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Compelling Interests and Contraception

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On the eve of Griswold v. Connecticut's fiftieth anniversary, employers are bringing challenges under the Religious Freedom Restoration Act (RFRA) to a federal law requiring them to include contraception in the health insurance benefits that they offer their employees. In Burwell v. Hobby Lobby Stores, five Justices concluded that the government has compelling interests in ensuring employees access to contraception, but did not discuss these interests in any detail. In what follows, we clarify these interests by connecting discussion in the Hobby Lobby opinions and the federal government's briefs to related cases on compelling interests and individual rights in the areas of race and sex equality.

The government's compelling interests, we argue, are best understood from within two horizons. First, they encompass core concerns of the community in promoting public health and facilitating women's integration in the workplace. Second, they encompass crucial concerns of the employees who are the intended beneficiaries of the Affordable Care Act's contraceptive coverage requirement—concerns that sound in bodily integrity, personal autonomy, and equal citizenship. Further, as we show, a full accounting of the government's compelling interests attends both to their material and expressive dimensions.

This more comprehensive account of the government's compelling interests in providing employees access to contraception matters both in political debate and in RFRA litigation as courts determine whether the government has pursued its interests by the least restrictive means. The more comprehensive account offered here is less susceptible to compromise and tradeoffs than is an account focused only on material interests in public health and contraceptive cost.

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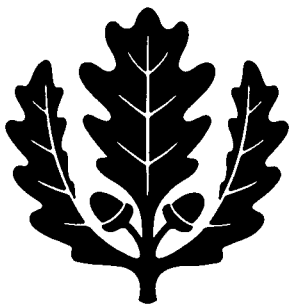
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Compelling Interests and Contraception

NEIL S. SIEGEL* & REVA B. SIEGEL**

Under our cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold v. Connecticut*, 381 U.S. 479, 485–486 (1965)

Burwell v. Hobby Lobby Stores (2014)¹

I. INTRODUCTION

Federal law often vindicates constitutional values in ways that exceed judicially enforceable constitutional requirements. Examples include laws prohibiting race or sex discrimination in the private sector, or regulations requiring employees' health insurance benefits to cover contraception.² Such statutory protections address vital concerns of the community and crucial concerns of individuals, and they help to make meaningful the exercise of constitutional rights.

The permissive accommodation of religion offers another example. In the ordinary case, laws of general applicability do not violate the Free Exercise Clause even when they substantially burden an individual's religious exercise.³ But in the Religious Freedom Restoration Act (RFRA), Congress provided additional protection to individuals whose religious exercise is substantially burdened by laws of general applicability—unless granting the exemption would compromise compelling interests of the

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¹ 134 S. Ct. 2751, 2779–80 (2014).

² Consider the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012), and the regulations promulgated pursuant to the Patient Protection and Affordable Care Act that are discussed in Part II.

³ See, e.g., *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (“Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’”) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

government in enforcing these laws.⁴

Whether granting an exemption would compromise compelling government interests was at issue in *Burwell v. Hobby Lobby Stores*.⁵ In this case, the religious owners of a for-profit corporation brought a RFRA challenge to federal regulations requiring them to include contraceptive coverage as part of the insurance that they provide to their female employees.⁶ Although the U.S. Supreme Court ultimately held that application of the regulations to the complainants violated RFRA, five Justices concluded that the government has compelling interests in ensuring women (and men) access to affordable contraception.⁷ None of the Justices, however, fully explicated these interests.

This Essay aims to enhance understanding of the government's compelling interests in providing employees access to contraception. These compelling interests, we argue, are best understood from within two horizons. First, they encompass core concerns of the community in promoting public health and facilitating women's integration in the workplace. Second, they encompass crucial concerns of the employees who are the intended beneficiaries of federal law's contraceptive coverage requirement—concerns that sound in bodily integrity, personal autonomy, and equal citizenship. As we show, a full accounting of these compelling interests attends both to their material and expressive dimensions.

This more comprehensive understanding of the government's interests matters. Courts facing claims for religious exemption under RFRA must decide whether the government can exempt the faith claimant without compromising its compelling interests in enforcing other laws. How judges answer this question depends on how they understand the government's interests in enforcing these laws.

The timing of current RFRA challenges to contraceptive coverage requirements under federal law is noteworthy. These challenges are occurring on the eve of the 50th anniversary of the Supreme Court's decision recognizing the right to use contraception in *Griswold v. Connecticut*.⁸ In *Hobby Lobby*, Justice Alito invoked the constitutional right vindicated in *Griswold* in the course of discussing the government's assertion of compelling interests in providing employees insurance

⁴ Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-1(a), (b) (2012)). See *infra* Part II for further discussion of RFRA's provisions.

⁵ *Hobby Lobby*, 134 S. Ct. at 2759.

⁶ *Id.* at 2765.

⁷ *Id.* at 2758, 2779-80, 2785-86.

⁸ 381 U.S. 479, 485-86 (1965). *Griswold* held that married couples have a fundamental constitutional right to use contraception, and the Court extended this right to unmarried people seven years later. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

coverage of contraception,⁹ but he did not discuss these interests in any detail. In what follows, we examine the Court's discussion of compelling interests in the areas of race and sex equality. Looking back to the Court's prior case law brings into view additional dimensions of the government's compelling interests that were identified by the Solicitor General and endorsed by a majority of the Court.

Part II documents that five Justices found compelling interests in *Hobby Lobby*, but also notices omissions in the compelling interest discussions of all the Justices in this case. To identify additional compelling interests at stake, Part III surveys the Court's jurisprudence of compelling interests, which identifies two horizons within which compelling interests may be ascertained. Part IV examines, from each of these perspectives, the compelling interests that support the government's efforts to ensure women and men access to effective and affordable contraception. A conclusion suggests why this more comprehensive account of the government's interests in providing employees access to contraception matters in politics as well as law.

II. THE OPINIONS IN *HOBBY LOBBY*

RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁰ In *Hobby Lobby*, the Supreme Court considered the legality of regulations adopted by the three departments that are responsible for implementing the relevant portion of the Patient Protection and Affordable Care Act (ACA).¹¹ These regulations require non-grandfathered group health insurance plans offered by employers to cover contraception.¹² Dividing five to four, the Court held that the regulations violate RFRA as applied to closely held, for-profit corporations whose owners raise religious objections to paying for their employees' insurance covering contraception.¹³ Specifically, the Court concluded that the regulations were not the least restrictive means of advancing the government's interests.¹⁴

⁹ *Hobby Lobby*, 134 S. Ct. at 2779–80 (citing *Griswold*, 381 U.S. at 485–86).

¹⁰ Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-1(a)-(b) (2012)).

¹¹ See 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011); 45 C.F.R. § 147.130(a)(1)(iv) (2013) (Department of Health and Human Services); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2013) (Department of Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (2013) (Department of the Treasury).

¹² *Hobby Lobby*, 134 S. Ct. at 2758–59.

¹³ *Id.* at 2785, 2787 (2014).

¹⁴ *Id.* at 2759–60.

Although the Court held that the regulations violated RFRA, five Justices concluded that the government has compelling interests in ensuring women access to affordable contraception.¹⁵ Justice Kennedy, who joined the majority opinion in full, also wrote separately in part to affirm the existence of a compelling interest. "It is important to confirm," he emphasized, "that a premise of the Court's opinion is its assumption that the [Health and Human Services] regulation here at issue furthers a legitimate and compelling interest in the health of female employees."¹⁶ He subsequently declared that "the law deems compelling" the interests of female employees in securing access to affordable contraception.¹⁷ In a dissenting opinion that Justices Breyer, Sotomayor, and Kagan joined, Justice Ginsburg invoked *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁸ for the proposition that "[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."¹⁹ She later referenced "compelling interests in public health and women's well being."²⁰

Justice Alito, who wrote the majority opinion invalidating the regulations on narrow tailoring grounds, assumed for purposes of analysis that Congress's interest in providing women insurance coverage of contraception was compelling under RFRA.²¹ In requiring employer-provided insurance to cover contraception, Justice Alito reported, the government sought to promote "public health" and "gender equality."²² He then related the government's interests in enacting the statute to the concerns of the citizens on whom the statute conferred benefits, citing *Griswold v. Connecticut*²³ and observing that "[u]nder our cases, women (and men) have a constitutional right to obtain contraceptives."²⁴ Justice Alito again discussed the concerns of individual citizens in a statute's enforcement when he asserted "that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose

¹⁵ *Id.* at 2785–86 (Kennedy, J., concurring), *id.* at 2787, 2805 (Ginsburg, J., dissenting).

¹⁶ *Id.* at 2786 (Kennedy, J., concurring).

¹⁷ *Id.* at 2787. Specifically, he made clear that people who exercise their religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* Kennedy thus indicated that he thought compelling interests had been established and should not merely be assumed. Presumably, the members of the majority coalition in *Hobby Lobby* disagreed about whether there were compelling interests.

¹⁸ 505 U.S. 833 (1992).

¹⁹ *Hobby Lobby*, 134 S. Ct. at 2787–88 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 856).

²⁰ *Id.* at 2799 (majority opinion).

²¹ *Id.* at 2779.

²² *Id.*

²³ *Id.* at 2779–80 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²⁴ *Id.*

on nonbeneficiaries.”²⁵ He then observed that this “consideration will often inform the analysis of the Government’s compelling interest.”²⁶

The opinions in *Hobby Lobby*, however, did not fully explicate the government’s compelling interests in ensuring access to affordable contraception. The government’s account, too, was incomplete. It appropriately emphasized a compelling interest in “public health,”²⁷ but it did not develop what was at stake for women as a matter of individual autonomy and self-determination.²⁸ Likewise, the government’s merits brief invoked “gender equality”²⁹ and asserted the “importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women,”³⁰ but the brief focused on cost differences that women and men face in purchasing contraception.

Questions about the government’s compelling interests in ensuring access to affordable contraception will multiply in the years ahead, not only under federal law but also under state law.³¹ In what follows, we read *Hobby Lobby* alongside Supreme Court decisions that have endorsed the government’s compelling interests in ending race and sex discrimination. Contextualizing *Hobby Lobby* in this way brings into view aspects of the government’s interests in promoting access to contraception that the Justices discussed in the case, as well as others that they did not.

²⁵ *Id.* at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

²⁶ *Id.* For development of this point, see Doug NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2580–85 (2015) (discussing the compelling interest and least restrictive means inquiries in *Hobby Lobby*).

²⁷ Brief for the Petitioners at 15–16, 46–49, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

²⁸ In its Reply Brief, the Solicitor General observed in passing that the female employees of the Hobby Lobby Corporation are “real people, whose statutory rights, health, and pocket-book interests—not to mention individual dignity and autonomy—are directly at issue.” Reply Brief for the Petitioners at 16, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

²⁹ Brief for the Petitioners at 15, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

³⁰ *Id.* at 85 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)).

³¹ See BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 7:6 (2014 ed.) (“As a result of the U.S. Supreme Court’s declaration in *Boerne* that RFRA was unconstitutional, a number of states have enacted religious freedom statutes modeled extensively on that federal statute.”) (footnote omitted); *id.* (identifying those states as Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia); *id.* (noting that “Alabama amended its state constitution to require strict judicial scrutiny of religious freedom claims”).

III. THE TWO HORIZONS

As we show, a complete account of the compelling interests that support a law will take into consideration both the concerns of the community and the concerns of the intended beneficiaries of the law. These dual concerns are evident in decisions that deem compelling the government's interests in eradicating race discrimination and sex discrimination.

In *Hobby Lobby*, Justice Alito asserted without elaboration that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race."³² To understand this interest, we might look back to the Court's 1983 decision in *Bob Jones University v. United States*,³³ which rejected free exercise and other challenges to the IRS's denial of tax-exempt status to a private religious school that offered faith-based reasons for discriminating on the basis of race.³⁴ In explaining why "[t]he governmental interest at stake here is compelling," the Court emphasized the interest that American society as a whole has in eradicating race discrimination,³⁵ and it reasoned about this interest in remedial terms. "[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education," the Court declared, "discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."³⁶

But the nation's compelling interest in eradicating race discrimination is not only backward looking. In prohibiting race discrimination, the public also expresses the identity and values of the polity as a whole, defending and furthering its form of life as a community. Shared understandings of this kind are essential if a society is to realize its claims to provide equal

³² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014). Justice Alito added that "prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.*

³³ 461 U.S. 574, 577, 612 (1983).

³⁴ *Id.* at 577, 612 (holding that Bob Jones University and Goldsboro Christian Schools, "non-profit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine," did not qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954). The Court noted that the sponsors of Bob Jones University "genuinely believe that the Bible forbids interracial dating and marriage." *Id.* at 580. The Court further noted that "[s]ince its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible." *Id.* at 583 (footnote omitted). According to Goldsboro's interpretation, "race is determined by descentance from one of Noah's three sons—Ham, Shem, and Japheth [c]ultural or biological mixing of the races is regarded as a violation of God's command." *Id.* at 583 n.6. For an explication of the biblical argument for racial segregation based upon "Noah's Curse," see William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665–67 (2011) (discussing how religious leaders used "Noah's Curse" to justify slavery and racial segregation).

³⁵ *Bob Jones Univ.*, 461 U.S. at 604 (footnote omitted).

³⁶ *Id.* (footnote omitted).

citizenship and to practice democracy. In *Grutter v. Bollinger*,³⁷ the Court emphasized the government's compelling interest in showing its citizens—not just when the government speaks, but when citizens themselves look around³⁸—that America is one society, not two. “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry,” the Court wrote, “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”³⁹

These backward and forward-looking interests in eradicating race discrimination are both material and expressive, leading the government to combat the distributive legacies of segregation and its social meanings.⁴⁰ Yet as important as these material and expressive concerns of the community are, they do not exhaust the government's compelling interests in combatting race discrimination.

Other decisions have emphasized that the government's compelling interests in ending race discrimination can be understood within a second horizon—from the perspective of the individuals protected by a legislative prohibition on race discrimination. For example, in upholding Congress's power to enact Title II of the 1964 Civil Rights Act in *Heart of Atlanta Motel, Inc. v. United States*,⁴¹ the Court stressed that the “fundamental object” of the federal ban on race discrimination in public accommodations “was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”⁴² This protection for individual dignity has both liberty and equality dimensions.

Individuals have liberty concerns in self-definition—that is, in the capacity to develop a life plan, including work and family projects, free of the constraints that public and private race discrimination may impose.

³⁷ 539 U.S. 306 (2003).

³⁸ Compare *id.* at 332 (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (“In the eyes of government, we are just one race here. It is American.”).

³⁹ *Grutter*, 539 U.S. at 332.

⁴⁰ In a similar vein, the community has a concern in enforcing the criminal law for reasons that are not exhausted by the prevention of violence. See, e.g., Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 91 (2011) (defending “[c]ommunicative, [c]haracter-[b]ased retributivism” on the ground that “[s]ociety must thus punish offenders to counter their demeaning messages, replacing the messages with clear statements that offenders are no better than those upon whom they prey” (footnote omitted)). In both cases, the nature of the polity as a polity is also implicated. In acting to eradicate racism and to enforce the criminal law, the community is not only affecting the distribution of material opportunities, but also is creating social meanings.

⁴¹ 379 U.S. 241 (1964).

⁴² *Id.* at 250 (quoting the report of the Senate Commerce Committee, S. REP. NO. 88-872 (1964)); see also NeJaime & Siegel, *supra* note 26, at 2574–75 (“But of course a refusal to serve also has dignitary effects. This objection became clear during the civil rights movement, when denials of service at lunch counters were understood as meaning-making transactions.”).

Freedom from race discrimination greatly affects the ability of individuals to provide materially for themselves and for their families, and to make positive meaning out of their own lives. Individuals also have equality concerns in living free of race discrimination that have both material and expressive dimensions. Part of what is at stake for them is their ability to participate in the educational, economic, and political life of the community. Also at stake for them is their standing in the community. Whether they possess or lack equal citizenship stature determines whether they live as outsiders looking in, or as insiders looking around.

The liberty and equality concerns of individuals in not being subject to race discrimination are not the same as the community's concerns in ending race discrimination. Yet *both* underwrite the Court's justifiable confidence in *Hobby Lobby* that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race."⁴³

The Court expressly reasoned from within these two horizons when it upheld a law prohibiting sex discrimination by distinguishing between the "social and personal harms" that sex discrimination causes.⁴⁴ In *Roberts v. United States Jaycees*,⁴⁵ the Court held that the government possesses a "compelling interest in eradicating discrimination against its female citizens,"⁴⁶ explaining that sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."⁴⁷

In *Jaycees*, a private organization argued that a state law requiring it to admit women as full voting members violated the constitutional freedom of association of its members.⁴⁸ The Court acknowledged that the case "plainly implicated" the First Amendment right of Jaycees members "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."⁴⁹ The Court nonetheless rejected their constitutional challenge, emphasizing "the importance, *both to the individual and to society*, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women."⁵⁰ In

⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

⁴⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

⁴⁵ 468 U.S. 609 (1984).

⁴⁶ *Id.* at 625.

⁴⁷ *Id.* (citing *Heckler v. Mathews*, 465 U.S. 728, 744–45 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723–26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684–87 (1973) (plurality opinion)).

⁴⁸ *See id.* at 612.

⁴⁹ *Id.* at 622–23.

⁵⁰ *Id.* at 626 (emphasis added) (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam), and *Frontiero*, 411 U.S. at 684–86).

addition to such material concerns, the Court invoked the “stigmatic injury” emphasized by the Court in *Heart of Atlanta*,⁵¹ which “is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”⁵²

The compelling interest analysis in *Hobby Lobby* invoked these same two horizons of concern. The majority observed that the compelling interests potentially served by enforcing the ACA’s contraceptive coverage requirement include not only the community’s concerns, but also the concerns of the citizens who benefit from the law. As noted in Part II, Justice Alito mentioned “public health,”⁵³ a community concern. He also cited *Griswold* for the proposition that “[u]nder our cases, women (and men) have a constitutional right to obtain contraceptives”⁵⁴—an individual concern. He discussed the individual citizen’s concern about the enforcement of a statute designed to protect her as relevant to the compelling interest inquiry, just as *Heart of Atlanta* and *Jaycees* did. “It is certainly true,” Justice Alito observed, “that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”⁵⁵ “That consideration,” he added, “will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.”⁵⁶

⁵¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

⁵² *United States Jaycees*, 468 U.S. at 625.

⁵³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); see *supra* text accompanying note 22.

⁵⁴ *Hobby Lobby*, 134 S. Ct. at 2779–80.

⁵⁵ *Id.* at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

⁵⁶ *Id.* For development of this point, see NeJaime & Siegel, *supra* note 26, at 2580–85 (discussing the compelling interest analysis in RFRA from the perspective of both the government enacting legislation and the individuals the legislation protects).

Professor Thomas Berg, who believes that *Hobby Lobby* was decided correctly and indeed was “an easy case,” also acknowledges that an analysis of third-party harms is relevant to the inquiry into compelling interests under RFRA. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517633. In discussing the relevance of third-party harms, however, he emphasizes “preserv[ing] the importance of religious freedom in the welfare state,” which in his view means “there must be some limits on what counts as a harm to others that justifies state regulation seriously burdening religion.” *Id.* at 35.

IV. THE CASE OF CONTRACEPTIVE ACCESS

The Court's opinions in *Hobby Lobby*, *Jaycees*, and the race discrimination cases⁵⁷ show that the government's compelling interests in requiring insurance coverage of contraception are assessed both from the perspective of the community and of the individuals protected by the law. As noted in Part II, the federal government's merits brief in *Hobby Lobby* identified some, but not all, of these dimensions of the government's compelling interests.⁵⁸ This is because the federal government tended to assume the perspective of the community—not of the individual female employees—in identifying its compelling interests, and it tended to focus on material considerations, not on the creation of social meanings. For example, the Solicitor General emphasized the government's compelling interest in a uniform insurance system,⁵⁹ as well as a compelling interest in public health.⁶⁰ Attention to material concerns similarly shaped the government's discussion of gender equality, which focused on the higher costs that women face relative to men in obtaining effective contraception.⁶¹ These considerations are each crucial dimensions of the government's compelling interests. But the analysis of Part III suggests aspects of the government's compelling interests that were identified by the government and endorsed by the Court, but not extensively discussed by either. We now point to additional dimensions of the government's interests in improving employees' access to contraception, in addition to public health and sex equity in compensation.

⁵⁷ See, e.g., *supra* notes 33–36 (discussing *Bob Jones University*).

⁵⁸ See *supra* text accompanying notes 27–30 (discussing the government's argument).

⁵⁹ The government compared its interest in “ensuring a ‘comprehensive insurance system with a variety of benefits available to all participants’” to previously accepted interests in other social programs. Reply Brief for the Petitioners at 38–39, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (quoting *United States v. Lee*, 455 U.S. 252, 258 (1982)). The government also characterized this interest as an interest in the “continued well-being and security of millions of employees and their dependents” through their “[employee benefit] plans,” an interest expressed by Congress in enacting ERISA. *Id.* at 42 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). Both characterizations were supported by the government's claim that there is “a compelling interest in uniform application of a *particular program* by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.” *Id.* at 45 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006)).

⁶⁰ The federal government and its amici devoted more attention to the impact of contraceptives on the health of families, rather than the impact on individual women. For example, the government emphasized that there is a “wealth of empirical data demonstrating that providing women access to contraceptives without cost-sharing has significant health benefits for them and their children,” *id.* at 15, and that as a result a “woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family,” *id.* at 46.

⁶¹ See *id.* at 49 (“The contraceptive-coverage provision also advances the government's related compelling interest in assuring that women have equal access to recommended health-care services.”) (citing 78 Fed. Reg. 39,872, 39,887 (July 2, 2013)).

The federal government has a compelling interest in promoting women's equal citizenship in American society, given women's exclusion from key sites of citizenship for most of American history. Women's exclusion, it is important to note, was accomplished in significant part by requiring that they occupy the role of caregivers, not breadwinners.⁶² Traditional sex role assumptions shaped efforts to control women's decisions about childbearing, contributing to the criminalization of abortion and contraception in the nineteenth century⁶³ and to gender-biased enforcement of the ban on contraception that the Court struck down in *Griswold*.⁶⁴ These assumptions persisted in recognizable forms into the modern era.⁶⁵

Over the centuries in which law and custom dictated that women were to serve as caregivers and men as breadwinners, assumptions about the "ideal worker"⁶⁶ shaped the development of educational and employment institutions. Given these widespread and deeply entrenched norms and arrangements, control over the timing of childbearing and childrearing is now crucial to women's full and equal participation in the educational and economic spheres. Contraception both enables and symbolizes women's interest in coordinating work and family. As the Department of Health and Human Services explained, "[c]ontraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies . . . allow[s] women to achieve equal status as healthy and productive members of the

⁶² Cf. *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (observing that laws enforcing this traditional role allocation are now unconstitutional).

⁶³ "Separate spheres" reasoning about women pervaded arguments for criminalizing abortion and contraception in the decades after the Civil War. See, e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 293–318 (1992) (analyzing the "nineteenth century campaign against abortion").

⁶⁴ Elsewhere we have shown that Connecticut's enforcement of its ban on contraception in *Griswold* reflected and reinforced traditional double standards in matters of sex and parenting. See generally Neil S. Siegel & Reva B. Siegel, *Griswold at 50: Contraception as a Sex Equality Right*, 124 YALE L.J.F. (2015), available at <http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right> (discussing the ways that *Griswold* expanded both liberty and equality for women). Connecticut allowed a health exception to its ban on contraception for men, but not for women, and it allowed men to purchase the most effective form of contraception for men (condoms), but did not allow women to purchase the most effective forms of contraception for women (diaphragms or the pill). *Id.* at 4.

⁶⁵ The modern Court has recognized that denying women control over their reproductive capacity may reflect, at least in part, constitutionally suspect judgments about women's roles that reinforce their exclusion from the economic and social spheres. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 856 (1992) ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

⁶⁶ See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 2 (2000) ("[T]he ideal worker [is] someone who works at least forty hours a week year round. This ideal-worker norm, framed around the traditional life patterns of men, excludes most mothers of childbearing age.").

job force.”⁶⁷ This very understanding prompted *criticism* of contraception by amici supporting Hobby Lobby.⁶⁸

Like the government’s interest in ending race and sex discrimination, the government’s interest in providing employees access to contraception has both backward and forward looking dimensions. Providing access redresses exclusion and promotes inclusion. Laws improving employee access to contraception function like (and in coordination with) laws requiring employers to provide family leave.⁶⁹ Laws improving employee access to contraception help women (and men) negotiate institutions that are organized on the ideal worker model, moving American society a step closer to the day that paths to leadership are visibly open to those with caregiving responsibilities as well as those without.

The interest in integrating caregivers in the workplace, like many

⁶⁷ The Department of Health and Human Services stated:

Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force.

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

⁶⁸ Several of the amici who opposed the ACA’s contraceptive coverage requirement argued that contraception harms women spiritually, emotionally, and physically by undermining—and undermining society’s respect for—the role of women as mothers. *See, e.g.*, Brief of American Freedom Law Center as *Amicus Curiae* at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (“[T]he widespread use of contraceptives has . . . harmed women physically, emotionally, morally, and spiritually—and has, in many respects, reduced her to the ‘mere instrument for the satisfaction of [man’s] own desires.’”); Brief *Amicus Curiae* of Westminster Theological Seminary at 22, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (“The Mandate does not purport to protect women from discrimination based on their being women or based on their being pregnant. What it purports to do is to provide women a cost free way to avoid exercising an aspect of their womanhood—their unique capacity to bear children. Promoting gender equality in that way does not, and cannot, legitimize the Mandate.”); Brief of Amicus Curiae Women Speak for Themselves at 38, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (“It is demeaning to women to suggest that women’s fertility and their bearing and rearing of children, are ‘barriers’—‘plagu[ing]’ women’s economic, social and political integration, and women’s opportunities for ‘equal access to . . . goods, privileges and advantages,’—requiring women’s usage of more contraception and ECs. Most women aspire to and do bear and rear children. They build society itself, and need and deserve social support for this important contribution, among others.”). The arguments of these amici appear to echo a number of claims regarding the efficacy and impact of contraceptives on women that Helen Alvare presented in *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379 (2013).

⁶⁹ *Cf. Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (holding that to remedy and deter violations of equal protection, Congress had authority to enact a law requiring employers to provide unpaid family leave to men and women); *id.* at 735 (“In sum, the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.”) (footnote omitted).

regulatory interests, has material and expressive dimensions. Until institutions are redesigned to welcome those with caregiving responsibilities, helping women control the timing of birth sends a message of inclusion. This is why the ACLU in *Hobby Lobby* argued that invalidating the contraceptive-coverage requirement would “send the message that women are second-class citizens, and that they are not employees equally valued by the employer.”⁷⁰ Conversely, exempting religious employers from the requirement that they include contraception in insurance coverage because they deem contraception sinful may stigmatize contraception and deter employees from using it.

To this point, we have examined the government’s compelling interests in promoting public health and supporting women’s integration in the workplace, considering these interests in requiring insurance coverage of contraception from the perspective of the community. The decisions surveyed in Part III also instruct us to examine the issue from the perspective of the individual employees whose liberty and equality, both materially and expressively, are potentially at stake. As noted above, the Court in *Hobby Lobby* observed that RFRA requires an analysis of third-party effects in determining the compelling interests that justify a legal entitlement to contraceptive coverage.⁷¹ Third-party harms form part of the analysis of compelling interests because this analysis includes an examination of what is at stake from the horizon of the citizens on whose behalf the government is acting.⁷²

To understand these interests from the perspective of the individual, we can look to the Court’s contraception, abortion, sex equality, and gay rights decisions. The Court in *Bob Jones* drew from *Brown v. Board of Education*⁷³ and its progeny in declaring a compelling interest in

⁷⁰ Brief *Amici Curiae* of Julian Bond, the ACLU, the ACLU of Pa., the ACLU of Okla., the NAACP Legal Defense & Educ. Fund, Inc., & the Nat’l Coal. on Black Civic Participation, in Support of the Gov’t at 32, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

⁷¹ *Supra* notes 55–56 and accompanying text. Third-party effects also are relevant to the narrow tailoring inquiry. What counts as a sufficient alternative must provide for all beneficiaries of the law. See NeJaime & Siegel, *supra* note 26, at 2585–86 (examining concerns about third-party harm inflicted by complicity based conscience claims).

⁷² RFRA does not make an inquiry into third-party harms an express part of the statutory test because the Court’s previous free exercise cases did not include instances in which vindicating claims of religious liberty would have caused harms to third parties. See, e.g., NeJaime & Siegel, *supra* note 26, at 2524–29 (discussing differences between the free exercise cases that Congress invoked in RFRA and complicity-based conscience claims); Catherine Fisk, *Guest Post: Does Hobby Lobby Allow Gender Discrimination?*, ONLABOR (Nov. 7, 2014), <http://onlabor.org/2014/11/07/guest-post-does-hobby-lobby-allow-gender-discrimination/> (“Before *Hobby Lobby*, the Court’s religious freedom cases typically involved religious people who quit their jobs, or wished to avoid the draft or to ingest prohibited substances, and recognition of their right to free exercise did not infringe others’ rights to equal treatment under law.”).

⁷³ 347 U.S. 483 (1954).

eradicating race discrimination,⁷⁴ and the Court in *Jaycees* drew from *Frontiero v. Richardson*⁷⁵ and its progeny in declaring a compelling interest in eradication sex discrimination.⁷⁶ Likewise, the Court in *Hobby Lobby* cited *Griswold* in its discussion of compelling interests.⁷⁷ The *Griswold* line of cases (*Griswold*, *Eisenstadt v. Baird*,⁷⁸ *Roe v. Wade*,⁷⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸⁰ *Lawrence v. Texas*,⁸¹ and *United States v. Windsor*⁸²) have much to teach about the individual's concern with access to contraception. So do the equal protection sex discrimination line of cases. As documented below, all these decisions emphasize the liberty concern of women in bodily integrity, and they require the government to respect the liberty and equality concerns of those who might become pregnant or assume caregiving responsibilities.

Pregnancy can, under various circumstances, be a threat to a woman's health or life. The Court noted this fact in *Poe v. Ullman*⁸³ and emphasized it in *Eisenstadt*.⁸⁴ So did Justice Ginsburg in *Hobby Lobby*.⁸⁵ Bodily integrity is at the root of the liberty concern that is protected in the Court's contraception and abortion cases.⁸⁶ Insurance coverage of contraception substantially addresses this individual concern.

⁷⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (citing *Brown*, 347 U.S. 483).

⁷⁵ 411 U.S. 677 (1973).

⁷⁶ See *Roberts v. United States Jaycees*, 468 U.S. 609, 625–626 (1984) (citing, *inter alia*, *Frontiero*, 411 U.S. 677).

⁷⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779–80 (2014) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

⁷⁸ 405 U.S. 438 (1972).

⁷⁹ 410 U.S. 113 (1973).

⁸⁰ 505 U.S. 833 (1992).

⁸¹ 539 U.S. 558 (2003).

⁸² 133 S. Ct. 2675 (2013).

⁸³ 367 U.S. 497, 498 (1961) (observing that the Connecticut ban on contraception applies to “married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse”); see *id.* at 498 (“Mrs. Poe has had three consecutive pregnancies terminating in infants with multiple congenital abnormalities from which each died shortly after birth.”); *id.* at 500 (“Another pregnancy [for Mrs. Doe] would be exceedingly perilous to her life.”); *id.* at 510 (Douglas, J., dissenting) (“One wife is pathetically ill, having delivered a stillborn fetus. If she becomes pregnant again, her life will be gravely jeopardized.”).

⁸⁴ See 410 U.S. at 153 (“The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.”).

⁸⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting) (“The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.”) (citation omitted).

⁸⁶ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896 (1992) (“It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s. The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.”) (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990)).

Both the liberty and the equality cases protect the individual's concern with self-definition—her freedom to develop a life plan free from governmental control or stereotypical constraints. This concern with self-definition extends to intimacy and to family formation.⁸⁷ As importantly, it extends to life projects whose prospects for success turn in substantial part on the successful integration of caregiving and breadwinning.⁸⁸ *Casey* makes especially vivid the practical and dignitary stakes for women in controlling how to coordinate their caregiving and breadwinning roles. The decision recognizes—as Justice Ginsburg reminded us in *Hobby Lobby*⁸⁹—that “[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.”⁹⁰

The Court's constitutional sex equality cases also protect the ability of women and men to integrate their work and family lives. Decisions such as *Frontiero v. Richardson*,⁹¹ *Weinberger v. Wiesenfeld*,⁹² and *United States v. Virginia*⁹³ recognize that the government has long interfered with the choices of women and men concerning caregiving and breadwinning roles, and the cases prohibit state action of this kind.⁹⁴ In *Nevada Department of*

⁸⁷ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (citing *Lawrence* for the proposition that “the Constitution protects” the “moral and sexual choices” of same-sex couples); *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (“In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”); *id.* at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”); *Casey*, 505 U.S. at 849 (“It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity.”) (citations omitted).

⁸⁸ See, e.g., *Casey*, 505 U.S. at 852 (“[The pregnant woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”).

⁸⁹ *Hobby Lobby*, 134 S. Ct. at 2787–88 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 856).

⁹⁰ *Casey*, 505 U.S. at 856.

⁹¹ 411 U.S. 677 (1973).

⁹² 420 U.S. 636 (1975).

⁹³ 518 U.S. 515 (1996).

⁹⁴ See, e.g., *id.* at 556 (holding that the Virginia Military Institute's male-only admissions policy was unconstitutional absent an “exceedingly persuasive justification” for the gender-biased policy); *Weinberger*, 420 U.S. at 640, 653 (holding unconstitutional a provision of the Social Security Act that denied benefits to widowed fathers with children because the benefits were available only to women); *Frontiero*, 411 U.S. at 690–91 (holding unconstitutional a federal statute requiring wives in the military to prove that their husbands were dependent on them in order to obtain a dependent's allowance when

Human Resources v. Hibbs,⁹⁵ the Court affirmed Congress's power under the Fourteenth Amendment to enact laws that would break with this history and help employees coordinate their work and family lives in new ways.⁹⁶

Just as the liberty cases vindicate equality values, the equality cases vindicate liberty values. Considering these two lines of cases together, we can better appreciate how, both practically and expressively, the government promotes the freedom and equality of women and men when it ensures that individuals have access to affordable contraception.⁹⁷

V. CONCLUSION

The Supreme Court's cases make it clear that compelling governmental interests—whether in eradicating race or sex discrimination, or in ensuring employee access to contraception—are understood both from the perspective of the community and of the individual. The federal government has compelling interests in ensuring access to contraception. From within the horizon of the community, access to contraception promotes public health and helps integrate those who bear and rear children as participants in all spheres of life. From within the horizon of the individual, access to contraception protects concerns about bodily integrity, autonomy, and equality. Protecting public health is enormously important, as is ensuring that insurance benefits equally cover the expenses of male and female employees. But these concerns should not obscure the forms of social participation that are enabled and affirmed by control over the timing of bearing and rearing children.⁹⁸ Most fundamentally at stake is “a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”⁹⁹

This more comprehensive account of the government’s compelling interests in promoting access to contraception matters in politics and in law. Political debates over contraceptive coverage are not fully or fairly framed when they are characterized as pitting material concerns with protecting public health and reducing the costs of women’s contraception

husbands in the military automatically obtained a dependent’s allowance regardless of whether their wives were in fact dependent on them).

⁹⁵ 538 U.S. 721 (2003).

⁹⁶ *Id.* at 734–35 (holding that Congress had authority under Section Five of the Fourteenth Amendment to enforce the Equal Protection Clause by requiring employers to provide unpaid family leave to men and women).

⁹⁷ *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).

⁹⁸ The controversiality of the government’s interests in certain religious communities does not render them un compelling, just as the long controversiality of the governmental interests in combatting race discrimination and sex discrimination in certain communities (documented in Part II) did/does not render them un compelling.

⁹⁹ *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

against moral concerns with protecting religious liberty and promoting the inclusion of religious Americans in public life. There are profound moral concerns, as well as concerns with inclusion, on both sides of the debate. On the account of governmental interests that we have provided, defenders of contraceptive coverage need not cede any ground sounding in morality or meaning.

Legally, it makes a major difference in heightened scrutiny cases—under the First Amendment, the Fourteenth Amendment, and RFRA—not just whether there are sufficiently vital governmental interests, but also what those interests are. Deciding whether a given regulation “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering [a] compelling governmental interest”¹⁰⁰ depends upon having a full accounting of the relevant government interests. We have not endeavored here to explain how courts should apply RFRA,¹⁰¹ so we will limit ourselves to one observation in closing: an understanding of the government’s interests that focuses only on material interests in public health and contraceptive cost is more susceptible to compromise and tradeoffs than is one that also comprehends other dimensions of the government’s interests that we have discussed in this Essay.

¹⁰⁰ Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–1(b) (2012)).

¹⁰¹ For one such account, see NeJaime & Siegel, *supra* note 26, at 2580–81, 2585–86 (discussing relation of compelling interests, narrow tailoring, and third-party harm).

