FREE EXERCISE LOCHNERISM

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In this Article, I identify and critique a phenomenon I call Free Exercise Lochnerism. In promoting corporate religious exemptions from employment and consumer protections, litigants, scholars, and courts are resurrecting Lochner v. New York*—a case symbolic of the courts' widely criticized use of freedom of contract to strike down economic regulation at the turn of the last century. Today, in their interpretations of the First Amendment and the Religious Freedom Restoration Act, courts replicate the commitment to private ordering and resistance to redistribution that were at the heart of* Lochner*. While this phenomenon is exemplified by* Burwell v. Hobby Lobby*, its reach is wider.*

The comparison to Lochner *offers two insights overlooked in contemporary debates over business religious liberty. First, in resisting compliance with antidiscrimination laws, pharmacy regulations, and insurance mandates (most prominently, the Affordable Care Act's contraceptive mandate), businesses make claims more reminiscent of market libertarianism than of religious freedom. In siding with these businesses, courts have begun to incorporate the premises of* Lochner *into religious liberty doctrine. In the contraceptive mandate litigation in particular, courts—from the trial level to the Supreme Court—defined a business's right to free exercise of religion by reference to its ability to contract. They postulated private market ordering as a legally and economically neutral baseline and regulation as an unnecessary and unfair redistribution. Second, comparing business religious liberty doctrine to* Lochner*-era freedom of contract lays bare the implications for the regulatory state beyond contraception and same-sex marriage. While scholars have recognized a link between* Lochner *and the Free Speech Clause, this Article establishes that free exercise has taken on a similar role with potential to undermine the regulation of business more broadly.*

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INTRODUCTION

As the Gilded Age gave way to the Progressive Era, legislatures across the United States moved to curb the excesses of industry.[1] The judiciary, however, soon blocked reform, interpreting liberty under the Fifth and Fourteenth Amendments to include virtually absolute rights to contract and to pursue one's livelihood.[2] In *Lochner v. New York*, a case emblematic of this judicial resistance to employee- and consumer-protective laws, the Supreme Court struck down a maximum-work-hours statute as a violation of freedom of contract.[3] Three decades later, the Court firmly repudiated Lochnerism and ushered in the New Deal.[4]

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1. See generally Claudio J. Katz, Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era, 31 Law & Hist. Rev. 275, 275–81 (2013) (describing this history and the judicial response).

2. See, e.g., Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 466–68 (David L. Shapiro et al. eds., 13th ed. 1997) (concluding *Lochner* Court correctly defined liberty broadly, but failed to adequately defer to legislatures on economic matters).

3. 198 U.S. 45, 64 (1905).

4. See, e.g., W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–97 (1937) (holding Fourteenth Amendment does not prohibit legislatures from interfering with freedom of contract to set minimum wages).

This Article identifies and critiques a phenomenon I call "Free Exercise Lochnerism." Today, businesses, scholars, and courts increasingly incorporate the central premises of *Lochner* into religious liberty doctrine. They resurrect the ideal of private ordering and the resistance to redistribution that were at the heart of *Lochner*. This interpretation of religious liberty, like freedom of contract before it, poses a threat to the regulatory state.

In the most high-profile manifestation of Free Exercise Lochnerism, hundreds of businesses have demanded exemptions under the Religious Freedom Restoration Act (RFRA)[5] from the Affordable Care Act (ACA)'s requirement that employee health insurance plans cover contraception.[6] The CEO of Eden Foods, for example, declared, "I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me that I have to do that?"[7] Making similar arguments, pharmacies have brought claims under the First Amendment of the U.S. Constitution against requirements that they fill all prescriptions.[8] Businesses have also raised religious liberty as a shield against laws prohibiting discrimination on the basis of gender or sexual orientation.[9] In support of his religious objection to serving a same-sex wedding, one bakery owner said, "I don't like having the government tell me which [cakes] I can make and which ones I can't make, and trying to control that part of my life."[10]

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5. See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(c) (2012) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

6. 42 U.S.C. § 300gg-13(a)(4) (2012); see also HHS Mandate Information Central, The Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/ [http://perma.cc/F7QY-B6WD] (last visited July 30, 2015) (compiling HHS Mandate cases).

7. Irin Carmon, Eden Foods Doubles Down in Birth Control Flap, Salon (Apr. 15, 2013, 11:45 AM), http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ [http://perma.cc/82W4-8ZUE].

8. See Stormans, Inc. v. Selecky (*Stormans II*), 844 F. Supp. 2d 1172, 1201 (W.D. Wash. 2012) (granting exemption); Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *7 (Ill. Cir. Ct. Apr. 5, 2011) (granting declaratory and injunctive relief), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

9. See Elane Photography, LLC v. Willock, 309 P.3d 53, 72 (N.M. 2013) (rejecting photography studio's argument that enforcement of antidiscrimination law based on its refusal to serve same-sex commitment ceremony "violates [studio's] First Amendment right to freely exercise its religion"), cert. denied, 134 S. Ct. 1787 (2014); Answer, Affirmative Defenses and Third-Party Complaint at 16, State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2013 WL 10257927 (Wash. Super. Ct. May 16, 2013) (arguing antidiscrimination law requiring florist to provide flowers for same-sex wedding violates First Amendment).

10. Michael Paulson, Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises, N.Y. Times (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html (on file with the *Columbia Law Review*).

Such objections will likely extend beyond contraception and gay rights. In the past, some for-profit employers have asserted their religious identity to refuse to hire or promote employees who are not willing to comply with their religious dictates.[11] In their roles as landlords, employers, and retailers, commercial businesses—both for- and nonprofit—previously asserted religious objections (with little success) against race, marital status, and religion antidiscrimination laws under federal and state constitutions and RFRAs.[12]

Recently, however, objecting businesses have begun to succeed in the courts. Under the First Amendment, state and federal trial courts exempted pharmacies from their duties to fill prescriptions for emergency contraception, despite the effects on patients.[13] Across the nation, courts enjoined the contraceptive mandate under RFRA, stripping employees of their statutory rights.[14] Confronted with religious objections to the contraceptive mandate, the Supreme Court in *Burwell v. Hobby Lobby Stores* required the government to accommodate for-profit corporations on equal terms with nonprofit religious organizations. While the question of whether a for-profit corporation could exercise religion was open, the exemption of a commercial enterprise from employee-protective legislation broke with the courts' previous understanding of the First Amendment and RFRA.[15]

These courts incorporate the dual premises of *Lochner*—an ideal of private ordering and a resistance to redistribution—into RFRA and First Amendment doctrine. They construct the employer–employee relation-

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11. See McLeod v. Providence Christian Sch., 408 N.W.2d 146, 148 (Mich. Ct. App. 1987) ("NRC Consistory decided that the school should avoid hiring women with small children as full-time teachers whenever possible . . . [because of] the church's teaching that a woman's place is in the home raising children and not in the work force . . . ."); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985) (en banc) (discussing company's defense of religion, sex, and marital status discrimination using "rigid work rules based on the Bible").

12. See EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615–16 (9th Cir. 1988) (addressing Title VII suit by atheist employee who refused to attend mandatory weekly worship services in which employer based defense on its own religious beliefs); Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 436 (4th Cir. 1967) (disallowing race discrimination by restaurant), aff'd, 390 U.S. 400 (1968); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (refusing to grant landlord constitutional exemption from marital status antidiscrimination law); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 929–31 (Cal. 1996) (refusing to grant landlord RFRA exemption from marital status antidiscrimination law).

13. See supra note 8 and accompanying text (describing cases granting exemptions).

14. See Korte v. Sebelius, 735 F.3d 654, 654 (7th Cir. 2013) (granting for-profit employers injunction against contraceptive mandate); Monaghan v. Sebelius, 931 F. Supp. 2d 794, 803 (E.D. Mich. 2013) ("The Court finds that the mandate forces Monaghan to violate his beliefs and modify his behavior or else pay substantial penalties for noncompliance . . . [constituting] a substantial burden on his free exercise of religion.").

15. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) (holding contraceptive mandate imposes substantial burden on religious exercise of for-profit closely held corporations).

ship as a private contractual agreement and suggest that both parties benefit from minimal or no government regulation of its terms. In the consumer context as well, these courts perceive businesses that refuse to serve particular individuals (such as women in need of emergency contraception) as merely declining to enter into a contract. In their view, the existing market forms a legally and economically neutral baseline, and regulation unfairly imposes on business. On this account, the government has little power to change the market distribution of both wealth and entitlements. The responsibility for remedying any inequities in the market lies, not with private enterprise, but with individuals or the government directly.

While legal scholars have long recognized a link between *Lochner* and the Free Speech Clause of the First Amendment,[16] this Article establishes that free exercise—under both statutory and constitutional provisions—has taken on a similar role. As its current manifestations indicate, business religious liberty may reach areas of commercial regulation, including antidiscrimination and employment law, where free speech claims rarely succeed.[17]

The comparison to *Lochner* offers two insights that go overlooked in contemporary debates over business religious liberty. First, it shows that the underlying premises of business religious exemption reflect a tradition of market libertarianism, rather than religious liberty. The legal claim that objectors make is the right to run their businesses as they see

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16. See J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 384 ("Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment . . . ."); Stuart Minor Benjamin, Proactive Legislation and the First Amendment, 99 Mich. L. Rev. 281, 286–87 (2000) (describing need "to avoid a revival of *Lochner* through the First Amendment"); Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 30–31 (1979) ("[T]he Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech."); Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. Rev. 1149, 1212–13 (2005) ("[T]here are some fairly strong parallels between the traditional conception of *Lochner* and the First Amendment critique of data privacy legislation."); Frederick Schauer, First Amendment Opportunism, *in* Eternally Vigilant: Free Speech in the Modern Era 175, 178–79 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("Facing the increasing constitutional (or at least doctrinal) weakness of arguments from economic libertarianism, economic libertarians turned their attention to the First Amendment.").

17. See, e.g., Christian Legal Soc'y v. Martinez, 561 U.S. 661, 665 (2010) (finding no violation of free speech in imposition of nondiscrimination requirements); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 89 (Cal. 2004) (holding compliance with insurance regulations "does not require one to convey a verbal or symbolic message" in "support for the law or its purpose"); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) (holding that requiring insurance coverage for employees' contraceptive prescriptions does not obstruct employer's religious message). But see Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (finding unconstitutional state antidiscrimination law that would compel organization to accept members against its expressive message).

fit (including with the benefit of incorporation). They conflate freedom of contract with freedom of religion. Claimants—and courts siding with them—emphasize private ordering as constitutionally or at least statutorily significant. Abrogation of this order, accordingly, becomes suspect.

Second, the comparison to *Lochner* reveals that business religious liberty claims are not limited to women and gay people, but instead have the potential to carve out exemptions from a wide swath of regulation. That is not to say that the litigants' motives are to challenge the regulatory state. The logic of Free Exercise Lochnerism, however, equally applies to other regulation. As Judge Ilana Rovner of the Court of Appeals for the Seventh Circuit said in dissenting from a decision to exempt for-profit employers from the contraceptive mandate, the rationales used by the courts subject "a potentially wide range of statutory protections to strict scrutiny, one of the most demanding standards known in our legal system," in a way that is "reminiscent of the *Lochner* era."[18] At risk is the integrity of the many laws that protect employees and consumers in our religiously diverse nation.

To develop these claims, this Article begins in Part I by defining Lochnerism. Drawing on Professor Cass Sunstein's influential account,[19] it uses the term to mean strict-in-theory, fatal-in-fact scrutiny of economic regulation characterized by an ideal of private ordering and a resistance to redistribution.

Part II analyzes and critiques the rise of Free Exercise Lochnerism as it was urged by litigants, supported by academics, and adopted by the lower courts. While it focuses primarily on claims of for-profit businesses against economic regulation benefitting employees and consumers, it includes virtually identical arguments made by nonprofit commercial actors against the contraceptive mandate and nondiscrimination requirements. It excludes the special context of houses of worship and recognizes that many religious liberty claims do not advance economic libertarianism.[20]

Part II contends that the dual premises of *Lochner* are being incorporated into each step of courts' scrutiny of laws under RFRA and sometimes the First Amendment. With regard to the threshold question of whether a regulation substantially burdens religion, the market serves as a baseline for doctrinal analysis. Against a market baseline, the government's compelling interests in regulating business shrink to ensuring access to goods and services in the market. Provided individuals

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18. *Korte*, 735 F.3d at 693 (Rovner, J., dissenting).

19. See Cass R. Sunstein, *Lochner*'s Legacy, 87 Colum. L. Rev. 873, 877 (1987) ("[T]here can be no doubt that most forms of redistribution and paternalism were ruled out [in the *Lochner* era]."); see also David E. Bernstein, *Lochner's Legacy*'s Legacy, 82 Tex. L. Rev. 1, 13–14 (2003) [hereinafter Bernstein, *Lochner's Legacy*'s Legacy] ("*Lochner's Legacy* is one of the most influential constitutional law articles of the last twenty years.").

20. See, e.g., Holt v. Hobbs, 135 S. Ct. 853, 859 (2015) (granting Muslim inmate religious exemption from prison policy prohibiting growing beards).

can access the market, the government has little interest in enlisting commercial actors to meet regulatory goals.

As in *Lochner*, litigants, scholars, and courts deny the artificiality of the private order and overlook the ways in which it distributes subsidies and burdens. Resistance to redistribution and commitment to market mechanisms then inform the analysis of whether the government has a means to further its interests that is less restrictive of business religious liberty. According to the logic of business religious liberty claimants and their supporters, any time a state or private entity might theoretically fill the gap caused by a business's denial of statutory rights, its employees and would-be customers are not harmed.

Part III argues that the Supreme Court's decision in *Burwell v. Hobby Lobby* largely brings Free Exercise Lochnerism to fruition. The Court interpreted religious liberty doctrine to encompass freedom-of-contract rationales. It did not join the lower courts in entirely exempting employers without regard for the burdens on their employees or the costs to the government. The Court nonetheless failed to repudiate their Lochnerian reasoning, unsettling religious liberty doctrine and inviting future business religious exemptions from economic regulation.

Part IV contends that looking at the shift in religious liberty doctrine through the lens of *Lochner* reveals the wider stakes both doctrinally and practically. The comparison to *Lochner* avoids the temptation to categorize objections to contraception and same-sex marriage as "culture war" issues separate from the broader constitutional order. It shows that strict scrutiny of economic regulation at the service of powerful economic entities invites deregulation through exemption. Business religious liberty may lead to exemptions from health, social insurance, and nondiscrimination laws in the workplace and beyond.

I. DEFINING LOCHNERISM

Lochnerism refers to the Supreme Court's 1905 decision in *Lochner v. New York* striking down a state law that limited bakers' work hours as violating employers' and employees' liberty of contract.[21] The case became symbolic of a time in which courts found unconstitutional a series of statutes mandating maximum hours, days of rest, and minimum wages, and protecting collective bargaining and unionization.[22] Although

21. 198 U.S. 45, 52–53 (1905).

22. Revisionists have long argued that the *Lochner* Court was not hostile to regulation per se. See Michael J. Phillips, The Progressiveness of the *Lochner* Court, 75 Denv. U. L. Rev. 453, 488–90 (1998) (concluding, based on empirical study of all substantive due process cases, "*Lochner* Court rejected considerably more substantive due process claims than it granted"). But see Julie Novkov, Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years 29–30 (2001) (determining, based on empirical review of employment regulation cases, that federal courts struck down

the term Lochnerism has long been used to critique judicial decisions striking down commercial regulation, its meaning remains contested.

The aim of this Part is modest. It takes the perspective, well accepted in legal scholarship, that the trouble with *Lochner* lay not with liberty of contract itself, but rather with the courts' overly stringent—sometimes absolutist—approach to regulatory infringement of that liberty.[23] It makes no claim to read *Lochner*-era cases in a new way. It takes no position on whether the decisions were rooted in the legal principles of the day or motivated by favoritism toward business interests. Nor does it seek to criticize the endeavor of judicial review of legislation or examine the role of unenumerated rights in the constitutional system.

Drawing on Sunstein's influential account, this Part defines Lochnerism to mean strict scrutiny of economic regulation supported by an ideal of private ordering and a resistance to redistribution from that private order.[24] As regards the first premise, courts took the market as the relevant baseline against which to measure the constitutionality of regulation.[25] Then-Judge Peckham, who later joined the *Lochner* Court, expressed this commitment; it would be "a violation of the fundamental law," he wrote, "to interfere with . . . the most sacred rights of property and the individual liberty of contract."[26] In reviewing employer regulation in particular,[27] courts portrayed the market as naturally and neutrally distributing rights and responsibilities.[28] As Felix Frankfurter

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sixty percent of general employee protective legislation but more frequently upheld protections specific to children and women).

23. See, e.g., David A. Strauss, Why Was *Lochner* Wrong?, 70 U. Chi. L. Rev. 373, 383 (2003) ("[T]he Court lacked an understanding of freedom of contract that might have enabled it to develop a plausible legal regime.").

24. See Sunstein, supra note 19, at 875 ("[T]he case should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements . . . .").

25. Id. at 874; see also Bruce Ackerman, We the People: Transformations 365–66, 489 n.41 (1998) (contending that, to *Lochner* Court, "the market operated as a prepolitical baseline establishing basic entitlements"); Richard E. Levy, Escaping *Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 390–91 (1995) ("*Lochner*-era jurisprudence rested on the incorporation of common-law property and contract rights as a prepolitical, natural-law baseline.").

26. People ex rel. Annan v. Walsh, 22 N.E. 682, 694–95 (N.Y. 1889) (Peckham, J., dissenting).

27. Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, Constitutional Law 755–56 (5th ed. 2005) (noting that striking down of laws "centered primarily, although not exclusively, on labor legislation"); Victoria F. Nourse, A Tale of Two *Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights, 97 Calif. L. Rev. 751, 753 (2009) [hereinafter Nourse, Tale of Two *Lochner*s] ("The *Lochner* bias was not against regulation *simpliciter*; it was bias against labor and price regulation . . . .").

28. See Catherine L. Fisk, *Lochner* Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits, 56 Ohio St. L.J. 153, 160 (1995)

said in critique, courts conceived of society "as independent individuals dealing at arms' length with one another."[29] Employers and employees were expected to negotiate for the best bargain possible, with no more rights or responsibilities than any other contracting parties.[30] If an employee failed to secure satisfactory terms with an employer, courts emphasized, he always had the option to exit and sell his labor elsewhere.[31] Having consented to a bargain, however, the employee should be held to it.

According to this highly formalist view of the employment relationship,[32] employees shared with their employer an interest in bargaining without government intervention. For example, when the New York Court of Appeals issued its decision in *Lochner*, a dissenting judge expressed concern that regulating the relationship "must inevitably put enmity and strife between master and servant."[33] The U.S. Supreme Court agreed, invalidating maximum hour laws binding on employers as "mere meddlesome interferences with the rights of the individual"—that is, the laborer.[34] Such alignment of employee and employer interests is the high-water mark of Lochnerism. It is, as this Article demonstrates, adopted in Free Exercise Lochnerism.

A second and related premise of *Lochner*-era reasoning resisted government regulation that disrupted private agreements. Any change from the market as defined by common law rules of contract, property, and tort prompted skepticism as a form of "redistribution."[35] As Sunstein

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(characterizing *Lochner* as involving "faith in voluntary private ordering as the preferred form of social organization").

29. Felix Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 Harv. L. Rev. 353, 367 (1916).

30. See Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 558–59 (1923) (comparing employment relationship to arm's-length sales of goods); see also id. at 545 ("[T]he parties have an equal right to obtain from each other the best terms they can . . . .").

31. See, e.g., Adair v. United States, 208 U.S. 161, 172–73 (1908) (reasoning employee possessed right "to become or not, as he chose, an employee . . . upon the terms offered to him"). As a result, the employer had the right, which legislation could not abridge, to fire an employee for being a member of a labor union, just as the employee could have quit because the employer hired nonunion employees. Id. at 175.

32. See Fisk, supra note 28, at 187 ("As the Realists long ago observed about the freedom of contract doctrine of *Lochner* and its progeny, the notion of equality and bargaining between employer and employee is a fallacy '[t]o everyone acquainted at first hand with actual industrial conditions.'" (quoting Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454, 454 (1908))).

33. People v. Lochner, 69 N.E. 373, 385 (N.Y. 1904) (O'Brien, J., dissenting).

34. Lochner v. New York, 198 U.S. 45, 60–61 (1905). At courts' (and employers') purported concern for employees' freedom, the Mississippi Supreme Court wryly observed that "it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable right to labor. This inestimable privilege is generally the object of the buyer's disinterested solicitude." State v. J.J. Newman Lumber Co., 60 So. 215, 217 (Miss. 1913).

35. See Sunstein, supra note 19, at 882 ("We may thus understand *Lochner* as a case that failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and without prepolitical status."); see also Owen M. Fiss,

argues, courts took as a constitutional principle the preservation of "the existing distribution of wealth and entitlements" under "the baseline set by the common law."[36] For example, in *Adkins v. Children's Hospital*, the Supreme Court deemed unconstitutional a minimum wage law because it "amount[ed] to a compulsory exaction from the employer for the support of a partially indigent person . . . and therefore, in effect, arbitrarily shift[ed] to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[37] While employees could contract for the fair (i.e., market-driven) value of their labor, government regulation of its value was seen as an unfair burden on business.[38] The Court accepted that an employee may have "the ethical right . . . to a living wage," but refused to concede that the employer bore any "peculiar responsibility" to provide it.[39] According to the Court, Sunstein explains, "[s]uch legislation was . . . a kind of 'taking' from A to B . . . . If B is needy, it is not A, but the public at large, who should pay."[40] Departures from the private order, or "takings," were constitutionally suspect with regard to legal duties or entitlements as well as compensation, as the Court's invalidation of laws preventing discrimination against union members showed.[41]

Troubled Beginnings of the Modern State, 1888–1910, at 295 (1993) (observing state was "denied the authority to alter the distribution of power or wealth in civil society"); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 194, 272 (1992) (arguing late nineteenth-century legal thought perceived market as neutral and legitimate such that redistribution was illegitimate); J.M. Balkin, Ideology and Counter-Ideology from *Lochner* to *Garcia*, 54 UMKC L. Rev. 175, 182–83 (1986) (arguing *Lochner* Court considered redistributive law suspect); Martha T. McCluskey, Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State, 78 Ind. L.J. 783, 793 (2003) (noting "naturalized market" contrasted with "social citizenship's 'redistributive' policies").

36. Sunstein, supra note 19, at 874. But see Bernstein, *Lochner's Legacy*'s Legacy, supra note 19, at 39–40 (rejecting this view but noting "Court . . . did invalidate one specific category of laws that might be considered redistributive: laws that it believed had no purpose other than to aid labor unions").

37. Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 557–58 (1923).

38. See id. at 557 (stating minimum wage requirement "ignores the necessities of the employer . . . generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss"); see also Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 158–59 (1993) (arguing Court saw minimum wage laws as "granting to workers an 'unnatural' (non-market-based) economic advantage vis-à-vis their employers"); Jeffrey M. Shaman, On the 100th Anniversary of *Lochner v. New York*, 72 Tenn. L. Rev. 455, 489 (2005) ("Given this deification of an unregulated market as a manifestation of the natural order, it followed that a contract 'voluntarily' agreed to by an employer and employee in an unregulated market determined the fair value of the services to be rendered under the contract.").

39. *Adkins*, 261 U.S. at 558.

40. Sunstein, supra note 19, at 876.

41. See Adair v. United States, 208 U.S. 161, 174 (1908) (reasoning "it is not within the functions of government— . . . in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain [another's] personal services"); see also Daniel A. Farber, Who Killed *Lochner*?, 90 Geo.

The result was the affirmation of the status quo.[42] With the market as a constitutional baseline against which to evaluate burdens and benefits, courts inevitably overlooked the costs that businesses imposed on employees and the public. They could not perceive that businesses created significant negative externalities by failing to pay adequate wages, ensure safe working conditions, and provide support to injured employees.[43] Nor, as Chief Justice Taft noted in his *Adkins* dissent, could the Court recognize that, under its interpretation, the law effectively subsidized businesses by lifting burdens they otherwise would bear.[44] The artificiality of the market went unacknowledged.

Relying on ideals of private ordering and government neutrality with regard to distribution of resources and entitlements, *Lochner*-era courts struck down highly salient legislation aimed at safeguarding workers.[45] Although judicial use of Lochnerian rationales ebbed and flowed, it formed a serious barrier to economic regulation from 1923 to 1937.[46] To the extent that courts were willing to uphold business regulation, contemporaries saw their decisions as "arbitrary, random, unpredictable, and ultimately political."[47] The result was uncertainty and chilling of legislation.[48]

In its 1937 decision in *West Coast Hotel Co. v. Parrish*, the Supreme Court reversed course.[49] It rejected the use of private ordering as a constitutional baseline and accepted redistribution from the private order as a governmental goal. No longer could employers pay wages

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L.J. 985, 988 (2002) (indicating "*Lochner*-era's philosophy" may be encapsulated in "Court reject[ing] the legitimacy of any state effort to deal with unequal bargaining power or to change the distribution of wealth" (citing Coppage v. Kansas, 236 U.S. 1 (1915))).

42. See Sunstein, supra note 19, at 882 ("[T]he Court took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.").

43. See Katz, supra note 1, at 277 (noting judicial view based on "understanding that competitive markets fairly distributed opportunity").

44. 261 U.S. at 563 (Taft, C.J., dissenting). The disagreement between Taft and the majority involved both the appropriate baseline and its consequences for law. See Sunstein, supra note 19, at 876 ("The notion of subsidy is of course incoherent without a baseline from which to make a measurement.").

45. See Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383, 1449 (2001) (arguing "small absolute number of overrulings looked like a sea change to observers living at the time").

46. See David E. Bernstein, *Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism, 92 Geo. L.J. 1, 10–11 (2003) ("From 1923 to the mid-1930s, the Court was dominated by Justices who expanded *Lochner* by voting to limit the power of government in both economic and noneconomic contexts.").

47. Howard M. Wasserman, *Bartnicki* as *Lochner*: Some Thoughts on First Amendment Lochnerism, 33 N. Ky. L. Rev. 421, 431 (2006).

48. See Nourse, Tale of Two *Lochner*s, supra note 27, at 769 ("*Lochner* was a shadow that hung over states' attempts to pass hours laws . . . .").

49. 300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

determined to be inadequate through the legislative process to their employees. The Court came to understand economic regulation "as *reducing* rather than *creating* moral hazard" by requiring businesses to internalize costs they had previously imposed on other parties and the state.[50] It recognized that the existing law was not neutral, but rather provided a subsidy to "unconscionable employers" from employees and the rest of society.[51]

Since that time, economic regulation largely has been safeguarded from libertarian objections.[52] Landmark legislation of the New Deal and subsequently the Great Society shifted the distribution of resources and entitlements without successful constitutional challenge.[53] Courts no longer interpreted the Constitution to deny workers' rights to statutory protections.[54]

Today, however, the defining characteristics of *Lochner* are undergoing a revival in the form of Free Exercise Lochnerism.

II. THE RISE OF FREE EXERCISE LOCHNERISM

This Part documents and critiques the recent rise of Free Exercise Lochnerism as it has been championed by scholars, claimed by litigants, and embraced by lower courts. This phenomenon incorporates into religious liberty doctrine the central premises of *Lochner*—that is, stringent judicial scrutiny of economic regulation informed by a baseline of private ordering and a skepticism toward redistribution. In making religious liberty claims, businesses resist regulation that benefits employees and consumers.

Section II.A briefly describes the constitutional and quasi-constitutional nature of business religious liberty claims. It reviews the recent judicial acceptance of business religious liberty under the Religious Freedom Restoration Act in litigation related to the Affordable Care Act's contraceptive mandate and under the First Amendment in cases

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50. McCluskey, supra note 35, at 818.

51. *W. Coast Hotel Co.*, 300 U.S. at 399.

52. See Schauer, supra note 16, at 178 ("[T]hose who would have argued against government economic control on libertarian grounds now found that after the New Deal their views had neither constitutional nor cultural . . . support.").

53. See James W. Ely, Jr., The Protection of Contractual Rights: A Tale of Two Constitutional Provisions, 1 N.Y.U. J.L. & Liberty 370, 394 (2005) ("*West Coast Hotel* . . . marked the demise of freedom of contract as a viable constitutional doctrine before the Supreme Court. The Justices have never again invoked the liberty of contract to strike down legislation.").

54. As the *West Coast Hotel Co.* Court said, "In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety." 300 U.S. at 393; see also Gillman, supra note 38, at 200 (arguing *West Coast Hotel Co.* "was a true constitutional revolution" and "expressed a willingness to allow government to intrude itself into market relations on the behalf of" workers).

involving requirements that pharmacies fill all prescriptions. It also explains the constitutional significance of RFRA, which set a strict-scrutiny-like standard for federal laws that substantially burden a person's exercise of religion.[55]

The remaining Parts contend that, in these business religious liberty claims, the dual premises of *Lochner* become salient. As section II.B argues, businesses define their religious liberty as the ability to contract and view redistribution as a burden on their free exercise. The private order becomes the baseline. Lochnerian premises then inform the application of strict scrutiny, as courts assess whether the burdensome law "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[56] As section II.C contends, the market baseline constricts the harms that government may address through legislation and that, accordingly, accrue to third parties when a business receives a religious exemption from law. In this way, as section II.D shows, courts (and litigants) deny the artificiality of the market order and overlook the ways in which it distributes subsidies and burdens. Section II.E explains that resistance to redistribution and commitment to market mechanisms together fuel analysis of whether an alternative exists that is less restrictive on business religious liberty. In the logic of business religious exemptions, any time a state or private entity might theoretically fill the gap caused by a business's denial of statutory rights, its employees and would-be customers are not harmed.

A. *Constitutional and Quasi-Constitutional Business Religious Liberty Claims*

Proceeding primarily under the Religious Freedom Restoration Act but also under the Free Exercise Clause of the Constitution, businesses demand religious exemptions from a variety of commercial regulations. For-profit employers refuse to hire or promote employees based on their religious beliefs.[57] Pharmacies balk at filling prescriptions for emergency contraception as required by law.[58] Wedding vendors and other businesses object to serving same-sex couples.[59] They build on similar

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55. See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012) ("[G]overnments should not substantially burden religious exercise without compelling justification.").

56. Id. § 2000bb-1(b).

57. See supra note 11 and accompanying text (compiling cases).

58. See infra notes 78–82 and accompanying text (discussing state and federal cases).

59. See, e.g., Complaint for Injunctive Relief, Declaratory Relief & Damages at 6, Cervelli v. Aloha Bed & Breakfast, No. 11-1-3103-12 ECN (Haw. Cir. Ct. Dec. 19, 2011), http://www.lambdalegal.org/sites/default/files/cervelli_hi_20111219_complaint.pdf [http://perma.cc/MA4N-B4GN] (alleging bed and breakfast refused to admit same-sex couple because of their sexual orientation); Answer, Affirmative Defenses & Third-Party Complaint at 16, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. May 16, 2013) (arguing that requiring arranging flowers for wedding of same-sex couple

arguments asserted in years past (with little success) by landlords, employers, and stores against antidiscrimination laws.[60]

Recently, however, some of these businesses have begun to prevail. For-profit and nonprofit employers have won exemptions from the Affordable Care Act's contraceptive mandate under RFRA.[61] In both Illinois and Washington, trial courts have granted religious exemptions to for-profit pharmacies under the First Amendment of the U.S. Constitution.[62] Under a state religious freedom restoration act, another state court exempted a for-profit print shop from antidiscrimination law.[63] In these cases, courts have incorporated freedom-of-contract

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would "substantially burden the free exercise of religion by Barronelle and Arlene's Flowers"); Katie McDonough, Oregon Baker Denies Lesbian Couple a Wedding Cake, Salon (Feb. 2, 2013, 11:55 AM), http://www.salon.com/2013/02/04/oregon_baker_denies_lesbian_couple_a_wedding_cake/ [http://perma.cc/445D-87SE] (reporting Oregon baker refused "to do business with a lesbian couple who sought a cake for their upcoming wedding"); Katie McDonough, Yet Another Bakery Refuses to Make Cake for Gay Wedding, Salon (May 15, 2013, 11:51 AM), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/ [http://perma.cc/37UW-2G7X] (chronicling several bakeries' refusals to bake wedding cakes for gay and lesbian couples); Nina Terrero, N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride, ABC News (Aug. 19, 2011), http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333 (on file with the *Columbia Law Review*) (detailing bridal shop owner's refusal to sell wedding dress to lesbian bride); Wedding Cake Battle Brews Between Couple, Baker, KCCI Channel 8 (Nov. 12, 2011, 9:37 AM), http://www.kcci.com/Wedding-Cake-Battle-Brews-Between-Couple-Baker/-/9357770/7310176/ [http://perma.cc/V89E-LUF6] (describing baker's refusal to bake wedding cake for same-sex couple on religious conviction grounds).

60. See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (9th Cir. 1988) (rejecting contention that application of prohibition on religious discrimination under Title VII violates Free Exercise Clause); Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966) ("Neither is the court impressed by defendant Bessinger's contention that the judicial enforcement of the public accommodations provisions of the Civil Rights Act of 1964 upon which this suit is predicated violates the free exercise of his religious beliefs in contravention of the First Amendment to the Constitution."), rev'd, 377 F.2d 433 (4th Cir. 1967), aff'd, 390 U.S. 400 (1968); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994) (rejecting argument that prohibitions on marital-status discrimination in housing violated landlord's right to religious freedom).

61. See, e.g., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (holding contraceptive mandate violates religious freedom of "closely held corporations" under RFRA).

While for-profit businesses virtually by definition make Lochnerian claims, nonprofit commercial actors also sometimes assert such arguments against the regulation of their commercial activities. For example, inspired by the successes of the for-profit challengers, nonprofits are making nearly identical arguments against the contraceptive mandate premised on Lochnerian grounds. See, e.g., Brandt v. Burwell, 43 F. Supp. 3d 462, 494 (W.D. Pa. 2014) (granting permanent injunction from enforcement of ACA contraceptive mandate for religiously affiliated nonprofit), appeal filed, No. 14-4087 (3d Cir. 2014).

62. See infra notes 78–82 (discussing state and federal cases).

63. See Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n, Civ. No. 14-CI-04474, slip op. at 15 (Fayette Cir. Ct. Apr. 27, 2015), http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf [http://perma.cc/C6QV-

rationales into each step of the scrutiny of laws under RFRA and the First Amendment in a move toward Free Exercise Lochnerism.

Because most business religious liberty claims arise under RFRA, one might initially question whether the interpretation of a statute can restore *Lochner*, which involved constitutional rights. To be sure, RFRA offers statutory, rather than constitutional, protection for the exercise of religion. Through RFRA, however, Congress sought to reinstate the constitutional level of scrutiny for religious liberty claims.[64] RFRA, in effect, overrides the Supreme Court's decision in *Employment Division v. Smith*, in which the Court rejected strict scrutiny for Free Exercise claims.[65] Unlike other statutes, RFRA sets a constitution-like standard of review for all federal legislation. Where a law imposes a substantial burden on religion, RFRA requires courts to engage in constitutional analysis to identify compelling governmental interests and determine whether the law proves the least restrictive means of furthering those interests.[66]

As scholars tend to agree, RFRA's interpretation has constitutional or quasi-constitutional significance.[67] Courts understand the statute as

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5GLN] (holding application of antidiscrimination law to print shop refusing to provide shirts for gay rights organization, albeit complicated by separate, viable Free Speech defense, violated state RFRA).

64. See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b)(1) (2012) (listing RFRA's purpose as "to restore the compelling interest test as set forth in Sherbert v. Verner, and Wisconsin v. Yoder, and to guarantee its application in all cases where free exercise of religion is substantially burdened" (citations omitted)); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (observing Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*"); Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995) ("Since RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim."); S. Rep. No. 103-111, at 9 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898 ("[RFRA] is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard . . . applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); H.R. Rep. No. 103-88, at 16 (1993) (noting same); Douglas Laycock, The Religious Freedom Restoration Act, 1993 BYU L. Rev. 221, 221 [hereinafter Laycock, RFRA] ("[RFRA] would enact a statutory version of the Free Exercise Clause.").

65. 494 U.S. 872, 888 (1990) ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

66. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2012).

67. See Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 468 (1994) (describing RFRA as "quasi-constitutional [] in the sense that it is in service of values germane to the liberty-bearing provisions of the Constitution and extends those values further than the reach of contemporary judicial doctrine"); Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 Cardozo L. Rev. 357, 386 (1994) ("Professor Laycock did not go far enough when he stated that RFRA 'is a quasi-constitutional statute.' As applied to federal law, it is a constitutional *amendment*." (footnotes omitted)); Douglas Laycock & Oliver S.

analogous to a constitutional right.[68] Although RFRA only applies directly to federal law, its interpretation can also influence state courts' reading of state constitutional provisions or state RFRAs, many of which are modeled on the federal law.[69] Religious liberty doctrine under RFRA similarly has the potential to shape popular understandings of constitutional rights.[70]

The doctrinal shift toward Free Exercise Lochnerism also could continue under the First Amendment. In practice, courts conflate constitutional Free Exercise and RFRA.[71] In considering whether to grant

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Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 219 (1994) (arguing RFRA is "designed to perform a constitutional function . . . designed to restore the rights that previously existed under the Free Exercise Clause"); Laycock, RFRA, supra note 64, at 254 (stating "RFRA is a quasi-constitutional statute"); Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 224 (1995) ("RFRA's subject matter and terms give it a quasi-constitutional character."); Gregory P. Magarian, *Hobby Lobby* in Constitutional Waters: Two Life Rings and an Anchor, 67 Vand. L. Rev. En Banc 67, 71 (2014) (describing RFRA as "quasi-constitutional device").

68. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013) (noting "case law analogizes RFRA to a constitutional right" because RFRA "trumps later federal statutes"), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328, 1351 (M.D. Fla. 2013) (calling RFRA "statutory corollary" of First Amendment).

69. See Christopher C. Lund, Religious Liberty After *Gonzales*: A Look at State RFRAs, 55 S.D. L. Rev. 466, 475–77 (2010) (describing dominant form of state RFRAs); see also Barr v. City of Sinton, 295 S.W.3d 287, 296 (Tex. 2009) ("[W]e will consider decisions applying the federal statutes germane in applying the Texas statute."); Piero A. Tozzi, Whither Free Exercise: *Employment Division v. Smith* and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. Cath. Leg. Stud. 269, 277–79 (2009) (describing ways in which courts are likely to follow federal interpretations in interpreting state constitutions). For a recent example, see Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n, Civ. No. 14-CI-04474, slip op. at 14 (Fayette Cir. Ct. Apr. 27, 2015), http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf [http://perma.cc/C6QV-5GLN] (citing *Hobby Lobby* in concluding state statute protecting "person's freedom of religion" applies to corporations).

70. Cf. Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 Calif. L. Rev. 959, 972 (2004) ("Popular understandings inexorably overtake and reshape judicial pronouncements, a process facilitated by the fact that opinions are virtually always indeterminate to some extent and so invariably open to multiple interpretations."); Victoria F. Nourse, The Accidental Feminist, *in* Transcending the Boundaries of Law: Generations of Feminism and Legal Theory 339, 349 (Martha Albertson Fineman ed., 2011) ("These conventions are not embodied necessarily in formal amendments but in . . . small 'c' constitutionalism—framework statutes like the [ADA] and the Civil Rights Act of 1964 . . . which reconstitute the people and their image of themselves, in light of the nation's most basic principles.").

71. See Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1350 (11th Cir. 2014) ("The statutory promise the Act embodies is necessarily intertwined with the constitutional promise of the Free Exercise Clause."); Korte v. Sebelius, 735 F.3d 654, 693 (7th Cir. 2013) ("Although the claim is statutory, RFRA protects First Amendment free-exercise rights . . . ."); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (saying RFRA "covers

a preliminary injunction against the contraceptive mandate, judges described the infringement of RFRA as the loss of constitutional rights.[72] Indeed, several courts did not limit their holdings to RFRA, concluding, for example, that "a corporation is a 'person' under the First Amendment."[73] The Tenth Circuit, for example, seemed to engage in constitutional adjudication, speaking in the language of "Free Exercise rights" and finding "no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."[74] The Seventh Circuit also decided that "nothing in the Court's general jurisprudence of corporate constitutional rights suggests a nonprofit limitation on organizational free-exercise rights."[75]

If business religious exemptions were to extend from quasi-constitutional to constitutional status, the litigation against pharmacy mandatory-fill regulations might foretell the method. In granting for-profit pharmacies exemptions under the First Amendment, trial courts in Illinois and Washington revived strict scrutiny as follows.[76] They determined state pharmacy regulations to be neither neutral on the subject of religion nor of general applicability. The existence of what these courts called "secular" exceptions[77]—for example, for pharmacies that provide

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the same types of rights as those protected under the Free Exercise Clause of the First Amendment").

72. See, e.g., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 416 (3d. Cir. 2013) (Jordan, J., dissenting) ("It is well-established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting Hohe v. Casey, 868 F.2d 69, 72 (3d Cir. 1989))), rev'd, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Geneva Coll. v. Sebelius, 960 F. Supp. 2d 588, 601 (W.D. Pa. 2013) ("'[T]he loss of First Amendment freedoms,' or a violation of the RFRA, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976))), rev'd, 778 F.3d 422 (3d. Cir. 2015); *Tyndale House*, 904 F. Supp. at 129 (holding abridgment of rights under RFRA constitutes irreparable harm).

73. Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d at 1339 (quoting Ky. Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923)); see also Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402, 430 (W.D. Pa. 2013) (holding for-profit corporation has statutory and constitutional standing to assert owners' religious beliefs).

74. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). But see id. at 1161 (Bacharach, J., concurring) (criticizing plurality for failing to recognize "RFRA and the First Amendment are distinct").

75. *Korte*, 735 F.3d at 681.

76. *Stormans II*, 844 F. Supp. 2d 1172, 1172 (W.D. Wash. 2012); Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *7 (Ill. Cir. Ct. Apr. 5, 2011) (exempting pharmacy in reliance on state medical conscience legislation, rather than Constitution or RFRA), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1163 (Ill. App. Ct. 2012).

77. *Stormans II*, 844 F. Supp. 2d at 1188 ("The most compelling evidence that the rules target religious conduct is the fact the rules contain numerous secular exemptions."); see also Stormans, Inc. v. Selecky (*Stormans I*), 524 F. Supp. 2d 1245, 1261, 1263 (W.D. Wash. 2007) (concluding regulation "appears aimed only at a few drugs and

only pediatric drugs, are temporarily out of stock of a drug, or encounter a customer unable to pay for the prescription—demonstrated a lack of general applicability and neutrality.[78] Some accommodation of religion was seen as further evidence that the regulations were not neutral.[79] The regulations, therefore, were subject to strict scrutiny under the First Amendment, notwithstanding *Smith*.[80] The trial courts' applications of strict scrutiny under the First Amendment did not go well for the government.[81] Indeed, many of the arguments that *Hobby Lobby* embraced for RFRA purposes were pioneered as constitutional arguments in *Stormans* by the Becket Fund, which also represented Hobby Lobby, and the Alliance Defending Freedom, which represented the other plaintiff in *Hobby Lobby*, Conestoga Wood.[82]

Based on rapid successes against the contraceptive mandate and some favorable decisions against pharmacy regulation, businesses continue to claim further, broader exemptions.[83] Much remains in flux. Litigation continues against the contraceptive mandate with the Supreme Court expected to take up the issue again in the 2015 term. While the Ninth Circuit reversed the *Stormans II* district court in July 2015 and concluded that the mandatory-fill regulation was neutral and generally applicable, the argument that the Constitution requires "surpassingly strict scrutiny" whenever a law contains even "a single

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the religious people who find them objectionable," because it "excuse[s] a pharmacy from filling a lawful prescription for logistical reasons such as a national or state emergency or the lack of expertise or specialized equipment"), vacated and remanded, 586 F.3d 1109 (9th Cir. 2009); *Morr-Fitz*, 2011 WL 1338081, at *4 ("The Rule is also subject to a host of exceptions for what the government called 'common sense business realities.' . . . No parallel exemption exists for pharmacists and pharmacy owners barred by their religion from participating in sales of particular drugs.").

78. See *Stormans II*, 844 F. Supp. 2d at 1199 ("The rules operate primarily to force (some) religious objectors to dispense plan B, while permitting other pharmacies to refrain from dispensing other medications for virtually any reason.").

79. See *Stormans I*, 524 F. Supp. 2d at 1262 ("These laws come with their own exemptions that hint towards at least some potential to further limit the subject regulations' ability to increase access to lawful medicines."); *Morr-Fitz*, 2011 WL 1338081, at *6 (noting rule's inapplicability to doctors, nurses, and hospitals).

80. See *Stormans II*, 844 F. Supp. 2d at 1193, 1199–1200 (analyzing rules that are "not neutral" under strict scrutiny); *Stormans I*, 524 F. Supp. 2d at 1257 (applying strict scrutiny to state laws that discriminate based on religion); *Morr-Fitz*, 2011 WL 1338081, at *6 ("The evidence at trial established a Free Exercise violation because the Rule is neither neutral nor generally applicable.").

81. See *Stormans II*, 844 F. Supp. 2d at 1199 ("[T]he state [neither] demonstrated [n]or argued that it has a compelling interest in reaching this result. The rules cannot survive strict scrutiny, and they are not constitutional."); *Morr-Fitz*, 2011 WL 1338081, at *6 ("The government has not carried its burden of proving that forcing participation by these Plaintiffs is the least restrictive means of furthering a compelling interest.").

82. *Stormans II*, 844 F. Supp. 2d at 1199.

83. Some states have already seen claims filed by businesses demanding exemptions from state laws. See, e.g., Complaint at 4, Yep v. Dep't of Health & Human Servs., No. 1:12-cv-06756 (N.D. Ill. Aug. 22, 2012) (challenging state contraceptive equity law).

secular exemption" continues to be voiced in support of business religious exemptions.[84] The Alliance Defending Freedom has announced its intention to appeal the Ninth Circuit's decision.[85] Isolated claims of businesses against antidiscrimination laws implicating gay rights have largely been unsuccessful,[86] but are likely to escalate following the recognition of corporate religious exercise in *Hobby Lobby* and the constitutional protection of same-sex marriage in *Obergefell v. Hodges*.[87]

B. *Lochnerian Premises of Business Religious Liberty Claims*

The analysis presented here focuses on the legal construction of religion as contractual freedom, rather than the motives or sincerity of the litigants. Even if unwittingly, litigants, scholars, and courts articulate business religious liberty claims by invoking *Lochner*'s central premises. First, they present the right at issue in contract terms. They adopt a formalist view of the relationship between employer and employee that presumes bargaining between equals over the terms of employment. Second, they describe government regulation as disrupting this private order. In this view, the harm of regulation lies in redistributing rights and responsibilities from businesses to individuals in a way that differs from their private agreements. Economic libertarianism becomes the baseline for constitutional and statutory analysis.

1. *Private Ordering as Baseline for Religious Liberty.* — Across business religious liberty claims, free exercise of religion is defined by reference to businesses' ability to contract. On this account, as market actors,

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84. James M. Oleske, Jr., The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages, 50 Harv. C.R.-C.L. L. Rev. 99, 127 (2015) (noting twenty-four constitutional law professors filed brief with Ninth Circuit in *Stormans II* making this argument); see also Brief of Douglas Laycock et al., as Amici Curiae in Support of Petitioners at 34, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) ("If, for example, an anti-discrimination law exempts very small businesses—at least if that exemption reflects a purpose to respect their privacy or free them from the burden of regulation—then the Constitution requires exemptions for religious conscience, subject to the compelling interest test.").

85. See Press Release, All. Defending Freedom, Wash. Pharmacy, Pharmacists Will Appeal 9th Cir. Ruling that Forces Them to Violate Their Beliefs (July 23, 2015), http://www.adfmedia.org/News/PRDetail/9713 [http://perma.cc/3JWP-YQAK] (quoting Alliance Senior Vice President of Legal Services as saying "[n]o one should be forced to choose between their religious convictions and their family businesses and livelihoods").

86. See, e.g., State v. Arlene's Flowers, No. 13-2-00871-5, 2015 WL 720213, at *31 (Wash. Super. Ct. Feb. 18, 2015) (concluding application of antidiscrimination law to florist refusing to serve same-sex wedding does not violate state or federal constitutions). But see Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n, No. 14-CI-04474, slip op. at *15 (Fayette Cir. Ct. Apr. 27, 2015), http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf [http://perma.cc/C6QV-5GLN] (holding application of antidiscrimination law to print shop refusing to provide shirts for gay rights organization violated state RFRA).

87. 135 S. Ct. 2584 (2015).

businesses are entitled, as a matter of religion, to enter into and to refuse contracts in the normal course of business.

The linking of religious exercise to freedom of contract manifests itself in cases involving housing and public accommodation. In a predecessor to today's litigation, landlords asserted religious objections to complying with marital status antidiscrimination law; the Massachusetts Supreme Court described the burden on their free exercise under the state constitution as arising from the fact that "[t]he statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs."[88] Public accommodations give rise to similar arguments. Elizabeth Fenton and Loren Lomasky, for example, label a pharmacy's refusing to provide emergency contraception as its denying women a contract.[89] Antidiscrimination laws similarly are presented as infringements on the "freedom to choose . . . whom to contract with and for what goods."[90]

As in *Lochner*, the melding of rights protection and contractual freedom is most evident in the employment relationship. Many objectors to the contraceptive mandate, for example, expressed their religious claims as a right to contract with their employees. Cherry Creek Mortgage Company stated that compliance with the mandate "will have a profound and adverse effect on how it negotiates contracts and compensates its [730] employees."[91] A nonprofit employer similarly argued that, even though the ACA gives employers the option to cease to offer health insurance, to do so "also would injure them because it would be inconsistent with their religious mission *and* would deny them the recruitment and retention benefits of providing tax-advantaged health care coverage to their employees."[92] These businesses seek to set compensation through private negotiation and to hold employees to their bargain.[93] Religious objections to employment regulation are not

88. Attorney Gen. v. Desilets, 636 N.E.2d 233, 237 (1994).

89. See Elizabeth Fenton & Loren Lomasky, Dispensing with Liberty: Conscientious Refusal and the "Morning-After Pill," 30 J. Med. & Phil. 579, 583 (2005) (arguing refusal "to enter into a transaction that the other party desires" is merely a "fail[ure] to provide a benefit," not actionable harm (emphasis omitted)).

90. Ryan T. Anderson, 'Homosexual Jim Crow Laws'? Get Real, Nat'l Rev. (Feb. 19, 2014, 12:11 PM), http://www.nationalreview.com/corner/371454/homosexual-jim-crow-laws-get-real-ryan-t-anderson [http://perma.cc/SG2N-URKL]; see also Russell Nieli, Gay Weddings and the Shopkeeper's Dilemma, Pub. Discourse (Dec. 17, 2014), http://www.thepublicdiscourse.com/2014/12/14190/ [http://perma.cc/96ER-QSZ9] (arguing "clash between deeply held moral and religious values and the obligations of private business are largely a product of the New Deal era . . . [when] state and national government began to dictate . . . the manner in which private enterprises must conduct their businesses").

91. Armstrong v. Sebelius, No. 13-CV-00563-RBJ, 2013 WL 5213640, at *3 (D. Colo. Sept. 17, 2013) (quoting plaintiff's complaint and granting preliminary injunction).

92. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 245 n.13 (D.C. Cir. 2014) (emphasis added).

93. See Elizabeth Sepper, Contraception and the Birth of Corporate Conscience, 22 Am. U. J. Gender, Soc. Pol'y & L. 303, 321 (2014) [hereinafter Sepper, Contraception]

limited to health insurance. Religiously affiliated employers have brought (and lost) claims to refuse workers' compensation and unemployment insurance to their employees.[94]

As in the *Lochner* era, litigants portray employees as consenting to the terms of their bargain. For example, Tyndale House Publishers contended that its "directors, trustees, and even many of their employees, share the same religious beliefs."[95] The agreement of employees (and other individuals) to submit to the corporate religion could be inferred, it said, from the fact that half of its employees attended weekly chapel service, executives and directors routinely engaged in Christian prayer, and board members were "required to sign a Statement of Faith each year."[96] In another case, a court exempted a nonprofit, in part because it "employs individuals who share its religious views regarding emergency contraception and are therefore 'less likely to use contraceptive services even if such services were covered under their plan.'"[97] In an earlier iteration of business religious objection, a for-profit manufacturing company defended against a religious nondiscrimination suit by arguing that the employee had signed an employee handbook, which required attendance at religious services, and thus had legally waived his rights to nondiscrimination.[98]

Some scholarly proponents of religious exemptions for employers also advance a formalist view of the employment relationship. According to these accounts, employer and employees mutually agree to the terms of a transaction.[99] Employees seem to be required to inform themselves

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(discussing how benefits, like wages, constitute compensation and are effectively purchased by employee in form of deferred wages).

94. See, e.g., S. Ridge Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1204 (6th Cir. 1990) (rejecting church's objections to paying premiums into public workers' compensation on behalf of employees); Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus., 291 P.3d 1231, 1234 (Mont. 2012) (holding religious colony's requirement to provide workers' compensation coverage for colony's members does not violate Free Exercise Clause or Establishment Clause); Victory Baptist Temple, Inc. v. Indus. Comm'n of Ohio, 442 N.E.2d 819, 822 (Ohio Ct. App. 1982) (rejecting school's challenge to maintaining workers' compensation insurance).

95. Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012).

96. Id.

97. La. Coll. v. Sebelius, 38 F. Supp. 3d 766, 787 (W.D. La. 2014); see also Plaintiff's Reply Brief in Support of Motion for Preliminary Injunction at 1, Wheaton Coll. v. Burwell, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (No. 1:13-cv-8910) ("The students, faculty, and staff of Wheaton College have voluntarily joined together in a religious community to pursue their shared religious convictions.").

98. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 616 (9th Cir. 1988).

99. See Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1145–46 (1990) (arguing *Alamo Foundation*, *Lee*, and *Bob Jones University* were wrongly decided because employees (and students in *Bob Jones University*) chose to become part of community and agreed to abide by its rules, whether no pay, no payment to social security, or no protection from racial discrimination).

of corporate religious beliefs and bargain over them,[100] even in the context of an employee benefit plan, which is the "quintessential contract of adhesion."[101]

By virtue of "associating" themselves with a religious entity (however defined), these scholars say, employees consent—explicitly or implicitly—to the religious terms of employment.[102] For example, in proposing a theory of religious institutions that includes some for-profit businesses, Professor Michael Helfand says that "religious institutionalism amounts to a constitutionally protected contract of sorts" that is founded on "the voluntary choice of individuals to join the religious institution."[103] Like employers, employees' interests lie in the enforcement of agreed-upon terms without government interference.

Businesses—and courts siding with them—go so far as to justify exempting employers from laws based on their employees' interests. In its challenge to the mandate to provide health insurance, nonprofit Liberty University insisted that it was defending "the type and level of

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100. See Michael A. Helfand, What Is a "Church"?: Implied Consent and the Contraception Mandate, 21 J. Contemp. Legal Issues 401, 411 (2013) [hereinafter Helfand, What Is a "Church"?] (supporting "exemption from the contraception mandate so long as the facts and circumstances surrounding the employment environment provide sufficient reason to presume that employees understood the unique religious aims of their employer"); Robert K. Vischer, Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace, 17 Stan. L. & Pol'y Rev. 83, 95 (2006) [hereinafter Vischer, Conscience in Context] (arguing pharmacists will evaluate employers' moral policies and choose employment accordingly).

101. Fisk, supra note 28, at 198 (noting benefit plans are "seldom subject to modifications for any particular individual" and often neither employer nor employees know their exact terms).

102. See Helfand, What Is a "Church"?, supra note 100, at 423 ("[W]hen individuals join the institution as employees we can safely assume that they understand that the institution is organized to achieve uniquely religious objectives . . . ."); Christopher C. Lund, Free Exercise Reconceived: The Logic and Limits of *Hosanna-Tabor*, 108 Nw. U. L. Rev. 1183, 1201–05 (2014) (arguing religiously affiliated organizations should be exempted from "imposed" legal obligations such as liability for defamation, discrimination, and employment protections based on employees' consent to religious rules of the employer). But see Jessie Hill, Ties that Bind? The Questionable Consent Justification for *Hosanna-Tabor*, 109 Nw. U. L. Rev. Online 91, 98 (2014), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1007&context=nulr_online [http://perma.cc/PCD3-FNQ4] (critiquing Lund for "stretching the idea of consent past the breaking point to treat individuals as consenting to the church's authority when they did not know that they were foregoing civil enforcement [and] were not aware of the rules to which they were agreeing").

103. Michael Helfand, Religious Institutionalism, Implied Consent, and the Value of Voluntarism, 88 S. Cal. L. Rev. 539, 570 (2015); see also id. at 570–71 ("[W]hile the law generally does not allow individuals to waive certain statutorily protected rights, members are granted the constitutional authority to do so when it comes to joining religious institutions in order to promote the value of religious voluntarism."). Professor Helfand argues for balancing through strict scrutiny under the Free Exercise Clause rather than an absolute prohibition on regulation under the Establishment Clause. Id. at 578–79.

health care services that are desirable to its employees."[104] March for Life also alleged that its employees' religious beliefs could only be protected by exempting their employer from the contraceptive mandate.[105] Likewise, in granting an exemption from a mandatory-fill regulation to a for-profit pharmacy, one court said that the regulation, which accommodated individual pharmacists but imposed a duty to fill on pharmacies, "creat[ed] an immutable conflict between a pharmacy that cannot refuse and a pharmacist that cannot dispense" emergency contraception.[106] In *McClure v. Sports & Health Club*, a chain of for-profit sports clubs made an early (and unsuccessful) claim that the owners' religious beliefs required it to discriminate in interviewing and hiring applicants.[107] One justice would have sided with the sports clubs on the ground that prohibiting the employer from asking questions about applicants' marital status and religious beliefs "affects not only the well-being of the employer and his business, but also that of the prospective employee's fellow employees."[108] As in *Lochner*, the interests of employers and employees align.

2. *Regulation as Suspect "Redistribution"* — In the view of objectors and now many courts, the regulation of commerce unfairly disrupts this private order and "redistributes" from the market baseline. On this account, individuals require subsidies from their employers. They demand entitlements from businesses seeking simply to be left alone.[109]

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104. First Amended Complaint for Declaratory, Preliminary & Permanent Injunctive Relief at 8, Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No. 6:10-cv-00015-nkm), 2010 WL 5867473.

105. Verified Complaint at 8, March for Life v. Burwell, No. 1:14-cv-01149 (D.D.C. July 7, 2014), http://www.adfmedia.org/files/MarchForLifeComplaint.pdf [https://perma.cc/GTX6-YUQK] ("[T]he March for Life employees object, on the basis of their sincerely held ethical and religious beliefs, to participating in a health insurance plan which provides coverage for abortifacient items for themselves and their family members."); see also Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 392 (3d Cir. 2013) (Jordan, J., dissenting) (predicting compliance with mandate "will rapidly destroy the business and the 950 jobs that go with it").

106. *Stormans I*, 524 F. Supp. 2d 1245, 1265 (W.D. Wash. 2007), vacated and remanded, 586 F.3d 1109 (9th Cir. 2009); see also Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *2 (Ill. Cir. Ct. Apr. 5, 2011) ("The Rule also imposes financial harms by making it more difficult for Plaintiffs to recruit employees . . . ."), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

107. 370 N.W.2d 844, 846 (Minn. 1985) (en banc) (noting owners' admission that their religious practices compel discrimination).

108. Id. at 876 (Yetka, J., dissenting).

109. See, e.g., Robin Fretwell Wilson, Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 77, 80 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (describing gay rights movement as attempting to transform same-sex marriage from "negative right to be free of state interference" to "positive entitlement to assistance by others"); see also Douglas Laycock, Afterword, *in* Same-Sex Marriage and

The very characterization of regulation as redistributive, however, assumes the market distribution of responsibilities and entitlements is neutral and just. It accepts as given the legal rules of the common law and the economic distribution of resources. Manifesting a "classic baseline problem," this view resists regulation that redistributes rights, responsibilities, or wealth away from the existing private order.[110] As a matter of religious liberty doctrine, any regulation that seemingly redistributes from businesses to employees and consumers becomes a substantial burden on religious exercise.

Businesses describe antidiscrimination laws, for example, as unjustly requiring them to fulfill demands that patrons have no right to make. Thus, in *McClure*, the for-profit sports club argued that requiring it to hire employees irrespective of their religious, family, or marital status would force the company to "subsidize" immoral relationships and beliefs, contrary to its free exercise of religion.[111] In opposing antidiscrimination law in employment, Professor Richard Epstein describes it as always "redistributive"; he says, "[t]he form of the redistribution is covert; it is capricious, it is expensive, and it is wasteful."[112] With regard to public accommodations, proponents of business religious exemptions likewise perceive antidiscrimination law as abrogating a baseline according to which businesses have a right to refuse service to any person for any reason.[113]

The contraceptive mandate litigation, in particular, reveals vigorous resistance to redistribution. Professor John Eastman, for example, argues that women "might have the 'liberty' to use contraceptives . . . , but forcing others to pay for their contraceptive use is not the exercise of liberty."[114] The Tenth Circuit similarly described employees as requiring

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Religious Liberty: Emerging Conflicts, supra, at 189, 192 [hereinafter Laycock, Afterword] (endorsing this formulation).

110. Samuel R. Bagenstos, "Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825, 862–63 (2003) [hereinafter Bagenstos, Rational Discrimination] (critiquing "circular concept of 'redistribution'"). From the perspective of employees and consumers, the Affordable Care Act and nondiscrimination laws might restore the just distributive order, rather than redistribute from the appropriate baseline.

111. 370 N.W.2d at 858 (Peterson, J., dissenting).

112. Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 494 (1992).

113. For an analysis of these arguments, see generally Nelson Tebbe, Religion and Marriage Equality Statutes, 9 Harv. L. & Pol'y Rev. 25 (2015) (focusing on "religion exemptions that appear in state statutes extending marriage equality to gay and lesbian couples").

114. John Eastman, Symposium: No Free Lunch, but Dinner and a Movie (and Contraceptives for Dessert)?, SCOTUSblog (July 7, 2014, 1:18 PM), http://www.scotusblog.com/2014/07/symposium-no-free-lunch-but-dinner-and-a-movie-and-contraceptives-for-dessert/ [http://perma.cc/6TSF-DML3].

their employers to provide "free contraception."[115] In its brief to the Supreme Court, Hobby Lobby said that "the ultimate question" is "who will pay for a third-party's" contraceptives.[116] On this view, the mandate grants employees more than the fair value of their labor (i.e., compensation they have not earned or secured through contract).

Just as *Lochner*-era plaintiffs claimed that a minimum wage amounted to an unlawful wealth transfer from *A* to *B*,[117] proponents of business religious exemptions have mounted a "takings" argument against the regulation of employee health insurance. For example, the U.S. Conference of Catholic Bishops said, "Very simply, [the Department of Health and Human Services] is forcing Citizen A, against his or her moral convictions, to purchase a product for Citizen B."[118] The burden on the religion of person *A* results from requiring him to subsidize person *B*.

Under Free Exercise Lochnerism, regulation seen to redistribute imposes a substantial burden on a business's free exercise of religion by impeding its contractual freedom. Challengers object to what they see as a duty "to confer benefits on third parties."[119] The strict scrutiny standard then requires the government to show that the burdensome regulation furthers "a compelling governmental interest" and "is the least restrictive means of furthering" that interest.[120] The market baseline informs each of these analyses.

C. *Narrowing Compelling Interests to Market Access*

After *West Coast Hotel Co.*, the courts recognized the power of the legislature to lift burdens imposed by the private order through economic regulation. In reviewing legislation affecting constitutional rights, they accepted a broad universe of compelling governmental interests. Recent interpretations of compelling interests in cases arising under RFRA and the First Amendment, however, reduce governmental interests to ensuring market access and seem to permit regulation of religious objectors only where the market fails.

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115. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144 (10th Cir. 2013), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

116. Brief for Respondents at 59, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 546899, at *59.

117. See Sunstein, supra note 19, at 876 (discussing *Lochner*-era arguments against economic regulation).

118. U.S. Conference of Catholic Bishops, Standing Together for Religious Freedom: An Open Letter to All Americans (July 2013), http://erlc.com/documents/pdf/2013 0702-openletter-hhs.pdf [http://perma.cc/H8RJ-VSXH].

119. *Hobby Lobby*, 134 S. Ct. at 2782 n.37; see also infra notes 216–217, 222–229 and accompanying text (discussing *Hobby Lobby* Court's construction of and shift in substantial burden analysis).

120. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–1(a) to (b) (2012).

The laws now facing business religious objections aimed to mitigate harm that the status quo imposed on individuals and society. In requiring employers to cover preventive services, including contraception, Congress understood some employers to free-ride on the system. By failing to offer adequate insurance, these employers imposed externalities on their employees, other employers (as workers with inadequate insurance enrolled in spousal plans), and society at large (as workers turned to public insurance). The contraceptive mandate also aimed to ensure women's equality in the workplace and to remedy the gaping disparity between men and women in out-of-pocket medical bills.[121] Pharmacy mandatory-fill laws similarly were to relieve women of delays resulting in unintended pregnancies and the interposition of pharmacy clerks in the doctor–patient relationship.[122] In enacting antidiscrimination laws, legislatures also had broad goals.[123] To the benefit of all of society, they would eradicate the uncertainty, scrutiny, and judgment to which individuals disadvantaged because of their gender, race, or religion might otherwise be subjected.

By contrast, against a market baseline, the government's compelling interests—across these legislative pursuits—shrink to ensuring access to goods and services in the market. In 1999, in an account that proves prescient to the construction of compelling interests in today's business religious liberty cases, Professor Eugene Volokh observed that business free-exercise objections rely on a libertarian claim that refusing to provide goods and services inflicts no harm, rather than on a claim that objectors may harm others because their motives are religious.[124] According to this perspective, no one has a right to be sold another's goods, to enter into an employment contract with another person, or to rent another's property.[125] Refusal to enter into such contracts thus does not infringe on any rights.

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121. See Sepper, Contraception, supra note 93, at 336 (discussing aims Congress articulated behind contraceptive mandate).

122. See, e.g., Press Release, Ill. Governor's Office, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862 [http://perma.cc/83EK-4CUZ] (noting "[f]illing prescriptions for birth control is about protecting a woman's right to have access to medicine her doctor says she needs" and highlighting importance of avoiding "unnecessary delays").

123. Bagenstos, Rational Discrimination, supra note 110, at 842–44 (arguing anti-discrimination law works to "remove the stigmatic injury that results from exclusion," encourage excluded groups to develop their human capital, and send "a tangible invitation of admission as full members of society").

124. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1520 (1999) [hereinafter Volokh, Common-Law Model] (noting supporters of, for example, religious landlady's right to discriminate against unmarried couples in housing rentals, usually claim "landlady's religiously motivated decision should be immune because it doesn't *really* harm the tenants, since the tenants don't *really* have a true private right to equal treatment").

125. Id. at 1526.

Volokh explained that religious exemptions from economic regulation necessarily depend on rejecting more comprehensive legislative goals.[126] For example, one can see the harm addressed by an antidiscrimination law (and thus lifted from beneficiaries) in one of two ways: (1) "acts of discrimination [that are] independent social evils" and "degrade[] individuals, affront[] human dignity, and limit[] one's opportunities" or (2) impediments to access to goods and services in the market.[127] Religious exemptions defeat the law's effectiveness in achieving the former interest, as courts previously acknowledged.[128] The latter interest, by contrast, is satisfied so long as people ultimately can access goods and services.[129] In order to grant exemptions, Volokh said, courts must reduce governmental goals to market access and, in so doing, impede the ability of the legislature to create statutory rights as in *Lochner*.[130]

In the contraceptive mandate litigation, courts adopted this perspective, narrowing the government's interests to market access. Sex equality and public health became irrelevant. According to the Tenth Circuit, for example, sex equality could not justify the mandate, because

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126. Id.

127. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282–83 (Alaska 1994) (discussing these two formulations); see also Att'y Gen. v. Desilets, 636 N.E.2d 233, 329 (Mass. 1994) (construing harm narrowly as "significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit" and emphasizing market alternatives).

128. See Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1982) (free-exercise exemption "cannot be accommodated" with prevention of discrimination); Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 39 (D.C. Cir. 1987) ("District of Columbia's . . . compelling interest in eradicating sexual orientation discrimination outweighs any burden . . . on Georgetown's religious exercise."); EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980) ("[C]reating [a free-exercise] exemption . . . greater than that provided by [Title VII] would seriously undermine the means chosen by Congress to combat discrimination.").

129. See Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. Rev. 839, 872 (critiquing "sweeping claims" of compelling interests in women's health, public health, or nondiscrimination as failing to allow exemptions or statutory rights holders to suffer "any inconvenience or affront").

130. Volokh, Common-Law Model, supra note 124, at 1522 (observing, after rejection of *Lochner*, "legislature wasn't limited to protecting private rights akin to those traditionally secured by the common law" but "constitutional religious exemption regime would . . . return courts to identifying their own favored view of what really constitutes others' private rights"). Volokh understood the federal RFRA to put courts and Congress in conversation with one another through a common-law, rather than constitutional, exemption model that he saw as unproblematic. Id. at 1472–80. The history of RFRA has not borne out this prediction of judicial–legislative conversation. See Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J.L. & Gender 35, 73 (2015) [hereinafter Lupu, *Hobby Lobby* and Religious Exemptions] (noting Volokh's "view made perfect sense as a matter of academic logic" but "[i]n practice, . . . things have not worked out this way," and "only congressional overrides in such cases have been of judicial denials of *constitutional* claims"). As Part IV explains, Free Exercise Lochnerism has also affected First Amendment claims.

women remained "free" to purchase contraception themselves.[131] The D.C. Circuit similarly disallowed sex equality as a goal; the contraceptive mandate, it said, amounted to the "subsidization of a woman's procreative practices," which might promote "resource parity" but had little to do with equality.[132] Nor, given access to alternative methods and providers, could a "general" interest in public health be compelling.[133] Several courts criticized the mandate for promoting "greater parity in health-care costs," a goal not of "the highest order."[134]

Some law and religion scholars advance the perspective that, for RFRA (and perhaps First Amendment purposes), the government may have no compelling interest in applying antidiscrimination law to a "religious organization"—defined to include a number of commercial actors—if "a same-sex couple seeking goods or services . . . can readily obtain comparable goods or services from other providers."[135] A broader group proposes, as a matter of legislation, that small for-profit businesses should be exempted from duties to provide same-sex couples with housing, spousal benefits, or any good or service for a wedding, counseling, or "other services that directly facilitate the perpetuation of any marriage."[136] An exception would apply unless the individual is "unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship."[137] Antidiscrimination protections become necessary only where the market fails—that is, where

131. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144–45 (10th Cir. 2013) ("Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here."), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); see also Ilya Shapiro, Mandates Make Martyrs out of Corporate Owners, SCOTUSblog (Feb. 24, 2014), http://www.scotusblog.com/2014/02/symposium-mandates-make-martyrs-out-of-corporate-owners/ [http://perma.cc/9GSN-VRFR] ("Without the HHS rule, women will still be free to obtain contraceptives, abortions, and whatever else isn't illegal.").

132. Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1221–22 (D.C. Cir. 2013).

133. Korte v. Sebelius, 735 F.3d 654, 686 (7th Cir. 2013); see also *Stormans I*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007) (preventing gender discrimination and promoting public health were not compelling interests with regard to emergency contraception in pharmacies).

134. *Korte*, 735 F.3d at 686; Zubik v. Sebelius, 983 F. Supp. 2d 576, 609 n.21 (W.D. Pa. 2013) (noting "Court of Appeals in *Korte* took great offense to the Government's identification of its two 'compelling' interests," including achieving greater parity).

135. Brief of Douglas Laycock et al., as Amici Curiae in Support of Petitioners at 5, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1048450, at *5.

136. Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of L., et al., to Paul A. Sarlo, Chairman, N.J. Senate Judiciary Comm. (Dec. 4, 2009), http://mirrorofjustice.blogs.com/files/12-4-2009-nj-sarlo-ssm-letter-1.pdf [http://perma.cc/AZH6-4KXD].

137. Id.

pervasive discrimination means "markets will not solve the problem" and individuals will not find alternative providers.[138]

Reflecting this perspective, one court accepted a print shop's defense under a state RFRA to a sexual orientation discrimination complaint.[139] It concluded that the government had failed to show a compelling governmental interest in enforcing antidiscrimination law, because the plaintiff was able to obtain printing at another shop for the same price.[140] The government then only has a compelling interest in remedying market failure and preventing interference with freedom of contract.

This view implies that a competitive market inflicts no harm that justifies government intervention in the private order. A number of law and religion scholars regularly describe the denial of wedding-related services to same-sex couples on an equal basis with other couples as "mere inconvenience."[141] Flower shops and wedding venues alike deny engaging in discrimination against gays and lesbians generally; they object instead to facilitating their marriages.[142] From the businesses' perspective, the availability of options in the market negates any harm to couples.[143]

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138. See Andrew Koppelman, You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions, 72 Brook. L. Rev. 125, 133 (2006) (arguing Richard Epstein convincingly establishes "[a]nyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not solve the problem"). Koppelman distinguishes between public accommodations and employers, the latter of which he views as inappropriate to exempt, because employers serve as a conduit for benefits and wages such that exemptions burden employees. Frederick Mark Gedicks & Andrew Koppelman, Invisible Women: Why an Exemption for *Hobby Lobby* Would Violate the Establishment Clause, 67 Vand. L. Rev. En Banc 51, 59–60 (2014).

139. Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n, No. 14-CI-04474, slip op. at 15 (Fayette Cir. Ct. Apr. 27, 2015), http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf [http://perma.cc/C6QV-5GLN].

140. Id.

141. Laycock, Afterword, supra note 109, at 198; see also Thomas C. Berg, Religious Accommodation and the Welfare State, 38 Harv. J.L. & Gender 103, 143 (2015) ("If the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one.").

142. E.g., Verified Petition at 15, Odgaard v. Iowa Civil Rights Comm'n, No. CV046451 (Polk Cty. Dist. Ct. Oct. 7, 2013), http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf [http://perma.cc/2AUX-JZYH] ("The Odgaards have never discriminated against anyone at the Gallery because of his or her sexual orientation."); see also Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of L., et al., to Brian E. Frosh, Md. Sen. (Jan. 30, 2012), http://mirrorofjustice.blogs.com/files/maryland-letter-1.pdf [http://perma.cc/4NYN-EB4K] (arguing objection "arises not from anti-gay animus, but from a sincere religious belief in traditional marriage").

143. Verified Petition, supra note 142, at 15 (arguing couple denied use of wedding venue "continued to look for another venue and found an alternative location within days").

In allowing pharmacies to refuse to fill prescriptions to which they object, one district court also espoused this view:

> [T]he interests promoted by the regulations have more to do with convenience and heartfelt feelings than with actual access to certain medications. Patients understandably may not want to drive farther than the closest pharmacy and they do not want to be made to feel bad when they get there. These interests are certainly legitimate but they are not compelling interests of the kind necessary to justify the substantial burden placed on the free exercise of religion.[144]

Despite the fact that the pharmacies admitted that they regularly turned away women seeking emergency contraception, another court said it had "heard no evidence of a single person who ever was unable to obtain emergency contraception because of a religious objection."[145] That is, the court assumed, the market ultimately delivered the drug, despite the initial denial.

Where, however, private actors block access of others to the market, the government may act. In the contraceptive mandate litigation, in evaluating the burdens of employer exemption on employees, the Tenth Circuit noted that the employers "do not prevent employees from using their own money to purchase" contraceptives.[146] Regarding refusal to fill prescriptions, courts similarly distinguished between blocking access to a prescription drug and returning the prescription to the patient, allowing her to seek alternatives in the market.[147]

In this way, some advocates, scholars, and courts have come to take the libertarian position of Richard Epstein, the preeminent opponent of the New Deal in the legal academy. Epstein has long contended that "all tensions" between religion and the state arise from the post-1937

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144. *Stormans I*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007), vacated, 586 F.3d 1109 (9th Cir. 2009).

145. Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *3–4 (Ill. Cir. Ct. Apr. 5, 2011), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

146. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144 (10th Cir. 2013), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); see also Eugene Volokh, 3B. Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?, The Volokh Conspiracy (Dec. 4, 2013, 5:11 PM), http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/ [http://perma.cc/NPF8-75CD] [hereinafter Volokh, Exemption] ("The employer isn't forbidding its employees from using certain contraceptives. It's just not paying for them.").

147. See, e.g., Noesen, No. LS-0310091-PHM, at ¶¶ 25–32 (Wis. Pharmacy Examining Bd. Apr. 13, 2005), https://online.drl.wi.gov/decisions/2005/ls0310091phm-00068882.pdf [https://perma.cc/R7AW-7UCJ] (disciplining pharmacist who refused to fill prescription and then refused to transfer or return it to customer).

acceptance of state regulation of contract and employment.[148] With regard to the contraceptive mandate, he argues that the right of women to access contraceptives in the market implied only a duty on their employers not to interfere.[149] Beyond that circumstance, he says, a "strong competitive market negated any compelling state interest."[150] The government could not regulate objecting employers in the absence of "natural and legal monopolies" or "necessity for which there is no simple market-based solution."[151]

D. *Burdens and Subsidies Under the Market Baseline*

The ideal of market ordering in business religious liberty claims replicates *Lochner*'s baseline problem. Litigants, scholars, and courts deny the artificiality of the market order. They overlook the ways in which it distributes subsidies and burdens.

Courts and claimants perceive the government as intruding into new areas of commercial life. Thus, the enactment of the ACA and its requirement to cover women's preventive services intervenes in a purportedly private agreement between employer and employee. For example, Judge Jordan, dissenting from the Third Circuit's opinion in *Conestoga Wood*, wrote, "[T]he government's demand that employers provide insurance coverage for abortifacients and other contraceptives is unprecedented," and viewed with suspicion the ACA's intervention into employer–employee relations.[152] In evaluating religious objections to pharmacy mandatory-fill regulation, a trial court in Illinois similarly expressed skepticism that the government had a compelling interest in "timely access to drugs."[153] If requiring pharmacies to fill prescriptions were compelling, it concluded, the government would have adopted the regulation previously.[154] Similarly, in the same-sex marriage context, religious objectors tend to describe same-sex marriage as a new and unprecedented intrusion on religious beliefs.

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148. Richard A. Epstein, Religious Liberty in the Welfare State, 31 Wm. & Mary L. Rev. 375, 407 (1990).

149. Richard A. Epstein, The Defeat of the Contraceptive Mandate in *Hobby Lobby*: Right Results, Wrong Reasons, 2013–2014 Cato Sup. Ct. Rev. 35, 52 [hereinafter Epstein, Defeat] ("The right of any woman to access these services surely implies . . . a correlative duty not to interfere.").

150. Id. at 66.

151. Id. at 52.

152. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 1277419, at *10 (3d Cir. Feb. 8, 2013) (Jordan, J., dissenting).

153. Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *3–4 (Ill. Cir. Ct. Apr. 5, 2011) (noting government provided no evidence of compelling interest), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

154. Id.

Yet, existing employment and commercial markets are legally constructed, not neutral. Commercial actors routinely must abide by laws without religious exemption. Pharmacies comply with myriad state rules. Extensive regulation of employers and public accommodations is the norm.[155] Indeed, in refusing to serve same-sex couples on an equal basis, religious objectors typically contest existing antidiscrimination law, not same-sex-marriage-specific statutes.[156]

The denial of contraceptive coverage, for example, occurred against a backdrop of federal and state regulation, not private ordering. Before the passage of the Affordable Care Act, the Equal Employment Opportunity Commission and several federal courts had indicated that denying contraceptive coverage in a comprehensive employer insurance plan discriminates against female employees in violation of Title VII of the Civil Rights Act.[157] More than half of states required contraceptive coverage in insurance plans.[158] But by virtue of federal statute—the Employee Retirement Income Security Act—employers were able to avoid all state health insurance regulation, including contraceptive coverage requirements, by self-insuring.[159] Only because of this federal statute did employees of many contraceptive challengers newly receive rights to contraception with the enactment of the ACA.

The artificiality of a market ideal is exacerbated by the recourse of many objecting businesses to state incorporation law. As Daniel Crane notes, "[e]ven in the *Lochner* era, the liberty of contract and of property did not entail a right to invoke the privileges of the corporate form and

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155. Tebbe, supra note 113, at 56 (critiquing use of libertarian baseline in public accommodations as "constructed" rather than "natural").

156. See Douglas NeJaime, Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination, 100 Calif. L. Rev. 1169, 1169 (2012) ("[R]eligious objections to same-sex marriage are merely a subset of objections to sexual orientation equality.").

157. See Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 985–86 (E.D. Mo. 2003) (finding female employees stated disparate impact and disparate treatment claims based on exclusion of contraceptives); Mauldin v. Wal-Mart Stores, Inc., CIV.A.1:01-CV2755JEC, 2002 WL 2022334, at *19 (N.D. Ga. Aug. 23, 2002) (certifying class of female employees); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268 (W.D. Wa. 2001) ("[T]he selective exclusion of prescription contraceptives from defendant's generally comprehensive prescription plan constitutes discrimination on the basis of sex."); EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216, 1219–20 (D. Minn. 2001) (finding employees had sufficiently alleged intentional disparate treatment and disparate impact in exclusion of contraceptives). But see In re Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 939–45 (8th Cir. 2008) (holding plan excluding "all types of contraception, whether prescription, non-prescription or surgical and whether for men or women" does not violate Title VII).

158. State Policies in Brief: Insurance Coverage of Contraceptives, Guttmacher Inst. (July 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf [http://perma.cc/XV2H-K3KA] (charting all twenty-eight states requiring full coverage and all seventeen also mandating related outpatient services).

159. 29 U.S.C. § 1144(B) (2012) (preempting state regulation of self-insured plans).

then insist on the right to be left alone by the government."[160] In claiming religious exemptions today, corporations invoke precisely such rights.[161]

As in *Lochner*, this purportedly unregulated baseline obscures existing subsidies. Take, for example, objections to health insurance mandates. The federal government has long provided significant tax benefits to employers for compensating employees with health benefits in the place of wages.[162] Now, in order to ensure that these benefit plans meet minimum standards, the Affordable Care Act imposes penalties for failing to cover a minimum set of health benefits including contraception and other preventive care.[163] In seeking religious exemptions from the contraceptive mandate, employers effectively demand the tax subsidy despite their failure to meet these minimum standards. Although the ACA permits them to drop coverage altogether,[164] they insist on the tax-preferred method of compensation. As Professor Michael McConnell makes clear, "[e]ven apart from religious convictions, the right of an employer to provide health insurance coverage for its employees is a valuable right under the law."[165] Once exempted, employers continue to

160. Daniel A. Crane, Lochnerian Antitrust, 1 N.Y.U. J.L. & Liberty 496, 511 (2005).

161. Kent Greenfield, *Hobby Lobby* Symposium: *Hobby Lobby*, "Unconstitutional Conditions," and Corporate Law Mistakes, SCOTUSblog (June 30, 2014, 9:07 PM), http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes/ [http://perma.cc/5C5T-LTSV] (noting companies are asking that states expressly grant "corporate charters" that "allow companies to opt out of otherwise applicable laws"); see also Robert L. Kerr, Naturalizing the Artificial Citizen: Repeating *Lochner*'s Error in *Citizens United v. Federal Election Commission*, 15 Comm. L. & Pol'y 311, 339 (2010) (endowing corporations with constitutional rights "arguably serves to transform an artificially provided economic advantage into a fundamental constitutional right representing the same sort of subsidies for business interests that *West Coast Hotel Co.* articulated as indefensible").

162. Robert I. Field, Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform, 159 U. Pa. L. Rev. 1669, 1712 (2011) (indicating tax subsidy amounts to one-third of premiums paid to private establishments); see also Cong. Budget Office, The Distribution of Major Tax Expenditures in the Individual Income Tax System 12–14 (2013) (showing federal government itself pays one-third of aggregate premiums for employer-sponsored health insurance).

163. Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H(a) (2012).

164. See Marty Lederman, *Hobby Lobby* Part III—There Is No "Employer Mandate," Balkinization (Dec. 16, 2013, 9:36 AM), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html [http://perma.cc/4KXM-L7SP] (explaining "federal law does not impose a legal duty on large employers to offer their employees access to a health insurance plan, or to subsidize such a plan" and paying assessment "would almost certainly be far *less* costly than continuing to offer health insurance").

165. Eugene Volokh, Prof. Michael McConnell (Stanford) on the *Hobby Lobby* Arguments, Wash. Post: Volokh Conspiracy (Mar. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/ [perma.cc/HT4Q-N74M] [hereinafter Volokh, McConnell on *Hobby Lobby*].

receive these valuable subsidies, even though they offer insurance that does not comply with the ACA's requirements.[166]

Throughout the contraceptive litigation, these subsidies to employers remained invisible. For example, the Seventh Circuit opined that "[l]ifting a regulatory burden is not necessarily a subsidy, and it's not a subsidy here. The plaintiffs are not asking the government to pay for anything. They are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception . . . ."[167] This approach suggests that once the government grants a subsidy, it cannot remove or change it. To do so becomes a burden on the religious liberty of the business that previously received the subsidy.

The market baseline also affects the salience of the burdens of religious exemption on third parties. Before the rise of Free Exercise Lochnerism, the Supreme Court routinely rejected exemptions that would foist significant burdens on individuals in its constitutional (and statutory) religious liberty doctrine. In the leading case, *United States v. Lee*, which involved an Amish employer who objected to paying social security insurance, the Court reasoned that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[168] In *Cutter v. Wilkinson*, arising under RFRA's sister statute, the Court again underscored that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries."[169] The Establishment

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166. Elizabeth Sepper, Gendering Corporate Conscience, 38 Harv. J.L. & Gender 193, 219 n.142 (2015) [hereinafter Sepper, Gendering] ("In the absence of the religious exemption, Hobby Lobby would effectively lose the subsidy in the sense that the subsidy would be dwarfed by the taxes for providing non-ACA-compliant insurance plans . . . .").

167. Korte v. Sebelius, 735 F.3d 654, 687 (7th Cir. 2013).

168. 455 U.S. 252, 261 (1982); see also S. Ridge Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1211–12 n.6 (6th Cir. 1990) ("[T]o preclude some other employee not exercising such belief from the benefits of [workers' compensation] merely because the Church itself opposes them or prefers to provide for them in a different manner, could not escape the prospective danger of denying that employee the equal protection of the state's law . . . ."); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468 (N.Y. 2006) ("[W]hen a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit.").

The Supreme Court even seemed perturbed by the prospect of employer exemptions from Sunday closing rules, due to the impact on employees for whom Sunday is a day to see family and relax. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility . . . .").

169. 544 U.S. 709, 720 (2005); see also Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709–10 (1985) (invalidating law mandating time off for religious Sabbath observers in part because it burdened their coworkers); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977) (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or coworkers); Sherbert v. Verner, 374 U.S.

Clause barred granting a religious exemption to employers if it would transfer the costs of corporate faith to their employees.[170]

Yet, as the contraceptive mandate litigation percolated through the courts, many judges enjoined the regulation and deprived employees of their rights.[171] Such apparent disregard for the burdens on employees stemmed directly from the reduction of the government's compelling interests to market access. With interest in legislation so limited, granting a religious exemption to an employer did not harm employees. It merely returned them to the status quo prior to the redistribution from the private order.[172] Emblematic of this position was Hobby Lobby's portrayal of the contraceptive mandate: "[T]he government program forces one party to provide another benefit to another [and] the loss of that benefit is not the kind of impact on third parties that should matter."[173] In this view, courts could accept the importance of third-party burdens to religious liberty doctrine, but disallow that the denial of contraceptive coverage imposed any such burden.

As Professor Nelson Tebbe points out, supporters of same-sex marriage religious objections similarly argue that the removal of antidiscrimination law restores a baseline, according to which businesses may refuse service to any person for any reason.[174] Some business

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398, 409 (1963) ("[R]ecognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."). But see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (holding application of Title VII's religious organization exemption to religious organization's secular nonprofit activities did not violate Establishment Clause).

170. See Brief for Amici Curiae Church-State Scholars in Support of the Gov't at 3, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 333891, at *3 ("Establishment Clause prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not."); Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343, 349 (2014) (pioneering this argument).

171. See, e.g., Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144–45 (10th Cir. 2013) ("Accommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere."), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

172. See Volokh, Exemption, supra note 146 ("If the employees want certain implantation-preventing contraceptives, they would have to buy them with their own funds . . . . They would thus be in essentially the same legal position . . . ."); see also Marc O. DeGirolami, On the Claim that Exemptions from the Contraception Mandate Violate the Establishment Clause, Ctr. for L. & Religion F., St. John's Univ. Sch. of L. (Dec. 5, 2013), http://clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause/ [http://perma.cc/HF66-QGRS] (agreeing with Volokh).

173. See Brief for Respondents at 54–55, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at *54–55 (contending such burdens are "irrelevant" for RFRA).

174. Tebbe, supra note 113, at 55 ("Under the *libertarian baseline*, organizations that provide goods and services to the public have a right to refuse service to anyone for any

objectors (and their supporters) make the broad claim that the removal of statutory rights categorically does not burden third parties in a way that is legally relevant.[175] From their perspective, the unregulated market inflicts no harms. It merely reverts to a time before the enactment of a statute.

Others make a seemingly more moderate claim that "new" statutory rights can be taken away without affecting beneficiaries.[176] They would return, not to a pre-1937 era, but to some unspecified date in time. This baseline shares the commitment to the market and resistance to redistribution that marked *Lochner*. It lacks, however, the coherence of *Lochner*'s baseline that was structured only by common law obligations. It accepts some, but not all, regulations, but provides no guiding principle. It suggests that, at the time of their enactment, statutory entitlements are irrelevant to analysis of burdens and subsidies but ultimately may become part of the baseline. For example, on this account, employers might not be exempted from paying the current minimum wage, but could seek exemptions if Congress were to enact a higher minimum wage. By the same logic, existing state contraceptive mandates might allow no religious exemptions because of the harms to employees, even as employees are treated as unharmed by exemptions from the federal mandate.

Litigants, scholars, and courts thus consider the existing distribution of resources and obligations to be neutral, when it is actually partial. In stark contrast to "takings" imposed by government regulation,[177] the market baseline is seen to preserve the freedom of all market actors. With

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reason, however irrational . . . . Civil rights laws, in other words, mark a departure from the natural state of affairs.").

175. See Richard W. Garnett, Accommodation, Establishment, and Freedom of Religion, 67 Vand. L. Rev. En Banc 39, 47 (2014) (arguing all federal laws are "subject to and incorporate[] RFRA's religious-exercise-protecting invitation for judicial review" such that any cost "shifted from the objecting employer to the employee is one that . . . RFRA did not allow the government to impose on that employer in the first place"). But see Gedicks & Koppelman, supra note 138, at 61 ("Mandate opponents cannot prevail on the basis of arguments about federal entitlement 'baselines.' A RFRA exemption from the Mandate for Hobby Lobby would deprive its employees of a federal entitlement solely to facilitate the exercise of Hobby Lobby's religion."); Gedicks & Van Tassell, supra note 170, at 371 ("[T]his baseline can only be the distribution of relevant burdens and benefits for religious exercise immediately preceding enactment of the accommodation.").

176. See Volokh, McConnell on *Hobby Lobby*, supra note 165 (arguing, where regulation redistributes from business to employees, government does not have compel ling interest in protecting those employees' "new 'statutory right'"); see also Kevin C. Walsh, A Baseline Problem for the "Burden on Employees" Argument Against RFRA-Based Exemptions from the Contraceptives Mandate, Mirror of Just. (Jan. 17, 2014), http://mirrorofjustice.blogs.com/mirrorofjustice/2014/01/a-baseline-problem-for-the-burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html [http://perma.cc/QS5P-Q5AJ] (arguing contraceptive mandate regulations should not be taken into account in evaluating third-party burdens, because they violate RFRA and therefore cannot become part of the baseline).

177. See Sunstein, supra note 19, at 876 (discussing *Lochner*-era arguments against economic regulation).

this interpretation of religious liberty, subsidies and burdens become fixed in time. Employing private market ordering as a baseline tends to determine the fate of any economic regulation that disrupts the status quo. It grants the imprimatur of law to disparities in power and resources without even acknowledging that they exist.

While law inevitably sets and uses baselines, treating the baseline as neutral hides substantive commitments. Without the concept of a market-determined baseline, courts would examine the subsidies and burdens inherent in the status quo. They would treat the distribution of resources and obligations as inherently artificial and malleable, rather than natural and fixed. As Professors Tebbe, Richard Schragger, and Micah Schwartzman argue, though no neutral or natural baseline exists against which to measure third-party burdens, a realist baseline would more appropriately measure burdens by identifying and weighing the public commitments and constitutional values at stake. [178]

E. *Maintaining the "Private" Order as Least Restrictive Means*

Just as it restricts the government's interests and constrains analysis of third-party burdens, the market baseline also skews the least-restrictive-means analysis under RFRA and the First Amendment. With the interest in regulation reduced to market access, alternative providers offer an available means to fulfill that interest that is less restrictive of objecting businesses' religious liberty. Resistance to redistribution informs this analysis. Even in a functioning market, some objectors and their supporters grant, the government may have an interest in providing support to those who cannot afford particular goods. In such cases, however, it must do so directly.

1. *Letting the Market Work.* — According to Free Exercise Lochnerism, even as the existence of a competitive market diminishes the need for government regulation, it simultaneously furnishes its alternative. The market as least restrictive means follows from the narrowing of the government's interest. For example, with regard to housing antidiscrimination law, the Alaska Supreme Court explained that, if limited to "providing access to housing for all," the government's interest is satisfied whenever "a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs."[179] Across goods and services, the market ostensibly can meet the government's goals without intruding on the religious liberty of businesses.

In First Amendment litigation, the existence of other pharmacies justified exempting objectors from compliance with mandatory-fill laws.

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178. Nelson Tebbe, Richard Schragger, & Micah Schwartzman, When Do Religion Accommodations Burden Others? 5–7 (unpublished manuscript) (on file with the *Columbia Law Review*).

179. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994).

In Illinois, the trial court pointed to "willing sellers of over-the-counter Plan B, either at pharmacies or over the internet" as a least restrictive means to meet any government interest in ensuring access to the drug.[180] Confronted with similar claims in Washington, a federal district court also relied on the existence of other providers, noting that permitting a pharmacy to "refuse and refer" allows a patient to find "a nearby pharmacy that will dispense the drug."[181]

The notion that the market will work to supply the goods is central to refusals to serve same-sex couples as well. Defendants present same-sex couples as having ample alternatives in the market.[182] For example, having refused to host the wedding of a same-sex couple, an Iowa art gallery and wedding venue noted that over fifty other possible locations exist in the county and "two websites focus solely on supporting same-sex weddings in Iowa."[183] In the view of the objecting business, the availability of options in the market proved antidiscrimination law unnecessary.[184]

Scholarly proponents of business exemptions also construct least restrictive means around the market. With regard to gay clients in particular, Professor Thomas Berg says, "[t]here may be multiple adoption services, or multiple wedding photographers, ready to provide such service at little or no extra cost to the clients."[185] More broadly, Professor Robert Vischer argues that, as a general rule, businesses should be able to refuse service for religious reasons when a would-be customer seeks "roughly fungible goods and services" in an adequately competitive market.[186]

To facilitate market alternatives, some scholars further endorse disclosure of religious objections. Proposing a limited right of refusal, Professor Andrew Koppelman, for example, says businesses should provide notice of their refusal to serve same-sex weddings and thus avert

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180. Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *4 (Ill. Cir. Ct. Apr. 5, 2011), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

181. *Stormans I*, 524 F. Supp. 2d 1245, 1248–49 (W.D. Wash. 2007).

182. See, e.g., Kristen Waggoner & Jonathan Scruggs, Wash. Grandmother's Religious Freedom, Livelihood at Stake, All. Defending Freedom (Dec. 18, 2014), http://www.adfmedia.org/News/PRDetail/8608 [http://perma.cc/3CAD-4W2J] ("Plenty of other florists are willing to provide flowers for same-sex ceremonies, yet the lawsuits against Barronelle jeopardize her business, livelihood, and personal assets. The court should stop this injustice.").

183. Verified Petition at 15, Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Polk Cty. Dist. Ct. Oct. 7, 2013), http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf [http://perma.cc/2AUX-JZYH].

184. Id.

185. Berg, supra note 141, at 141.

186. Robert K. Vischer, Conscience and the Common Good: Reclaiming the Space Between Person and State 28 (2010).

"unpleasant shock" to would-be customers.[187] Professor Douglas Laycock also favors disclosure, while admitting that "same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago."[188] In this view, disclosure further allays a governmental interest in antidiscrimination law.

The argument that market alternatives, facilitated through disclosure, suffice stands at odds with the rights that the legislatures sought to create through antidiscrimination laws.[189] As the Senate Commerce Committee stated, the Civil Rights Act targets

> the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.[190]

In contrast to the disclosure that some scholars now advocate, advertising one's intent to discriminate has long been prohibited as discrimination.[191] As Congress saw it, disclosure continues to tell a person that he or she is unacceptable as a member of the public. Discrimination is not undone because another entity will usually provide the good or service one seeks. Free Exercise Lochnerism rejects this perspective.

2. *Making the Government Pay.* — Having reduced the governmental interest to individuals' access to the market, scholars, litigants, and courts propose that the government itself take on the role of provider. Resistance to redistribution further influences this least-restrictive-means

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187. Andrew Koppelman, Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law, 88 S. Cal. L. Rev. 619, 646–47 (2015).

188. Laycock, Afterword, supra note 109, at 200.

189. See Marvin Lim & Louise Melling, Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws, 22 J.L. & Pol'y 705, 711–16 (2014) (reviewing Supreme Court's constitutional jurisprudence recognizing dignitary harm of discrimination).

190. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)); see also Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) ("[S]tigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

191. See, e.g., Fair Housing Act, 42 U.S.C. § 3604(c) (2012) (defining as actionable discrimination "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination"); Me. Rev. Stat. tit. 5, § 4592(1) (2013) (prohibiting public accommodations from advertising their services as limited by sexual orientation).

analysis. As in *Lochner*, responsibility for any unequal distribution of resources is not to be borne by businesses, but by society as a whole.[192]

In contemporary debates over business religious exemptions, scholars often set forth government programs and market mechanisms as interchangeable and equally viable less restrictive means of achieving governmental goals. Professors Vikram Amar and Alan Brownstein, for example, argue that the Affordable Care Act has the "unusual" purpose of delivering "fungible, intangible goods that can be provided by either the public or private sector."[193] Having narrowed the governmental interest to access to goods, they conclude that conflicts with religious objectors could be avoided "if the government provided supplemental insurance coverage (or required health plan insurers to do so) to the employees of religiously-exempt organizations."[194] According to Berg, this logic applies more broadly, because "in many cases, the government could increase access to a good or service by increasing its subsidies or providing tax incentives to encourage manufacturers or distributors to provide it at lower cost."[195]

Other scholars claim the government can almost always act in lieu of a private business. McConnell, for example, describes the contraceptive mandate as marked by redistributive goals and reducible to "a funding question: Who should pay for the contraceptive coverage the government has decided people should have?"[196] He then concludes that, wherever a funding question is involved, "there will always be less restrictive alternatives, because the government can always choose to fund its own priorities."[197] A government program both fulfills governmental interests and avoids intruding on the free exercise of religion by private market actors.

Lest one think that antidiscrimination laws are not subject to this line of argument, consider that Free Exercise Lochnerism reduces the goals of antidiscrimination law to remedying exclusion from the market. However, as Samuel Bagenstos has observed in a different context, if material inequalities are "the primary target of antidiscrimination law,"

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192. Katz, supra note 1, at 314 (arguing central to *Lochner* was view that "injustice of poverty lies in the background circumstances of the economy, for which the employer is not responsible" because "[h]e is doing business in the world as he finds it").

193. Vikram David Amar & Alan E. Brownstein, The Narrow (and Proper) Way for the Court to Rule in Hobby Lobby's Favor, Verdict (Apr. 11, 2014), http://verdict.justia.com/2014/04/11/narrow-proper-way-court-rule-hobby-lobbys-favor [https://perma.cc/D4FY-869L]; see also Alan Brownstein, Taking Free Exercise Rights Seriously, 57 Case W. Res. L. Rev. 55, 128–29 (2006) (proposing "cost spreading" as way to balance government interests, employer's free-exercise rights, and other "political goods").

194. Amar & Brownstein, supra note 193.

195. Berg, supra note 141, at 141.

196. Volokh, McConnell on *Hobby Lobby*, supra note 176.

197. Id.; see also Epstein, Defeat, supra note 149, at 65 ("[T]he government should never be given free rein in its legislative directives. It *should* pick up the tab if it wants to impose the program in question . . . .").

they "can be addressed by a range of tax-and-transfer programs."[198] That is, the government could achieve nondiscrimination—defined as material equality—by offering tax benefits and credits to disfavored groups (or those willing to hire or serve them) without imposing discrimination bans on employers or other businesses.

Several courts have come to interpret the least-restrictive-means requirement of RFRA in this way. They propose market mechanisms but also allow that, were market failure to occur (i.e., individuals could not find other options), the government should fill the role of provider. For example, rather than require pharmacies to deliver emergency contraception, the Illinois trial court said that the government could harness the workings of the market by "using its websites, phone numbers, and signs to help customers find willing sellers," without substantially burdening objecting pharmacies' religious exercise.[199] Alternatively, the court concluded, the government could "provid[e] the drug directly"—a government program was required under the First Amendment.[200]

In enjoining the contraceptive mandate, many courts determined that the government had a number of options that did not involve employers. The Seventh Circuit, for example, opined: "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; [or] it can give tax incentives to consumers of contraception and sterilization services."[201] Other courts saw the existence of Title X family planning funding for low-income women as a means to provide contraceptive access to all women that was less restrictive of their employers' religious beliefs.[202] Taking the position that employees may consent to deregulation, some courts suggested that, at least as regards nonprofit organizations, an alternative to the mandate "could be to have the employee self-certify on an as-needed basis that their employer is a religious nonprofit that does not provide coverage for

198. Bagenstos, Rational Discrimination, supra note 110, at 840.

199. Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495, 2011 WL 1338081, at *6 (Ill. Cir. Ct. Apr. 5, 2011), aff'd in part as modified, rev'd in part sub nom. Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. Ct. 2012).

200. Id.

201. Korte v. Sebelius, 735 F.3d 654, 686 (7th Cir. 2013).

202. See, e.g., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 415 (3d Cir. 2013) (Jordan, J., dissenting) ("[T]he government already provides free contraception to some women, and there has been no showing that increasing the distribution of it would not achieve the government's goals."); Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328, 1349 n.16 (M.D. Fla. 2013) ("[F]orcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established program.").

such services"[203]—that is, employees could simply waive their statutory rights.

Yet, as the government explained during the notice-and-comment process and in litigation, the alternatives identified by these courts "were not feasible because the agencies lacked statutory authority to implement them; they would impose considerable new costs and other burdens on the government; and they would otherwise be impractical."[204] Nor, the government said, would these alternatives effectively fulfill its goals.[205] Several courts nevertheless concluded that less restrictive means need not further "the [g]overnment's interests 'as effectively as' the contraceptive mandate" does.[206]

As should be clear, advocates of business exemptions and the courts siding with them require implausible government alternatives to satisfy RFRA and the First Amendment.[207] Congress will not create a single-payer insurance plan for contraception alone. To suggest otherwise is to disregard not only political realities, but also the basic structure of insurance. Insurance functions by pooling and spreading different risks across populations. A comprehensive insurance plan expends money toward preventive care (like contraception) and reaps the savings of reduced risks (unintended pregnancies). A contraceptive-only plan does not benefit from the reduced risks, because it does not cover the costs of pregnancy. It also suffers from adverse selection, whereby only women who use contraception join the plan. Reliance on Title X is equally far-

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203. La. Coll. v. Sebelius, 38 F. Supp. 3d 766, 789 (W.D. La. 2014) (quoting E. Tex. Baptist Univ. v. Sebelius, 988 F. Supp. 2d 743, 770 (S.D. Tex. 2013)).

204. Defendants' Memorandum in Support of their Motion to Dismiss or, in the Alternative, for Summary Judgment at 26, *La. Coll.*, 38 F. Supp. 3d 766 (No. 12-00463). See generally Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156) (noting no statutory authority or funding for government-provided plans or tax incentives).

205. See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 & 2590, 45 C.F.R. pts. 147 & 156) (noting, whereas ACA provides preventive services through employment insurance to impose "minimal logistical and administrative obstacles," separate plans would impose barriers, and tax incentives would require women to pay out of pocket and not benefit women who do not earn enough to be required to file tax returns); see also Univ. of Notre Dame v. Burwell, 786 F.3d 606, 616–17 (7th Cir. 2015) (critiquing these proposed less-restrictive means).

206. Zubik v. Sebelius, 983 F. Supp. 2d 576, 612 (W.D. Pa. 2013); see also *La. Coll.*, 38 F. Supp. 3d at 789 ("Greater efficacy does not equate to the least restrictive means.").

207. See Frederick Mark Gedicks, One Cheer for *Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, & Third-Party Employee Burdens, 38 Harv. J. Gender & L. 153, 161 (2015) [hereinafter Gedicks, Improbable Alternatives] ("Funding for direct government coverage of contraceptives or a substantially larger exchange-tax credit is not politically viable, and it is disingenuous to suggest otherwise."); Lupu, *Hobby Lobby* and Religious Exemptions, supra note 130, at 89 ("It is unlikely in the extreme that Congress will appropriate funds to pay for the various contraceptives to which Hobby Lobby and other firms object on religious grounds . . . .").

fetched. The program already suffers shortfalls[208] and could not absorb (or reach) women denied contraception due to their employers' religious objections. In the context of pharmacy regulation, while the government theoretically could identify sellers of emergency contraception through its websites, such information would be unlikely to reach women seeking the drug. Innumerable practical obstacles prevent the state from providing a drug that must be used within seventy-two hours of unprotected sex.

* * *

In sum, with the rise of Free Exercise Lochnerism, the lower courts incorporated the dual premises of private ordering and anti-redistribution into RFRA and the First Amendment. The private order—with its purported lack of requirement to serve same-sex couples and minimal regulation of employee health benefits—became a neutral baseline. The government's compelling interests were narrowed to facilitating market access. In turn, the least-restrictive-means analysis drew on resistance to redistribution. As in the *Lochner* era, courts indicated that businesses bear no responsibility for the market as they find it. Other private parties or the government must step in.

As the next Part argues, the Supreme Court's decision in *Burwell v. Hobby Lobby* brought religious liberty doctrine to the threshold of Free Exercise Lochnerism.

III. ON THE THRESHOLD OF *LOCHNER*

Before the contraceptive mandate litigation, employers lost their bids for judicial religious exemptions from antidiscrimination laws, wage-and-hour laws, and insurance mandates under both RFRA and the First Amendment.[209] Outside the special context of houses of worship and

208. Nat'l Family Planning & Reprod. Health Ass'n, Title X: Budget and Appropriations, http://www.nationalfamilyplanning.org/title-x_budget-appropriations [http://perma.cc/7KDX-YTQ5] (last visited Sept. 19, 2015) ("Title X . . . has sustained significant cuts as a result of tremendous pressure to reduce the federal deficit. On top of those cuts, in 2011, for the first time in the history of the Title X program, the House voted to completely defund the program.").

209. See Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (N.J. Dep't. of L. and Pub. Safety Dec. 29, 2008), http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf [http://perma.cc/S87X-NTKA] (refusing to exempt religious organization that would not serve lesbian couple for their civil union); see also Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 399 (1990) (refusing to exempt defendant from state sales and use taxes); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985) (same for federal wage requirements); United States v. Lee, 455 U.S. 252, 261 (1982) (same for social security obligations); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 631 (7th Cir. 2000) (same for unemployment insurance); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366 (9th Cir. 1986) (prohibiting religious employer from sex discrimination in employee benefits); St. John's

ministers, employers could not prevail against laws meant to safeguard their employees or customers. Infrequent claims from for-profit corporations were always denied.[210]

The enactment of the Religious Freedom Restoration Act twenty years ago was not thought to alter this framework.[211] Until the rise of Free Exercise Lochnerism, courts had rebuffed the rare case brought by businesses under RFRA.[212] Under both the Constitution and RFRA, the courts' scrutiny of religious liberty claims was "strict in theory, but feeble in fact."[213]

In *Burwell v. Hobby Lobby*, confronted with claims to RFRA exemptions from the contraceptive mandate, the Supreme Court upended this tradition. It conducted several significant shifts in religious liberty doctrine. First, it granted a religious exemption to a for-profit business for the first time.[214] Second, rather than confront the line of precedent rejecting business free-exercise exemptions from employee and consumer protections, the Court read the Religious Freedom Restoration Act as "an obvious effort to effect a complete separation from First Amendment case law."[215] Finally and significantly, it relaxed

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Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1278 (Mont. 1992) (refusing to exempt defendant from workers' compensation requirements); Victory Baptist Temple, Inc. v. Indus. Comm'n of Ohio, 442 N.E.2d 819, 822 (Ohio Ct. App. 1982) (same).

210. See, e.g., Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (calling for-profit corporations' claims to religious liberty "patently frivolous"); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988) (holding religious "beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of [Title VII's religious exemption]"); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 854 (Minn. 1985) (en banc) (holding Minnesota Civil Rights Act constitutional as applied in First Amendment challenge).

211. See supra notes 64–69 and accompanying text (compiling legislative, judicial, and scholarly understandings of RFRA).

212. See, e.g., Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 931 (Cal. 1996) (refusing to grant RFRA exemption from ban on marital status discrimination to Christian landlord).

213. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994); see also Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 857–58 (2006) ("[T]he religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies: 59 percent, more than double the mean of the other doctrinal categories.").

214. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014) (concluding for-profit businesses must be accommodated on same terms as religious nonprofit organizations).

215. Id. at 2761–62; see also id. at 2772 ("[N]othing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment."); Micah J. Schwartzman, What Did RFRA Restore?, Cornerstone (Sept. 11, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-

RFRA's requirement that objectors establish that the burden on their religious freedom is substantial. It suggested that courts must accept plaintiffs' assertions that a law imposes a substantial burden.[216] It quickly decided that the contraceptive mandate presented such a burden.[217]

The Court assumed, without deciding, that the governmental interest in guaranteeing cost-free access to contraceptives was compelling,[218] but then used apparently heightened strict scrutiny as it assessed whether the mandate was the least restrictive means of furthering that interest. It said that the mandate could not satisfy the "exceptionally demanding" least-restrictive-means standard of RFRA.[219] The government had allowed nonprofit religious organizations to exclude contraceptive coverage from their insurance plans, but required their insurance companies to offer contraceptive-only policies directly to employees, once given notice of the employer's objection.[220] The Court determined that the government could similarly accommodate for-profit corporations.[221]

As section III.A argues, *Hobby Lobby* began to incorporate Lochnerian premises into religious liberty doctrine in several significant ways. As section III.B explains, the Supreme Court stopped short of fully embracing Free Exercise Lochnerism. Unlike the lower courts, it did not exempt for-profit corporations entirely from the mandate without regard to their employees' burdens. It instead reasoned that the government could extend an existing accommodation to encompass for-profit corporations and concluded that, if the government did so, all the interests at stake would be satisfied. The Court nonetheless left religious liberty doctrine unsettled. By failing to repudiate the reasoning of the lower courts, the Court invited further steps down the path to *Lochner*.

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implications-for-religious-freedom/responses/what-did-rfra-restore [http://perma.cc/6NRY-VJFL] (describing this interpretation as radical).

216. *Hobby Lobby*, 134 S. Ct. at 2779 ("[T]heir companies sincerely believe that providing the insurance coverage demanded . . . lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

217. Id. at 2780 ("The least-restrictive means standard is exceptionally demanding and it is not satisfied here.").

218. Id. ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . .").

219. Id. (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

220. Coverage of Preventive Services Under Patient Protection and Affordable Care Act, 78 Fed. Reg. 8456, 8462 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R pt. 2590, 45 C.F.R. pts. 147, 148, 156). With regard to self-insured plans, a third-party administrator of the plan must provide contraception coverage at no cost. Press Release, U.S. Dep't of Health & Human Servs., Administration Issues Final Rules on Contraception Coverage and Religious Organizations (June 28, 2013), http://www.hhs.gov/news/press/2013pres/06/20130628a.html [http://perma.cc/TR2N-GD3N].

221. *Hobby Lobby*, 134 S. Ct. at 2782 (relying on nonprofit accommodation).

A. *Merging Liberties of Contract and Religion*

In three important respects, the *Hobby Lobby* Court adopted the Lochnerian reasoning of the lower courts. First, it linked the free exercise of religion to freedom of contract. Contrary to past precedent, a formalist view of the employment relationship entered the doctrine. Second, as in the lower courts, redistribution, in the form of a financial subsidy from employer to employee, became the burden on business religious liberty. Finally, the Court appeared to narrow the government's interests to market access in a way that may have repercussions for analysis of least restrictive means and third-party burdens in future cases.

In a first step toward *Lochner*, the *Hobby Lobby* decision calibrated religious rights to businesses' ability to contract and shifted the baseline to the private order. Like the litigants, their scholarly supporters, and many lower courts, the Court introduced a formalist notion of the employment relationship into religious liberty doctrine. To the Court, employees consented to associate with the corporation, informed of its religious identity.[222] So doing, they agreed to the terms of employment. The Court portrayed the interests of employee and objecting employer as aligned in this private bargain—saying "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[223]

The Court then constructed free exercise of religion around a business's right to contract with employees. It observed that, under the mandate, the objecting businesses could cease to offer health insurance which they had offered "in part, no doubt, for conventional business reasons" and "in part because their religious beliefs govern their relations with their employees."[224] Even this choice could be burdensome, the Court said, because the companies would be deprived of the ability to offer "a benefit that employees value."[225] The Court acknowledged that at stake for religious objectors was their ability to "deduct the cost of providing health insurance" from their taxes.[226] The Court expressed concern that Hobby Lobby "would face a competitive disadvantage in retaining and attracting skilled workers" if it dropped insurance coverage to comply with both the mandate and its religious beliefs.[227] The burden on free exercise, therefore, was the loss of unfettered liberty to contract over benefits and to receive a tax deduction.

Second, like the lower courts, the Court perceived the regulation of employee insurance benefits as redistributing gains from a private order

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222. Id. at 2764–66 (discussing religious message sent by plaintiff corporations).

223. Id. at 2768.

224. Id. at 2776.

225. Id.

226. Id. at 2777.

227. Id.

built on consent. It described the mandate as "a legal obligation requiring the plaintiff to confer benefits on third parties"[228]—that is, employees. The businesses would have to "fund contraceptive methods that violate their religious beliefs."[229]

With these first two moves, the Court implicitly repudiated its prior analysis of religious exemptions in commerce. In employment in particular, it had taken a realist view of power imbalances between employer and employee and emphasized the risk of abuse.[230] In earlier decisions, the Court saw entry into the marketplace as a choice. As it said in *United States v. Lee*:

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity *as a matter of choice*, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[231]

Other precedent instructed that the regulation of commerce did not burden free exercise in a constitutionally significant way insofar as it simply made "the practice of . . . religious beliefs more expensive."[232] From this point of view, business religious exemptions were not neutral, but rather required a subsidy from the state (or third parties) to objectors. In *Hobby Lobby*, however, the Court could not see plaintiffs as

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228. Id. at 2781 n.37.

229. Id. at 2782.

230. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292, 302–03 (1985) (coming to this conclusion despite undisputed evidence that "associates" saw their work as a "ministry").

231. United States v. Lee, 455 U.S. 252, 261 (1982) (emphasis added); see also Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1984) ("By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees."), aff'd sub nom. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) ("[T]he economic burden, or 'Hobson's choice,' of which [the landlord] complains, is caused by his choice to enter into a commercial activity that is regulated by antidiscrimination laws."); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996) (noting landlord can "avoid the conflict [with antidiscrimination laws], without threatening her livelihood, by selling her units and redeploying the capital in other investments").

232. Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961) ("[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."); see also Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant."); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (disallowing tax exemption for religious "auditing" sessions reduced objectors' income, but did not burden religious activity).

demanding a subsidy in the form of the ability to "deduct the cost of providing health insurance" from their taxes.[233]

Before *Hobby Lobby*, the Court had acknowledged that business religious exemptions might grant a competitive edge to objectors. It consequently held that the Fair Labor Standards Act applied to workers engaged in a religious foundation's commercial activities, because exempting the foundation and allowing "the payment of substandard wages would undoubtedly give [it] and similar organizations an advantage over their competitors."[234] Nor could observant Jews open their store on Sundays contrary to law, because such an exemption would privilege them over their competitors.[235]

While an exemption from the contraceptive mandate may not generate as significant a financial advantage as exemptions from minimum-wage or Sunday-closing laws, the accommodation works as a benefit to objectors. Although companies claiming a religious exemption offer their employees an insurance plan deemed insufficient by law, they continue to receive tax-preferred treatment of their plans. They also receive accommodation related to antidiscrimination obligations.[236]

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233. *Hobby Lobby*, 134 S. Ct. at 2777.

234. *Tony & Susan Alamo Found.*, 471 U.S. at 299.

235. See *Braunfeld*, 366 U.S. at 608–09 ("To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day . . . .").

236. The competitive implications of objections to various laws are not always clear. Some claim that exemption from antidiscrimination laws would be a competitive disadvantage. But see State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) (en banc) (refusing to exempt objectors to antidiscrimination law because "[o]ther employers in the state engaged in secular business activities would be bound by the law, but those professing such convictions would not"). For example, discrimination against pregnant women might generate short-term competitive advantages but ultimately disadvantage a firm by making it more difficult to recruit or retain high-caliber employees. Similarly, objections to insurance mandates to cover vaccines might generate small savings, but would not obviously advantage one business over another. Discrimination in public accommodations could cut either way. By objecting to same-sex marriage, some businesses have experienced a sales boom. See, e.g., Mark Meredith & Will C. Holden, Cake Shop Says Business Booming Since Refusal to Serve Gay Couple, Fox31 Denver (July 30, 2012, 9:03 AM), http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple [http://perma.cc/2MEP-J9HL] (describing boom in business for cake store refusing to create cakes for gay weddings); Leon Stafford, Chick-fil-A Keeps Growing Despite Uproar, Atlanta J.-Const. (Jan. 29, 2013, 6:22 AM), http://www.ajc.com/news/business/chick-fil-a-keeps-growing-despite-uproar/nT85n/ [http://perma.cc/4KGZ-FWXJ] (describing company's sales growth following CEO's comments opposing same-sex marriage). Employers have previously asserted religious objections to participation in unemployment insurance and workers' compensation programs, but claimed a commitment to provide such funds for their own employees separate from the state. Under such circumstances, how would competitive advantage be analyzed? What kind of economic analysis is required? Economic analyses have long indicated that higher wages lead to more productive workers, among other benefits to employers. See Justin Wolfers & Jan Zilinsky, Ten Reasons Workers Should Be Paid More, Newsweek

Third, with rights and burdens calibrated to the private order, the Court narrowed the government's interest in the mandate. The government had advanced three interests in support of the mandate: sex equality, public health, and access to a comprehensive insurance system.[237] It specifically pointed to the significant ill effects for women's health, families, income, and equality linked to their lack of insurance coverage for contraception.[238]

The *Hobby Lobby* majority, however, indicated that exemptions—as it called the ACA's exclusion of small businesses and grandfathering of existing plans—might render any governmental interest less than compelling.[239] It further emphasized to the lower courts that they must "loo[k] beyond broadly formulated interests" and "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."[240] In so doing, it implicitly called into question precedent that had focused on the externalities that judicial accommodation of any one commercial entity imposed on society.[241]

Nonetheless, the majority opinion assumed a narrow governmental interest in "guaranteeing cost-free access" to contraceptives.[242] It rejected interests in public health and sex equality as "couched in very broad terms."[243] It called the contraceptive mandate "different" from other insurance mandates.[244] The government might consider contraception to serve public health, but the Court disagreed. Although Justice Kennedy concurred to highlight that "a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees," he too failed

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(Jan. 18, 2015, 4:40 PM), http://www.newsweek.com/ten-reasons-workers-should-be-paid-more-300212 [http://perma.cc/HKM9-CGX4] (compiling studies on subject). Does this mean that religious exemptions from the minimum wage would represent a competitive disadvantage?

237. See *Hobby Lobby*, 134 S. Ct. at 2779 (describing compelling interests put forward by government).

238. Id. at 2799–2802 (Ginsburg, J., dissenting) (listing evidence supporting interests in mandate).

239. See id. at 2780 (majority opinion) (describing exemptions as "features of ACA that support [the] view" that mandate does not serve compelling interests). Contra id. at 2800–01 (Ginsburg, J., dissenting) (noting federal law frequently applies only to larger employers and grandfathering does not exempt, but instead phases in, compliance).

240. Id. at 2779 (majority opinion) (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 420 (2006)).

241. See Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); see also Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (refusing Fair Labor Standards Act exemption to nonprofit foundation, which united associates committed to working without pay, out of concern for workers' rights to a minimum wage across marketplace).

242. *Hobby Lobby*, 134 S. Ct. at 2780.

243. Id. at 2779.

244. Id. at 2783.

to consider sex equality and broader health goals.[245] The Court also rejected the government's asserted interest in a comprehensive health insurance system.[246]

In its construction of business liberty claims and the government's interest in regulation, the *Hobby Lobby* Court manifested commitment to a market baseline and resistance to redistribution like the *Lochner* Court. However, whereas the *Lochner* Court treated the baseline as the market defined by the common law of contract, property, and tort, this Court treated the baseline as the market supplemented by some undefined set of statutory requirements. It affirmed that prohibitions on race (although perhaps not sex) discrimination in employment (although perhaps not elsewhere) are part of the baseline.[247] It indicated that other insurance mandates, justified by reference to public health like the contraceptive mandate, "may be supported by *different interests*."[248] It described the religious objection to social security insurance that it had refused to accommodate in *United States v. Lee* as "quite different" from the contraceptive mandate litigation.[249] It attempted to distinguish general revenue taxation—and objections thereto—from employer mandates to participate in government programs.[250] Nonetheless, like scholarly supporters of Free Exercise Lochnerism who distinguish between "new" and "old" statutory requirements, the Court failed to identify which statutes are sufficiently "different" from the contraceptive mandate to form part of the baseline.

B. *Unsettling Least-Restrictive-Means and Third-Party-Burden Analysis*

Unlike the lower courts, the *Hobby Lobby* Court did not fully assimilate *Lochner* into religious liberty doctrine. It did not require the government to step in as an alternate provider in order to satisfy the least-restrictive-means prong of RFRA, as the litigants had urged.[251]

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245. Id. at 2786 (Kennedy, J., concurring in the judgment).

246. See id. at 2784 (majority opinion) (distinguishing employer religious objections to social security contributions as general tax objections).

247. See id. at 2783 ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). The majority failed to respond to the dissent's examples of sex, sexual-orientation, religion, and marital-status discrimination. Id. at 2804–05 (Ginsburg, J., dissenting).

248. Id. at 2783 (majority opinion) (emphasis added).

249. Id. at 2751, 2783.

250. Id. at 2784 (concluding "[r]ecognizing exemptions from the contraceptive mandate is very different" from creating exemptions to "categorical requirement to pay taxes"). As tax experts have noted, the distinctions drawn by the Court do not hold. See Jasper L. Cummings, Jr., *Hobby Lobby* and Federal Taxes, Tax Notes, Nov. 3, 2014, at 519, 530–31 (arguing *Hobby Lobby* invites religious exemptions from much of federal tax code).

251. Transcript of Oral Argument at 84, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf [http://perma.cc/5CDH-T6V9] ("The government paying or

Significantly, unlike the lower courts, it did not exempt for-profit corporations from the mandate without regard for their employees' ability to continue to access contraceptives. The majority instead indicated that the government could include for-profit corporations within the nonprofit accommodation—an outcome that many attribute to Justice Kennedy, whose vote was key to the five-Justice majority.[252] In the Court's view, this move ensured religious liberty for employers and access to contraception for employees.

Nonetheless, *Hobby Lobby* unsettled religious liberty doctrine related to least-restrictive-means and third-party burdens. The Court left the door open for broader religious exemptions,[253] including for the many employers who already challenge the accommodation as itself a violation of RFRA.[254] Even as the majority avoided holding that the government must serve as a least restrictive means, it did not reject that view. It agreed that "[t]he most straightforward way of [advancing its interest] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[255]

Instead of strengthening the case for employer regulation, the compelling nature of the interest supported an obligation of government funding. If access to contraception is a compelling interest, the majority said, "[i]t is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal."[256] It explained, "[w]e do not doubt that cost may be an important factor in the least-restrictive-means analysis, but . . . RFRA . . . may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."[257] In its view, RFRA may require even the creation of "entirely new programs."[258] More trou-

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a third-party insurer paying is a perfectly good least restrictive alternative."); id. at 86 ("[T]here's also Title X . . . . [T]he most obvious least restrictive alternative is for the government to pay for their favorite contraception methods themselves.").

252. See, e.g., Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2530 (2015) ("Justice Kennedy appears to have guided the Court to a decision that endeavored to vindicate both the interests of the claimants seeking religious exemptions and of the government in enforcing the statute.").

253. See *Hobby Lobby*, 134 S. Ct. at 2782 (refraining from saying whether accommodation "complies with RFRA for purposes of all religious claims").

254. See, e.g., Eternal Word Television Network, Inc. v. Burwell, 756 F.3d 1339, 1340 (11th Cir. 2014) (challenging contraception mandate as violating RFRA generally); Archdiocese of St. Louis v. Burwell, 28 F. Supp. 3d 944, 955–57 (E.D. Mo. 2014) (challenging contraception mandate as failing "least restrictive means" standard).

255. *Hobby Lobby*, 134 S. Ct. at 2780.

256. Id. at 2781.

257. Id.

258. Id.

blingly, the Court hinted that the appropriate comparator of the "additional funds" required for a least restrictive means is the entire cost of major legislation. The cost to the government of providing contraceptives to women, it said, "would be minor when compared with the overall cost of ACA" (or $1.3 trillion over a decade).[259]

Any expansion of the nonprofit accommodation also demands potentially significant government expenditures. Under the accommodation, the third-party administrators of self-insured plans arrange for contraceptive-only plans. The government then reimburses the costs of these plans through reductions in fees that insurers pay to the federal insurance exchanges. At oral argument, Solicitor General Verrilli told the court that including for-profit businesses within this accommodation would impose an "open-ended increase in the cost to the government."[260] No matter, the Court said, because "payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees."[261] Again, the total fees—$450 million in 2014—determined whether the cost was material to least-restrictive-means analysis.[262]

In concurring with the majority, Justice Kennedy also seemed to accept that accommodation could impose costs on government.[263] He nonetheless noted that the Court appropriately did not resolve the question of whether the government must create "a whole new program."[264] He observed that the availability of the nonprofit accommodation "might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise."[265]

Justice Kennedy adopted a distinctly libertarian tone in his concurrence, however. He labeled the contraceptive mandate representative of "an era of pervasive governmental regulation."[266] He said the corporate

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259. Id.

260. Transcript of Oral Argument at 66, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (No. 13-354), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf [http://perma.cc/5CDH-T6V9].

261. See *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (internal quotation marks omitted) (quoting government's analysis of accommodation of nonprofit religious organizations).

262. U.S. Gov't Accountability Office, Patient Protection and Affordable Care Act: Status of CMS Efforts to Establish Federally Facilitated Health Insurance Exchanges 13 (2013), http://www.gao.gov/assets/660/655291.pdf [http://perma.cc/89GF-SUMV] (estimating "$450 million in user fees will be collected from issuers of health coverage participating in the exchanges in fiscal year 2014").

263. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring in the judgment) (noting accommodation could be made in this case "without imposition of a whole new program").

264. Id. (Kennedy, J., concurring in the judgment).

265. Id. at 2787 (Kennedy, J., concurring in the judgment).

266. Id. at 2785 (Kennedy, J., concurring in the judgment).

objectors brought "a legitimate claim for freedom in the health care arena."[267] Whereas the majority opinion assumed government-funded contraception would be *less* restrictive of liberty, Kennedy instead worried such a plan might protect "one freedom . . . by creating incentives for additional government constraints."[268]

Although *Hobby Lobby* raised costs to the government (and suggested a new program might be required), it nonetheless appeared to safeguard employees from the financial burdens of their employers' religious beliefs. The majority affirmed that "our decision in these cases need not result in any detrimental effect on any third party . . . . [T]he Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees."[269] The decision, therefore, had "precisely zero" effect, the Court said, on employees.[270] Moreover, in a concurrence celebrated for affirming the limits of accommodation,[271] Justice Kennedy emphasized that the accommodation of a business's exercise of religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[272]

The majority, however, expressed doubts about the relevance of burdens on employees and other private parties. It admitted that the burdens an exemption imposes on others "will *often* inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[273] But it said that businesses sometimes must be exempted from laws that redistribute from businesses to individuals—whether consumers or employees—irrespective of the burdens on third parties.[274] Like the lower courts, it perceived a return to the pre-ACA status quo as neutral toward employees (simply withholding

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267. Id. at 2786 (Kennedy J., concurring in the judgment).

268. Id. (Kennedy, J., concurring in the judgment).

269. Id. at 2781 n. 37 (majority opinion).

270. Id. at 2760.

271. See Gedicks, Improbable Alternatives, supra note 207, at 175 (identifying as *Hobby Lobby*'s "silver lining" that four dissenting Justices and Justice Kennedy recognized "RFRA does not authorize permissive religious exemptions that shift the costs of observing a religion from those who practice and believe it to those who do not").

272. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring in the judgment).

273. Id. at 2781 n.37 (majority opinion) (emphasis added).

274. The Court stated, "[I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." Id.; see also Nelson Tebbe, Richard Schragger & Micah Schwartzman, Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation, Balkinization (Oct. 16, 2014), http://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html [https://perma.cc/RB5W-2E6N] (describing footnote thirty-seven as "contain[ing] troubling language that could sweep aside this established principle of constitutional law").

benefits), whereas regulation burdened employers (imposing an obligation "to confer a benefit").[275]

Without response from Justice Kennedy, the majority further suggested that the real burden on employees comes, not from exempting employers, but from failing to exempt them. The mandate, it said, put employers to "the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans."[276] Employer and employee interests aligned against workplace regulation.

In focusing on access to a good, all five Justices siding with Hobby Lobby disallowed a broader conception of harms and burdens. As Professors Douglas NeJaime and Reva Siegel observe, the Court "focused entirely on material, rather than dignitary, harm" and failed to consider how accommodation "might create harmful social meanings that undermine both individual and societal interests the statute promotes."[277] While Justice Kennedy's formulation of the compelling interest as the health of female employees is broader than the majority's "access to cost-free contraceptives," he too failed to acknowledge an interest in equality. He thus overlooked the ways in which exemption from the mandate could reimpose burdens on women's equality. The Lochnerian premises of the Court's approach provide a possible explanation for this omission. The limited burdens that the Court considered derive from its narrowing of the governmental interest in regulation. Because the compelling interest lies in access to contraception, a woman is not burdened so long as market alternatives or government programs might provide it to her.

Within days of *Hobby Lobby*, the Court continued its trajectory toward business religious exemptions. It denied review in several cases that had entirely exempted for-profit corporations from the mandate, leaving in place for the course of litigation decisions that deprive employees of access to contraceptives.[278] The Court also granted an injunction in favor of Wheaton College, a religious nonprofit, against the very accommodation that it had endorsed in *Hobby Lobby*.[279] Over the following year, it vacated and remanded for reconsideration decisions of the courts of

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275. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

276. Id. at 2777; see also Volokh, McConnell on *Hobby Lobby*, supra note 165 (arguing "[i]n that case, all 13,000 employees would lose excellent health insurance and be forced to buy their own insurance on an exchange," which represents "a far greater burden on Hobby Lobby's employees.").

277. NeJaime & Siegel, supra note 252, at 2581.

278. Burwell v. Newland, 134 S. Ct. 2902, 2902 (2014) (mem.), denying cert. to Newland v. Sebelius, 542 F. App'x 706 (10th Cir. 2013); Burwell v. Korte, 134 S. Ct. 2903, 2903 (2014) (mem.), denying cert. to Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013).

279. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2806 (2014).

appeals that had concluded that the nonprofit accommodation did not rise to the level of a substantial burden on business religion.[280]

As a practical matter, the Court's decisions detrimentally affected employees. As Tebbe, Schragger, and Schwartzman observed, more than a year later, employees of Hobby Lobby and other companies that have received religious exemptions lacked contraceptive coverage.[281] Judge Rovner thus could equally level at the Supreme Court the same reproach she gave her colleagues on the Seventh Circuit:

> Whatever work-around might be possible to bestow that right through alternate means, there is no certainty that the government can or will implement the work-around or that it will do so on any given timeline, and in the meantime the corporate owner has vindicated its asserted rights at the expense of others.[282]

As the next Part argues, Free Exercise Lochnerism seems likely to expand beyond "culture war" issues of contraception and same-sex marriage.

IV. THE THREAT TO THE REGULATORY STATE

The lens of *Lochner* reveals that business religious liberty claims stand to affect not only women and gay people but also potentially a wide swath of post-New Deal regulation. As section IV.A explains, the rise of Free Exercise Lochnerism and its partial acceptance by the *Hobby Lobby* Court introduce true strict scrutiny of economic regulation into religious liberty doctrine. The courts welcome, for the first time, religious objections from for-profit entities, as they lower the threshold for making claims and raise the standard for the government to defend them. Under such circumstances, over time, exemptions risk destabilizing regulation. As section IV.B indicates, religious analysis driven by private ordering and resistance to redistribution could generate exemptions from, and thus undermine, any number of laws.

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280. Mich. Catholic Conference v. Burwell, 135 S. Ct. 1914, 1914 (2015); Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015).

281. Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby*'s Bitter Anniversary, Balkinization (June 30, 2015), http://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html [https://perma.cc/YV42-CYMW] (noting "Obama Administration has not yet implemented the solution that the Court suggested in its opinion, perhaps because of understandable difficulties defining what counts as a closely-held corporation"). The final rule now allows for-profits to avail themselves of the same accommodation as nonprofits by notifying the government of their objection and providing minimal information. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,343 (July 14, 2015) (to be codified at 26 C.F.R. 54). It seems likely to face legal challenge.

282. Korte v. Sebelius, 735 F.3d 654, 719–20 (7th Cir. 2013) (Rovner, J., dissenting).

A. *The Deregulatory Potential of Exemptions*

While *Lochner*-era courts struck down state and federal laws to preserve a purportedly neutral baseline (thus preserving the status quo across the marketplace), courts in the religious liberty cases grant exemptions to specific plaintiffs. Their decisions might then be perceived, not as challenges to the regulatory state, but as reasonable carve-outs for religious objectors that nonetheless maintain the vigor and general applicability of the social insurance and antidiscrimination framework.[283] Even if informed by libertarian premises, religious exemptions do not achieve complete libertarianism.[284]

While the invalidation of laws more thoroughly impedes government action, the interpretation of RFRA and the First Amendment to conform to Lochnerian ideals nonetheless may frustrate legislative goals. Three developments in particular raise the risk of rendering exemptions effectively deregulatory: *Hobby Lobby*'s reduction of the substantial burden showing for litigants; the embrace of a new class of litigants for religious liberty claims; and the reinterpretation of compelling interest and least restrictive means to limit the government's power to regulate.

First, in a doctrinal shift that alone could render the regulatory state vulnerable, *Hobby Lobby* suggests courts must accept plaintiffs' assertions, or beliefs, that the burden on their free exercise of religion is substantial—without further inquiry.[285] Courts seemingly can no longer examine objectors' proximity to and responsibility for the alleged wrongdoing.[286] As Judge Easterbrook of the Seventh Circuit said, *Hobby*

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283. For example, responding to my argument, Professor Berg argues that "religious accommodation does not interfere nearly as greatly with regulation as *Lochner* did," because it "does not undo legislation in toto and put the subject beyond government's power"; instead, "the regulation accomplishes its goal in the large majority of cases." Berg, supra note 141, at 121, 148.

284. Nor did *Lochner* achieve complete libertarianism. As David Bernstein has frequently pointed out, free-labor Lochnerism permitted the regulation of some businesses and protection of some categories of workers. See David E. Bernstein, The Conservative Origins of Strict Scrutiny, 19 Geo. Mason L. Rev. 861, 865 (2012) ("Both before and after *Lochner*, the Court also upheld many other ameliorative labor laws . . . .").

285. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2571, 2779 (2014) ("[C]ompanies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

286. See *Korte*, 735 F.3d at 705–06 (Rovner, J., dissenting) (discussing departure of her colleagues and other courts siding with challengers "from both historical practice and the language of RFRA" by declining to assess burden on challengers' exercise of religion); La. Coll. v. Sebelius, 38 F. Supp. 3d 766, 778 (W.D. La. 2014) (discussing divide among district courts over substantial burden analysis). Previously, the Supreme Court distinguished between inquiry into the centrality of belief—unavailable to the courts—and analysis of the substantiality of the burden—required of the courts. See Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (distinguishing inquiries into beliefs from inquiries into burden). Other courts also did so under RFRA. See, e.g., Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) (accepting plaintiffs' beliefs as sincere and religious, but "not the legal

Lobby and the Court's subsequent decision in *Holt v. Hobbs*[287] "articulate a standard much easier to satisfy" and introduce "a lot of uncertainty" with regard to substantial burdens.[288] Indeed, as Justice Ginsburg noted in her dissent, the *Hobby Lobby* majority hinted that the religion clauses of the Constitution, not RFRA, bar examining the substantiality of a burden on free exercise.[289]

This "any burden" standard, as one court called it,[290] seems to remove the primary limiting mechanism for RFRA claims.[291] Under this new standard, a corporation could claim a sincerely held religious belief, assert that the burden of compliance with a regulation is substantial, and, with pleadings alone, shift the burden of proof to the government. Evaluating this argument from a landlord who objected to state antidiscrimination law under RFRA, the California Supreme Court previously concluded:

> This would turn on its head the ordinary assumption that legislation on economic and social matters need only have a rational basis; instead, any declaration of sincerely held religious belief, however "[in]comprehensible", would require the state to justify any conflicting law under the compelling interest standard or forego its uniform enforcement.[292]

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conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); Mead v. Holder, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (concluding requirement to pay into health insurance or pay tax is de minimis burden on religious freedom of plaintiffs who object to medical care).

287. 135 S. Ct. 853 (2015).

288. Schlemm v. Wall, 784 F.3d 362, 364 (7th Cir. 2015); see also Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1348 (11th Cir. 2014) (Proyer, J., specially concurring in the judgment) (interpreting *Hobby Lobby* to require that "[s]o long as the Network's belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the Network is a substantial burden on its religious exercise").

289. 134 S. Ct. at 2805–06 (Ginsburg, J., dissenting).

290. Gilardi v. Sebelius, 926 F. Supp. 2d 273, 282 (D.D.C. 2013); see also Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) ("This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief.").

291. See Ira C. Lupu, The Failure of RFRA, 20 U. Ark. Little Rock L.J. 575, 594 n.86 (1998) (concluding, based on systematic review of first years of RFRA, that substantial burden requirement "accounted for over 70% of the RFRA defeats in court"); Lupu, *Hobby Lobby* and Religious Exemptions, supra note 130, at 61 n.118 (compiling decisions rejecting RFRA claims for lack of substantial burden).

292. Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 924 (Cal. 1996) (citation omitted).

With little to no showing from objectors, this interpretation "subjects a potentially wide range of statutory protections to strict scrutiny, one of the most demanding standards known in our legal system."[293]

Second, a new class of litigants now can request religious exemptions from federal law. For-profit corporations are not the insular or religious minority individuals of past accommodations,[294] but politically powerful religious and commercial entities—the very centerpiece of regulatory efforts. Of course, as compared to Free Speech Lochnerism, Free Exercise Lochnerism allows for a limited category of plaintiffs; as the *Hobby Lobby* Court emphasized, only closely held "religious" for-profit corporations exercise religion.[295] However, because no such category exists in state or federal law, the number of potential objectors cannot be accurately predicted.[296] If, as some claim, a significant and increasing trend exists toward bringing religion into corporate governance,[297] a wide pool of claimants might emerge.

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293. Korte v. Sebelius, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting); see also Gedicks, Improbable Alternatives, supra note 207, at 165 ("*Hobby Lobby* left little doubt that RFRA now imposes a genuinely 'strict' standard of review . . . ."). The Supreme Court is expected to take up ongoing claims by nonprofit employers that the very process of requesting a religious accommodation imposes a substantial burden on religious beliefs. Thus far, even as district courts have applied *Hobby Lobby* to preclude a finding of insubstantial burden, the courts of appeals have unanimously concluded that no substantial burden exists in the "paradoxical and virtually unprecedented" circumstance that "the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths." Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 557 (7th Cir. 2014); see also Little Sisters of the Poor Home for the Aged v. Burwell, No. 13-1540, 2015 WL 4232096, at *16 (10th Cir. July 14, 2015); E. Tex. Baptist Univ. v. Burwell, No. 14-10241, 2015 WL 3852811, at *5 (5th Cir. June 22, 2015); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 427 (3d Cir. 2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 252–53 (D.C. Cir. 2014); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 389 (6th Cir. 2014).

294. See United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

295. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014) ("No known understanding of the term 'person' includes *some* but not all corporations.").

296. In the rule promulgated following *Hobby Lobby*, the Department of Health and Human Services acknowledged as much. See Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,332 (July 14, 2015) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R pt. 147) ("It is uncertain how many closely held for-profit entities have religious objections to providing coverage for some or all of the contraceptive services otherwise required to be covered.").

297. See, e.g., Paul Horwitz, The *Hobby Lobby* Moment, 128 Harv. L. Rev. 154, 180–81 (2014) (arguing people increasingly integrate business and religion); Robert K. Vischer, How Necessary Is the Right of Assembly?, 89 Wash. U. L. Rev. 1403, 1414–15 (2012) (arguing "reality of the corporate landscape" shows commitment to religious and moral positions).

Exemptions also create incentives for commercial operations to claim religious status. Whereas the grant of a religious exemption for the religious use of peyote is "self-limiting" by virtue of its unpleasantness,[298] exemption from employer regulation has no such limits. As Judge Briscoe noted in her dissent from the Tenth Circuit's *Hobby Lobby* opinion,

> [I]f all it takes for a corporation to be categorized as a 'faith based business' for purposes of RFRA is a combination of a general religious statement in the corporation's statement of purpose and more specific religious beliefs on the part of the corporation's founders or owners, the majority's holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs.[299]

Businesses may litigate once-settled statutory duties to provide social security, unemployment insurance, and workers' compensation.

Third, the narrowing of compelling interests and heightening of least-restrictive-means analysis has implications for the government's ability to act. In radically constricting the universe of compelling government interests, proponents of business religious objections make claims about the authority of the state to regulate economic life, rather than demands for one-off exemptions. For example, Professor Perry Dane suggests that the government has a compelling interest in protecting employees in some for-profit firms but has less interest in protecting employees who have "voluntarily signed on to live with the consequences of an entity's religious convictions" or who have "fair notice of those convictions."[300] McConnell argues that "the government has no legitimate power to intervene" where employers assert a religious identity.[301] More broadly still, in the moral marketplace that Vischer advocates, the government's power "is constrained, as it is devoted to maintaining a well-functioning market, not to eviscerating the market through the top-down imposition of particular moral norms."[302] On this account, the regulation of religious objectors falls outside of the government's power, except in cases of market failure or monopoly. The

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298. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 914 n.7 (1990) (Blackmun, J., dissenting).

299. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174 (10th Cir. 2013) (Briscoe, J., concurring in part and dissenting in part), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

300. Perry Dane, Doctrine and Deep Structure in the Contraception Mandate Debate 6 (July 21, 2013) (unpublished manuscript) (on file with the *Columbia Law Review*) (noting "for-profit firms might fall along a range").

301. McConnell, supra note 99, at 1145.

302. Vischer, Conscience in Context, supra note 100, at 86–87.

least-restrictive-means analysis then limits the tools at the government's disposal.[303]

Finally, Free Exercise Lochnerism may implicate governmental practice more broadly than individual exemptions indicate. Courts previously understood exemptions as destabilizing regulation. Faced with religious objections from businesses to employer-based social insurance schemes, courts took the perspective that social insurance requires near-universal participation to function and is undermined by ad hoc exemptions.[304] They questioned their competence to evaluate the effects of exempting employers from widespread mandates, leaving that task to the legislatures.[305]

Today, the courts' reinterpretation of RFRA may contribute to an overall culture of accommodation, in which administrative bodies and government litigators are more likely to engage in exemptions[306]—here to the benefit of businesses. As in the time of *Lochner*, legislatures might hesitate to create "new" statutory rights for workers and consumers.[307] Consider, for example, that the litigation over pharmacies' right to refuse to dispense emergency contraception stopped the legislative trend in its tracks.[308] Alternatively, legislatures might refuse to accommodate religion at all,[309] with the expectation that courts will otherwise broaden exemptions.

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303. See supra notes 242–250 and accompanying text (discussing how *Hobby Lobby* may disfavor regulation of business, while permitting general revenue tax to meet government goals).

304. See United States v. Lee, 455 U.S. 252, 259–60 (1982) ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."); S. Ridge Baptist Church v. Indus. Comm'n, 911 F.2d 1203, 1208, 1211 (6th Cir. 1990) (citing *Lee*, 455 U.S. at 258–59) (finding, despite religious objections, Ohio has a strong interest "in maintaining the fiscal vitality of its old age and unemployment benefits system through mandatory participation").

305. See *Lee*, 455 U.S. at 260 ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system.").

306. See Frederick Mark Gedicks, RFRA and the Possibility of Justice, 56 Mont. L. Rev. 95, 95 (1995) (noting compelling interest test "made a difference at the administrative and trial level, where many religious exemption cases are decided, even if the test was largely ineffective in appellate litigation"); Laycock & Thomas, supra note 67, at 244 ("Bureaucrats may be more likely to accommodate religious exercise when they know that a federal statute requires them to do so.").

307. See supra note 48 and accompanying text (noting this phenomenon in *Lochner* era).

308. See Leslie C. Griffin, Conscience and Emergency Contraception, 6 Hous. J. Health L. & Pol'y 299, 300–05 (2006) (noting phenomenon has already influenced legislative trend toward granting pharmacists greater conscience exceptions in dispensing emergency contraception).

309. See Oleske, supra note 84, at 139 (arguing reticence to exempt small businesses makes sense because "leading academic proponents of the exemption [Berg, Laycock, and Stern] have argued elsewhere that exemptions for small businesses deprive a law of neutrality and general applicability under the Constitution and trigger a presumptive

B. *Vulnerable Regulatory Efforts*

With the rise of Free Exercise Lochnerism, settled legal questions are now unclear. May religious businesses pay below minimum wage? Are they due exemptions from social security insurance? Can they be excused from compliance with the Civil Rights Act? Although current cases target particular social insurance and antidiscrimination obligations, they suggest their categorical susceptibility to religious exemptions. This Part briefly reviews several employee and consumer protections rendered vulnerable. It is speculative, rather than predictive.

As a general matter, the introduction of a formalist view of employment relations into religious liberty doctrine calls into question the regulation of employers. In enjoining the contraceptive mandate, courts have begun to take the view that those employees who work for a religious employer (now defined to include national, multi-billion-dollar for-profit corporations) consent to their employer's religious identity and its objections to regulation.

Employment laws are further destabilized by the courts' endorsement of the view that regulation substantially burdens a business's free exercise of religion whenever it can be seen to redistribute from employer to employee. On this basis, longstanding social insurance programs—such as workers' compensation, unemployment insurance, and social security—could again see religious objections from employers, as they did not so long ago.[310] As Professor Frederick Gedicks explains, an "almost endless" list of laws require for-profit employers to supply their employees with benefits, such as "limited hours and minimum pay," a "safe working environment," and "an employment market and a work environment free of race, gender, religion, national origin, and disability discrimination."[311] If the contraceptive mandate substantially burdens free exercise of religion, virtually any employment protection would seem to do so. Whereas the delivery of health insurance through

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requirement that large businesses receive religious exemptions"); see also Kent Greenawalt, The *Hobby Lobby* Case: Controversial Interpretive Techniques and Standards of Application 4 (Columbia Public Law, Working Paper No. 14-421, 2014), http://ssrn.com/abstract=2512906 [http://perma.cc/5Y3Q-PS4J] (predicting *Hobby Lobby* "may well intensify resistance to religious exemptions in general").

310. See, e.g., Balt. Lutheran High Sch. Ass'n, Inc. v. Emp't Sec. Admin., 490 A.2d 701, 713 (Md. 1985) (evaluating Free Exercise claim against compliance with unemployment insurance); Big Sky Colony, Inc. v. Mont. Dept. of Labor & Indus., 291 P.3d 1231, 1240 (Mont. 2012) (rejecting objections of Anabaptist colony organized as religious corporation to participation in workers' compensation scheme); Victory Baptist Temple, Inc. v. Indus. Comm'n, 442 N.E.2d 819, 822 (Ohio Ct. App. 1982) (rejecting school's challenge to maintaining workers' compensation insurance).

311. Gedicks, Improbable Alternatives, supra note 207, at 171.

employment is optional for employers, other social insurance programs require employer participation.[312]

Under past precedent, courts had recognized that regulation of employment corrected a status quo that imposed significant costs (or burdens) on workers. Thus, in applying strict scrutiny to an employer's claim for exemption from unemployment insurance, the Oregon Supreme Court underscored the importance of ensuring against "the cost that unemployment imposes on the discharged employee and on society."[313] Considering an employer's objection to workers' compensation insurance, the Sixth Circuit also noted the government's compelling interests in the protection of workers and their dependents and concluded that "[w]here [religious] beliefs clash with important state interests in the welfare of others, . . . accommodation is not constitutionally mandated."[314]

Today, by contrast, under RFRA (and perhaps the First Amendment), the government's interests in regulating the employment relationship may be construed as narrowly as possible. Social security, unemployment insurance, workers' compensation, and even minimum wages are reducible to a "funding question"[315] and offer benefits that are "fungible" and "intangible."[316] Like health insurance, these programs require employers to administrate funding and contribute a share, and provide a mechanism through which employees pay into the system.[317] Employees ultimately pay the employer's share in the form of foregone wages as they do with health insurance.[318] Like the ACA, all federal social insurance programs excluded large numbers of employers in their origin and most continue to do so today—apparently undermining the government's interest in universal participation, according to *Hobby*

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312. See Lederman, supra note 164 (explaining ACA imposes no mandate, but rather allows employers to choose to offer health insurance or pay a typically "far less costly" assessment); see also Sepper, Contraception, supra note 93, at 333 (explaining workers' compensation insurance is mandated).

313. Salem Coll. & Acad., Inc. v. Emp't Div., 695 P.2d 25, 35 (1985).

314. S. Ridge Baptist Church v. Indus. Comm'n, 911 F.2d 1203, 1208, 1211 (6th Cir. 1990).

315. Volokh, McConnell on *Hobby Lobby*, supra note 165.

316. Amar & Brownstein, supra note 193; see also Volokh, Exemption, supra note 146 (discussing scholars' arguments for exemptions from contraceptive mandate).

317. Cf. Sepper, Contraception, supra note 93, at 333–34 (documenting many similarities between workers' compensation in particular and employer-based health insurance).

318. See Jonathan Gruber & Alan B. Krueger, The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance 28 (Nat'l Bureau of Econ. Research, Working Paper No. 3557, 1990), http://www.nber.org/papers/w3557.pdf [http://perma.cc/PBV8-HZME] ("[Empirical analysis of two data sets suggests] that a substantial portion of the cost to employers of providing workers' compensation benefits are shifted to employees in the form of lower wages.").

Lobby's rationale. If exemptions lead to exemptions, much federal employment regulation is vulnerable.[319]

If the government must pay wherever it might, as *Hobby Lobby* suggests and a number of lower courts agree, this less restrictive means would seem to be available for most employment regulation. As Professor Ira Lupu says in critique, "[t]he provision of goods—vaccinations, minimum wages, and the entire stock of benefit-creating policies—can always be accomplished by direct government expenditure rather than forced regulatory transfers among private parties."[320] In this realm of the fantastic, the government could retrofit buildings for handicapped access, instead of requiring the same from their owners. It could clean up superfund sites, rather than burden polluting companies. It could employ people when businesses refuse to hire them due to their age, religion, or gender. Courts would potentially evaluate the economic impact (and feasibility) of any such least restrictive means by reference to the cost of the entire government program.

While all employment regulation could succumb to exemptions when evaluated against a market baseline, the doctrinal shift in the contraceptive cases makes litigation against nondiscrimination statutes particularly likely. Consider prohibitions on discriminating based on religion. To the extent that for-profit businesses have raised religious objections to laws in the past, they most frequently did so in the context of religious discrimination lawsuits.[321] Seemingly secular companies demanded that employees attend purported management trainings that teach, for example, that women's place is in the home and the Bible gives husbands authority superior to that of their wives—contrary to the employees' own religious beliefs.[322] Businesses required employees to deliver religious messages in violation of their own convictions.[323] One chain cited biblical prohibitions on working with "unbelievers" as support for restricting managerial positions to Christians and refusing to

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319. In his seminal note, James Ryan identified over 2,000 statutes with religious exemptions, including gambling, copyright, and drug laws. See James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1445–47 (1992).

320. Lupu, *Hobby Lobby* and Religious Exemptions, supra note 130, at 89.

321. See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988) (holding "spiritual hardship" did not allow employer to require all employees, including atheists, to attend weekly devotional services).

322. See Kolodziej v. Smith, 588 N.E.2d 634, 636-37 (Mass. 1992) (affirming directed verdict for defendant on claim against company that considered itself a "Christian company" and fired its Roman Catholic, female controller for refusing to attend management seminar contrary to her beliefs).

323. See, e.g., Ky. Comm'n on Human Rights v. Lesco Mfg. & Design Co., 736 S.W.2d 361, 362 (Ky. Ct. App. 1987) (involving manufacturing and steel products company that required Jehovah's Witness secretary to answer telephone with "Merry Christmas").

hire devout non-Christians.[324] It also invoked the Bible to support its refusal to hire individuals in co-habiting couples, gay individuals, and women working without the consent of their fathers or husbands.[325] Some large national firms allegedly made decisions about hiring and firing based on employees' religious identity, despite legal prohibitions on their doing so.[326]

Free Exercise Lochnerism now gives such companies a plausible claim to exemption.[327] In accepting corporate religion, the lower courts and the Supreme Court portray employees as united with the enterprise in a religious mission. In order to ensure that it can function in this way, a business would seem to have to be selective in its "membership." Contrary to antidiscrimination law, managers, employees, affiliates, and perhaps customers would have to ascribe to the same core beliefs. Indeed, after *Hobby Lobby*, some scholars advocate for excusing for-profit businesses from nondiscrimination laws to allow them to pursue a religious identity, based in part on the ability of the market to deliver alternatives.[328]

Public accommodations also more plausibly may object to antidiscrimination laws. Because Title II of the Civil Rights Act applies only to a limited set of commercial entities and includes only "race, color, religion, or national origin,"[329] religious objections from businesses are most likely to arise in the context of state public accommodation

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324. State by McClure v. Sports & Health Club, 370 N.W.2d 844, 846–47 (Minn. 1985) (en banc) (rejecting business's defense). But see id. at 859 (Peterson, J., dissenting) (voting to allow religious discrimination because no business "should be required to be associated at the critical managerial level with a person who rejects the basic operational objectives and philosophy of the business enterprise").

325. Id. at 847 (majority opinion).

326. See Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues United Health Programs of America and Parent Company for Religious Discrimination (June 11, 2014), http://www.eeoc.gov/eeoc/newsroom/release/6-11-14.cfm [http://perma.cc/PRJ2-U6A9] ("United Health Programs of America, Inc., and its parent company, Cost Containment Group, Inc., which provide customer service on behalf of various insurance providers, coerced employees to participate in ongoing religious activities . . . . When employees opposed taking part in these religious activities or did not participate fully, they were terminated.").

327. See Ira C. Lupu & Robert W. Tuttle, Religious Exemptions and the Limited Relevance of Corporate Identity, *in* The Rise of Corporate Religious Liberty 34 (Zoe Robinson, Chad Flanders, & Micah Schwartzman eds., forthcoming 2015), http://ssrn.com/abstract=2535991 (on file with the *Columbia Law Review*) (predicting *Hobby Lobby* may result in for-profit corporations arguing they fall under "religious corporation" exemption or that Title VII's prohibition of religious discrimination imposes substantial burden on their religious exercise).

328. See, e.g., Berg, supra note 141, at 138 (arguing that "meriting consideration [for exemption], are businesses (most of them very small) that provide typical goods and services but seek to create a pervasively religious workplace").

329. 42 U.S.C. § 2000a (2012).

laws.[330] Already, vendors that object to serving same-sex couples resist the application of such laws to their businesses. If they win exemptions, other claims are likely to follow.

Consider how the premises of Free Exercise Lochnerism might apply to *Newman v. Piggie Park*. In that case, the owner of a BBQ chain asserted religious objections against the Civil Rights Act shortly after its enactment.[331] His religion would not tolerate the mixing of the races. The trial court found the claim that a BBQ chain owner exercised religion through his business so preposterous as to be dismissed in one sentence.[332] The Supreme Court called the notion of religious liberty of for-profit corporations "patently frivolous."[333] Today, by contrast, courts would have to entertain the chain's claim for exemption.

Even more so than the employment relationship, public accommodations invite the logic of Free Exercise Lochnerism.[334] Employees of religious objectors are dependent on their employers for health insurance and restricted in their ability to easily exit the relationship. By contrast, consumers have no relationship of dependency with the average vendor. They engage in true arm's-length transactions. From the libertarian perspective, the government's compelling interest in antidiscrimination law is market access; the only wrong it may seek to remedy is the absence of a competitive market. On this view, as Epstein explains, the civil rights cases, such as *Piggie Park*, were rightly decided at their time, because the existence of common carriers and "brutal restraints on entry" impeded black Americans' access to the markets.[335] It follows that requiring all businesses to comply with antidiscrimination laws is no longer the least restrictive means to achieve the government's goals, because "the coercive institutional structure of segregation has been dismantled."[336] As a matter of religious liberty doctrine, other

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330. While state public accommodation laws differ in form and breadth, "[e]stablishments commonly covered are hotels, restaurants, transport facilities, places of entertainment, retail stores, lodgings, and state facilities." Lisa Gabrielle Lerman & Annette K. Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 240–41 (1978). A typical definition of a public accommodation is "any establishment that provides or offers its services, facilities, accommodations, or goods to the general public." Id. at 242 (internal quotation marks omitted).

331. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966), rev'd, 377 F.2d 433 (4th Cir. 1967), aff'd per curiam, 390 U.S. 400 (1968).

332. Id. at 945 ("This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.").

333. *Newman v. Piggie Park Enters.*, 390 U.S. at 402 n.5.

334. See Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 Stan. L. Rev. 1205, 1240 (2014) (predicting if contraceptive mandate challenges succeed, "libertarian opponents of public accommodations statutes will be well positioned to . . . contain, and indeed roll back," antidiscrimination laws).

335. Epstein, Defeat, supra note 149, at 66.

336. Id.

providers of similar goods might simultaneously undermine the government's interest and suggest a least restrictive means for racial minorities, like same-sex couples, to access goods and services.

This analysis is necessarily tentative. It makes no prediction that these claims will succeed. They are, however, rendered viable by the courts' adoption of Lochnerian rationales and the *Hobby Lobby* Court's failure to identify any principle that contains the extension of these rationales. Recent litigation may have planted the seeds for Free Exercise Lochnerism to spread, just as the recognition of commercial speech in *Virginia Pharmacy* bloomed into *Citizens United* decades later.[337] Alternately, new theories might form a bulwark against further incursions of business religious exemption into the regulatory state.

The only certainty is uncertainty. For-profit businesses need not be set on par with nonprofit religious organizations, or the welfare state brought low. In future years, courts might provide business religious exemptions selectively. They might grant exemptions with regard to contraception and abortion, but not vaccination. Wedding vendors refusing to serve same-sex couples might receive accommodations, while landlords might not. Prohibitions on gender discrimination might be eroded, while racial discrimination remains categorically prohibited.

These results, nonetheless, embody another Lochnerian problem—arbitrariness and unpredictability.[338] They would call into question our constitutional commitment to sex equality.[339] They would suggest a religious freedom regime that protects rich, powerful, and mainstream entities while burdening poor, vulnerable, and minority individuals.

V. CONCLUSION

In 1937, in *West Coast Hotel Co. v. Parrish*, the Supreme Court declared that "[t]here is no absolute freedom to do as one wills or to contract as one chooses."[340] Rejecting *Lochner*, the Court decided that the legislature could recognize the harms of the private order and act to avoid the exploitation of workers.[341] The baseline had changed.

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337. See Jackson & Jeffries, supra note 16, at 30–31 (characterizing adoption of commercial speech doctrine as like *Lochner*).

338. See Friedman, supra note 45, at 1406 (documenting how "*Lochner*-era critics" saw courts, not as unprincipled, but rather as applying principles "in extremely arbitrary ways"); see also Lupu, *Hobby Lobby* and Religious Exemptions, supra note 130, at 37 (predicting post-*Hobby Lobby* "regime is highly likely to be unprincipled").

339. For an analysis of how sex might serve as a pragmatic limit on corporate conscience, see Sepper, Gendering, supra note 166, at 220–32.

340. 300 U.S. 379, 392 (1937) (quoting Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 565 (1911)).

341. Id. at 394–95.

Regulation did not unfairly burden business, but merely withdrew a subsidy the community was not bound to provide.[342]

Free Exercise Lochnerism reverses course. It employs a form of strict scrutiny under religious freedom protections that instead reflects liberty of contract commitments. The courts—urged by litigants and scholars—perceive the market as a legally and economically neutral baseline and regulation as an unfair imposition on businesses. From this perspective, in a functioning market, a business's refusal to comply with the law does not harm employees or customers. Nor does the government have any interest in intervening in the operation of business.

Comparing business religious liberty claims to *Lochner*-era freedom of contract lays bare the implications for the regulatory state. The veiling of economic libertarianism in religious liberty garb proves a powerful vehicle. It encourages a hands-off approach by courts and harnesses our cultural commitment to religious exercise. Like the *Lochner* Court, litigants, scholars, and courts implicitly treat government regulation as "arbitrarily shift[ing] to [a business's] shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[343] Blind to the subsidies and burdens imposed by the market, they affirm the status quo as a matter of religious liberty doctrine.

342. See id. at 399 ("What these workers lose in wages the taxpayers are called upon to pay.").

343. Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 558 (1923).