty claim, the bishops implied that the freedom not to pay for birth control rose to the same level as, say, the freedom to worship or to preach the faith. This led to wild rhetorical excesses, including a comparison of Obama to Hitler and Stalin by one bishop and an analogy between the president's approach and the Soviet constitution by another.").



nonetheless defer to claims about religious belief, regardless of what other interests are sacrificed.

The USCCB argues that even with the accommodation the contraceptive coverage rule remains an affront because it creates an artificial distinction between “the church and its ministries” (i.e., hospitals, universities, social service agencies): “[g]overnment has no place defining religion and religious ministry. HHS thus creates and enforces a new distinction—alien to both our Catholic tradition and to federal law—between our houses of worship and our great ministries of service.”<sup>129</sup> Federal law, of course, employs myriad definitions of religious organizations for myriad purposes. The Internal Revenue Code alone has multiple categorizations; indeed, the definition the HHS rule uses comes directly from code.<sup>130</sup> Eliminating these distinctions in all contexts would have far reaching implications—implications that proponents of eliding the distinction in this context would likely vigorously resist. For example, government funding of houses of worship is unconstitutional,<sup>131</sup> but government dollars regularly flow by the millions to religiously affiliated hospitals.<sup>132</sup>

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129. *United for Religious Freedom*, Admin. Comm. of the U.S. Conf. of Catholic Bishops, U.S. Conf. of Cath. Bishops (Mar. 14, 2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm>.

130. Religion law expert, Professor Bob Tuttle has made the incisive observation that the government uses definitions for government purposes, not spiritual ones. Those lines need not map onto the ones that religious communities develop for themselves. See Bob Tuttle, *Remarks at the Georgetown University Law Center Symposium on Contraception and Conscience: What is the Burden on Religious Exercise?*, YOUTUBE (Sept. 21, 2012), <http://www.youtube.com/watch?v=1J4rCsq732c>.

131. See, e.g., *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Bowen v. Kendrick*, 487 U.S. 589, 610-12, 621 (1988); *Roemer vs. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Steele v. Indus. Dev. Bd.*, 301 F. 3d 401, 408-09 (6th Cir. 2002); see also *Mitchell v. Helms*, 530 U.S. 793, 855-56 (2000) (O’Connor, J. concurring); *id.* at 818 (plurality opinion); *id.* at 890-91 (Souter, J., dissenting).

132. See MERGER WATCH, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY SPONSORED HOSPITALS IN THE UNITED STATES 1, 2 (2002) (documenting the taxpayer dollars that flow to religiously sponsored hospitals); see also BARBRA MANN WALL, *AMERICAN CATHOLIC HOSPITALS* 112 (Rutgers University Press, 1st ed. 2010); cf. Bridgette Dunlap, *Self-Certification and the Contraceptive Coverage Rule: What Does it Mean for an Institution to “Hold Itself Out as Religious?”*, RH REALITY CHECK (Apr. 1 2013, 10:50 PM), <http://rhrealitycheck.org/article/2013/04/01/the-problem-with-self-certification-in-the-new-contraceptive-coverage-rule-what-does-it-mean-for-an-institution-to-hold-itself-out-as-religious/> (discussing the “pattern of religiously-affiliated institutions characterizing themselves one way when recruiting or seeking public funding and another when demanding to be exempt from laws that

The push to treat hospitals and social service agencies as if they were churches—and to insulate them from the laws that apply to the rest of us—would undermine equality in a number of ways. In 2011, the U.S. House of Representatives passed a bill that would have allowed a hospital's religious restrictions to trump protections for patients in medical emergencies and withhold emergency abortion care.<sup>133</sup> The bill thankfully failed to gain support in the Senate, but efforts to legitimize religiously affiliated hospitals' desire to ignore generally applicable patient protections and the medically indicated standard of care continue. Religiously affiliated hospitals also routinely deny women access to a range of reproductive health care from emergency contraception to sterilization.<sup>134</sup>

It can be helpful to think about these claims in contexts unrelated to reproductive health. In April 2010, the Obama Administration issued a policy protecting hospital visitation rights for same-sex couples at any hospital participating in Medicaid or Medicare.<sup>135</sup> That policy treats religious hospitals no differently from any other. But what if it did not? What if the accommodation principle were applied there? Would hospitals be able to opt out by sending their LGBT patients elsewhere, or by placing them in a single wing run by another entity?<sup>136</sup> Or consider the case of adoption agencies. Some states require that social service agencies not discriminate against LGBT individuals when it comes to placing children. Catholic Charities—accommodated for purposes of the contraception rule—has been held to the same standard as other social service agencies when it comes to government contracts to run adoptions programs.<sup>137</sup> Would proponents of the contraception accommodation argue for an accommodation here?

Cardinal Dolan, head of the USCCB, described the contraception accommodation as “appear[ing] to offer second-class status to our first-class institutions in Catholic health care, Catholic education and Catholic charities. HHS offers what it calls an ‘accommodation’ rather than

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govern secular institutions”).

133. Protect Life Act, H.R. 358, 112th Cong. (2011).

134. See MERGER WATCH, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY SPONSORED HOSPITALS IN THE UNITED STATES (2002).

135. Ari Shapiro, *Obama: Hospitals Must Grant Same-Sex Visitations*, NAT'L PUB. RADIO (Apr. 16, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=126034014>.

136. Creating a “hospital within a hospital” is the approach that some institutions have used to continue to provide some reproductive health services after mergers between religious and secular hospitals. See MANN WALL, *supra* note 132, at 169.

137. See *Catholic Charities v. DCFS*, AM. CIVIL LIBERTIES UNION OF ILL., <http://www.aclu-il.org/catholic-charities-v-dcfs22/> (last visited Mar. 15, 2013).

accepting the fact that these ministries are integral to our church and worthy of the same exemption as our Catholic churches.”<sup>138</sup> From a reproductive rights perspective, the accommodation is certainly far better than expanding the exemption to include all non-profits that would hold themselves out as religious. But when we celebrate the accommodation, we reinforce a world in which women can be second-class citizens—where women’s rights come second to others’ religious beliefs.

### *B. Harms to Women’s Dignity*

Coverage for contraception advances women’s health and equality. Access to affordable and effective contraception facilitates women’s participation in all parts of society. Women explain that birth control helps them “to support [themselves] financially,” “to stay in school,” and “to get or keep [a] job or have a career.”<sup>139</sup> Even the U.S. Supreme Court has noted “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>140</sup> Put simply, contraception changes women’s lives.

Importantly, if the accommodation works as intended, employees at accommodated organizations should be able to obtain contraception without cost-sharing,<sup>141</sup> mitigating much of the harm from institutions’ refusal to include contraceptive coverage in insurance plans. But it leaves in place a dignitary harm that should not be underestimated. The accommodation siphons off contraception into a category separate from all other health care, signaling that contraception is somehow different, either lesser or inherently controversial—much in the same way that abortion has been isolated and stigmatized over the years.

When we reason by analogy about the contraception rule, we often suggest a Jehovah’s Witness employer that might want to withhold insurance coverage for blood transfusions,<sup>142</sup> or sometimes an Orthodox

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138. Press Release, U.S. Conf. of Catholic Bishops, HHS Proposal Falls Short in Meeting Church Concerns (Feb. 7, 2013), <http://www.usccb.org/news/2013/13-037.cfm>.

139. Jennifer Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *CONTRACEPTION* 467-69 (2013), available at <http://www.guttmacher.org/pubs/journals/j.contraception.2012.08.012.pdf>.

140. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

141. There will inevitably be hiccups that create extra barriers for employees at these institutions. It is to be seen whether those are kinks that will get worked out over time or whether they will be more lasting.

142. See, e.g., Katie Hicks, *Sandra Fluke: Opposing the Contraception Mandate Is Just Like Opposing Leukemia Coverage*, *TOWNHALL* (Feb. 1, 2013, 5:12 PM), <http://townhall.com/tipsheet/katehicks/2013/02/01/sandra-fluke-opposing-the->

Jewish employer that might want to withhold coverage for organ transplants.<sup>143</sup> These examples are meant to draw out the harms of creating exemptions from insurance coverage by pointing to health services that are generally understood as more consequential than contraception. But what if we posited an institution that out of religious belief wanted to withhold coverage for sickle cell anemia treatments, a condition that predominately affects African-Americans? Would the same commentators countenance creating a sphere of insulation for hospitals and social service agencies that hold that belief?<sup>144</sup>

There is also the perception that discriminatory treatment of contraception is not the same as gender discrimination—that contraception is about a commodity. Louise Melling, Deputy Legal Director of the ACLU, has explained that this argument presents a false dichotomy. Distinguishing treatment of contraception from women’s status is no more valid than distinguishing the treatment of sodomy from sexual orientation status.

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contraception-mandate-is-just-like-opposing-leukemia-coverage-n1503446 (quoting Sandra Fluke “[n]ow if you take a step back and think about that, that’s—you know, you work at a restaurant, you work at a store, and your boss is able to deny you leukemia coverage, or contraception coverage, or blood transfusions, or any number of medical concerns that someone might have a religious objection to”).

143. See, e.g., Aram Schvey, *Administration Should Deny Bishops’ Request for a Veto over Women’s Healthcare*, THE HILL’S CONGRESS BLOG (Sept. 30, 2011, 9:30 AM), <http://thehill.com/blogs/congress-blog/healthcare/184741-administration-should-deny-bishops-request-for-a-veto-over-womens-healthcare> (referring to a hypothetical “Orthodox Jewish organization [that] might refuse to cover organ transplants”).

144. Over the course of this debate, I have drawn comparisons to institutions that resisted the 1964 Civil Rights Act’s prohibition on segregation out of religious belief, and the fact that courts did not allow those beliefs to trump integration. See, e.g., Sarah Lipton-Lubet, *Putting Religious Groups’ Opposition to Contraception Into Context*, McCLATCHY NEWSPAPERS (Nov. 11, 2011, 12:53 PM), <http://www.mcclatchydc.com/2011/11/13/v-print/130064/commentary-putting-religious-groups.html>; SARAH LIPTON-LUBET, ACLU, PROMOTING EQUALITY: AN ANALYSIS OF THE FEDERAL CONTRACEPTIVE COVERAGE RULE (Oct. 2012), available at [http://www.aclu.org/files/assets/promoting\\_equality\\_-\\_an\\_analysis\\_of\\_the\\_federal\\_contraceptive\\_coverage\\_rule.pdf](http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf). I sometimes get the response that those just do not seem like real religious beliefs—that they are obviously just a cover for racism—whereas Catholic opposition to contraception is more readily understood as genuine. Religion, however, has long been the source of racially discriminatory beliefs. See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 97 (Harvard University Press 2013); Louise Melling, *Will We Sanction Discrimination?: Can “Heterosexuals Only” Be Among the Signs of Today?*, 60 UCLA L. REV. DISC. 248 (2013).

To cast the contraception mandate as about a good, perhaps to be denied the way other services are denied in insurance, is similarly a “failure to appreciate the extent of the liberty at stake.” The Court in *Lawrence v. Texas* compared the liberty issue there to that involved in personal decisions about ‘marriage, procreation, contraception, family relationships, child rearing, and education.’ Looking to *Planned Parenthood v. Casey*, the *Lawrence* Court noted “the respect the Constitution demands for the autonomy of the person making these choices,” emphasizing that “at the heart of liberty is the right to define one’s own concept of existence.” That, not just a pill, is what is at stake in today’s debate about contraception. The reasoning of the *Lawrence* Court readily applies: “While it is true that the rule applies only to a service, the service targeted is closely correlated with being a woman. Under the circumstances, the law is targeted at more than a service. It is instead directed toward women as a class.”<sup>145</sup>

Although there remains a mechanism through which women at accommodated organizations will receive coverage, separating contraception from other health care still sends a message about women’s equal membership in society.

#### V. FOR WHOM THE TACO BELL TOLLS: FOR-PROFIT BUSINESSES CLAIM A LICENSE TO DISCRIMINATE

In February 2012, USCCB General Counsel Anthony Picarello made headlines when he asserted that no alteration short of total rescission of the contraceptive coverage rule would be acceptable because as long as the rule existed, there would always be some companies required to comply. More concretely, he explained: “If I quit this job and opened a Taco Bell, I’d be covered by the mandate.”<sup>146</sup> In other words, running any for-profit company should be considered an exercise of religious belief that should be insulated from compliance with laws promoting equality.

Although some had previously mentioned this issue in their administrative comments to HHS,<sup>147</sup> this was the first time the claims about private businesses got significant attention. The assertion that for-profit companies should be able to impose religious restrictions on employee health care coverage took many by surprise. Coming during a period in which the war on religion framing of the rule seemed ascendant,

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145. Melling, *supra* note 144, at 255-56 (citations omitted).

146. Richard Wolf & Cathy Lynn Grossman, *Obama Mandate on Birth Control Coverage Stirs Controversy*, USA TODAY (Feb. 8, 2012, 10:36 AM), <http://usatoday30.usatoday.com/news/washington/story/2012-02-08/catholics-contraceptive-mandate/53014864/1>.

147. See USCCB Comments to HHS at 18, Aug. 31, 2011 (explaining that the rule requires “secular” organizations to provide birth control coverage).

commentators asserted that this was an overreach that would clinch the debate for President Obama.<sup>148</sup>

But that did not keep members of Congress from picking up on the for-profit idea and running with it. On March 1, 2012, the Senate only narrowly defeated a provision known as the Blunt Amendment, which

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148. See, e.g., Andrew Rosenthal, *Ask and You Will Receive*, N.Y. TIMES BLOGS (Feb. 14, 2012, 3:15 PM), <http://takingnote.blogs.nytimes.com/2012/02/14/ask-and-you-will-receive/> (“Anthony Picarello, the lawyer for the U.S. Conference of Catholic Bishops, said his taxpayer-subsidized group wanted anyone—Mr. Picarello cited a Taco Bell owner—to be able to refuse to pay for birth control insurance. Stop the federal government from regulating the Church of the Taco Bell Manager!”); Irin Carmon, *A Birth-control Compromise Could Divide the Right*, SALON (Feb. 10, 2012, 3:31 PM), [http://www.salon.com/2012/02/10/a\\_birth\\_control\\_compromise\\_could\\_divide\\_the\\_right/](http://www.salon.com/2012/02/10/a_birth_control_compromise_could_divide_the_right/) (asserting that Picarello’s statement was “getting greedy. As long as the USCCB and Republican opportunists could intimate that Obama was forcing pious priests to offer birth control pills instead of communion, they had a shot at reframing this debate about religious liberty instead of equal access to healthcare for women. But once the bishops made it clear they would take their opposition to birth control to the bitter end—past not only employees of Catholic hospitals and universities, and to all American women interested in no-cost birth control—they lost”); Ed Kilgore, *Bishops to Over-Reach?*, THE WASH. MONTHLY (Feb. 9, 2012, 12:08 PM), [http://www.washingtonmonthly.com/political-animal-a/2012\\_02/bishops\\_to\\_overreach\\_035296.php](http://www.washingtonmonthly.com/political-animal-a/2012_02/bishops_to_overreach_035296.php) (“Now as it happens, the bill being sponsored by Sen. Marco Rubio, which is widely being described as intended to ‘reverse’ the [A]dministration’s decision for a relatively narrow ‘conscience clause,’ appears to widen the clause to the point where it would deal with the ‘Taco Bell’ issue, since it enables any individual employer citing religious objections to contraceptives coverage to evade the mandate.”); Nick Baumann & Kate Sheppard, *Catholic Bishops Want Entire Birth Control Rule Repealed, Not Just the Religious Exemption*, MOTHER JONES (Feb. 9, 2012, 9:11 AM), <http://www.motherjones.com/mojo/2012/02/catholic-bishops-want-entire-birth-control-rule-repealed-not-just-religious-exemption> (“‘If I quit this job and opened a Taco Bell, I’d be covered by the mandate,’ Picarello said. So in short, the bishops want your Catholic boss to be able to decide whether or not you have to pay full freight for your birth control.”); Alec MacGillis, *On Birth Control, Obama Saved by the Taco Bell?*, THE NEW REPUBLIC (Feb. 8, 2012 9:11 AM), <http://www.newrepublic.com/blog/the-stump/100577/birth-control-obama-saved-the-taco-bell#> (“Yes, the fight that the church’s defenders thought was about protecting Catholic Charities and St. Mary’s school down the street from purchasing health plans that violate their leaders’ conscience is now, as the Church sees it, also about protecting the right of *all employers*—including, apparently, fast food franchises—to deny contraception coverage to their employees.”); *The Rachel Maddow Show for February 9, 2012* (MSNBC Broadcast Feb. 9, 2012), [http://www.nbcnews.com/id/46368165/ns/msnbc-rachel\\_maddow\\_show/](http://www.nbcnews.com/id/46368165/ns/msnbc-rachel_maddow_show/) (“And you know, I think for women this is just not an issue, except for a few women, who want to go along with a narrow band of bishops, who actually have said, this Anthony Picarello. He said, no employer should have to provide contraception. He says if he leaves being director of the bishops and he wants to open a Taco Bell, that he shouldn’t have to be able to have to provide insurance coverage for contraception because he’s a good Catholic. Imagine.”).

would have allowed any employer—including for-profit businesses—to withhold coverage of any health service they object to on religious or moral grounds.<sup>149</sup> It reached far beyond reproductive health care to any health care service that insurance plans were required to include under the ACA.<sup>150</sup> Had the amendment been enacted, coverage for prenatal care, testing for HIV, mental health services, and vaccinations could all have been at risk. It is notable that Senate opponents of the rule chose to push forward with a measure as sweeping as the Blunt Amendment when there was other, more targeted, legislation available.

The failure of the Blunt Amendment did not the end claims by businesses to an exemption from the contraception rule.<sup>151</sup> Two weeks after the Amendment's defeat, O'Brien Industrial Holdings filed a lawsuit in federal court in St. Louis, challenging the rule under the Religious Freedom Restoration Act (RFRA), among other theories.<sup>152</sup> O'Brien is a holding company that operates a number of mining and processing businesses; it is closely held by Frank O'Brien and his family. This was the first challenge to the contraceptive coverage rule filed by a for-profit company. Whereas the challenges by non-profit organizations are generally thought of as claims to an institutional right of religion, O'Brien's claims were styled as arguments about individual rights—the right of Frank O'Brien to operate his company in accordance with his

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149. Tom Cohen & Dan Merica, *Senate Kills Controversial Conscience Amendment*, CNN POLITICS (Mar. 1, 2012, 3:55 PM), <http://www.cnn.com/2012/03/01/politics/senate-health-care/>. The Blunt Amendment had been introduced as stand-alone legislation in the form of the Respect for Rights of Conscience Act in the House on March 17, 2011 and the Senate on August 2, 2011, but had received scant attention prior to the winter of 2012.

150. See, e.g., Adam Sewer, *The GOP Plan to Give Your Boss "Moral" Control Over Your Health Insurance*, MOTHER JONES (Feb. 14, 2012, 4:00 AM), <http://www.motherjones.com/politics/2012/02/republican-plan-give-bosses-moral-control-health-insurance> (noting that "a boss who regarded overweight people and smokers with moral disgust could exclude coverage of obesity and tobacco screening from his employees' health plans"). It is notable that Senate opponents of the contraception rule chose to push forward with a measure as sweeping as the Blunt Amendment when there was other more targeted legislation available.

151. Since then, Congress has continued to seek out for-profit corporations. Most recently, the House of Representatives made this an issue in the government shutdown fight of 2013. See Sarah Lipton-Lubet, *House Takes Aim at Women's Health in Shutdown Fight*, ACLU BLOG OF RIGHTS (Sept. 30, 2013, 2:26 PM), <https://www.aclu.org/blog/reproductive-freedom/house-takes-aim-womens-health-shutdown-fight>.

152. Michelle Baumann, *First Secular Business Files Lawsuit over HHS Mandate*, CATHOLIC NEWS AGENCY (Mar. 15, 2012, 4:36 PM), <http://www.catholicnewsagency.com/news/first-secular-business-files-lawsuit-over-hhs-mandate/>.

religious beliefs. Explaining the impetus for the lawsuit, O'Brien's attorney asserted that "[r]eligious liberty is not limited to institutions" and that the rule forces Frank O'Brien to violate his conscience.<sup>153</sup> Put otherwise, they maintain that the business is an extension of the owner's person.<sup>154</sup> This rhetorical move is particularly interesting, given that ninety percent of corporations are closely held, and that by definition, a corporation is created as a distinct legal entity in order to insulate shareholders. The argument in cases like *O'Brien* is that shareholders should be able to have it both ways.<sup>155</sup>

Over time, it seems that the claims of for-profit businesses became normalized. By November 1, 2013, for-profit businesses had filed over forty lawsuits challenging the rule—among them a wastewater treatment company in Minnesota, a furniture manufacturer with several plants across the country, a produce-packing company operating in over twenty states,<sup>156</sup> and most famously, Hobby Lobby, a national craft supply chain store that employs more than 13,000 people.<sup>157</sup> The owners of these businesses come from multiple faith traditions—Evangelical, Mennonite, Catholic.

The contraceptive coverage rule lawsuits can be understood as part of a larger trend about the role of religion in negotiating the way we order

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153. *Id.*

154. In the lawsuits, both the business and the owners are named as plaintiffs. In addition, the plaintiffs argue that a business may bring a claim on its own behalf, as well as on behalf of its owners.

155. The question of whether a corporation can make a claim under the Religious Freedom Restoration Act, as opposed to whether that claim fails under the test set out by the statute, is beyond the scope of this article. That is a question that will play out as the litigation progresses, and will surely be the topic of many articles. Judge Rovner of the Seventh Circuit may have put it well when she wrote "[t]he corporate form may not be dispositive of the claims raised in this litigation, but neither is it meaningless." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at \*5 (7th Cir. 2012) (Rovner, J., dissenting).

156. See *Challenges to the Federal Contraceptive Coverage Rule*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-rule> (last visited Nov. 18, 2013). In all, over 80 lawsuits have been filed challenging the contraception rule, about half brought by for-profit corporations, and the rest brought by non-profit organizations. Courts have for the most part dismissed the non-profit suits as premature—due to the safe harbor there was no immediate injury and the forthcoming accommodation would affect their claims. Now that the accommodation is final, some plaintiffs may drop their claims or decide not to re-file, while others will certainly continue to pursue legal recourse. We may well know more on this front by the time this article is published.

157. See generally *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013).



society and our obligations to one another.<sup>158</sup> More and more, companies have been claiming religious belief as a justification for discriminating against others or eschewing equality-advancing laws.<sup>159</sup> This is a trend that pre-existed the contraceptive coverage rule. Consider the following examples: in 2006, a same-sex couple filed a complaint with the New Mexico Human Rights Division against a photography studio for violating state antidiscrimination law by discriminating against customers based on their sexual orientation.<sup>160</sup> Among other things, Elane Photography argued that the business owner's religious beliefs entitled it to refuse certain customers. Elane Photography's lawyer at the Alliance Defending Freedom explained that "Christians shouldn't be penalized for abiding by their beliefs . . . . The government cannot make people choose between their faith and their job."<sup>161</sup> In 2011, the owners of an Illinois inn asserted that "Bible trumps Illinois law" when they refused to allow a same-sex couple to hold a civil union ceremony there.<sup>162</sup> In 2008, a pharmacy challenged Washington state regulations requiring it to stock emergency contraception, arguing that it violated the pharmacy's free exercise rights.<sup>163</sup>

The contraceptive coverage rule cases take this trend and amplify it,

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158. See generally Richard Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 4-5 (2013) (suggesting that we are likely to see an escalation in "conflict between religiously inspired corporations and government regulations").

159. See Griffin, *supra* note 116.

160. ACLU Issue Page, *Elane Photography, LLC v. Vanessa Willcock*, <https://www.aclu.org/lgbt-rights/elane-photography-llc-v-vanessa-willock> (last visited Nov. 18, 2013).

161. *ADF Attorney Available to Media Following Hearing in Complaint Against N.M. Photographer*, ALLIANCE FOR DEFENDING FREEDOM (Jan. 15, 2008), <http://www.adfmedia.org/News/PRDetail/1767>. In August 2013, the New Mexico Supreme Court held that there is no right to violate the State's nondiscrimination law. *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013). In November 2013, Elane Photography petitioned the U.S. Supreme Court for certiorari, arguing that because photography is an expressive activity, the business has a First Amendment right to refuse to provide services. Adam Liptak, *Can Photographer Reject Gay Couple's Request?*, N.Y. TIMES (Nov. 19, 2013), <http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html>.

162. See *Mattoon Couple Challenge Denial of Services at Two Illinois Bed and Breakfast Facilities*, AM. CIVIL LIBERTIES UNION OF ILL., <http://www.aclu-il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/> (last visited Mar. 15, 2013).

163. See *Stormans v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); see also *Morr-Fitz v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2012) (challenge from pharmacies to birth control stocking requirements).

raising the profile of the issue by virtue of their number alone.<sup>164</sup> On November 26, 2013, the U.S. Supreme Court granted certiorari in two for-profit cases: *Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Sebelius*. Whichever way the Justices decide these cases, the heightened attention to the claims of for-profit businesses—and the legitimacy conferred by reaching the Supreme Court—means that we are likely to see this trend continue.<sup>165</sup>

## VI. WHAT'S AT STAKE MOVING FORWARD

Reproductive rights advocates are not the only ones who know that much is at stake in the way our society works through these conflicts. Advocates on the other side have always understood the contraceptive coverage rule as one piece in a much larger puzzle. We see these themes play out when religiously affiliated hospitals withhold reproductive health care from women, putting ideology above patient needs.<sup>166</sup> We see them when

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164. See, e.g., Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, N.Y. TIMES (Jan. 26, 2013), <http://www.nytimes.com/2013/01/27/health/religious-groups-and-employers-battle-contraception-mandate.html?pagewanted=all>; Rachel Zoll, *Birth Control Lawsuits: Obama Health Care Mandates Loosen Legal Challenges*, HUFFINGTON POST (Jan. 26, 2013, 5:03PM), [http://www.huffingtonpost.com/2013/01/26/birth-control-lawsuits\\_n\\_2559773.html](http://www.huffingtonpost.com/2013/01/26/birth-control-lawsuits_n_2559773.html); Sharon Johnson, *Birth Control Mandate Faces Onslaught of Lawsuits*, WOMEN'S ENEWS (Feb. 19, 2013), <http://womensenews.org/story/reproductive-health/130216/birth-control-mandate-faces-onslaught-lawsuits>.

165. This issue of exemptions for secular businesses also continued to be a key part of opposition to the rule on the administrative and legislative advocacy fronts. See, e.g., Robert Pear, *Catholic Bishops Reject Contraception Compromise*, N.Y. TIMES (Feb. 7, 2013), <http://www.nytimes.com/2013/02/08/health/bishops-reject-white-house-proposal-on-contraceptive-coverage.html> (quoting Archbishop Chaput of Philadelphia as saying that the February 1, 2013 proposed rule “remains unnecessary, coercive and gravely flawed. The White House has made no concessions to the religious conscience claims of private businesses . . .”); Letter from Archbishop Lori to Members of Congress (Feb. 15, 2013), available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf> (urging Congress to override the contraceptive coverage rule).

166. See Douglas Dalby, *Hospital Death in Ireland Renews Fight over Abortion*, N.Y. TIMES (Nov. 14, 2012), <http://www.nytimes.com/2012/11/15/world/europe/hospital-death-in-ireland-renews-fight-over-abortion.html> (reporting on the death of Savita Halappanavar who died in an Irish hospital after being refused an emergency abortion to complete her ongoing miscarriage); Cienna Madrid, *Faith Healers: Catholics Are Taking Over Local Hospitals, Imposing Their Faith on Your Health Care, and Planning to Deny Certain Treatments for Patients Who Are Pregnant or Dying*, THE STRANGER (Feb. 20, 2013), <http://www.thestranger.com/seattle/faith-healers/Content?oid=16050396> (noting that “cases like Halappanavar’s exist in Washington State”); Lori R. Freedman et al., *When There’s a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774 (Oct. 2008)

religiously affiliated schools fire teachers for being pregnant and unmarried or for conceiving with assisted reproductive technologies.<sup>167</sup> We see them when social service agencies add religious restrictions to programs they carry out on the government's behalf.<sup>168</sup> We see them when nursing homes limit patients' end of life care options. We see them when businesses turn away same-sex couples who want to purchase a wedding cake<sup>169</sup> or a flower arrangement<sup>170</sup> because the owners claim religious opposition to their nuptials.

While each legislative debate or lawsuit may be distinct, these issues are all tied together as competing narratives and values struggle for dominance.<sup>171</sup> How will the accommodation affect efforts to dismantle the notion that there should be certain sphere of public life where women can be treated like second-class citizens—the notion that religious belief can be used as a justification for conduct that harms third parties? Will the position that for-profit entities can enact religious restrictions continue to

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(documenting Catholic-run hospitals practices of putting ideology ahead of patient care).

167. See Christina Brandt-Young & Jenny Lee, *Religion Isn't a Free Pass to Discriminate Against Employees*, ACLU BLOG OF RIGHTS (Sept. 17, 2012, 5:49 PM), <http://www.aclu.org/blog/womens-rights-religion-belief/religion-isnt-free-pass-discriminate-against-employees> (describing cases where women have been fired by religiously affiliated schools).

168. See, e.g., *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012) (holding that a religious institution does not have the right to use taxpayer money to impose its beliefs on others).

169. See, e.g., *Oregon Bakery Refuses to Make Gay Wedding Cake*, ASSOCIATED PRESS (Feb. 4, 2013), <http://www.foxnews.com/us/2013/02/04/oregon-bakery-refuses-to-make-gay-WEDDING-cake/>.

170. See, e.g., *Richland Florist Refuses to Serve Gay Wedding Customer*, NBC NEWS (Mar. 5, 2013, 9:56 PM), <http://www.kndu.com/story/21528621/richland-florist-refuses-to-serve-gay-wedding-customer>.

171. The fact of prior refusal clauses is often used as an argument in favor of the next one. See Brief for Bart Stupak et al., as Amici Curiae, at 13, *Newland v. Sebelius*, No. 12-1380 (10th Cir. 2013) (arguing that previous federal refusals stigmatizing abortion should be evidence that the rule imposes a substantial burden on religious exercise—the first part of the test under the Religious Freedom Restoration Act). While Stupak articulates this as a doctrinal argument in the context of a lawsuit, it is certainly a political argument as well. It can similarly be found in the findings section of proposed legislation to override the contraception rule. See *Health Care Conscience Rights Act*, H.R. 940 113th Cong. (2013). Cf. Jessica Arons, *Unhappy Birthday to the Amendment that Started the War on Women*, DAILY BEAST (Sept. 30, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/09/30/unhappy-birthday-to-the-amendment-that-started-the-war-on-women.html> (positing that decades of the Hyde Amendment set the stage for the theory that someone else's coverage of contraception is an affront to your religion).

gain prominence?

In a February 2013 letter to Congress urging it to override the contraceptive coverage rule, the USCCB listed existing federal refusal laws that allow institutions to put ideology ahead of women's health and equality and restrict access to reproductive health services. The letter asserts:

It can hardly be said that all these Presidents and Congresses, of both parties, had been waging a war on women. I have seen no evidence that such laws, showing respect for Americans' conscientious beliefs, have done any harm to women or to their advancement in society. What seems to be at issue instead is a new, more grudging attitude in recent years toward citizens whose faith or moral principles are not in accord with the views of the current governing power.<sup>172</sup>

We are at a crossroads. As we move forward, will restrictions on reproductive rights that use religion as a license to discriminate be understood as harming women and advancement in society, or will the insistence that religious belief not trump others' rights be taken as a grudging attitude toward faith that should be rejected? If the latter frame prevails, much will be at risk.

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172. Letter from Archbishop William Lori to Members of Congress (Feb. 15, 2013), *available at* <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf>.