Hobby Lobby, Conestoga Wood Specialties, and the Future of *Roe v. Wade*

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ABSTRACT: In 2013 the Supreme Court of the United States heard two important cases brought by pro-life employers that try to foster a pro-life culture in the workplace. They objected to Obamacare regulations requiring them to provide insurance coverage for some contraceptives and abortifacients for their employees. The Supreme Court held that the Religious Freedom Restoration Act protects such companies from regulations that violate their religious beliefs if the government could pursue its policy objectives through less restrictive means. The decision erodes the underpinnings for *Roe v. Wade*.

I. Introduction[1]

In recent years, there has been an eruption of legislatures enacting regulations and restrictions of abortion.[2] That explosion of anti-abortion legislation may be related to several significant and stunning scandals, including the Kermit Gosnell "house of horrors" scandal in Philadelphia in 2011-2013,[3] which were widely noticed by pro-life observers (albeit

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[1] The excellent research assistance of Zachary Ashby, Sully Vega Bryan, and Roselynn Lewis is gratefully acknowledged.

[2] See "Last Five Years Account for More Than One-Quarter of All Abortions Restrictions Enacted since *Roe*," Guttmacher Institute, News in Context, January 2016, at https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe (seen 28 July 2016).

[3] Steven Ertelt, "Kermit Gosnell Receives Third Consecutive Life Term for Killing Baby," LifeNews.com, May 15, 2013, http://www.lifenews.com/2013/05/15/kermit-gosnell-receives-third-consecutive-life-term-for-killing-baby/ (seen 15 May 2013); Jon Hurdle, "Doctor Starts His Life Term in Grisly Abortion Clinic Case," *The New York Times*, 15 May 2013, at http://www.nytimes.com/2013/05/16/us/kermit-gosnell-abortion-doctor-gets-life-term.html (seen 10 April 2017).

largely neglected by the mainstream media).[4]

There also has been an eruption of courts invalidating certain abortion restrictions, which may also directly relate to the explosion of publicity about abortion abuses in recent years. When people read or hear about unsafe, deadly, sleazy, or abusive practices, they tend to react, and legislators tend to react by passing laws to deter or eliminate the safety hazards and abuses. Abusive abortion practices were especially apparent during the Gosnell trial.[5] The eruption of courts invalidating abortion restrictions in and after 2013 may also directly relate to the Supreme Court's 2013 same-sex marriage decisions in *United States v. Windsor*[6] and *Hollingsworth v. Perry,*[7] which revived radical judicial activism.[8] Both the legalization of these abortion and same-sex marriage policies were achieved by a judicial cramdown of policies largely rejected by voters and their elected representatives.

In 2013, there were two cases (joined for purposes of review) pending in the Supreme Court of the United States involving defensive pro-life litigation, *Burwell v. Hobby Lobby*,[9] and *Conestoga Wood Specialties v. Secretary Dept. Health & Human Services*.[10] Both cases involved suits by closely-held companies seeking relief from government regulations that penalized them for their efforts to live their pro-life beliefs by not providing insurance coverage for contraceptives (including some that reportedly could cause abortions) to their employees.

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[4] See Micaiah Bilger, "*New York Times* Leaves Pro-Life Book on Kermit Gosnell Off Its Best-Seller List," LifeNews.com, 3 Feb. 2017, at http://www.lifenews.com/2017/02/03/new-york-times-leaves-pro-life-book-on-kermit-gosnell-off-its-best-seller-list/ (seen 10 April 20167).

[5] See supra n3.

[6] 570 U.S. ___, 133 S.Ct. 2675 (2013).

[7] 570 U.S. ___, 133 S.Ct. 2652 (2013).

[8] Just two years after these decisions, the Supreme Court mandated the legalization of same-sex marriage throughout the United States. *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015).

[9] *Hobby Lobby* was decided by the Supreme Court in 2014. 573 U.S., ___, 134 S.Ct. 2751 (2014).

[10] *Conestoga Wood Specialities Corp. v. Secretary, Department of Health & Human Services*, Court of Appeals for the Third Circuit, Çase No. 12-1144 (26 July 2013).

II. *Hobby Lobby*, *Mardel* and *Conestoga Wood*

Hobby Lobby Stores, Inc. (herein "Hobby Lobby") is a closely-held for-profit corporation in the arts and crafts retail business, with over five hundred stores nationwide and more than 13,000 employees.[11] Mardel, Inc. (herein "Mardel") operates a chain of thirty-five Christian-themed bookstores with over 370 employees. Both Hobby Lobby and Mardel are owned by members of the Green family, who are devout Christians and who integrate their religious principles into their business practices.[12] Conestoga Wood Specialities (herein "Conestoga" or "Conestoga Wood") is a company with over 950 employees that makes wood furniture; it is owned by the Hahn family, who are Pennsylvania Mennonites.[13] All three companies cultivate a religion-friendly, pro-

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[11] *Hobby Lobby Stores, Inc., v. Sebelius*, 568 U.S. ____ (2012), denying injunction pending appeal. At the time of the original ruling against a preliminary injunction, Hobby Lobby operate[d] 514 arts and crafts stores in 41 states with 13,240 full-time employees. Mardel...ha[d] 35 stores in 7 states with 372 employees." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278, 1284 (W.D. Okla. 2012).

[12] Bill Mears, "Justices to Hear Hobby Lobby Case on Obamacare Birth Control Rule," CNN (March 23, 2014), available at http://www.cnn.com/2014/03/21/politics/scotus-obamacare-contraception-mandate/ (viewed March 28, 2014); *Sibelius v. Hobby Lobby,* available at http://www.becketfund.org/hobbylobby/ (viewed 22 May 2014) (herein "Becket Fund"): "Devout Christians, the Green family believes that 'it is by God's grace and provision that Hobby Lobby has endured.' Therefore, the Greens seek to honor God by 'operating their company in a manner consistent with Biblical principles.'" See also Ed Feulner, Honoring Hobby Lobby, Conestoga Wood Specialities for living their faith," *The Washington Times* (March 31, 2014): The Greens of Oklahoma City, Oklahoma, and the Hahns of Lancaster, Pennsylvania, "credit their success in life to their religious faith."

[13] Ibid. See also Mark Sherman, "Health Law Birth Control Coverage before Justices," *Denver Post* (March 24, 2014), available at http://www.denverpost.com/healthcare/ci_25407148/health-law-birth-control-coverage-before-justices (seen 28 March 2014): "Some of the nearly 50 businesses that have sued over covering contraceptives object to paying for all forms of birth control. But the companies involved in the high court case are willing to cover most methods of contraception, as long as they can exclude drugs or devices that the government says may work after an egg has been fertilized. The largest company among them, Hobby Lobby Stores Inc., and the Green family that owns it, say their 'religious beliefs prohibit them from providing health

family, pro-life work environment.[14] As "Conestoga's President Anthony Hahn, son of the privately held company's co-founder," put it: "'Our religion is Mennonite; that is our faith. Our company was founded on that religion as well....'"[15]

Hobby Lobby, Mardel and Conestoga are among the many businesses that objected to provisions in the Patient Protection and Affordable Care Act (herein "PPACA" or "Affordable Care Act" or "Obamacare")[16] and to the implementing regulations of the Health

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coverage for contraceptive drugs and devices that end human life after conception.' Oklahoma City-based Hobby Lobby has more than 15,000 full-time employees in more than 600 crafts stores in 41 states. The Greens are evangelical Christians who also own Mardel, a Christian bookstore chain. The other company is Conestoga Wood Specialties Corp. of East Earl, Pa., owned by a Mennonite family and employing 950 people in making wood cabinets." See also "Judge Grants Injunction in PPACA Benefits Mandate Case," available at http://www.zinninsurance.com/blog/580/judge-grants-injunction-in-ppaca-benefits-mandate-case/#sthash.aOMgrTAj.dpuf (seen 28 March 2014): "Members of the Green family say they believe life begins at conception, and oppose birth control methods that can prevent implantation of a fertilized egg in the uterus, such as an intrauterine device or forms of emergency contraception." The company offers 16 other forms of birth control mentioned in the federal health care law in its health insurance plans. "To offer prescriptions that take life is not an option for us," said Green, who attended Friday's hearing with other family members and supporters.

[14] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013): "As owners and operators of both Hobby Lobby and Mardel, the Greens have organized their businesses with express religious principles in mind. For example, Hobby Lobby's statement of purpose recites the Greens' commitment to '[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles'(JA 22-23a). Similarly, Mardel, which sells exclusively Christian books and materials, describes itself as 'a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support' (JA 25a). Furthermore, the Greens allow their faith to guide business decisions for both companies. For example, Hobby Lobby and Mardel stores are not open on Sundays; Hobby Lobby buys hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior' (JA 24a), and Hobby Lobby refuses to engage in business activities that facilitate or promote alcohol use." See also Mears, supra n__.

[15] Ibid.

[16] Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation

Resources Services Administration,[17] which required for-profit employers of businesses of a certain size to offer, without any co-pay, insurance benefits for "all Food and Drug Administration...approved contraceptives methods, sterilization procedures."[18] Under the regulations adopted pursuant to Women's Preventive Healthcare, group health plans and health insurance issuers are required to provide coverage consistent with the HRSA guidelines in plan years beginning on or after August 1, 2012, unless the employer or plan is exempt.[19] Corporations like Hobby Lobby and Conestoga must provide employee health insurance plans that include coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling" – including so-called emergency contraceptives such as Plan B and Ella – "for all women with reproductive capacity, as prescribed by a provider."[20] The Regulations exempt certain "grandfathered" plans, companies with 49 or fewer employees,[21] and provide an exception to women's contraception

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Act, Publ. L. No. 111–152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA"). See PPACA, § 1001(5), 124 Stat. 131, 42 U.S.C. §300gg-13(a): "Coverage of preventative health services."

[17] *Hobby Lobby,* 870 F.Supp.2d at 1283-84: "The Health Resources and Services Administration (HRSA) commissioned the Institute of Medicine (IOM) to develop recommendations for the HSRS guidelines. The IOM published a report which proposed, among other things, that insurance plans cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Included among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices."

[18] 77 Fed. Reg. 8725 (Feb. 15, 2012). See also 76 Fed.Reg. 46621; 45 C.F.R. § 147.130 (HRSA adopted IOM's recommendations in full), and 75 Fed.Reg. 41726, 41729 (interim final regulations).

[19] "Women's Preventive Services: Required Health Plan Coverage Guidelines," U.S. Dept. of Health and Human Services, http:// www. hrsa. gov/ womens guidelines/(last visited Jan. 8, 2013) ("HRSA Guidelines"). The interim final regulations and guidelines were adopted without change on April 16, 2012.

[20] Conestoga Wood Specialties Corp., 724 F.3d 377, 391 (3d Cir. 2013).

[21] 26 U.S.C. § 4980H(c)(2)(A).

requirements that extends to certain "religious employers."[22] The drugs included in the government insurance mandate include some that operate post-fertilization as abortifacients that cause early-pregnancy abortions (usually pre-implantation).[23] That is important because surveys consistently show that many women report that they do not use or intend not to use any birth control method that operates after fertilization.[24] The new requirement of the PPACA that they, as employers, provide insurance coverage and payment for drugs that cause abortions caused

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[22] "A religious employer is defined as an organization in which: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization...."
45 C.F.R. § 147.130(a)(1)(iv)(B); 77 FR 8725–01 (Feb. 15, 2012); see Conestoga Wood, 917 F.Supp.2d at 401-02.

[23] At a rhetorical level, there has been some effort to ignore the controversial moral and policy issues about government mandates that compel objecting persons and organizations to provide, pay for and/or facilitate elective abortions by denying that the drugs covered by the Affordable Care Act cause abortion. That depends upon how one defines abortion. Some of the drugs which are covered by the PPACA mandate operate to destroy or prevent implantation of the fertilized egg. Some supporters of the Affordable Care Act argue that this is not abortion; asserting that abortion only occurs after implantation has occurred; that destruction of the separate human organism after fertilization but before implantation technically is not "abortion." But, as the dozens of lawsuits against these PPACA requirements show, many other persons (arguably most Americans) believe that any destruction of the separate, existing, human life created by fertilization constitutes abortion, whether it occurs before or after implantation.

[24] Huong M. Dye, Joseph B. Stanford, et al., "Women and Postfertilization Effects of Birth Control: Consistency of Beliefs, Intentions and Reported Use," *BMC Womens Health 2005* (Nov. 28, 2005), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1325031/ (viewed 28 March 2014): "Of all respondents, 38% gave consistent responses about intention to not use or to stop use of any birth control method that acted after fertilization, while 4% gave inconsistent responses. The corresponding percentages for birth control methods that work after implantation were 64% consistent and 2% inconsistent. Of all respondents, 34% reported they believed that life begins at fertilization and would not use any birth control method that acts after fertilization (a consistent response), while 3% reported they believed that life begins at fertilization but would use a birth control method that acts after fertilization (inconsistent)...."

the Greens and Hahns and their corporations, Hobby Lobby and Conestoga, to file suit against the contraceptive mandate in Obamacare.[25] The Becket Fund has summarized the situation in this way:

> The Green family has no moral objection to the use of 16 of 20 preventive contraceptives required in the mandate, and Hobby Lobby will continue its longstanding practice of covering these preventive contraceptives for its employees. However, the Green family cannot provide or pay for four potentially life-threatening drugs and devices. These drugs include Plan B and Ella, the so-called morning-after pill and the week-after pill. Covering these drugs and devices would violate their deeply held religious belief that life begins at the moment of conception, when an egg is fertilized.[26]

III. Recent Litigation Before the Supreme Court

At least ninety-six separate lawsuits were filed by over 200 plaintiffs against the "contraceptive mandate" of PPACA by these and many other companies.[27] The principal named defendant in most cases was the then-Secretary of Health and Human Services (HHS), Kathleen Sibelus.[28] Secretary Sibelius was the former Governor of Kansas and the daughter of a form Governor of Ohio.[29] She is described as "staunchly

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[25] Feulner, supra note __ : "As Anthony Hahn puts it, 'Before the mandate, women already had access to all the drugs the mandate would force us to provide. They still have that access. We simply believe that those who have moral convictions against providing certain potentially life-ending drugs shouldn't be forced to do so.'"

[26] Becket Fund, *supra* note __.

[27] Ibid.; "HHS Mandate Information Central, Legal Challenges to the HHS Mandate," available at http://www.becketfund.org/hhsinformationcentral/ (viewed 22 May 2014).

[28] Secretary Sebelius announced her resignation as Secretary of Health and Human Services in April 2014. See "HHS Secretary Kathleen Sebelius Resigns," *USA Today* (April 10, 2014), available at http://www.usatoday.com/story/news/politics/2014/04/10/hhs-secretary-sebelius-resigns/7567733/ (viewed 15 May 2014). She was succeeded later by Sylvia Burwell.

[29] Teresa Mull, "Who Has On A Kathleen Sebelius Costume for Halloween?" *Human Events*, 31 October 2013 available at http://www.humanevents.com/2013/10/31/who-has-on-a-kathleen-sebelius-costume-for-halloween/ (viewed 28 March 2014); "Kathleen Sebelius," Wikipedia, available at http://en.wikipedia.org/wiki/Kathleen_Sebelius (viewed 28 March 2014);

pro-choice."[30]

A. *Hobby Lobby*

In their lawsuits, Hobby Lobby and Mardel requested an injunction to protect them against being forced to provide the controversial contraception and abortion drugs, but a federal district court in Oklahoma denied their motion for a preliminary injunction.[31] District Judge Joe Heaton denied their prayer for an injunction, holding that corporations do not have "free exercise" rights under the First Amendment nor were corporations "persons" protected under the Religious Freedom Restoration Act (RFRA)[32] and that the individual plaintiffs failed to showed a likelihood of success on the merits of their First Amendment or RFRA claims.

The Tenth Circuit Court of Appeals reversed on the merits and remanded to the district court.[33] While five of the eight appellate judges on the circuit panel joined the majority opinion written by Judge Tymkovich, there were a total of six opinions in the case: the court

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"Plan B is Overruled," *The Baltimore Sun*, 8 December 2011, available at http://articles.baltimoresun.com/2011-12-08/news/bs-ed-fda-20111208_1_pregnancy-ru-486-emergency-contraceptive-pill (viewed 28 march 2014); see further "Kathleen Sebelius on Abortion," OnTheIssues, available at http://www.issues2000.org/Cabinet/Kathleen_Sebelius_Abortion.htm (viewed 28 March 2014).

[30] Timothy Carney, "Democrats Will Yield on Everything but Abortion," *Washington Examiner* (April 10, 2011) available at http://washington examiner.com/democrats-will-yield-on-everything-but-abortion/article/112727 (seen 28 March 2014).

[31] *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278 (W.D. Okla. 2012), holding that corporations do not have religious liberty rights under the First Amendment or protections as "persons" under the Religious Freedom Restoration Act ("RFRA") and that individual petitioners did not show a likelihood of success on the merits as to either the religious liberty or RFRA claims.

[32] The district court reasoned that since the purpose of the free exercise clause is to secured the right to the exercise of religious liberty by individuals believers, corporations could not claim such rights. 870 F.Supp.2d at 1288. On similar grounds, the court held that "secular, for-profit corporations...are not 'persons' for purposes of the RFRA." Ibid. at 1291-92.

[33] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) (en banc), cert. granted, 134 S.Ct. 678 (26 Nov. 2013).

opinion, three concurring opinions,[34] and two opinions concurring in part and dissenting in part.[35] The Tenth Circuit appellate court majority opinion noted that:

> The most immediate consequence for Hobby Lobby and Mardel would come in the form of regulatory taxes: $100 per day for each "individual to whom such failure relates" [26 U.S.C. § 4980D(b)(1)]. The plaintiffs assert that because more than 13,000 individuals are insured under the Hobby Lobby plan (which includes Mardel), this fine would total at least $1.3 million per day, or almost $475 million per year. This assumes that "individual" means each individual insured under Hobby Lobby's plan. If the corporations instead drop employee health insurance altogether, they will face penalties of $26 million per year. [See ibid. §4980H.][36]

Hobby Lobby's "central claims" were asserted under the Religious Freedom Restoration Act (RFRA). Under RFRA,

> A plaintiff makes a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise [*Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001)]. The burden then shifts to the government to show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened" [*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (quoting 42 U.S.C. § 2000bb–1(b))].[37]

Finding standing and rejecting application of the Anti-Injunction Act,[38] the Tenth Circuit rejected the government's claim that only non-profit

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[34] 723 F.3d at 1147 (Hartz, J., concurring); 723 F.3d at 1152 (Gorsuch, J., concurring, joined by Kelly, J., and Tymkovich, J.); 723 F.3d at 1159 (Bacharach, J., concurring).

[35] 723 F.3d at 1163 (Briscoe, C.J., concurring in part and dissenting in part, joined by Lucero, J.), asserting that the corporations are not covered by RFRA and that neither the First Amendment nor RFRA protect for-profit corporations; and ibid. at 1178 (Matheson, J., concurring in part and dissenting in part), asserting that the corporations are not covered by RFRA and that these parties failed to show that they are protected by RFRA or the First Amendment.

[36] 723 F.3d at 1125.

[37] 723 F.3d at 125-26.

[38] 723 F.3d at 1126-28.

corporations were protected by RFRA and by the Free Exercise Clause of the First Amendment.[39] Nothing in the Congressional "Dictionary Act"[40] or other federal statutes suggested any congressional intent to limit protection to non-profit religious corporation.[41] Likewise, case law failed to support the profit/non-profit distinction in RFRA but only suggested that this may be one factor among many in determining eligibility for protection.[42] The government's claim that the distinction between profit- and non-profit religious organizations is rooted in the First Amendment was also repudiated. Much of the cited case law was anachronist because priot to *Employment Division v. Smith*.[43] The court declared: "It is beyond question that associations – not just individuals – have Free Exercise rights...."[44] Indeed, the right of individuals to associate is essential for the free exercise of religion and recognizing corporate free exercise does not diminish individual free exercise.[45] The choice of the term "free exercise of religion" rather than "conscience" emphasizes the collective dimension of religion protected by the First Amendment.[46] Merely because a kosher butcher is paid for his work should not mean that his work is not protected as a free exercise of religion.[47] Indeed, recently the Supreme Court held that "the text of the First Amendment...gives special solicitude to the rights of religious organizations."[48] The appellate court also rejected the government's claim "that there can be no substantial burden here because '[a]n employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer.'"[49] Rather, the Tenth Circuit correctly held that "[t]his position is fundamentally flawed because it advances an understanding of "substantial burden" that

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[39] Ibid. at 1128-29.
[40] I U.S.C. § 1.
[41] 723 F.3d at 1129-30.
[42] Ibid. at 1131.
[43] 494 U.S. 872 (1990).
[44] 723 F.3d at 1133.
[45] Ibid.
[46] Ibid. at 1133-34.
[47] Ibid. at 1134-35.
[48] Ibid. at 1136, citing *Hosanna–Tabor*, 132 S.Ct. at 706.
[49] Ibid. at 1137.

presumes "substantial" requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs."[50] The religiousity and sincerity of the beliefs of Hobby Lobby and Mardel objecting to providing insurance coverage for abortions were undisputed. The multi-million-dollar financial penalties they faced were substantial burdens on the free exercise of religious beliefs.[51]

The government's claim that the Obamacare abortion coverage requirement was "just another form of non-wage compensation" and not a substantial burden on religion was rejected as inconsistent with the subjective-view of assessing religious burden established in other Supreme Court decisions.[52] Moreover, the government had failed to show that the Obamacare regulations were the least restrictive means to advance a compelling governmental interest. Neither public health nor gender equality, the two asserted governmental interests, justified the government's refusal to provide religious exemptions to the Obamacare contraceptive/abortion insurance mandate while exempting from the requirement tens of millions of others.[53]

> Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting Hobby Lobby and Mardel their requested exemption. Hobby Lobby and Mardel ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.[54]

The plaintiffs were not imposing their religious views on their employees because the employees who want to purchase the uncovered abortifacient-contraceptives remained free to do so.[55] A preliminary injunction against enforcement of the mandate was appropriate because

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[50] Ibid.
[51] Ibid. at 1139-41.
[52] Ibid. at 1141.
[53] Ibid. at 1142-44.
[54] Ibid. at 1144.
[55] Ibid.

the plaintiffs' verified complaint established that "Hobby Lobby and Mardel face irreparable harm; ...the balance of equities tips in Hobby Lobby and Mardel's favor; and...an injunction is in the public interest."[56]

On remand, the district court granted an injunction pending appeal to *Hobby Lobby*.[57] The Supreme Court granted the petition for certiorari.[58]

B. Conestoga Wood Specialties

Conestoga Wood Specialties also sought judicial protection against enforcement of the PPACA provisions mandating that they provide insurance coverage for abortifacient-contraceptives and sterilizations in their employee health insurance plan. In *Conestoga Wood Specialties Corp. v. Sebelius*[59] a federal district court in Pennsylvania denied Conestoga's motion for a preliminary injunction. A divided panel of the Third Circuit affirmed.[60]

The district court rejected both the constitutional and RFRA claims of Conestoga. The district court acknowledged that "[t]he Hahns are practicing Mennonite Christians whose faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles."[61] The court noted that "Conestoga's mission statement includes the following language: 'We operate in a professional environment founded upon the highest ethical, moral, and Christian principles reflecting respect, support, and trust for our customers, our suppliers, our employees and their families.'"[62] The district judged

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[56] Ibid. at 1145.

[57] *Hobby Lobby Stores, Inc. v. Sebelius*, Slip Copy, 2013 WL 3869832 (W.D.Okla., July 19, 2013).

[58] *Sibelius v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S.Ct. 678 (2013) (Mem).

[59] *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F.Supp.2d 394 (E.D.Pa. Jan.11, 2013), affirmed. *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dept. of Health & Human Services*, 724 F.3d 377 (3d Cir. 2013).

[60] *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dept. of Health & Human Services*, 724 F.3d 377 (3d Cir. 2013).

[61] 917 F.Supp.2d at 402.

[62] Ibid. at 402-03.

admitted that the Hahn Family openly avowed that they

> believe[] that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.[63]

The Mennonite Church to which the Hahns belong "teaches that taking of life that includes anything that terminates a fertilized embryo is an intrinsic evil and a sin against God [American Compl. ¶30]. Therefore, the Hahns believe that it would be sinful for them to pay for, or contribute in any way to, the use of abortifacient contraception...."[64] Conestoga's health insurance plan provides employees with coverage for "women's preventative health expenses but specifically excludes coverage for 'contraceptive prescription drugs' and '[a]ny drugs used to abort a pregnancy."[65]

As a matter of first impression, however, Judge Mitchell S. Goldberg held that for-profit corporations do not enjoy the right of free exercise of religion because the First Amendment is designed to secure individual liberties, not corporate rights, and the closely-held corporation was a distinct legal entity from the individual owners of it.[66] The Hahn's Free Exercise rights were not infringed because the PPACA regulations were neutral and generally applicable, and it was "clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the Women's Preventive Healthcare regulations is not to target religion, but instead to promote public health and gender equality...."[67] Conestoga could not assert the free exercise rights of the family members who owned the business, and the PPACA did not offend the Free Exercise clause anyway.[68] Likewise, the district

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[63] Ibid. at 403.
[64] Ibid.
[65] Ibid.
[66] Ibid. at 407-09.
[67] Ibid. at 410.
[68] Ibid. at 404-410.

court ruled that Conestoga did not enjoy any protection under RFRA,[69] that the PPACA did not substantially burden the owners' (Hahn's) religious rights (because it was the employees, not the Hahns or Conestoga who would purchase and use the abortifacients),[70] the partial exemption for religious employers did not violate the Establishment Clause,[71] and that the PPACA regulations did not constitute unconstitutional compulsory speech because "the conduct it requires of Plaintiffs – the purchase of certain health care coverage – is not inherently expressive. Purchasing a healthcare plan does not normally convey agreement with every medical procedure covered by the plan, or every health care decision made by a patient and her doctor."[72]

On appeal to the U.S. Court of Appeals for the Third Circuit, Judges Cowen and Vanaskie affirmed,[73] while Judge Jordan dissented. The majority opinion by Judge Cowen agreed with the district court that a for-profit, secular corporation cannot "exercise religion" because there is no history of Free Exercise Clause protection of corporations, or that the First Amendment was intended for their protection.[74] Secular, for-profit corporations do not pray, worship, observe sacraments or take other religiously-motivated actions.[75] And the traits of the human owners of Conestoga could not "pass through" to the corporation.[76] "Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga."*[77] For the same reasons, the Hahns did not have any viable RFRA claim because the PPACA applied only to the corporation-employer, not the corporate owners.[78] A holding that a for-profit corporation can engage in religious exercise "would eviscerate the

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[69] Ibid. at 411.

[70] Ibid. at 412-416 (citing Tenth Circuit ruling in *Hobby Lobby*).

[71] Ibid. at 416-17.

[72] Ibid. at 418.

[73] *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, 724 F.3d 377, 385 (3rd Cir. 2013).

[74] Ibid., 724 F.3d at 385.

[75] Ibid.

[76] Ibid. at 386.

[77] Ibid. at 388.

[78] Ibid. at 389.

fundamental principle that a corporation is a legally distinct entity from its owners."[79]

Judge Jordan dissented faulting the majority and the government for adopting a cramped and incoherent conception of religious liberty rights:

> The government takes us down a rabbit hole where religious rights are determined by the tax code, with non-profit corporations able to express religious sentiments while for-profit corporations and their owners are told that business is business and faith is irrelevant. Meanwhile, up on the surface, where people try to live lives of integrity and purpose, that kind of division sounds as hollow as it truly is.[80]

Emphasizing the unquestioned sincerity and legitimacy of the religious beliefs of the Hahns against destroying pre-natal human life, the dissent faulted the Third Circuit majority's approval of the District Court's "erroneous application of a more rigid standard than our case law requires."[81] Moreover, considering all of the factors appropriate for evaluation of a motion for preliminary injunction showed the Conestoga will suffer irreparable harm from the denial of injunctive relief and that they are likely to prevail on the merits.[82] The majority's focus on corporations' lack of human qualities missed the critical point.[83] Moreover, "[t]o recognize that religious convictions are a matter of individual experience cannot and does not refute the collective character of much religious belief and observance."[84] Corporate form facilitates

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[79] Ibid.

[80] 724 F.3d at 390.

[81] 724 F.3d at 393.

[82] Ibid. at 398.

[83] "Of course, corporations do not picket, or march on Capitol Hill, or canvas door-to-door for moral causes either, but the Majority would not claim that corporations do not have First Amendment rights to free speech or to petition the government. Corporations have those rights not because they have arms and legs but because the people who form and operate them do, and we are concerned in this case with people, even when they operate through the particular form of association called a corporation." Ibid. at 399 n14.

[84] Ibid. at 400.

individual worship: "[B]elievers have from time immemorial sought strength in numbers. They lift one another's faith and, through their combined efforts, increase their capacity to meet the demands of their doctrine. The use of the word 'congregation' for religious groups developed for a reason."[85] Exercise of religion enjoys special constitutional protection: "Our Constitution recognizes the free exercise of religion as something in addition to other kinds of expression, not because it requires less deference, but arguably because it requires more. At the very least, it stands on an equal footing with the other protections of the First Amendment."[86] Sadly, Judge Jordon noted, "the Majority relegates religious liberty to second-class status...."[87] He agreed with Judge Noonan's forceful dissent in *EEOC v. Townley Engineering and Manufacturing Company*, 859 F.2d, 610 (9th Cir. 1988):

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke.... Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.[88]

The majority's view "that seeking after filthy lucre is sin enough to deprive one of constitutional protections"[89] was ridiculed as a viewpoint "itself a species of religion."[90] So, "the government claims the right to force Conestoga and its owners to facilitate the purchase and use of contraceptive drugs and devices, including abortifacients, all the while telling them that they do not even have a basis to speak up in opposition. Remarkable."[91] Likewise, the plaintiffs-appellants' RFRA claims are likely to succeed because RFRA re-imposed strict scrutiny review on

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[85] Ibid.
[86] Ibid. at 402.
[87] Ibid.
[88] Ibid. at 404.
[89] Ibid. at 405.
[90] Ibid.
[91] Ibid. at 406.

infringement of religious exercise. A substantial burden exists because, "[a]s the Seventh Circuit rightly pointed out when granting an injunction in the Mandate case before it, '[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception or related services.'"[92] In this case "religious exercise is substantially burdened by a law that puts substantial pressure on a person to commit an act discouraged or forbidden by that person's faith, and the Hahns' Mennonite faith forbids them not only from using certain contraceptives, but from paying for others to use them as well."[93] It is not for the courts to dissect and pass upon the validity of religious beliefs such as those of the Hahns.[94] Moreover, "[t]he government's arguments against accommodating the Hahns and Conestoga are 'undermined by the existence of numerous exemptions [it has already made] to the...mandate.'"[95] The exemptions to the PPACA mandate provide "a classic example of such artibrary underinclusiveness. It cannot legitimately be said to vindicate a compelling governmental interest."[96] The "sheer number of exemptions" – applicable to an estimated 190 million employees and their families – makes a mockery of the government's claim of justifiable discrimination.[97] Conestoga noted that the government could provide greater access to contraception without violating religious liberty by offering tax deductions or credits for purchase of contraceptives, expanding eligibility for free government contraceptives, or allowing reimbursement for purchase of contraceptives, or giving pharmaceutical companies incentives to provide them for free to clinics, all without burdening religious liberty, and the government had failed to show that any (much less all) of these options would not work. Likewise, Judge Jordan found constitutional violation because the Mandate "is not generally applicable, and it is not

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[92] Ibid. at 410.
[93] Ibid.
[94] Ibid. at 411.
[95] Ibid. at 413.
[96] Ibid. at 414.
[97] Ibid.

neutral."[98] He noted that "it is utterly arbitrary to say that religious liberties depend on whether a company hires 49 or 50 employees."[99] Likewise, Conestoga has shown it was suffering irreparable harm because: "Faced with ruinous fines, the Hahns and Conestoga are being forced to pay for the offending contraceptives, including abortifacients, in violation of their religious convictions, and every day that passes under those conditions is a day in which irreparable harm is inflicted."[100] Thus, Judge Jordan concluded his dissent noting:

> This is a controversial and, in some ways, complex case, but in the final analysis it should not be hard for us to join the many courts across the country that have looked at the Mandate and its implementation and concluded that the government should be enjoined from telling sincere believers in the sanctity of life to put their consciences aside and support other people's reproductive choices.[101]

Discussion and Analysis

The first point that is clear from *Hobby Lobby* and *Conestoga Wood* is that the cases were very complex, involving multiple, substantial claims regarding constitutional and statutory protections of religious practices. Because so many different claims are involved, even if most claims are dismissed, it was possible for the plaintiff's to prevail on at least one claim. The legal issues include (1) legal standing to sue, (2) application of the Anti-Injunction Act, (3) whether for-profit corporations have First Amendment Free Exercise rights, (4) whether for-profit corporations are protected by RFRA, (5) whether the owners as individuals could assert the religious liberty interests of their corporations, (6)whether the PPACA substantially burdens the plaintiffs, (7) whether theological merit of the beliefs undermines the claim of substantial burden, (8) whether a subjective-perspective applies to determine whether a burden is substantial, (9) whether PPACA regulations were the least restrictive means to advance the governments interests in public health and gender equality, and (10) whether the fact

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[98] Ibid. at 415.
[99] Ibid. at 415-16.
[100] Ibid. at 416-17.
[101] Ibid. at 417.

that nearly 200 million American employees were exempted from the PPACA regulations made the government's refusal to grant religious employers an exemption improper.

Second, the contrast and differences between the decision of the Tenth Circuit and the decision of the Third Circuit are many and profound.

Third, these cases arose while other litigation proceeded to achieve the judicial cram-down of another unpopular "progressive" policy, namely, same-sex marriage. In ten of the thirteen federal circuits, the issue whether the Constitution mandates that states legalize same-sex marriage was judicially undecided then, but advocates of same-sex marriage had filed federal court lawsuits in all ten of those circuits.[102] Those cases were being pushed forward with great speed. For example, one "case completed summary judgment briefing just over three months after it was filed."[103] That reflected the politics of the Obama administration. When Mr. Obama became president, ten of the thirteen federal circuit appeals courts were controlled by judges appointed by a Republican president, one by judges appointed by Democrat presidents, and two were evenly split. By 2013, after five years of President Obama's administration, nine of the circuits were controlled by judges appointed by Democratic presidents, and only four by Republican-appointed judges.[104]

That is of great concern because there is a strong correlation between jurisdictions that have legalized same-sex marriage and abortion rates. There appears to have been a substantial increase in abortion in recent years in the first five European nations to allow same-sex marriage or equivalent civil unions. Those five nations are listed in the following chart, which shows the years in which each either re-defined marriage in genderless terms or adopted a genderless civil union or registered partnership regime that offered virtually all the incidents

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[102] Austin R. Nimocks, "History and Recent Developments in Same-Sex Marriage Litigation," *The Federalist Society* (May 2014), at p. 9.

[103] Ibid.

[104] Al Kamen, "Obama Judges Tip Appeals Courts to Democrats," *Washington Post* (May 29, 2014), available at http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/05/29/obama-judges-tip-appeals-courts-to-democrats/?wpisrc=nl_headlines (viewed 3 June 2014).

of marriage, including full adoption rights, to same-sex couples:[105]

Comparison of National Abortion Rates and Ratios
In European Union Nations Adopting Same-Sex Marriage
(or Practical Equivalents) before 2006[106]

Nation	Year adopted SSM (or equivalent)	Total abortion rate 2000	Total abortion rate 2011	Percent change abortion rate	Total abortion ratio 2000	Total abortion ratio 2011	Percent change abortion ratio
Norway	1993 (2009)	19.8	20.3	2.5%	246.7	254.8	8.1%
Sweden	1995 (2009)	25.3	25.2	-0.3%	342.5	333.7	-1.4%
Netherlands	2001	11.6	13.4	15.5%	131.7	154.5	17.3%
Belgium	2003	11.5	13.4	16.5%	129.9	154.8	19.2%
Spain	2005	13.6	18.8	38.2%	158.0	231.2	46.3%
Average Increases				14.5%			17.9%

As undeniably *one* of the worst (and arguably *the* worst) Supreme Court decision of the twentieth century, *Roe v. Wade,* was rightly described by Chief Justice Rehnquist as

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[105] Denmark adopted a registered partnership arrangement for same-sex couples in 1989. But as to adoption and other significant matters, and unlike the arrangements in Norway and Sweden, Denmark's registered partnership arrangement did not give same-sex couples the same rights as married couples.

[106] Source: William Robert Johnston, "Abortion Statistics and Other Data," last updated 14 April 2014, www.johnstonsarchive.net. I am indebted to Gene Schaerr for pointing me to this data.

a sort of judicial Potemkin Village, which may be pointed to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.[107]

The abortion jurisprudence of the Supreme Court of the United States has expanded to extremes unforeseen in 1973. For example, Chief Justice Burger concurred in the twin cases of *Roe* and *Doe* observing: "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices...."[108] Thirteen years later, in 1983, her conceded that he had woefully underestimated the extensive corrosive effects of *Roe* and *Doe.*[109]

Four decades after *Roe v. Wade*[110] was decided by the Supreme Court the baseline, default rules, social values, and foundational principles reflected in the cases and in the country at large seemed to have turned around completely, 180 degrees. In 1973 when *Roe* and *Doe* were decided, the baseline in society (in at least 46 states) was general rejection of elective abortion, and issue before the Court was whether (and to what extent) the government could prohibit all elective abortions and thereby bar women from terminating unwanted pregnancies by eliminating from existence the living-but-unwanted children in utero. In *Hobby Lobby* and *Conestoga* the baseline in society was presented as favoring unrestricted access to abortion, and the question presented was whether private employers can be exempted from a government rule mandating that they include coverage of elective early-term abortion in their employee health insurance programs that will provide the means for terminating unwanted but medically "safe" pregnancies (arguably not physically threatening to the mother) by eliminating from existence living-but-unwanted unwanted children in utero.

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[107] *Planned Parenthood v. Casey,* 505 U.S. 833, 966 (1992) (Rehnquist, C.J., dissenting).

[108] *Doe v. Bolton,* 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

[109] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 783 (1986) Burger, C.J., dissenting): "I regretfully conclude that some of the concerns of the dissenting Justices in *Roe...*have now been realized."

[110] 410 U.S. 113 (1973).

Conclusion

There have been some pro-life steps forward, as well as some disappointing developments in the past few years. For example, in July 2013 "Rasmussen Reports national telephone survey [found] that 46% of "Likely U.S. Voters" now consider themselves pro-choice, the lowest finding in three years of regular surveying. Forty-three percent (43%) say they are pro-life, matching the highest finding to date. Eleven percent (11%) are undecided."[111]

The implications of *Hobby Lobby* and *Conestoga* for religious liberty are very profound. As Professor Charles Russo put it:

> The question is...whether the American government, more particularly the executive and legislative branches, along with the judiciary, can steady the course by continuing to respect religious freedom in allowing believers to follow their consciences, which are rooted in their sincerely held religious beliefs. In the alternative, the question becomes whether politicians and jurists intend to take steps to blaze a new trail by requiring people of faith to become subservient to those who are willing to move the nation into a brave new secular world where religious freedom is marginalized at best.[112]

One thing is clear. The decades-old abortion controversy continues unabated in this country. Those committed to protecting the right to life of unborn human beings in the United States have a great deal of work to do. Men and women, including academics and professional who hold sincere pro-life beliefs, must continue to speak up and speak out in defense of unborn human life and in opposition to efforts to silence and suppress pro-life expressions and values.

In 2014 the Supreme Court ruled in favor of the Hobby Lobby and the other employers and held that under the Religious Freedom Restoration Act (RFRA),[113] those closely-held corporations could not be

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[111] Rasmussen Reports, July 9, 2013, at http://www.rasmussenreports.com/public_content/politics/current_events/abortion/46_are_pro_choice_43_pro_life (seen 10 April 2017).

[112] Charles J. Russo, "Religious Freedom in the United States: 'When You Come to a Fork in the Road, Take It," *Planned Parenthood v. Casey,* 38 *Dayton Law Review* 363, 400 (2013).

[113] Public Law No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. §2000bb through 42 U.S.C. §2000bb-4.

forced over their strongly-held religious objections to provide contraceptive coverage in the insurance coverage for their employees. *Burwell v. Hobby Lobby Stores, Inc.*[114] The Court reasoned that since the government had other means of achieving its contraceptive policy objectives under the that were less intrusive upon and less-restrictive of the pro-life religious beliefs of objecting employers, it could not force them to provide the offensive contraceptive coverage. It was reportedly the first time that the Court upheld a commercial company's claim for religious protection.

The controversy over government mandates requiring employers, however, include contraceptive coverage in their health insurance for employees did not end with the Supreme Court's 2014 decision in *Hobby Lobby* Three years later, another case involving a government mandate for contraceptive converage came before the Supreme Court again in *Zubik v. Burwell*.[115] In *Zubik*, a provision of the Patient Protection and Affordable Care Act (known as the "ACA" or "Obamacare") was interpreted by the governing federal agency as requiring employers to provide their employees with insurance coverage for twenty specific contraceptives, including some to which certain religions objected, including some that also arguably functioned as abortifacients.[116] Several private companies owned and/or operated by persons and organizations of faith (including evangelicals and the Little Sisters of the Poor), objected to being required to provide insurance coverage for such items on moral or religious grounds.[117]

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[114] 573 U.S. ____, 134 S.Ct. 2751 (2014).

[115] 578 U.S. ___, 136 S.Ct. 1557 (2016).

[116] Tom Howell, Jr., "Trump Moves to End Obama's Cost-Free Birth Control Mandate, *The Washington Times* (23 Jan. 2017), at http://www.washingtontimes.com/news/2017/jan/23/trump-moves-to-end-obamas-cost-free-birth-control-/ (seen 24 March 2017); Anna Maria Barry-Jester, "Trump's Executive Order on Obamacare Means Everything and Does Nothing," FiveThirtyEight, 21 Jan. 2017, at https://fivethirtyeight.com/features/trumps-executive-order-on-obamacare-means-everything-and-does-nothing/ (seen 24 March 2017).

[117] Brian Solomon, *Meet David Green: Hobby Lobby's Biblical Billionaire,* Forges, 8 Oct. 2012, at https://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/#73fb75fd5807 (seen 24 March 2017).

Following oral argument in *Zubik* the Court requested supplemental briefing about whether the contraceptive coverage could be provided by the insurance companies to the employees without participation of the objecting employers. In light of information in those supplemental briefs the Court unanimously vacated the lower court judgments and remanded to let the parties try to reach some accommodation of both the objectors' religious exercise and women's access to contraceptive coverage.

While none of these recent decisions directly challenges *Roe v. Wade,* they all erode the underpinnings of the 1973 decision that mandated the legalization of abortion-on-demand. These 2013 rulings reflect a new moral order in American society in which elective abortion is not considered liberated or liberating, but rather is seen as a social tragedy that is tolerated for ambiguous ideological reasons, and facilitating which persons who have moral objections should be free to avoid. These cases show that the conscientious objectors' rights to not participate in funding or facilitating abortion is at least as strong as the judicially-created personal "right" to choose to have an abortion. Eventually, such cognitive dissonance will result in the repudiation of *Roe v. Wade.*