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The Challenges of Conscience in a World of Compromise

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Abstract

The process of crafting and passing legislation might be thought to be the locus of compromise par excellence.¹ Yet, where the law that results impinges upon moral or religious belief or practice, the issue of compromise arises anew, in both senses of the word: Individuals who oppose the law on moral or religious grounds believe that their political obedience will compromise them in a fundamental way. Their plea for an exemption from the objectionable legal requirement is, then, a bid for further compromise.² Compromise in the first sense concerns an undercutting of the self, while compromise in the second sense involves a grant of concessions. Yet, unlike compromises that arise in the legislative process, or at least in some ideal version of it,³ the compromise involved in an exemption from a neutral law of general application involves neither an exchange of benefits nor the prospect of mutual benefit—two hallmarks of compromise in, say, political (and other) negotiations.⁴ There are several reasons to doubt the wisdom or fairness of the requested exemptions, then.

Disciplines

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THE CHALLENGES OF CONSCIENCE IN A WORLD OF COMPROMISE

AMY J. SEPINWALL

The process of crafting and passing legislation might be thought to be the locus of compromise par excellence.¹ Yet, where the law that results impinges upon moral or religious belief or practice, the issue of compromise arises anew, in both senses of the word: Individuals who oppose the law on moral or religious grounds believe that their political obedience will compromise them in a fundamental way. Their plea for an exemption from the objectionable legal requirement is, then, a bid for further compromise.² Compromise in the first sense concerns an undercutting of the self, while compromise in the second sense involves a grant of concessions. Yet, unlike compromises that arise in the legislative process, or at least in some ideal version of it,³ the compromise involved in an exemption from a neutral law of general application involves neither an exchange of benefits nor the prospect of mutual benefit—two hallmarks of compromise in, say, political (and other) negotiations.⁴ There are several reasons to doubt the wisdom or fairness of the requested exemptions, then.

First, why should government confer a “private right to ignore [a] generally applicable law[.]”⁵ Further, why defer to conscience at all? The claims of conscience compel from a first-person perspective; they have no hold over anyone but their bearer. And there is no necessary connection between these claims and moral truth—one might be just as gripped by a conscience dictating virtue as one demanding vice. Worse still, where the exemption would impose burdens on third parties, accommodating his claims

of conscience threatens not just political obedience but oppression of others too. Finally, if compromise embodies the best of politics, as at least some theorists contend, then conscientious exemptions might well embody its worst—instances of favoritism that offend against commitments to neutrality and equality too.

These are all concerns that would support significant restrictions on the exercise of conscientious objection, or perhaps its elimination altogether, as some theorists have proposed.⁶ In this chapter, I seek to defend robust rights of conscientious objection, first by arguing in favor of a highly, though not completely, deferential stance toward pleas for accommodations on conscientious grounds, and then by taking up in turn the challenges lodged against granting conscientious exemptions.

I frame the discussion through the challenges and requests for accommodations that have been raised in response to the Patient Protection and Affordable Care Act (PPACA), focusing in particular on the employer mandate—the legal requirement that employers with 50 or more employees provide health insurance that meets a minimum set of standards.⁷ Among these standards are rules requiring coverage for women’s healthcare, including all 20 FDA-approved methods of contraception.⁸ The most prominent challenge to the contraceptive coverage requirement—the so-called contraceptive mandate—is the one the US Supreme Court decided on the last day of its 2013 term, in *Burwell v. Hobby Lobby*.⁹ Hobby Lobby is a closely held corporation owned by a family of evangelical Christians who object, on religious grounds, to the use of certain forms of contraception. The PPACA’s employer mandate required that Hobby Lobby’s insurance package provide coverage for these forms of contraception, but the Supreme Court held that this requirement substantially and unnecessarily burdened the family’s freedom of religion, and that of its corporation by extension. As a result of the decision, Hobby Lobby was permitted to exclude contraceptive coverage from its employee health-care plan.¹⁰

Challenges to the employer mandate involve three features that render them especially difficult, and so fruitful, for an inquiry into the place of conscientious objection within a democratic polity. First, these cases turn upon an atypical conception of complicity. In the standard case of conscientious objection, the objector seeks to avoid

having to participate directly in conduct he deems wrong. Paradigmatically, pacifists seek to avoid fighting in a war. But the employer mandate cases involve complicity in an asserted wrong that occurs at a far greater remove: The employer claims that simply by subsidizing an insurance package through which his employees access medical interventions he deems wrong, he is complicit in their wrongs—and indeed complicit enough, he thinks, for him to warrant an exemption. Historically, courts have denied pleas for exemptions where the objector's connection to the conduct he believes wrong is attenuated in the way that the employer's is. Thus, those opposed to war may not withhold the portion of their tax burden meant to fund the military,¹¹ and those opposed to abortion may not withhold that portion of their university fees that fund campus health services where the health services provide abortions or abortion counseling.¹² *Hobby Lobby* marked a shift from these cases. Recognizing complicity through subsidization, as *Hobby Lobby* does, opens the door to a whole host of opt-outs, with potentially vast implications for much of our regulatory regime.

The second challenging, and so illuminating, feature of the employer mandate cases is that the exemptions sought threaten to impose costs upon third parties. If employers are released, on conscientious grounds, from their obligation to cover certain forms of healthcare, their employees will have to secure subsidization for, or provision of, the excluded drugs or treatment elsewhere, possibly at their own expense and inconvenience. Historically, however, cases of religious accommodation have involved claimants who have wanted to be left alone; they have not sought to impose their convictions, or the implications of their convictions, on others.¹³ In this way, the employer mandate cases raise issues that courts have not yet had significant occasion to think through.¹⁴ As such, these cases invite us to work out the appropriate balance between the employers' interests in purity of conscience and the material (and perhaps also expressive) costs of being denied what is otherwise a statutory entitlement.

Finally, the employer mandate challenges exemplify a kind of conscientious objection that is especially threatening to democratic politics. The typical case for an accommodation involves a claimant pressing a marginal religious or moral commitment, and an exemption can be granted to him with little or no disruption to

anyone else, and so no worries about government partiality. Thus, when we permit Native Americans to use peyote (an otherwise illegal drug) in their religious ceremonies, we can congratulate ourselves on our benevolence and cultural sensitivity.¹⁵ When we honor the pacifist employee's objection to manufacturing tanks even though he evidenced no objection to manufacturing the steel used to make these tanks, we can celebrate our deference and humility.¹⁶ In both cases, accommodation implicates no one else's legitimate interests. But when the government faces a conflict between respecting religious freedom and women's reproductive rights, any outcome it pursues threatens an intolerable favoritism. This conflict is perhaps the most vexing (and belabored) one in the literature on democratic disagreement. The employer challenges to contraceptive provision crystallize the conflict and allow us, perhaps, to see a way out.

I aim in the first part of the chapter to defend a qualified, albeit quite deferential, stance on conscientious accommodation. But that does not mean that we should offer exemptions to all comers. The second half of the chapter explores limits to the presumptively deferential exemption regime that the first part defends.

In sum, the aspiration here is to find a balance—a suitable compromise—between claims of conscience and the foundational commitments of a liberal democracy. The outcomes at which I arrive may not find widespread favor among political liberals, but I believe that they maintain faith with the spirit of political liberalism nonetheless.

I. CONSCIENCE AND ACCOMMODATION

A. Defining and Defending Conscience

Thomas Hill defines "conscience" as "a capacity, commonly attributed to most human beings, to sense or immediately discern that what he or she has done, or is about to do (or not do) is wrong, bad, and worthy of disapproval."¹⁷ This definition seems overly cognitive, however. For one thing, conscience is more than mere judgment, or the formation of a belief that something is "wrong, bad, and worthy of disapproval."¹⁸ If I have not internalized a particular moral prohibition—if I have no conviction in regard to it—I may

well know that an act I have done, or am about to do, is wrong and worthy of disapproval and yet feel no compunction about it. That is, it forms no part of my conscience. Further, if I *have* internalized the prohibition, then my conscience is likely to elicit more than just the belief that what I am about to do is wrong; it will also provide motivation to refrain from committing the wrong, and anticipatory guilt or fear at the prospect of doing wrong. In other words, "conscience," as I shall understand the term, is a complex of cognitive, conative, and emotional dispositions.¹⁹

In addition to the dispositions that conscience requires, we should also attend to its content. The commitments constitutive of one's conscience are those that are central to one's identity.²⁰ These can be non-moral (e.g., "never let the fire in one's soul die,"²¹ or "may what I do flow from me like a river, no forcing and no holding back, the way it is with children"²²), moral ("I will recognize the inherent dignity of all people and treat them all with equal respect") or "I will not unjustifiably harm another"), or religious (e.g., "I will treat all human life from the moment of conception as sacred"). Moreover, each of these can be specified in a multitude of ways. For example, "I will not cheat" is a specification of "I will play fair" (a moral commitment).

I doubt that non-moral commitments could justify a conscientious exemption, for we do not take it to be the state's role to facilitate our efforts at self-actualization. By contrast, moral and religious commitments are typically other-regarding and, for good or ill, we privilege commitments motivated by concern for others over commitments motivated by concern for self.²³ As such, we have more reason to exempt someone from a law binding on the rest of us where that law conflicts with a moral or religious commitment than where it conflicts with a commitment aimed at self-actualization that does not have religion or morality as its source.²⁴ At any rate, since most claims for an accommodation turn on moral or religious commitments, I do not consider non-moral commitments further.²⁵ On the other hand, I follow those theorists who argue, despite much law to the contrary, that we should be willing, where appropriate, to accommodate not just religious claims of conscience but moral ones too.²⁶ I seek to elucidate, in what follows, when and why we should conclude that these claims should ground an accommodation.

To begin, one might wonder why any conscientious commitments ought to command our respect. Andrew Koppelman argues that conscience poorly tracks the cases where we feel exemptions should or should not be granted.²⁷ Thus, some claims that we are inclined to think worthy of accommodation are not claims of conscience *per se*. For example, those who seek an exemption from the ban on peyote, because peyote is used in religious ceremonies, do not claim that their consciences mandate peyote use so much as their religion does. On the other hand, conscience can be strongly felt in favor of claims that we would not want to grant. Thus, Koppelman offers the rationale provided by a man who murdered his sister-in-law and her infant daughter because, as the murderer recounted, he received a divine command that he felt he could not disobey.²⁸

The first half of Koppelman's puzzle seems readily resolved once we note that the dictates of conscience may be specified in a multitude of ways and the reasons we have for accommodating these dictates provide at least *prima facie* reason for accommodating their specifications. Thus, we allow Native Americans to use peyote because peyote use is a central part of their religious observance and we believe religious observance worthy of accommodation in the face of the federal drug laws.

The second half of Koppelman's puzzle, however, which turns on the questionably moral nature of the contents of a conscience, is more troubling. And Koppelman is not alone in noting that claims of conscience need not track objective, or even commonly held, moral truths. Other theorists invoke Huck Finn as the paradigmatic instance of someone whose conscience would have led him astray had he heeded it, because he had internalized the law of his day, and so felt deep inner turmoil about not turning Jim in.²⁹ And Hannah Arendt's great and devastating insight in *Eichmann in Jerusalem* is precisely along these lines. She writes, "it was not his fanaticism but his very conscience that prompted Eichmann to adopt his uncompromising attitude [i.e., his unwavering devotion to the "final solution"] during the last year of the war."³⁰

Moreover, for Koppelman, it is not just that there is no reason to expect that the dictates of anyone's conscience will be worthy of deference but also that conscience itself—the capacity, rather than its contents—is hardly worthy of respect. Koppelman defines

conscience as “an imprecise word for an internal compulsion to act that is specified only by the possessor’s internal psychology.”³¹ Conscience, that is, is the capacity that turns one’s convictions—whatever their source—into authoritative commands. But so defined, Koppelman argues, conscience can play no compelling role in justifying accommodations: “Neither conscience . . . nor volitional necessity necessarily points toward anything that other people have any obligation to respect. . . . Perhaps it is very hard for someone to resist the force of volitional necessity, and perhaps that counts as a (rebuttable!) reason not to ask them to do it. But in that case, the appropriate response is not respect. It is pity.”³² In sum, the problem with conscience for Koppelman is that it “is entirely unmoored from any objective value”³³ and it is heeded automatically, and not because its possessor reflectively endorses its commands.

Contrary to Koppelman, I believe that the process of heeding one’s conscience is not as reflexive as Koppelman contends, and more valuable than he allows. The notion that we follow our conscience merely as a matter of compulsion fails to track both the phenomenology of, and our discourse around, conscience. Our most prominent experiences of conscience arise when we face a conflict between two incompatible norms—for example, secular law and religious conviction. There is no proceeding automatically in the face of this conflict. If we see both as normative—if we have adopted an “internal point of view” with respect to each³⁴—the conflict will call us to attention. We will be forced to decide which norm to follow, and the process of so doing will require that we engage in conscious deliberation.

With that said, some people do take their claims of conscience to be automatic trumps. Even here, however, we should not treat reliance on conscience as a matter of brute compulsion. For the automatic adherence to conscience would quite likely have been preceded by a moment when the individual in question did deliberately decide that conscience would prevail. This is just the way it is with commitments—we deliberately adopt them precisely so that, from the moment of their adoption, they will operate for us as non-starters:³⁵ To adopt a commitment is to decide once and for all that it will function as a trump. Should a commitment be implicated at some time thereafter, we will not need to go through

the deliberative exercise of deciding what weight to give it, less still whether to heed it at all. That work was done the moment we adopted the commitment. It is efficient to proceed in this way, but it is also appropriate to do so: What it is for something to be a conviction is for it to preempt our considering whether it should dictate our conduct. Having been made a conviction, it just does dictate. Other commitments work the same way. For example, the marriage vow, along with its commitment to fidelity, is intended to take off the table each spouse’s recurring evaluation of whether to stay in the relationship. While the marriage is well functioning at least, the question should not even arise; the vow short-circuits it. And convictions are just commitments of a particular kind—as I have already said, commitments are central to one’s identity. In sum, Koppelman is right that there is something automatic about the exercise of conscience. But there is nothing unusual or embarrassing about the deliberative elision that conscience involves.

Turning now to the other complaint, that conscience fails to track objective value. One can agree with those who express the worry and yet still believe that conscience itself is intrinsically valuable. The project of living one’s life in accordance with a set of values one chooses (or at least affirms) is a distinctive trait of persons. Living according to one’s conscience gives meaning to our lives, making them about more than the peripeteia of everyday existence. The fact that we are meaning-creating creatures, that we can and do play a role in shaping our life stories, is valuable in its own right. Insofar as conscience, which again consists of our identity-defining commitments, is central to the direction our lives take,³⁶ it too is valuable in its own right. We can grant all of this even while acknowledging that countervailing considerations might, at the end of the day, mandate that we deny the conscientious objector an accommodation. The connection of conscience to self, that is, confers a presumption in favor of claims of conscience. I shall go on to specify the circumstances where the presumption may be defeated. First, though, I seek to argue that conscience should always get a thumb on the scale.

B. Deferring to Conscience

When it comes to blaming one another for participation in, or facilitation of, a wrong, both legal and moral practice set the necessary threshold for complicity in light of the gravity of the sanctions that a finding of complicity entails.³⁷ Thus, under much domestic criminal law, for example, the predicates for complicity are quite demanding, given the gravity of a criminal conviction. In particular, one will be found complicit only if one shared the perpetrator's purpose in seeing the crime completed and one at least attempted to assist or encourage its commission.³⁸ More generally, the harsher the sanction, the more strongly connected one must be to the wrong—causally and psychologically—in order for one to be held morally or legally responsible for it.³⁹ In this way, third-personal judgments of complicity—those judgments we form about others—are both standardized and appropriately sensitive to commonsense ideas about individual culpability.

But our first-personal complicity judgments—each of our assessments of our *own* culpability in another's wrong—are nowhere near this regular, and this is so in light of three possible points of divergence. First, in a pluralistic society like ours, there is often widespread disagreement over what counts as a wrong. Contraceptive use is a paradigmatic case.

Second, we might disagree about the empirical facts. For example, the medical establishment rejects the Hobby Lobby owners' belief that the four contested forms of contraception are abortifacients. This is not a dispute about whether destroying embryos is morally permissible; it is a dispute about whether these four contraceptive devices work by destroying embryos. So it is a factual, and not a moral, dispute.

Finally, there is a third kind of disagreement, and it is the one of greatest relevance here—disagreement about the kind of connection one must bear to another's wrong in order for one to be complicit in that wrong. As described above, standard moral and legal accounts proceed with relatively demanding conceptions of complicity. But conscientious objectors to insurance subsidization under the PPACA, or conscientious tax resisters, operate with a conception of complicity that is far more encompassing than the standard account. These individuals believe that mere facilitation

in a wrong (or in conduct they believe wrong) is sufficient to render them morally responsible for that wrong, and this is so even if their contribution is made at several layers of remove from the wrong. Thus, in the contraceptive mandate challenges, the employer believes that merely by subsidizing an insurance plan through which its employees or their dependents have access to contraception, the employers become complicit in contraceptive use. Even if we are prepared to allow individuals to decide for themselves on matters of value (e.g., whether contraceptive use is wrong), we might question why we should defer to those with non-standard accounts when it comes to articulating the relevant standard of complicity.

I have argued elsewhere that we should not judge the strength of claims of conscientious objection on the basis of the strength of the complicity claims underpinning them, for the pain the objector would experience in contributing to a wrong may be insensitive to the extent of her anticipated contribution.⁴⁰ Being made to act against conscience produces a certain kind of pain—the pain of a loss of integrity, or a dislocation from the self.⁴¹ It is easy for many of us to imagine how compelled participation in a wrong might produce this sense of self-transgression, and yet difficult for us to fathom how a compelled remote and minor contribution might do so. But, from the perspective of one who holds a more expansive view of complicity, and so more readily sees herself as implicated in a wrong, the pain of facilitation in a wrong may be no less than that for the person who is made, against his will, to participate in the wrong. For example, the Quaker pacifist might view paying taxes to fund a war as no less violative of his commitments than is fighting in that war. And what should matter for purposes of conscientious accommodation is the objector's felt sense of complicity, not the sense of complicity we would have were we in her shoes.

Put differently, conscience is tied up with the self, so it is ineluctably subjective. Individuals may differ with respect to how readily their consciences are activated even where they agree on matters of substantive morality or religion—e.g., where all the individuals in question believe that contraceptive use is wrong. One will think that she bears responsibility only for her own contraceptive use; another will think she bears responsibility for any contraceptive

use that she has facilitated, through its provision or subsidization. But the subjective experience of both may well be the same—each may think that she has done wrong in light of her connection to contraceptive use, and the breach of conscience may feel equally severe for each of them.

There are circumstances where we think the law should, all else equal, protect individuals from having to contribute to conduct they deem wrong and the feelings of guilt to which that contribution would give rise. This is the rationale for which we permit conscientious objection to a military draft. But if the foregoing is correct, we have no reason to think that an objection to fighting in a war is more *intrinsically* compelling than is an objection to funding that war. To be sure, there may be extrinsic considerations that would justify our more readily exempting someone from military service than from paying taxes to support a war. For example, it may be easier to find a replacement for the conscientious objector to a draft than it would be to find alternative funds to cover all of the tax dollars that would be withheld if we were to allow individuals to resist paying taxes for every government initiative they oppose. I shall have more to say about when countervailing considerations should restrict our accommodating conscientious objections. The point for now, however, is that, looking at the objections on their own merits, the very reasons we accommodate objectors to the draft obtain for objectors to more remote contributions to war, like taxes. In both cases, the objector believes that he would be complicit in war, which the objector believes wrong. In both cases, the objector anticipates that his complicity will violate some of his most fundamental commitments, and so he conceives of his prospective complicity as a source of deep pain. If the experience of contributing would be the same for draftee and taxpayer alike, we have no reason—again, on the intrinsic merits of their claims—to yield to the first and not the second. All else equal, each has an equally compelling claim for accommodation.

The foregoing treats both military participation and military funding as differing only in degree of contribution. But one might contend that they are different in kind: The draftee *performs* the controversial act; the taxpayer merely funds it. The same might be said of the doctor who objects to abortion or physician-assisted suicide (PAS) and some other individual who contributes to it more

remotely—e.g., the taxpayer who funds Medicaid abortions or the store clerk who rings up the PAS prescription. When it comes to complicity, the former are like principals to a crime and the latter are only accomplices. Surely this difference should make the objection of the person who would be made to perform the objectionable act more compelling than the claim of the person who would contribute to it more remotely, the thought would go.

I maintain, however, that it is no less tendentious to refer to the draftee or the physician as someone who would be made to “perform” the objectionable act than it is to characterize both draftee (or physician) and taxpayer as “contributors” or “participants.” For medical care—in particular, the decision whether to have an abortion and especially whether to avail oneself of PAS—is typically a joint endeavor, involving physician and patient. Both are participants in the treatment decisions. The taxpayer or pharmacy clerk contributes far less directly, to be sure. But the difference in question is just one of degree, not of kind. The point is even clearer in the face of the two objectors to military conduct—the draftee and the taxpayer. The draftee does no more than participate in the war. Indeed, it is conceptually impossible for any one person to wage war; instead, war is, by definition, a collective endeavor. Again, the draftee’s participation is more direct than is the taxpayer’s. But again, that fact alone does not make an objection to the draft more compelling than an objection to funding the military. And, indeed, if the law did not recognize that different kinds of participation in a war might nonetheless lead to reasonable feelings of complicity, it would require all pacifist draftees to fulfill their service in noncombatant positions, rather than exempting those who object to facilitating war from military service altogether. That is, the fact that drafted pacifists may elect to perform community, rather than military, service shows that what matters is participation—including mere facilitation—and not perpetration.

Legal and moral thinking go wrong, I have argued, in distinguishing between different instances of facilitation on the basis of the strength of the causal connection between the objector and the asserted wrong. But they do not restrict conscientious exemptions to those who would be made to perpetrate the asserted wrong. Nor should they. Participation may be a matter of degree,

but the sense of guilt may not—and indeed need not—track the extent of one's causal involvement.

In sum, if we think that the law, at least all else equal, should protect people from having to participate in conduct they deem wrong, then we have reason to defer to the objector's subjective sense of implication even if it is one we do not share. We have, that is, presumptive reason to exempt the person who objects to funding contraceptive use just so long as she would view funding as a significant source of complicity in conduct she deems wrong. With that said, the deference I urge is merely presumptive. I turn now to the considerations that can and should defeat it, and the policies and values that should accompany, inform, and constrain a regime of moral or religious accommodation.

II. CONSCIENTIOUS EXEMPTIONS AND LIBERALISM

One might grant that there is a case to be made in favor of conscientious objection and still contend that a robust exemption regime offends against fundamental liberal values. In particular, one might argue that such a regime conflicts with three key liberal commitments: First, one might worry that granting exemptions is unfair because oftentimes the exemptions will impose significant costs on individuals who do not share the objectors' religious convictions. Second, insofar as the exemptions sought impose burdens disproportionately on historically oppressed groups—women, in the contraceptive mandate cases, or homosexuals in the cases where business owners seek to deny employment or goods and services to gays and lesbians—one might worry that exemptions involve discrimination, and governmental complicity therein. And, finally, one might see in an exemption regime a more widespread failure of governmental neutrality: Had the law evolved in more neutral ways, the thought would go, there would be no need for customized departures from it in the first place. I address each of these worries in turn.

A. *Externalizing the Costs of One's Moral or Religious Convictions*

I have sought to argue that we should, all else equal, grant an exemption from a legal requirement if adhering to it would

contravene an individual's deeply held moral or religious convictions. But often all else is not equal. In the employer mandate context in particular, granting the employer an exemption might well leave his employees without adequate healthcare coverage.⁴² Thus, in the cases where employers object to having to fund contraception, we would have reason to deny their bids for an exemption if the women covered by these employer plans could then obtain contraception only at significant cost or inconvenience to themselves. Happily, this was not the likely outcome in the *Hobby Lobby* case as the Obama administration had already developed a work-around, whereby the insurance companies would offer contraception for free, and so courts could grant exemptions without imposing any costs on the plan beneficiaries. Matters would surely be otherwise if the employer objected to life-saving treatment (e.g., blood transfusions, which Jehovah's Witnesses oppose), and there was no alternative arrangement.

More generally, claims of conscience ground at most a presumption in their favor. That presumption will be defeated when the cost of an exemption for third parties exceeds some threshold. Just where this threshold lies is a matter for us to decide through democratic deliberation. We need to determine together the extent to which we value freedom of conscience, and the burdens we are therefore willing to incur, or impose upon others, in order to respect it. Once we have done so, we will have identified a level of burden below which exemptions should be granted in the face of sincere conscientious objection and beyond which exemptions may be denied. In short, one constraint on our exemption regimes arises in light of the material consequences an exemption might entail for third parties.

B. *Political Oppression and Animus*

Even if we need not worry about third-party costs, though, one might still find exemptions objectionable, for they look to provide a way for individuals who lost in the democratic sphere to evade the outcome they opposed.⁴³ A plea for an exemption is, in other words, the enemy of compromise: The pleading party is unyielding, and granting him the exemption can undermine the prospect of compromise in future efforts at legislation. After all, why

should a party dissatisfied with some proposed legal requirement settle for a second-best version of his preferred outcome when he can instead, as a conscientious objector, seek to evade the resulting law altogether? The worry about evasion is especially compelling where one suspects that the objectors aim not just to preserve the purity of their souls by ensuring that they do not have a hand in, say, facilitating contraceptive use; they aim to right this (supposed) wrong through their objections and (what they hope will be) the ensuing denials of access. The concern, in short, is that these moral or religious objectors intend sabotage.⁴⁴

And there is a more cynical worry still lurking in some of the reaction to exemptions to the contraceptive mandate. On this thought, what motivates opposition to contraceptive use is not genuine concern for nascent human life but instead animus against women. It is plausible to see certain efforts to restrict access to abortion as evidence of misogyny.⁴⁵ And some commentators understand efforts to evade the contraceptive mandate in a similar way: As Ilyse Hogue, director of NARAL, says about the challenges, "The truth is that this is not about religious freedom, it's about sexism, and a fear of women's sexuality."⁴⁶

The worry here is not, as it was above, about discrete third parties who bear direct consequences if the government grants an exemption. Instead, the concerns suggest that all citizens may have reason to feel aggrieved by the intransigence of the objectors. In this way, these concerns should prompt us to question the viability of a liberal democratic regime in the face of deep and widespread division. To address these concerns, I consider in turn two possible policy responses: (1) no exemptions; and (2) public provision.

1. No Exemptions

Given the threat of sabotage, and the difficulty in discerning the objectors' true motivations, we might decide to grant no exemptions at all. Andrew Koppelman proposes as much when he argues that we should not permit any exemptions if the legal requirement from which the exemption is sought can function only with complete, or at least near-complete, compliance.⁴⁷ And this is just the way courts have traditionally proceeded, denying religious accommodations where the requested exemptions would undermine the system or program the legal requirement aims to support. Thus,

courts do not permit tax evasion on religious grounds because the tax system could not survive a multitude of exemptions.⁴⁸ So too they have denied exemptions from Sunday closing laws on the ground that allowing employers to close on any day they choose would undermine the effort to grant citizens a *common* day of rest.⁴⁹ In this way, Koppelman's concern about subverting the law through a grant of too many exemptions makes sense.

At the same time, the notion that the prospect of being granted an accommodation should turn on how many others share one's objection has the counterintuitive consequence that widespread opposition garners less deference than does opposition that is idiosyncratic or unusual. Because intersubjective convergence upon a proposition is at least some evidence of the proposition's truth, one might instead have thought that widespread opposition ought to be more compelling than opposition voiced by a few. And, at any rate, oppression of a significant minority is surely worse than oppression of an insignificant one.

The problem, writ large, is that compelled employer subsidization of healthcare that includes elements about which there is deep disagreement cannot be squared with the commitment to neutrality underpinning liberal democratic politics, and the tensions to which the employer mandate gives rise will be felt on both sides of the ideological spectrum.

From the perspective of the employer with conscientious objections to some of the forms of healthcare he is mandated to cover, the difficulty is just the obverse of the problem of dirty hands: In the classic case of dirty hands, politicians compromise themselves in order to carry out our political will. As a result, they bear the moral stain and suffer the transgression of self on our behalf.⁵⁰ Those who believe that contraceptive use (or other medical care that employers are mandated to cover) is wrong might think of the employer mandate as just the other side of the coin. Under the mandate, the government recruits employers to subsidize contraception and thereby outsources the moral stain to them.

The government might seek to protect these employers from having to incur this stain by allowing them to exclude contraception from their insurance plans, as the Court did in *Hobby Lobby*. But excusing employers from contraceptive coverage because they would otherwise feel implicated in a wrong involves symbolically

denigrating women's rights. In other words, having a woman's access to contraception turn not on her own convictions but instead on those of her employer puts them both in a contest, and has the government choose the victor. This is the kind of choice that a government committed to neutrality and equality should at all costs seek to avoid.

The exemption/no-exemption options, then, arise after we have already made a choice—that provision of basic healthcare will fall to private employers, rather than the government. It is time to revisit that choice.

2. Public Provision

Given the controversy over contraception, one might well wonder why providing coverage for it should have fallen within the employer mandate in the first place. Had the government, from the outset, undertaken the obligation to provide contraception to all women who needed it, the conflict between employers' conscience and employees' reproductive freedoms would have been avoided. More generally, the government should not recruit its citizens to provide goods or services that a significant portion of the populace opposes on conscientious grounds. Instead, providing these goods and services should be a core government responsibility, and it should have been recognized as such during the debates over the PPACA.

It would be naïve to overlook the role that special interests played in defeating a public option, under which government would have competed with private insurance companies for healthcare subscribers.⁵¹ We can anticipate that these interests would work even more strenuously to impede a regime under which government was the only game in town, even if government played the role of sole provider for only some, but not all, of the healthcare coverage individuals might seek. For good or ill, however, I am concerned here only with the principled merits of government contraceptive provision, not with its political feasibility. After all, if government provision is indefensible on the merits, then we need not worry about whether it could be implemented in practice. In any event, the issue of government healthcare provision—for contraception or other medical care—is largely illustrative. The discussion that

follows should illuminate more generally the appropriate role of government in issues around which there is deep disagreement.

One might worry that having government, rather than private employers, provide coverage for contraception does not so much resolve complicity concerns as displace them. For employers who oppose contraception might have just as much reason to object to having to fund it through taxation as through insurance subsidization. In fact, however, I believe that concerns about complicity through taxation are more easily met.

For one thing, the government might be able to provide contraception without relying on tax dollars at all. For example, in an effort to develop a work-around for religious non-profit institutions that object to contraception, the Obama administration convinced insurance companies to offer contraception at no cost either to the religious non-profits or their plan beneficiaries. Insurers were amenable to footing the bill because the costs to them of complications arising from unintended pregnancies are far more significant than the cost of contraception itself.⁵²

Moreover, even if the government must draw on the public fisc to provide contraception, there are still principled reasons for thinking complicity claims less compelling here than in the insurance subsidization context. The relevant line of argument draws upon liberal egalitarian responses to libertarian arguments against taxation.⁵³ Briefly put: It is reasonable to see a commitment to distributive justice as immanent in our tax scheme; in particular, our tax scheme aims to mitigate or eradicate the effect of brute luck, and it does so by claiming, as a matter of right, a portion of the earnings of those who are favored, through pure good luck, by features of our social and economic arrangements. As such, one's tax burden consists, at least in part, of money one has earned in fulfillment of one's obligations of justice to compensate those who are disadvantaged in our scheme. Since the money used to cover this part of one's tax burden is not, and never was, one's own, one cannot say that handing it over to the government connects one to conduct one deems wrong. Covering the costs of female contraception can be seen as part of a redistributive scheme. By some lights, structural injustices make it the case that women are all too disempowered with respect to deciding whether they will have

sex at all.⁵⁴ At any rate, women currently bear disproportionate healthcare costs resulting from unwanted pregnancies, and disproportionate childcare burdens. On this way of understanding the objectives of a tax scheme, then, the person who objects to contraceptive use has no legitimate complicity claim against taxation used to cover others' contraceptive costs. In particular, he cannot argue that using tax dollars to cover contraception forces him to spend *his* money on a wrong since the money was never his in the first place.⁵⁵

Further, even if one rejects the liberal egalitarian rationale for taxation, there is still a practical distinction between taxation and subsidization: Taxation, we have seen, is not subject to an exemption on conscientious grounds because the system would collapse were such exemptions to be granted. So, even if one concludes that the conscientious objector's complaint is strong, it is not one to which a court can yield. And the notion that the objector loses not on the merits but instead on practical grounds should serve to undercut concerns about government partiality.⁵⁶

In short, the contraceptive mandate challenges expose the limits of both compromise and conscientious objection. The concerns of those who object to funding contraception do not admit of compromise; reducing the amount these employers contribute will not mitigate their concerns. And exempting them altogether might implicate the government in an expressive harm, at least where it is animus that motivates the objectors. As such, government provision might well be the most defensible response. Making contraceptive provision a government responsibility in the first instance would both allow those who object to contraception to maintain clean, or at least cleaner, hands, and would ensure universal access to it under an exemption-free regime. While expanding the government's role in women's reproductive choices might not be the obvious liberal solution, it is, I believe, the one that most maintains fidelity with the foundational core of our political morality.

NOTES

1. Alin Fumurescu, *Compromise: A Political and Philosophical History* (Cambridge: Cambridge University Press, 2013), 28; T.V. Smith, *The Ethics of Compromise and the Art of Restraint* (Chicago: University of Chicago

Press, 1957) 50. See also Amy Gutmann and Dennis F. Thompson, *The Spirit of Compromise* (Princeton, NJ: Princeton University Press, 2012), 42 ("Far from being a necessary evil, contentious politics is an essential part of the democratic process, and an inevitable context for compromise").

2. Martin Benjamin refers to these two senses of compromise as internal (i.e., occurring within one person) and external (i.e., occurring between individuals or parties). Martin Benjamin, *Splitting the Difference: Compromise and Integrity in Ethics and Politics* (Lawrence: University Press of Kansas, 1990), 20. See also Chiara Lepora and Robert E. Goodin, *On Complicity & Compromise* (Oxford: Oxford University Press, 2013), p. 27 (referring to "interpersonal 'compromises with'" and "intra-personal feelings of 'being compromised'").

3. For the view that there are principled reasons to affirm compromise in politics, see, for example, Joseph Carens, "Compromise in Politics," in *Nomos XXI: Compromise in Ethics, Law, and Politics*, ed. J. Ronald Pennock and John Chapman (New York: New York University Press, 1979), 135; Richard Bellamy and Martin Hollis, "Consensus, Neutrality and Compromise," in *Pluralism and Liberal Neutrality*, ed. Richard Bellamy and Martin Hollis (London: Frank Cass & Co., 1999), 76; and Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990), 71.

4. See, for example, Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London, UK: Routledge, 1999), pp. 93–114.

5. *Emp't Div. v. Smith*, 494 U.S. 872, 885–86 (1990). Or, in the more florid words of Brian Leiter, allowing for exemption on conscientious grounds "would appear to amount to a legalization of anarchy!"—especially if, as Leiter believes, secular claims of conscience warrant no less respect than religious ones. Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2012), 91.

6. See, for example, Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001).

7. The full text of the PPACA can be found here: 42 U.S.C. §§ 300gg–13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2012). For a description of the employer mandate, see "Health insurance for businesses with more than 50 employees," Health Care, www.healthcare.gov.

8. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621–01 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

9. 134 S.Ct. 2751 (2014).

10. In using *Hobby Lobby* for illustration, I set aside two unique features of the case. First, the owners of Hobby Lobby objected not to all forms of contraception but only to the four that posed a risk of acting after fertilization, by destroying the embryo that had formed. Other employers have sought exemptions from the employer mandate because they object to all contraceptive use. For purposes of the discussion here, I assume that the employer under consideration opposes all contraception.

Second, while much of the critical reaction to *Hobby Lobby* focuses on its extension of religious freedom rights to a for-profit corporation, I do not attend to those questions here. Employers organized as sole proprietorships or partnerships might also object to having to fund contraceptive use, and so the question of whether to accommodate an employer's objections to aspects of a mandated employee health plan turn in significant part on considerations that have nothing to do with *corporate* religious exercise. For critical engagement with the notion of corporations and freedom of religion, see Amy J. Sepinwall, "Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to For-Profit Corporations," in 5 *Harvard Business Law Review* 173 (2015).

11. Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 *Wisconsin Law Review* 939, 972 (1999) (surveying cases and concluding that "[e]ach has held that . . . RFRA . . . does not require the income tax laws to accommodate religious beliefs, specifically those of conscientious objectors to war"); Michelle O'Connor, "The Religious Freedom Restoration Act: Exactly What Rights Does It 'Restore' in the Federal Tax Context?," 36 *Arizona State Law Journal* 321, 329 (2004) ("the Supreme Court never has held that the Free Exercise Clause requires the government to grant a person an exemption from a generally applicable, neutral tax law").

12. *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir., 1996) (use of university registration fee to fund student health insurance plan that included abortion coverage did not substantially burden free exercise rights of students who objected to abortion on religious grounds because, in part, "plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services"), *overruled* on other grounds by *City of Boerne v. Flores*, 521 U.S. 507; *Erzinger v. Regents of Univ. of Cal.*, 137 Cal.App.3d 389, 187 Cal.Rptr. 164, *cert. denied*, 462 U.S. 1133 (1983).

13. For example, in one of the seminal cases grounding the test for religious accommodation, Amish parents successfully challenged a Wisconsin law requiring education through age 16, arguing that they needed their children to be free to fulfill the farming obligations incurred in later adolescence, and that they feared the corrupting influence of a secular

education. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Their request involved only an effort to insulate their religious community, not an impingement upon anyone else's rights or entitlements.

14. I discuss the relevant case law at length, with an eye to establishing that the current doctrine neglects third-party costs, in "Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake," 82 *University of Chicago Law Review* 1897 (2015).

15. *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990).

16. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981).

17. Thomas E. Hill, Jr., "Four Conceptions of Conscience," in *Nomos XL: Integrity and Conscience* 14, ed. Ian Shapiro and Robert Adams (New York: New York University Press, 1998). For other theorists who view conscience exclusively in cognitive terms, see Thomas Aquinas, *Summa Theologiae, Ia IIae*, q. 19, a. 5, v. 18, 63 (Cambridge: McGraw-Hill/Blackfriars, 1966) (defining conscience as an exercise of reason); James F. Childress, "Appeals to Conscience," *Ethics* 89(4), 1979, pp. 315-335.

18. Hill, "Four Conceptions of Conscience."

19. See, e.g., C. D. Broad, "Conscience and Conscientious Action," in *Philosophy*, XV, No. 58 (New York: Humanities Press, 1952), 118. I argue elsewhere that corporations lack conative and emotional dispositions and it is for this reason that we may deny that they have rights of free exercise in their own right. Sepinwall, "Corporate Piety and Impropriety."

20. See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) ("The areas of a person's life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his self-respect"); Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, NJ: Princeton University Press, 2005) (arguing that claims of conscience are "likely to represent deeply constitutive aspects of people's identity"); Kent Greenawalt, "Refusals of Conscience: What Are They and When Should They Be Accommodated?," *Ave Maria Law Review* 9(1) (2010): 47-66, 49 (Conscience, in its "modern usage connotes something stronger, that she would disregard a deep aspect of her identity if she went along"); Peter Fuss, "Conscience," *Ethics* 74(2), 1964, pp. 111-120; Benjamin, *Splitting the Difference*, pp. 53-60.

21. *The Letters of Vincent van Gogh*, ed. Ronald de Leeuw, trans. Arnold Pomerans (London: Penguin Books, 1997), 54.

22. Rainer Maria Rilke, *Rilke's Book of Hours 65*, trans. Anita Barrows & Joanna Macey (New York: Riverhead Trade, 2005).

23. For the view that the hierarchy between moral and non-moral commitments should trouble us, see Bernard Williams, *Moral Luck* 23 (Cam-

bridge: Cambridge University Press, 1981) ("While we are sometimes guided by the notion that it would be the best of worlds in which morality were universally respected and all men were of a disposition to affirm it, we have, in fact, deep and persistent reasons to be grateful that that is not the world we have").

24. Jeremy Waldron offers a possible rationale for having the state treat moral or religious commitments more seriously than non-moral ones. He has argued that a conscientious bid for an exemption is not a bid to escape law; it is a request that secular officials recognize that the objector owes obedience not just to the law of the state but also to the laws of one or another religious (or, I would add, moral) authority. Jeremy Waldron, "One Law for All: The Logic of Cultural Accommodation," 59 *Washington and Lee Law Review* 3 (2002). According to this way of thinking, religion and morality have an authority of their own, sometimes even one that is as weighty as, or even weightier than, the state's. There is reason to doubt that one's self-chosen commitments—one's crafted mission statement, as it were—can claim this much authority.

25. I note, at least in a preliminary way, that, for some deeply held personal commitments, it will not be easy to discern whether they are moral in nature or not. For example, one can stake her identity on her strict adherence to one or more moral rules—e.g., "I am the kind of person who would never cheat." Further, one can treat one's personal commitments as if they were moral imperatives, such that in violating such a commitment—e.g., "I will be true to myself"—one not only endures a personal failure but also commits a wrong. This way of viewing personal commitments suggests that they are something like promises to self. (See Connie Rosati, "The Importance of Self-Promises," in *Understanding Promises and Agreements: Philosophical Essays*, ed. Hanoch Sheinman (Oxford: Oxford University Press, 2011), pp. 124–155, for an account elucidating the structure and grounds of self-promises). Perhaps the distinctive mark of type 4 rules, then, is that their content is not, or not merely, self-regarding. In the secular moral context, these rules typically concern how we should treat others. In the religious context, the "others" whom the rules concern might include a deity and its creations.

26. For support for the idea that the law should not distinguish between moral and religious convictions when it comes to exemptions, see, for example, Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Belknap Press, 1996), pp. 65–71; Kathleen Sullivan, "Religion and Liberal Democracy," 59 *University of Chicago Law Review* 195 (1992); Leiter, *Why Tolerate Religion?*, 54–67; Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), pp. 51–77. For argu-

ments on the other side, see Chad Flanders, "The Possibility of a Secular First Amendment," 26 *Quinnipiac Law Review* 257 (2008); Michael W. McConnell, "The Problem of Singling Out Religion," 50 *DePaul Law Review* 1, 1–3 (2000). For an especially searching inquiry into whether religion is special, see Micah Schwartzman, "What If Religion Is Not Special?" 79 *University of Chicago Law Review* 1351 (2012). See also Andrew Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions," 15 *Legal Theory* 215, 215 & n. 1 (2009) (noting that "[m]any distinguished legal theorists and philosophers have been drawn to the idea that it is conscience rather than religion that is entitled to special protection, and the U.S. Supreme Court has sometimes embraced the same position," and collecting sources and cases).

27. Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions." See also Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," 61 *University of Chicago Law Review* 1245, 1269 (1994).

28. Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions," at 221–222.

29. Jonathan Bennett, "The Conscience of Huckleberry Finn," *Philosophy* 49 (1974): 123–34; Hill, "Four Conceptions of Conscience," p. 45 note 22.

30. Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking Press, 1963), p. 131.

31. Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions," p. 234.

32. *Id.*, p. 237.

33. *Id.*, p. 239.

34. H.L.A. Hart, *The Concept of Law*, at p. 89.

35. The description of commitments in this paragraph borrows from David Owens's account of obligations in David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), pp. 79–89.

36. Or, more precisely perhaps, conscience may be central to determining the features that our life stories will *not* include. Thus, the conscientious objector to war does not want a life story in which he has engaged in military action; the conscientious objector to physician-assisted suicide does not want a life story in which she has used her medical training to help someone else end his life; and so on.

37. The account advanced in this section is developed at greater length in Sepinwall, "Conscience and Complicity."

38. Model Penal Code 2.06.

39. See, e.g., Lepora and Goodin, *On Complicity & Compromise*, pp. 59–70 (providing a detailed account for grading complicity that turns in sig-

nificant part on the strength of the putative accomplice's causal connection to another's wrong).

40. Sepinwall, "Conscience and Complicity."

41. See, e.g., John Stuart Mill, *Utilitarianism* (New York: Liberal Arts Press, 1957), p. 36 (describing as the "essence" of conscience the feeling of "a pain, more or less intense, attendant on violation of duty, which in properly cultivated moral natures rises, in the more serious cases, into shrinking from [the violation] as an impossibility"); Childress, "Appeals to Conscience," p. 321 (describing the reaction that would attend a breach of conscience as an "ache of guilt").

42. Sepinwall, "Conscience and Complicity."

43. As Douglas NeJaime and Reva Siegel argue, this was just the strategy underpinning the Hobby Lobby case: "After failing to achieve a complicity based exemption through legislation, lawyers turned to individual complicity-based claims to exemption through litigation under RFRA." Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," 124 *Yale Law Journal* 2516, 2552 (2015).

44. NeJaime and Siegel compellingly identify sabotage as the ultimate objective in bids for exemption from having to participate in contraceptive provision, abortion, or gay weddings. They quote the strategy as articulated by Bishop James Conley, who described *Hobby Lobby* as an exercise of religious liberty intended not to protect conscience so much as an effort to evangelize: "If we want to protect our religious liberty, the very best thing we can do is to use it—to transform culture by transforming hearts for Jesus Christ." *Id.* at 2552 (quoting Bishop James Conley, "Hobby Lobby Decision Is Also a Mandate," *Southern Nebraska Register: Bishop's Column*, July 11, 2014. NeJaime and Siegel describe this strategy as an instance of "preservation through transformation": "when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may act to preserve elements of the challenged regime through new rules and reasons." *Id.* at 2553.

45. See, e.g., Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 *Stanford Law Review* 261, 377 (1992) ("when the state enacts restrictions on abortion, it coerces women to perform the work of motherhood without altering the conditions that continue to make such work a principal cause of their secondary social status").

46. Jessica Valenti, "Birth Control Coverage: It's the Misogyny, Stupid," *Nation*, November 26, 2013. Available online at www.thenation.com (quot-

ing Hogue). See also Marci A. Hamilton, "The Republican War Against Women," *Justia*, October 3, 2013. ("This is not simply a move to ensure that contraception isn't paid for; it is an all-out war on women. This is the pushback to the feminist revolution, and it is being fostered by the religious organizations that believe that women should be subservient to men"); Ruth Rosen, "The War Against Contraception: Women Must Be Liberated from Their Libidos," *Huffington Post*, February 19, 2014.

47. Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," 88 *Southern California Law Review* 619 (2015).

48. See, e.g., *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990) (stating that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief" and invoking *United States v. Lee*, 455 U.S. 252 (1982) and *Hernandez v. Commissioner*, 490 U.S. 680 (1989) as support).

49. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

50. Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs*, 2 (1973): 160–180.

51. For an overview of the reasons for the demise of the public option, see Helen A. Halpin and Peter Harbage, "The Origins and Demise of the Public Option," *Health Affairs* 29 (6): June 2010, pp. 1117–1124.

52. "Good for Business: Covering Contraceptive Care Without Cost-Sharing Is Cost-Neutral or Even Saves Money," *Guttmacher*, July 16, 2014.

53. The libertarian objection is given voice in, for example, Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 169. The liberal egalitarian response can be found, for example, in Liam Murphy and Thomas Nagel, "Taxes, Redistribution, and Public Provision," *Philosophy and Public Affairs* 30(1): 53–71, 53–54 (2001) ("Taxes do not take away from taxpayers what is antecedently theirs; pretax income has no status as a moral baseline for the purpose of evaluating the justice of the tax system"); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), p. 349 ("It is a ruling principle of equality that it is unjust when some people lead their lives with less wealth available to them, or in otherwise less favorable circumstances, than others, not through some choice or gamble of their own but through brute bad luck"); G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989): 906–944.

54. See Catharine A. MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade," in *Feminism Unmodified: Discourses on Life and Law* 93, 185–194 (Cambridge, MA: Harvard University Press, 1987).

55. There is another way to understand the objectives of the tax system: On this understanding (which need not operate to the exclusion of a re-

distributive understanding), we pay taxes at least in part to fund public goods, costs for which are shared among all taxpayers, even if not every taxpayer benefits from every public good. The idea here is that it is efficient for taxpayers to pool their money and to use the resulting funds to pay for all public goods, instead of having the government operate on a pay-as-you-use system. See generally Arye L. Hillman, *Public Finance and Public Policy: Responsibilities and Limitations of Government*, 2d edition (Cambridge: Cambridge University Press, 2009).

Even though (at least currently) healthcare plans contemplate only female (and not male) contraceptives, it is not undue to consider coverage of these devices a public good. For one thing, contraception is needed only for heterosexual sex, so these devices protect both the men and women who want to have non-procreative sex. And there is no more problematic favoritism in having the government subsidize sexual activity than in having the government mandate that private insurance packages include coverage for contraception, as the PPACA does. Under either arrangement some citizens are made to defray the costs of other citizens' contraceptive use, and their doing so is no different—from the standpoint of concerns about government subsidization of certain "lifestyle" choices—from their defraying healthcare costs stemming from obesity, accidents incurred through extreme sports, and so on.

56. One might worry that the argument proves too much. If government provision avoids concerns about complicity, why not socialize any and every program generating opposition from some citizens? Why stop at contraception? Elective abortions, physician-assisted suicide, and so on all might be paid for from the public fisc, independent of the beneficiary's ability to pay for the service in question herself.

In response, it bears noting that the foregoing arguments might well entail government provision not only of contraception but also other elements of the mandated healthcare packages to which a significant number of employers object. If it turned out that enough employers objected to blood transfusions that exempting them all would undermine the employer mandate altogether, then it might make sense to have the government provide coverage for blood transfusions. (If, on the other hand, the number of objecting employers were trivial then, as I have argued, it would make sense to offer these employers an exemption—assuming that doing so does not impose undue third-party costs—rather than having government take over provision completely.)

But government subsidization of elements of the PPACA's mandated coverage is a far cry from having the government pay for non-Medicaid elective abortions, PAS, etc. With the contraceptive mandate, the government had already decided that women should have cost-free access to

contraception. And I have argued that there are good reasons, compatible with political liberalism, for providing contraception at no cost to the women using it (again, reasons that sound in distributive justice or theories of public financing for public goods). The distinctive and problematic element arose because the government had also mandated that private employers help defray contraceptive costs. The predicate for government provision then is that the government has decided—correctly—that citizens should be given no-cost access to a particular good or service and the question is whether the government should provide it directly. No such decision has been made about elective abortions for women who are not Medicaid beneficiaries, or about PAS. So the arguments here do not in fact lead to the objectionable implications that the worry raises.