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**It's About Money: The Fundamental
Contradiction of "Hobby Lobby"**

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It's About Money: The Fundamental Contradiction of "Hobby Lobby"

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Abstract

This Article contends that arguments for and against Hobby Lobby both fail to comprehend the special nature of money. As a consequence, opponents of Hobby Lobby wrongly deny the existence of a substantial burden, while Hobby Lobby's supporters fail to see that the understanding of financial transactions that underlies their conception of complicity refutes their libertarian views. Financial complicity, as construed by Hobby Lobby's proponents, should be recognized as a burden on religious exercise. But for the same reason that the financial obligations imposed by the "contraceptive mandate" constitute a burden, they also correlate to countervailing state interests that necessarily outweigh the right to religious freedom. A proper assessment of complicity-based claims and a proper application of the compelling state interest standard both require a better understanding of how money ties people together in relationships which make them mutually responsible for one another's actions, regardless of what they intend. This recognition of how money works is already reflected in our laws against "material support." This Article seeks to show the similarities between religious conceptions of complicity and legal conceptions of material support and to develop a better theoretical understanding of the distinctive properties of money and financial complicity claims.

IT'S ABOUT MONEY: THE FUNDAMENTAL CONTRADICTION OF *HOBBY LOBBY*

NOMI MAYA STOLZENBERG*

In late November, shortly after the Supreme Court granted certiorari in *Burwell v. Hobby Lobby*,¹ Linda Greenhouse published a perceptive op-ed arguing that the contraceptive mandate cases “aren’t about the day-in, day-out stuff of jurisprudence under the First Amendment’s Free Exercise Clause,” and they aren’t about the rights of corporations either. Instead, she said, “They are about sex.”²

In response to which I want to say yes, they’re about sex. *And* they’re about religion. But they’re also about money. They’re about sex, God, *and* money. Since sex and God have both gotten a lot of attention already, I’m going to focus on the money.

There’s something funny about money that makes financial obligations slippery and hard to analyze. Karl Marx once quoted Gladstone for the proposition that “not even love has made so many fools of men as the pondering over the nature of money.”³ But we risk still more

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1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that for-profit corporations are “persons” within the meaning of Religious Freedom Restoration Act, and that the contraceptive mandate in the Patient Protection and Affordable Care Act substantially burdens a closely held corporation’s exercise of religion).

2. Linda Greenhouse, Op-Ed., *Doesn’t Eat, Doesn’t Pray and Doesn’t Love*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html>.

3. KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 73 (N.I. Stone

foolishness if we shirk from the task. As explicated below, there is a duality to money that makes financial actions susceptible to contradictory characterizations. From one point of view (we might call it the “negative” or the “possessive individualist” view of money), people who “merely” transfer money to other people bear no responsibility for the actions undertaken by the recipients of “their” funds (because those funds are no longer *theirs*). Paying wages, for example, is not usually thought to make employers morally responsible for their employees’ expenditures. However, from another point of view (call this one the “positive” or “social responsibility” view), money transfers do make the transferor morally responsible for the actions that the receipt of funds enables. Calls for boycotts and laws against the “material support” of terrorist organizations are both based on this intuitive view of how money works. Neither view is false; each reflects insight into a different aspect of money’s character. But there is a fundamental tension between these two pictures. The negative view of money goes hand in hand with the negative conception of rights on which the libertarian economic philosophy is based. It subscribes to the logic of possessive individualism.⁴ The positive view of money, by contrast, goes hand in hand with the conception of positive rights and duties that better supports a progressive economic philosophy (though, as we shall see, progressive economics is by no means the only philosophy to which the positive view can be, or has been, attached).⁵

One of the curiosities in the *Hobby Lobby* litigation is that conservatives and progressives repeatedly traded places, with Hobby Lobby’s opponents mounting essentially libertarian arguments in an

trans., 1904).

4. “In the political theory of possessive individualism society is presumed to consist of relations among independent owners, and the primary task of government is to protect owners against illegitimate incursions upon their property and to maintain conditions of orderly exchange. The notion of ownership here draws upon an understanding of property as private and exclusive, entailing the right of owners to exclude others and to use or dispose of their property as they choose. This version of individualism is ultimately justified on the grounds that it is congruent with human nature, for human beings are portrayed as bundles of appetites that are, in principle, unlimited and not subject to rational scrutiny. A social world organized around individuals as owners will, it is said, maximize the satisfaction of such desires.” Joseph H. Carens, *Possessive Individualism and Democratic Theory: Macpherson’s Legacy*, in *DEMOCRACY AND POSSESSIVE INDIVIDUALISM: THE INTELLECTUAL LEGACY OF C.B. MACPHERSON* 1, 2 (Joseph H. Carens ed., 1993). See generally C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962) (setting forth the foundations of possessive individualism); Geoff Kennedy, *Capitalism, Contextualisation and The Political Theory of Possessive Individualism*, 1 *INTELL. HIST. & POL. THOUGHT* 228 (2012) (assessing C.B. Macpherson’s approach to possessive individualism as it applies to seventeenth-century English political thought).

5. See *infra* note 56 and accompanying text (discussing traditional religious views of money).

(unsuccessful) attempt to refute the existence of a burden and Hobby Lobby's advocates relying on ideas drawn from a philosophy of positive rights and obligations. These role reversals were more than just tactical maneuvers. They reflect the fact that, in their respective conceptions of what constitutes a burden on religious freedom, religious conservatives subscribe to traditional religious doctrines that are flatly inconsistent with libertarian principles, while conversely, the arguments made against the existence of a burden rest on a possessive individualist view of money and rights.

As a result, each side offered a conception of the burden whose political philosophical premises contradict the rest of their argument. Hobby Lobby's arguments in favor of the existence of a burden are rooted in the religious doctrine against the facilitation of sin⁶ and the progressive doctrine of economic coercion,⁷ both of which depend on a positive conception of rights, regulation, and money. But the rest of Hobby Lobby's position is grounded in libertarian concepts. Thus, the right to a religious exemption is styled as a negative liberty to be free from government regulation. Similarly, the government's interests are defined and discounted in ways that reflect a general distrust of regulation and antipathy toward public benefits and subsidies (not to mention the antipathy toward women's reproductive rights). These views of the (narrow) scope of the government's interests and the (negative) nature of the employer's rights are fundamentally inconsistent with the philosophical assumptions built into their theory of the burden.

The arguments on the other side are equally contradictory. Indeed, each side is a perfect mirror image of the other in this regard. Whereas Hobby Lobby's position cobbles together libertarian views of individual rights and state interests with a distinctly nonlibertarian conceptualization of the burden, Hobby Lobby's opponents cobble together libertarian positions about what constitutes a burden with progressive views of rights and regulation.

The resulting ironies were hard to miss.⁸ Think, for example, about

6. *Hobby Lobby*, 134 S. Ct. at 2764–65; Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL'Y & L. 343, 370 (2014).

7. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 476 (1923). See also William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 11–13 (1995) (discussing the work of Robert Hale and other legal realists who developed the concept of economic coercion); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 482, 485–87 (1988).

8. Fred Gedicks also calls attention to the irony of religious conservatives advocating direct

Hobby Lobby's lawyer suggesting, as a "less restrictive alternative," that the government should fund contraceptive services directly⁹ (a suggestion that Justice Alito incorporated into his opinion),¹⁰ while the government's lawyer countered this suggestion by insisting that funding has to be provided by the private employer.¹¹ The latter is the position usually taken by the opponents of "Obamacare," the former a position that advocates of reproductive rights have fought for tirelessly for decades against the resistance of religious and economic conservatives.¹² Similarly, in the debate over whether or not "merely having to pay a price" for religious observance is a "burden" on free exercise, Hobby Lobby adopted a theory of economic coercion originally developed by progressives as a critique of libertarian views,¹³ while its opponents made the standard libertarian argument that the formal existence of choice and rights negates the existence of coercion.¹⁴

There's something funny going on when it is the opponents of the exemptions who are upholding the narrow conception of coercion that libertarians favor while it is Hobby Lobby's defenders who are arguing that

government funding as a less restrictive alternative "when their religious and political allies have been doing everything possible to kill Title X" (the provision of the federal Public Health Service Act, which provides (limited) funding for contraceptives to lower-income women), "not to mention the entire ACA." Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Employee Burdens*, 38 HARV. J.L. & GENDER 153, 163 (2015). Gedicks interprets this role reversal as an act of political "chutzpah." *Id.* Without disagreeing with that, I suggest here that it may reflect deeper political philosophical commitments that are buried beneath the surface of the libertarian rhetoric and riddled with unacknowledged contradictions.

9. Transcript of Oral Argument at 39–41, 84, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) [hereinafter *Hobby Lobby Oral Argument*].

10. *Hobby Lobby*, 134 S. Ct. at 2781–83.

11. *Hobby Lobby Oral Argument*, *supra* note 9, at 64–65.

12. *Cf.* Gedicks, *supra* note 8 (describing the partially successful efforts of religious and political conservatives to defund federal contraceptive coverage programs since the Reagan administration).

13. See *supra* note 7. The description of economic burdens as "merely having to pay a price" originated in the Supreme Court's first confrontation with the question in two cases that arose in the early 1960s. In the first case, which involved the economic burden imposed by a Sunday Closing Law on merchants who observed the Jewish Sabbath, the Court held that a law that "simply . . . operates so as to make the practice of . . . religious beliefs more expensive" is not a "prohibition on the free exercise of religion." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Two years later, in the case that ushered in the modern doctrine of strict scrutiny for burdens imposed on religion, the Court found that being disqualified from unemployment benefits was a burden on religion even though the burden merely attached economic costs to the exercise of the choice to observe the Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963). This holding was affirmed by the Court in 1981, against the dissent of Justice Rehnquist, who argued that the Constitution did not require an exemption from a regulation that "simply made the practice of . . . religious beliefs more expensive." *Thomas v. Review Bd.*, 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting).

14. See Page, *supra* note 7, at 13–14 (explaining the "intentional" vision of legal realists, which saw exchange in the market as a mechanism of private coercion, empowered by public policy).

the choice between complying with the contraceptive mandate and paying the taxes or fines that accompany noncompliance is a hollow one. One might have thought that the spectacle of such contradictions would have led to some reflection about them. But the contradictions within each position's arguments seem to have gone largely unnoticed.

What makes it easy to overlook such glaring inconsistencies is our difficulty understanding the financial obligations instituted by the Affordable Care Act ("ACA") and our generally hazy understanding of money. Submerged beneath our hazy ideas about money lie the two competing conceptions: the positive view of money, cognate to the progressive philosophy of social responsibility and economic regulation, and the negative view of money, which reflects the free market philosophy of possessive individualism. If we want to be able to respond effectively to the next round of claims to religious exemptions,¹⁵ we will need to confront these contradictory understandings of money. The positive conception of money that underlies Hobby Lobby's theory of the burden ultimately undermines the argument for religious exemptions. But the only way to demonstrate that is by taking the burden argument seriously, rather than treating it dismissively and denying that the burden exists.

The fear of acknowledging the existence of the burden is understandable. Recognition of a burden on free exercise rights triggers "strict scrutiny" of the state's interest, which is always an uphill battle. The reigning assumption is that once the existence of a substantial burden is acknowledged, strict scrutiny has to be applied on a case-by-case basis, a

15. There are a number of cases in the pipeline involving challenges to the existing accommodation for religiously affiliated nonprofit institutions which rest on the claim that "merely signing a piece of paper" certifying the receipt of an exemption constitutes a burden, because that, too, requires the religious organization to participate in a regulatory scheme under which others gain access to contraception. *E.g.*, *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (issuing order granting religious nonprofit organizations temporary exemption from certain burdens of the ACA pending appellate review); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (issuing order granting temporary injunction in cases claiming a right not to have to comply with the procedures prescribed for nonprofit religious institutions to claim exemptions).

A number of related cases have been vacated. *E.g.*, *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *vacated sub nom.*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2014), *vacated sub nom.* *Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014); *Gilardi v. U.S. Dep't Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014); *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013), *vacated sub nom.* *Eden Foods Inc. v. Burwell*, 134 S. Ct. 2902 (2014). One such case, recently decided by the U.S. Court of Appeals for the D.C. Circuit, rejected the claim principally on the ground that the exemption process challenged by the claimants does not impose a substantial burden. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 246–56 (2014) (petition for rehearing pending). In addition, *Priests for Life* held that even if the exemption process does not constitute a substantial burden, it survives strict scrutiny. *Id.* at 257–67.

scenario that is deeply threatening to those who worry (with good reason) that the courts are likely to undervalue the government's interests in protecting women's access to reproductive healthcare and other social welfare interests that are likely to be at issue in future cases. The perception of this threat has fueled a legal strategy that makes denying the existence of the burden the lynchpin of the case against religious exemptions. But the premise of this legal strategy is false. Case-by-case application of strict scrutiny to government interests is not the only alternative to rejecting claims on the basis of the absence of a burden. There is in fact another way of disposing of cases once a substantial burden is recognized and strict scrutiny is triggered. This other way of disposing of exemption claims, which has gone largely unremarked,¹⁶ is not case-by-case evaluation of the strength of the government's interests and the existence of less restrictive alternatives, which is what "ordinary strict scrutiny" requires, but rather what I would call "meta-strict scrutiny," a form of strict scrutiny that actually precludes the application of strict scrutiny in the future. This is a form of scrutiny which accepts and meets the demand for showings that the government's interest is compelling and that there are no less restrictive ways of pursuing that interest, but which meets that demand by showing that the government's burden will be met in *every* instance of a certain class of cases. It thereby obviates the need (and the warrant) to examine the balance of interests in this category of cases in the future. There is ample precedent for applying this sort of categorical or meta-strict scrutiny in favor of the government when it comes to the payment of taxes,¹⁷ and strong reason to apply the same reasoning to challenges to the ACA.

16. One can discern an inchoate form of the argument advanced here for "meta-strict scrutiny" in the occasional invocations of *United States v. Lee*, 455 U.S. 252 (1982) (denying the free exercise claim of an employer who claimed that the obligation to pay social security taxes for his employees burdened his religious beliefs). But the logic of the *Lee* Court, which accepted the existence of a substantial burden, cannot be systematically developed or applied to the ACA cases so long as we persist in refusing to recognize the existence of the burden.

17. *Id.* See also *Bob Jones Univ. v. United States*, 461 U.S. 574, 603, 605 (1983) (citing *Lee*, 455 U.S. at 257–58, for the proposition that "[n]ot all burdens on religion are unconstitutional," and holding that a Christian university has no right under the Religion Clauses to an exemption from the Internal Revenue Code requirement that recipients of tax exemptions not practice racial discrimination); *Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990) (denying claim to a right to a free exercise exemption from imposition of sales tax on sale of religious literature). For a similar analysis of what I am calling "meta-strict scrutiny," see Chip Lupu's analysis of the cases claiming free exercise exemptions from taxation and antidiscrimination norms as ones in which the Supreme Court "categorically generalized the concept of compelling interest." Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 52 (2015). Establishment Clause challenges to the payment of taxes are not the only context in which the Court has applied this kind of analysis.

Many opponents of religious exemptions have taken comfort in Justice Sotomayor's saying, in a subsequent ACA case, that "*thinking* one's religious beliefs are substantially burdened . . . does not make it so."¹⁸ But that comfort is cold. The fixation on denying the existence or substantiality of the burden claimed by Hobby Lobby led to a missed opportunity for progressive opponents of the religious exemption claim. Far better to avoid subjecting religious claims that a burden exists to an "objective" judicial test and concede the existence of a substantial burden in cases where people sincerely believe that their making a financial payment facilitates "sin." Only then will the nature and the amplitude of the government's meta-interest in these cases come fully into view, and with that, the tools for explaining why the right to judicial relief from laws that require financial facilitation must *always* be denied.

There are, indeed, many different ways of describing the interest that the government has in enforcing the contraceptive mandate. It could be described in terms of health (public health, reproductive health, women's health). It could be described in terms of rights and liberty (protecting reproductive rights and women's ability to control their own bodies). Or it could be described in terms of equality (redressing the widespread gender discrimination that existed in pre-ACA insurance plans).¹⁹ All of these important (many of us would say compelling) interests are at stake in the ACA religious exemption cases. But the interest that the government has in enforcing the contraceptive mandate against religious objectors goes well beyond these important particular interests. Transcending the interests in any particular benefit secured by a government program from which the right to an exemption is claimed is the government's general interest in being able to determine how public funds will be spent and how the revenue to support that spending will be collected. Most commonly described as the powers to "tax" and to "spend," (although in the case of employer-based health insurance, the methods used by the government to collect and direct revenue toward the provision of benefits differ from conventional forms of taxation), these are interests that implicate the ability of the government to function at all.

Three things have made this meta- or macro-interest in controlling how revenue is raised and spent difficult to see. First, the financial mechanisms implemented by the ACA are incredibly complicated. This masks the fact that, though benefits technically are a form of private

18. *Wheaton Coll.*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting).

19. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 373-74 (1998).



compensation, they function in the same way that explicit taxes do as a source of revenue that the government uses to subsidize health insurance plans.²⁰ The state's interest in being able to safeguard its ability to collect revenue and direct it toward the provision of benefits can't be seen so long as the public nature and function of employer contributions remains obscured.

The second thing that makes the nature of the state interest hard to grasp is our failure to resolve (or even recognize) the tension between our two competing understandings of money. So long as we gloss over the difference between the two, it's easy to misunderstand the claim that the act of making a payment is an act that violates religious obligations. Indeed, the arguments that have been made against the existence of a burden reveal a profound misunderstanding of what "facilitation" means.²¹ It's only when we take the "facilitation of sin" argument seriously, following its logic where it leads, that we see what the financial obligations instituted by the ACA actually involve and what financial facilitation actually is. That in turn permits us to see that *any* alternative to the contraceptive mandate that effectively delivers the benefit of coverage to the employees will necessarily involve an act of facilitation on the part of the employers. The existence of a "less restrictive alternative" is in fact a logical impossibility.

20. For support for viewing Hobby Lobby as a tax case, see Jasper L. Cummings, Jr., *Hobby Lobby and Federal Taxes*, TAX NOTES: SPECIAL REPORT 519 (Nov. 3, 2014). Cummings's analysis focuses on the "penalty tax" that covered employers are required to pay if they choose not to provide health benefit plans as the "tax aspect" of the case, arguing that "the holding here was just as much a holding about paying taxes" as the holding in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding the "individual mandate" of the ACA against a challenge to its constitutional validity on the grounds that it is a valid exercise of Congress's power under the Taxing Clause). My argument is that not only is the "penalty tax" (i.e., the employer "shared contribution payment") a tax, but also the payment of benefits itself is either a tax, or, if not a tax, functionally analogous to a tax inasmuch as it, too, is a means of collecting revenue implemented by the government to fund government benefits.

21. My targets here are the arguments against the right to religious exemption that have been most prominent in the litigation and the extensive public commentary on the cases. To be sure, not all opponents of the *Hobby Lobby* claim deny the existence or substantiality of the burden. In particular, arguments focused on third party harms do not make the absence of a substantial burden the lynchpin of their analysis and therefore tend to avoid making the kind of arguments subject to critique in this Essay. E.g., Gedicks, *supra* note 8, at 6–9. A particularly notable example of an argument against granting religious exemptions that focuses on third party harms and takes the burden claim seriously is found in Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015). See also Amy Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. (forthcoming 2015). Like me, Sepinwall as well as NeJaime and Siegel base their arguments against exemptions on the unique features of complicity claims. But whereas my argument focuses on the unique features of acts of financial complicity, their argument is addressed to complicity claims more generally.

The logical implications of recognizing the right claimed in *Hobby Lobby* have been obscured only because many of the claimants of this right, including Hobby Lobby, have not themselves pressed the religious prohibition on acts of financial facilitation to its logical conclusion. Like all religious doctrines, the prohibition on the “facilitation of sin” is subject to different interpretations, and people who believe in the doctrine draw the line between permissible acts of payment and impermissible acts of financial facilitation in different places. For example, some view the act of paying taxes as an acceptable alternative to making benefits payments that does not run afoul of the prohibition on financially facilitating sin even if the government uses those tax dollars to cover the services deemed sinful, while others believe that paying taxes that go to support sinful activities is itself a prohibited act of facilitating sin. Some may deem the payment of wages that are spent on “sin” to be an act of financial facilitation, and some go so far as to believe that even “just signing a piece of paper” that triggers the coverage of the services by others is an act that facilitates sin. There is in fact no logical stopping point to this argument. Any act, short of active resistance to the provision of the service or complete withdrawal from the circulatory system of monetary relations through which money is conveyed to provide for the service, can be—and likely will be, by some—viewed as an act of accommodating the conveyance of the benefit and, as such, as an act that facilitates sin.

Of course, there is no requirement that religious beliefs be taken to their logical conclusion in order for them to receive legal protection. Furthermore, there may be perfectly good, perhaps even logical reasons for people to interpret the prohibition on facilitation as applying only to some kinds of acts that deliver money or benefits into the hands of “sinners” and not to others. As Justice Alito observed in oral argument, the question, “How close a connection does there have be between what B does . . . that may provide some assistance to A in order for B . . . to be required to refrain from doing that action” is “really a question of theology”²² over which the courts have no authority to take a stand. But that is just the point. If the classification of an act of payment as an act of “facilitation” is a theological question, then, from the courts’ point of view, it is a matter of private opinion or subjective belief, and therefore the question of whether a substantial burden is imposed by a legal regime that pressures religious objectors to engage in that act of payment is a matter of personal belief. That being the case, then the Court has no basis for recognizing the existence of a substantial burden in one case but not another. Indeed, courts

22. Hobby Lobby Oral Argument, *supra* note 9, at 69.

must be prepared to recognize the existence of the same burden in every case where an act of payment is involved (be it the payment of taxes, wages, benefits, or donations) that enters into the circulatory system through which money that will pay for “sinful” services flows.

Because *Hobby Lobby* interprets the religious prohibition on facilitating sin to condemn certain financial acts that facilitate others’ access to the offending health services, but not other acts that do the same thing, it has been hard to see that *every* alternative way of delivering the service to the intended beneficiaries is equally capable of being characterized as an act of financial facilitation. Otherwise put, there is no less restrictive alternative because every alternative that delivers the same financial benefit to the same beneficiary is equally facilitative of the delivery of the service, and therefore equally restrictive of the right not to facilitate sin, at least on some person’s perfectly logical construction of the requirements of the religious prohibition against facilitating sin. To be sure, many believers *won’t* carry the doctrine that far, but that is just to say that they are willing to make some accommodations and relax the demand for perfect moral purity and perfectly clean hands. For, make no mistake about it, at its core, that is what this doctrine is: a demand for spiritual purity applied to a domain of human relations—the material domain—that religious theologians have always understood to be inherently impure.

Generations of theologians have recognized that there is unresolvable conflict between the demand for perfect moral purity and the practical demands of participating in a circulatory system (i.e., the economy) through which money flows from one person to another, including people who commit sins, thereby making people responsible for facilitating one another’s actions, including the commission of sin. The traditional understanding was that, unless people completely withdrew from the realm of “worldly affairs” (the path of radical religious separatism), there was no choice but to accommodate the existence of, and one’s own facilitation of, people with sinful practices and beliefs. The conflict between the demand for perfect purity and the demands of material relations might be softened through the imposition of behavior regulations that lessen the incidence of “sinful” behavior, but it cannot be overcome. On this traditional understanding, theologians saw that there are only two logical possibilities: either total withdrawal from the realm of material relations, or relaxation of the standards of moral purity (the path of accommodation to the inherently impure nature of “worldly affairs”). Most chose the path of accommodation. This indeed was the original version of the principle of accommodation: not a secular doctrine about the need of secular society to

accommodate religious beliefs, but rather, a religious doctrine about the need of the religious to accommodate (and accept the inevitability of facilitating) people with different (“false”) beliefs.²³

The theological novelty of the Hobby Lobby position is that it does not acknowledge the fundamental contradiction between participation in economic relations and the demand to be unsullied by mutually facilitative economic relations with “sinners” which has long been recognized in traditional religious thought. Instead, blending traditional religious morality with the modern-day prosperity gospel, it grafts the traditional theological doctrine against facilitating sin onto a libertarian understanding of economic relations and money that is completely antithetical to the positive conception of money and economic relations which underlies the concept of financial facilitation.

That this contradiction has not been clearly perceived is a reflection of the fact that people on the other side of the Hobby Lobby controversy are equally in the grip of these two contradictory understandings of money. Indeed, we all are in the grip of these contradictory understandings, reflecting not just our ambivalent political philosophical commitments, by turns libertarian and pro-regulatory, but a duality inherent in money itself. Only by acknowledging this duality can we begin to dispel the confusions about money that have gotten in the way of a clearer understanding of what religious objectors to the contraceptive mandate actually object to and why their claims should nonetheless be refused.

“PRIVATE” HEALTH INSURANCE ISN’T PRIVATE

The arguments about *Hobby Lobby* are fantastically convoluted. There are many reasons for this, one of which is the obfuscatory rhetoric surrounding the healthcare debate, while another is the convoluted nature of the ACA itself. The two are related. It is generally understood that the ACA is the result of a political compromise between advocates of national healthcare and opponents who advocated for private healthcare instead. This understanding is false. In fact, the so-called private system that opponents of a single-payer system fought to preserve is not truly private. Rather, it is a form of social insurance, whose public character has been disguised by a combination of indirect mechanisms, innocent confusion, and willful obfuscation.

Many have pointed out that the employment-based system of health

23. See Nomi Maya Stolzenberg, *Political Theology with a Difference*, 4 U.C. IRVINE L. REV. 407 (2014).

insurance, which is peculiar to the United States, developed as the result of a series of historical accidents going back to the Depression when hospitals sought to fill beds by selling monthly health insurance plans.²⁴ This novelty consumer product received a huge boost during World War II when employers evaded wage and price controls and competed for scarce employees by offering them the plans as fringe benefits. The most crucial development occurred when the War Labor Board decided to allow employees to exclude employer contributions to their healthcare plans from their declarable income. The Internal Revenue Service followed suit, and the rest, as they say, is history. Not only did this tax policy lead to a massive expansion in employee health care plans, but it also amounted to a massive system of public subsidies.²⁵ In effect, the federal government has been funding health insurance through tax expenditures since the moment it decided to allow employees to exempt employer contributions from their taxable income.

More precisely, employment-based health insurance is a system that funnels public subsidies to employees who are lucky enough to work for employers who provide health plans. This is the unequal system of health care insurance that the Obama administration sought to rectify with the passage of the ACA. Rather than a system in which only a privileged (and shrinking) subset of the American population received government subsidies, proponents of healthcare reform sought to expand the provision of health insurance so that *all* of the population would have coverage supported by public funding. The choice was never between a public system and a truly private one. Rather, it was between preserving the preexisting system, in which only some received publicly subsidized health insurance while the rest had to make do without public subsidies,²⁶ and establishing a truly universal system of publicly subsidized health insurance.

24. JOHN E. MURRAY, ORIGINS OF AMERICAN HEALTH INSURANCE: A HISTORY OF INDUSTRIAL SICKNESS FUNDS 3, 6, 65, 235 (2007); Laura A. Scofea, *The Development and Growth of Employer-Provided Health Insurance*, MONTHLY LAB. REV., Mar. 1994, at 3, 5–10; Alex Blumberg & Adam Davidson, *Accidents of History Created U.S. Health System*, NPR (Oct. 22, 2009), <http://www.npr.org/templates/story/story.php?storyId=114045132>.

25. Healthcare economist Jonathan Gruber describes this subsidy as the glue that holds employer health plans together. Jonathan Gruber, *The Tax Exclusion for Employer-Sponsored Health Insurance*, NAT'L TAX ASS'N (June 2011), <http://www.ntanet.org/NTJ/64/2/ntj-v64n02p511-30-tax-exclusion-for-employer.pdf>.

26. To be precise, the rest made do without public subsidies except for Medicaid and publicly subsidized emergency care.

THE RIGHT TO AN EXEMPTION IS NOT A NEGATIVE RIGHT

The right to an exemption from the ACA is commonly framed as if it were a “negative liberty” (freedom *from* government intervention) rather than a positive right, which involves making claims on public resources and exercising control over others. Thus, for example, Jay Sekulow, a prominent advocate for the Christian Right, argued on Fox News that “if the United States can force the people running a corporation to use corporate resources to provide free abortion-pills to employees (especially when contraceptives are cheap and widely available on the open market), it is difficult to imagine the meaningful limits on government power in the marketplace.”²⁷

The problem with this statement is that every proposition in it is false. But while opponents of *Hobby Lobby* have been quick to contest the falsehoods about contraceptives’ low cost and easy accessibility, they have done much less to challenge the characterization of the mandate as a regulation that coerces business owners and robs them of control over their own resources. Instead of pointing out the tax subsidies that contradict the supposedly private nature of employer contributions—and instead of demonstrating how exemptions effectively grant companies the right to dictate to others how public resources will be used—opponents have largely accepted the portrayal of the right to a religious exemption as a negative right. This makes it seem like all that companies like Hobby Lobby are asking for is the right to opt out of a system of government subsidies and regulation instituted by the ACA.

But, as explained above, employee health benefits are subsidized and have been since well before the passage of the ACA. This fact has been obscured by an ideological discourse that portrays employer-based insurance as a private health insurance system, as if there were no government funding involved. To be sure, there are private elements in employer-based plans: the delivery system is private; the insurance carriers are private; and the employer’s contribution is part of the employee’s compensation package, which comes from the employer’s coffers. But to refer to employer contributions as “corporate resources” as if the government were commandeering a corporation’s private earnings without providing a hefty subsidy itself is entirely misleading.

Not only does the government provide a subsidy in the form of tax

27. Jay Sekulow, *Hobby Lobby Case—Three Reasons Why Corporations Must Have Religious Freedom*, FOX NEWS (Mar. 25, 2014), <http://www.foxnews.com/opinion/2014/03/25/hobby-lobby-case-three-reasons-why-corporations-must-have-religious-freedom>.

exemptions, but it also gets employers to help fund the subsidy. If the government used the mechanism that it uses to fund Medicare (collecting employer and employee contributions in the form of explicit taxes and doling out those tax dollars back to the employees), it would be obvious that employer contributions are not “corporate resources,” but rather public resources used to fund public programs. In the case of employer-based health insurance, the government eschews the usual tax and spend mechanisms used to fund most government benefit programs (and to convert private into public dollars) and relies on “indirect tax expenditures” to fund employee benefit plans instead. Either way, though, direct or indirect, a tax expenditure is a subsidy. Both Medicare and employer-based healthcare collect the revenue to fund those subsidies through employer and employee “contributions.” The only difference is, with employer-based plans the government skips the intermediate step of first collecting the contributions and placing them in public coffers where they are easily recognizable as tax money. Instead, the money “collected” from employers is transferred directly to employees. Employers thus function simultaneously as contributors to the public subsidy supporting employee health plans and as conduits through which the subsidies invisibly flow.

THE CONTRACEPTIVE MANDATE ISN'T A MANDATE ON EMPLOYERS

This is just one of the reasons why the libertarian claim that employers are being “force[d] . . . to use corporate resources to provide free abortion-pills to employees” is highly misleading:²⁸ the resources aren't *corporate*, at least not in the simple sense of ownership that this libertarian framing of the issue implies. As a formal matter, employer contributions may be a private form of compensation, but functionally, they serve the same role as they play in Medicare, where they are collected in the form of taxes.²⁹ As with ordinary taxes, being subject to a government levy effectively converts the employer's private or “corporate” funds into public funds.

Yet another reason why the libertarian framing of the issue is wrong is that employer contributions aren't, strictly speaking, *forced*. Employers aren't forced to contribute resources to health plans that cover contraception for the simple reason that employers aren't forced to provide health insurance plans at all. Employers actually have three different choices under the regulations: they can comply with the mandate; or not

28. *Id.*

29. Just as employers can claim a tax deduction for the benefits payments they make, they can also deduct contributions to Medicare from their corporate tax return.

comply and pay a fine;³⁰ or forego the provision of health insurance employers and pay the employer “shared responsibility” payment instead.³¹ There is no mandate that *employers* cover contraception. There is, rather, a mandate that all *health plans* cover contraception, whoever provides them.

ECONOMIC COERCION

Opponents of Hobby Lobby argue that the availability of these choices negates the existence of a burden. Since only one of these options involves directly contributing money to plans that cover contraception, employers are legally free not to cover contraception.

In response to this argument, Hobby Lobby’s advocates have retreated from the simplistic claim that the ACA “forces” them to provide insurance coverage for “abortion-pills,” arguing instead that it is the *costs* of the alternative scenarios that constitute the burden on their ability to practice their religion. In essence, their argument is that the right to choose that formally exists is vitiated by economic pressure. Hobby Lobby’s opponents counter that “merely making it more expensive” to practice religion is not a burden.³² Even if the costs are substantial,³³ business owners can’t (on this view) say their free exercise rights are burdened if they have the *right* to act in conformity with their religious beliefs if they so choose.

TRADING PLACES

Note the strange role reversal here. The assertion that “merely paying a price” is not a burden is a wholesale repudiation of the theory of economic coercion. Usually, it is economic conservatives who take the view that the theory of economic coercion should be rejected. Because of its perceived inconsistency with free market arguments against government regulation and redistribution, libertarians generally resist the expansive idea of economic coercion in favor of a narrower definition of coercion, limited to formal legal compulsion.³⁴ On this view, a right is legally protected if it is formally recognized, regardless of whether economic disadvantages (or

30. 26 U.S.C. § 4980D (2012).

31. *Id.* § 4980H. The government uses these payments to offset the costs it assumes of subsidizing the employees directly rather than through the indirect system of tax exemptions, which is only available when employers provide plans. *Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015*, U.S. DEP’T TREASURY (Feb. 10, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/j12290.aspx>.

32. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 & n.73 (2014).

33. Whether or not they are is contested.

34. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 476 (1923); Page, *supra* note 7, at 9.

other kinds of material or psychological pressure) make it difficult to exercise.

Hobby Lobby's advocates had to retreat from this position in order to make out the case that they are subject to a burden. That meant adopting a position developed by economic progressives. It was progressives who originally insisted that rights are hollow if people don't have the economic means to exercise them.³⁵ Progressives also recognized that less extreme forms of economic disadvantage can compromise choice and constitute legally cognizable "burdens."³⁶ Against conservative resistance, this position was gradually integrated into various areas of legal doctrine by last century's *liberal* Court.³⁷ In the field of religion, the theory of economic coercion was adopted in *Sherbert v. Verner* (the case that produced the standard codified by the Religious Freedom Restoration Act), which held that a Saturday Sabbath observer's ability to exercise her religion was burdened even though there was no law requiring people to work on Saturdays.³⁸ The "mere" loss of government benefits as a consequence of turning down a job that required work on Saturdays was deemed to be a sufficiently punitive cost as to constitute an unconstitutional condition on the right to free exercise.³⁹

MERE MONEY

Rejecting this expansive definition of coercion in favor of the libertarian position was another trap that opponents of the exemption claim regrettably fell into. More than just an unsuccessful legal strategy, it was a telltale sign of a deeper commitment to libertarian ideas that lies buried within progressives' responses to conservative religious beliefs. This commitment was expressed not only in their rejection of the idea that costs can constitute coercion, but also in their position on whether complying with the mandate itself is an act that violates the employers' religious beliefs.

This question is logically separate from the question of whether the act of depositing money into a benefits plan is "forced." Whether the act that employers object to (depositing money in an employee health plan) is legally compelled is one issue. Whether that act is an act that violates the employers' religious beliefs is another. If it isn't, then it doesn't matter

35. Page, *supra* note 7, at 13–14.

36. Singer, *supra* note 7, at 486–87, 534.

37. Page, *supra* note 7, at 15, 19, 23.

38. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

39. *Id.* at 403.

whether the act in question is compelled, directly or indirectly. The costs of the alternatives to providing a plan that covers contraception can't constitute pressure on employers to act in violation of their religious beliefs unless the act of depositing money into a plan itself constitutes the violation.

Money thus enters into the equation in two different places in the *Hobby Lobby* argument: in the form of the costs that companies face when they *don't* provide insurance plans that cover contraception,⁴⁰ and in the form of the payments they make when they *do* provide compliant plans. The core question in the contraceptive mandate controversy concerns the latter: How, opponents ask, can the mere deposit of money into an employment benefit plan constitute a violation, or burden, on the exercise of religion? As the rhetorical form of the question suggests, it is precisely the monetary nature of the act that makes its inconsistency with religious obligations hard for people who don't believe in such religious obligations to comprehend. Thus, it is often asserted (as if this were a clinching argument) that business owners are not being required to use contraception themselves. They are merely transferring money to an employee's account, and it is up to the employee to decide what health services she will use. Therefore, employers bear no responsibility for the use of contraception.

Similarly, employer contributions to a health benefit plan are likened to the payment of wages. Both benefits and wages are forms of private compensation. And both leave the ultimate choice of how to spend the money received by the employee up to the employee herself. No one claims that employers have the right to an exemption from the obligation to pay wages. Why then, opponents of the exemption claim ask, should the payment of benefits be any different?⁴¹

Both of these rhetorical questions boil down to the same basic idea: that the employee's choice (about how to use the funds) severs the

40. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) ("If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual." (citing 26 U.S.C. § 4980D (2012))).

41. See, e.g., *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1237 (Edwards, J., concurring in part and dissenting in part) (noting that the mandate does not require the owners to use contraceptives or to "encourage . . . employees to use contraceptives any more directly than they do by authorizing [the corporations] to pay wages"), *vacated*, 134 S. Ct. 2902 (2014). See also Reply Brief for Petitioners at 3, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) ("Judge Edwards explained that none of this Court's free-exercise decisions has recognized a substantial burden on a plaintiff's religious exercise where the plaintiff is not *himself* required to take or forgo action that violates his religious beliefs, but is merely required to take action that *might* enable other people to do things that are at odds with the plaintiff's religious beliefs." (internal quotation marks omitted)).

employer's responsibility for their use. Once again, defenders of the mandate are relying on libertarian notions of choice. Only here, the choice is the employee's rather than that of the employer. The fact that employers have the choice not to provide plans that comply with the mandate supposedly defeats the claim that Hobby Lobby is being *coerced* into providing a compliant plan. So too, the fact that employees have the choice whether to use contraceptive services is said to defeat the employer's complicity.

Both the wage analogy and the employee choice argument imply that employee choice negates "facilitation." But this reflects a profound misunderstanding of the concept of facilitation. The fact that employees are free to choose what to do with the economic resources they receive from their employers doesn't defeat the claim that employers are facilitating their choices in the case of *either* wages or benefits. Any act of payment, be it a charitable donation, the payment of wages, benefits, or taxes or a payment to purchase goods, is an act of transferring money *qua* material value into the hand of a recipient (who may or may not use it in ways deemed immoral or sinful). And that is just what financial facilitation is. If this is hard to see, that's in part because the concept of financial facilitation has been misconstrued and conflated with another, very different claim based on the idea that "money is speech." In fact, it is nothing of the sort.

MATERIAL SUPPORT

Illumination of the difference can be found in an unlikely source: Malick Ghachem's astute analysis of the laws against material support for terrorist organizations.⁴² Although the latter prohibit material support for "terrorist organizations," whereas the religious doctrine prohibits facilitation of "sin," the acts of material support and financial facilitation are, as we shall see, essentially the same. And the same competing conceptions of money and First Amendment rights that produce the confusion that Ghachem observes in the case of material support also have led to misunderstanding of the burden claim that's rooted in the doctrine of "facilitation of sin."

Payments to alleged terrorist organizations, payments of benefits, and payments of wages are all acts that transfer financial resources from one private party to another. They also are all acts that leave the recipient free to decide how the funds will be spent. In the case of wages and benefits, it

42. Malick W. Ghachem, *Religious Liberty and the Financial War on Terror*, 12 FIRST AMEND. L. REV. 139 (2013).

is entirely up to the employee to decide whether to spend those resources on the use of contraceptive services or not. Similarly, the recipients of donations to alleged terrorist organizations are free to decide how those donations will be spent.⁴³

One difference between the acts prohibited by the material support laws and the payment of wages and benefits is that the former usually involve donations, whereas the latter are both forms of compensation. Another difference is the direction of the relationship between the money transfer and the religious obligation at issue. Whereas the material support laws serve to prevent members of a religious group from making financial contributions that they view as religiously obligatory, the facilitation of sin argument is used to make the case that it is religiously obligatory *not* to make a financial contribution.

One thing that contributions to terrorist groups and wage payments have in common, which differentiates them both from benefits, is that they transfer money directly from one private party to another without the intervention of a government mandate dictating that the monetary transfer be made (or that if the transfer is not made, fees or fines will be assessed). By contrast, with health benefits, the transfer is *mediated* both by private insurance carriers (which provide the plans) and by the government and its regulatory agencies (which impose various regulatory requirements and financial incentives, which shape the choices that employers and employees make in various ways). As a result, there are many more layers of human relations and many more links in the chain of command through which the money is funneled to its allegedly sinful endpoint through the payment of benefits than there are in the payment of wages.

So there are differences among the three types of actions, to be sure. But none of these differences is significant when it comes to analyzing whether facilitation (be it of terrorism, crime, or sin) has *occurred*. In determining whether a transfer of money from source to recipient constitutes material support for the recipient's actions, it makes no difference whether the transfer was a charitable donation or the fulfillment of a contractual obligation to tender compensation for services rendered.⁴⁴

43. *See id.* at 150 (explaining “the ability of a designated terrorist organization to convert (innocent charitable) money into other, illegal uses”).

44. It may make a difference to criminal liability if there is an intent requirement. *See id.* at 194 n.194 (explaining that some statutes “require[] proof of an actual intent to support terrorist activity”). On this basis, it could be argued that the payment of wages to an employee who is a member of a terrorist organization is not a prohibited form of material support. Likewise, it could be argued that a consumer who makes a payment for goods sold by someone belonging to a terrorist organization (or by

The material value to the recipient is the same either way. Nor does it matter whether the act in question is prohibited by religion or by law. The only question with regard to the occurrence of an act of facilitation (or material support) is whether the source has facilitated the recipient's conduct. Whether that conduct is prohibited (by religious *or* secular law) and whether the source has satisfied the given intent requirement and therefore bears moral responsibility for the conduct are separate questions.⁴⁵

Most crucially, the concepts of "facilitation of sin" and "material support" both depend on what Ghachem calls the "fungibility" argument.⁴⁶ The fungibility of money serves to eliminate the possibility of distinguishing "innocent" from legally or religiously prohibited uses of the money by the beneficiary of the contribution and channeling contributions only to the former.⁴⁷ It likewise makes it difficult to separate the beneficiary's decisions from the contributor's, even when the contributor does not intend to support the beneficiary's "bad" decisions or even affirmatively intends *not* to support them. On the theory that money is fungible, and expending funds on services sanctioned by the contributor frees up money to be spent on the activities that the contributor opposes, the contributor of the funds is held to bear responsibility both for the activities of the beneficiary that it intended to support and those that it didn't.⁴⁸

the terrorist organization itself) is not a prohibited form of material support because the consumer does not have the requisite intent and therefore is not responsible for the use of the money by the terrorist organization. Even absent a requirement to demonstrate intent to support terrorist activity, payments for goods or services rendered might be deemed not to constitute material support on the grounds of a lack of knowledge that the money is going to a terrorist organization. All of this is to say that the question of *responsibility* for acts of financial facilitation is separate from the question of whether an act that facilitates the activities of a terrorist organization has occurred. For a fuller discussion, see Sepinwall, *supra* note 21 (manuscript at 15–19).

45. See Ghachem, *supra* note 42, at 160–61 (explaining that prosecution for material support requires knowledge that the organization engages in terrorist activities and does not require a showing that the money was intended to aid the illegal activities).

46. See *id.* at 150 (explaining that fungibility "describes the ability of a designated terrorist organization to convert (innocent charitable) money into other, illegal uses").

47. *Id.* at 189 & n.178 (explaining that fungibility "collapses legal and illegal uses of money" because "any single unit of money can be substituted for another").

48. A similar analysis has been applied to the devotion of public funds to religious schools under the Establishment Clause. *Id.* at 151 n.32 (comparing fungibility in the material support context to "the Supreme Court's rejection of 'divertibility' as a rationale for finding an establishment clause violation in the parochial school aid context"). Accord Sepinwall, *supra* note 21 (manuscript at 15).

MONEY DOESN'T ALWAYS TALK

As Ghachem shows, the application of the fungibility theory to financial contributions is thus flatly inconsistent with the endorsement theory that is often used to analyze the First Amendment nature of financial acts.⁴⁹ The basic proposition of the endorsement theory is that money is speech, and therefore the expenditure of money implicates the right to free speech. On the basis of this equation of money with speech, some opponents of religious exemptions from the contraceptive mandate have analyzed the “facilitation of sin” claim as a complaint about compelled speech.⁵⁰ Thus, they have purported to refute the existence of a burden by pointing out that complying with the ACA does not carry the message of endorsement that the objectors supposedly think it does.⁵¹ Indeed, the

49. See *id.* at 179–94 (providing examples of how “fungibility makes both the religious and the secular First Amendment claim essentially futile”).

50. An early example of equating “facilitation” with endorsement, predating the passage of the ACA, is *Catholic Charities of Sacramento, Inc. v. Superior Court*, 90 Cal. App. 4th 425, 463–64 (2001) (rejecting a claim of a right to a religious exemption from the Women’s Contraception Equity Act, which required certain classes of employers to include coverage for contraception in their health plans), *aff’d* 32 Cal. 4th 527 (2004). A clear example of equating facilitation with endorsement in the challenges to the contraceptive mandate in the ACA is *Gilardi v. United States Department of Health and Human Services*, 733 F.3d 1208, 1217–18 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (“The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies’ employer-provided plans, over whatever objections they may have. Such an endorsement . . . is a compel[led] affirmation of a repugnant belief. That, standing alone, is a cognizable burden on free exercise.”) (internal quotation marks omitted). In *Hobby Lobby* itself, the government relied on the endorsement theory more as an analogy than as a substitution for the provision of material support. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1142, *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (“For similar reasons, the government’s reliance on *Zelman v. Simmons-Harris* and *Board of Regents v. Southworth* is misplaced. First, in *Zelman*, the Supreme Court addressed an Establishment Clause challenge to a school voucher program . . . [and] concluded that such a program did not violate the Establishment Clause in part because the perceived endorsement of a religious message[] is reasonably attributable to the individual recipient, not to the government, . . . and in part because *no reasonable observer* would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement . . . The government suggests that because it was not possible to attribute the offensive speech to the students in *Southworth* and the support for religious schools to the state in *Zelman*, it is also impossible to attribute an employee’s independent choice to the employer. We reject this position because it assumes that moral culpability for the religious believer can extend no further than the government’s legal culpability in the Establishment or Free Speech contexts. . . . [T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of moral complicity.”) (citations and internal quotation marks omitted). By the time *Hobby Lobby* reached the Supreme Court, *Hobby Lobby* no longer was pressing the endorsement theory. But it has remained a popular way of constructing and thereby dismissing the burden claim in the blogosphere and the press.

51. Cf. *Catholic Charities of Sacramento*, 90 Cal. App. 4th at 462 (“Being compelled to provide such coverage cannot be viewed as endorsing the use of contraceptives; to the contrary, the organization remains free to advise its employees that it is morally opposed to prescription contraceptive methods

mandate doesn't require employers to express their beliefs about anything. Complying with the mandate no more implies support for the women's health policy that it implements than complying with the legal obligation to pay wages does. The mandate has not prevented employers like Hobby Lobby from making it loud and clear that that they do *not* endorse all of the services it covers. Nor are they disabled from expressing the beliefs that they do endorse. Therefore, opponents argue, the mandate cannot be said to have either the effect, or intention, of requiring employers to express their support for those services. In short, money, here, is not speech.

MONEY DOES MORE THAN TALK

The problem with this argument is that, even if it is true, it misses the mark. The complaint that businesses like Hobby Lobby are making against the mandatory benefit plan is not (or not only) that they are being forced to *endorse* the services covered by the plan or the policies that it reflects. The complaint is that they are being forced to *support* them. The complaint, in short, is about material support, not expressive support. If I provide material support to a terrorist organization that in fact goes to support terrorist activities, that support is not canceled out by virtue of my issuing a statement that I do not endorse the actions that I have in fact supported. Nor is it any less a form of material support for terrorism if I only intended to support the organization's charitable activities, even if everyone understood that was my intent. My intentions about how the money should be used are immaterial to the question of whether or not the material resource I provided enables the recipient to engage in activities I do not support.⁵² Material support may occur without or against my intentions. By contrast, symbolic support (that is, endorsement) is by definition an expression of my intentions. Material support and symbolic support are thus two very different things with very different relations to individual intentions, though money transfers are an effective means of accomplishing both.

Once we recognize the employer's claim of burden as a complaint about being required to provide material support, then the attempt to refute it on the basis of the endorsement theory fails. It fails because that theory

and to counsel them to refrain from using such methods.”).

52. That doesn't mean that we cannot make intent a requirement of the legal wrong of material support. See the discussion of intent in the sources cited in note 44, *supra*. Nor does it mean we are required to accept the conclusions of the cases that have upheld the material support prohibition against First Amendment challenges. But as currently defined, material support, at least in the terrorism context, does not require a showing that the donor intends to support the organization's terrorist activities, nor does it require that the contribution be shown to be causally linked to the organization's terrorist activities.

only addresses one side of money's double character, its expressive side, its character as speech. It fails to address money's strictly material character, its character as economic value that can be bestowed upon a beneficiary and put to any use the beneficiary of the value chooses, regardless of the intentions, declared or otherwise, of the source. The endorsement argument simply fails to recognize the employers' real concern, which is that they are being forced to lend to "the contraceptive project" not merely expressive but material support.

MONEY CONNECTS

The view that money is means of endorsement obeys the basic logic of libertarianism and possessive individualism. It imagines contributors and recipients of money, employers and employees, as separate possessive individuals, each responsible for her own actions, each capable of directing her actions through her own intentions and not being made responsible for the actions of others which she did not personally intend. It imagines that speech acts are simple expressions of the intentions of the speaker, whose ongoing meaning is subject to the speaker's control. And it further imagines that monetary contributions are that kind of speech act.

The logic behind the facilitation of sin argument destroys these assumptions. The doctrine against the financial facilitation of sin views money not as a means of endorsement, but rather as a means of material support. This is a view that recognizes the fungibility of money, which makes it difficult, if not impossible, to separate the contributor's intentions from the beneficiary's actions.⁵³ In this conception, money is less like a possession and more like language, endlessly iterable and mutable in its meaning. Money in this picture is still a kind of speech, but not speech that adheres to the model of possessive individualism embodied in the endorsement theory. Rather, it is more like language as deconstructionists or speech act theorists conceive of language—something bigger than us that passes through us and is only temporarily and even then only partially subject to our intentions and control.⁵⁴ Speech, as imagined in the endorsement theory, is a fixed thing that retains its basic character and meaning as it is transferred from one possessor to another. Language as the

53. Difficult is, of course, not the same as impossible.

54. See B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 738 (2010) ("The conventionality and iterability of speech acts ensure that the speech act can be recognized, understood, and reproduced by different speakers and listeners, but they also ensure that language can be used in ways that may not have been originally intended.").

deconstructionist conceives of it changes its meaning as it passes from one auditor to another.⁵⁵

So, too, with money. The same capacity for endless repurposing and diffusion that causes words to become detached from the author's intentions is a feature of money as it is pictured in the doctrine of facilitation. Just as language is always capable of changing meaning as it changes hands, so too, money changes meaning as it changes hands, responding to the intentions of the present, not the past, possessor. Like the proverbial author whose "death" the deconstructionists proclaimed, the money source is unable to exert authorial control over the ongoing meaning of her financial actions. As a result, she finds herself responsible for consequences of her financial actions that she never intended to occur. She may even have affirmatively wished for these consequences not to occur, and she may have expressed this desire and sought to gain the recipient's consent not to use the money for purposes she, the source, deemed illicit. But money has a peculiar capacity to escape any such binding commitments because, even if the source secures a promise from the recipient not to use the money on certain things, and even if the recipient honors that promise, the receipt of the money frees up other funds which are not subject to the source's prohibition. The result is that the source is simultaneously potent and impotent with respect to the ability to control the beneficiary's use of the money. Unable to direct the ongoing flow of money that was once, fleetingly, in her hands, the source is bereft of dead hand control, yet morally and legally accountable for the practical consequences of the act of bestowing material assets onto another party.

This is a vision in which, rather than being a possession that separates people from each other, money is an agent that diffuses the boundaries between people and links them together. Like language, like culture—like sex—money is a medium of exchange in which people are embedded and through which they are linked. Money talks, to be sure. But more than that, money connects. It draws people into profound forms of relationship with one another, relationships of influence and dependency that affect our shared culture and beliefs as much as our individual pocketbooks. Such relationships contradict the fundamental premises of libertarianism, according to which we can separate self from other, money from culture, external action from inward belief. It is a picture of money as a positive, material resource that necessarily goes hand in hand with a positive,

55. JACQUES DERRIDA, *LIMITED INC 1-2* (Samuel Weber trans., 1988). Cf. Hill, *supra* note 54, at 744 ("[B]ecause language is iterable and therefore partially open to change, any phrase . . . is always capable of being appropriated into a context that changes or subverts it.").

material theory of rights.

Intuitive as it is, this understanding of the connective, cultural, positive, material function of money seems to have deserted Hobby Lobby's opponents. In their confrontation with the burden claim, many if not all of those opponents have stuck to the view that facilitation equals endorsement, or alternatively dismissed the idea of facilitation as simply preposterous. This resistance may have been a legal strategy or it may reflect a bias against conservative religious views. (Talk about the financial facilitation of crime or of terrorism and everyone understands; talk about financial facilitation of *sin* and understanding goes out the window.) But it also reflects the double character of money. Indeed, money is *both* an agent of connection that dissolves the boundaries between individuals and a possession of individuals through which they express their intentions and impress those intentions on other people. It is both a medium through which expressive and possessive individuals express their intentions and a material (yet fungible) resource, which escapes the intentions of its previous possessors. So long as these contradictory aspects of money remain below the surface, it is easy for one view of how money works to be submerged under the other. But once these views are brought to the surface, and the difference between the two is teased out, it becomes clear that employers are not (primarily) claiming that they are being compelled to express their *endorsement* of the contraceptive services. Their basic claim is that, in providing benefit plans that cover those services, they are providing *material support* for them, an act that is prohibited by their religion. There is simply no basis for rejecting this claim.

It is a further question whether or not the ACA regulations "compel" this act of providing material support. I have already indicated why I think that progressives ought to accept that claim too: progressives have much to lose by abandoning the theory that "mere" costs can constitute coercion—and much to gain by accepting the claim that the ACA substantially burdens the employer's free exercise of religion. If, but only if, they accept the claim that the ACA compels employers to engage in acts that violate their religious obligations, they can then demonstrate the consequences that would follow if the Court were to accept the principle of a right not to facilitate *sin consistently*. In the absence of such a demonstration, inconsistent applications of the principle have been allowed to stand. That has obscured the true consequences of accepting the principle and the full scope of the government interests that those consequences threaten.

THE TRADITIONAL THEOLOGY OF MONEY⁵⁶

If one wants to understand what a *consistent* application of the principle looks like, there is no better place to look than traditional religious thought. It is often asserted that the current clashes between religion and government have been precipitated, or at least greatly exacerbated, by the rise of the regulatory state.⁵⁷ But the idea that in the good old days, religious and economic conduct weren't subject to extensive regulation is a myth. We have a long history of regulating both moral and economic relations (often without differentiating the two), which reflects the fact that money has always been a central concern of traditional religious thought.⁵⁸ Religious traditions have long grappled with the relationship between religion and "mammon." Both the material nature of economic activity and the need it creates to enter into relationships with people who hold different beliefs and live by different moral standards

56. Historians of economic thought and historians of religious thought seem to be largely in agreement that prior to the modern era, "economics . . . occupied a very subordinate position," and was largely "viewed as an ethical and legal matter" subsumed under the more general topic of "the rules of justice governing social relations," rather than being differentiated as a separate field of theoretical inquiry. Raymond de Roover, *Scholastic Economics: Survival and Lasting Influence from the Sixteenth Century to Adam Smith*, reprinted in BUSINESS, BANKING, AND ECONOMIC THOUGHT IN LATE MEDIEVAL AND EARLY MODERN EUROPE: SELECTED STUDIES OF RAYMOND DE ROOVER 307 (Julius Kirshner ed., 1974) [hereinafter Roover, *Scholastic Economics*]. As a consequence, it is difficult to find systematic treatments of the history of religious economic thought. The account that follows is an extrapolation from histories of religious thought about politics and about the relationship of religious law to the realm of material relations in general, which is based on my own admittedly speculative interpretation of the tradition of divine accommodation. See generally Nomi Stolzenberg, *The Profanity of Law*, in LAW AND THE SACRED 29, 31 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2007) [hereinafter Stolzenberg, *Profanity of Law*]; Stolzenberg, *supra* note 23. In the compressed form presented here, it glosses over the many variations in the application of the principle of accommodation that have been developed by generations of Catholic, Protestant, and Jewish theologians and political thinkers. For more on traditional religious conceptions of economic complicity, see the essays collected in DISTANT MARKETS, DISTANT HARMS: ECONOMIC COMPLICITY AND CHRISTIAN ETHICS (Daniel Finn ed., 2014). For more on Catholic economic thought, see the essays collected in THE TRUE WEALTH OF NATIONS (Daniel Finn ed., 2010).

57. See, e.g., Thomas Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 105 (2015) (arguing that "the expansion of social-welfare regulation creates new conflicts with the free exercise of religion") (citing Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 375-76 (1990)).

58. See LESTER K. LITTLE, RELIGIOUS POVERTY AND THE PROFIT ECONOMY IN MEDIEVAL EUROPE 99-112 (1978) (describing early medieval "religious responses to the profit economy"); *id.* at 176-83 (describing how "thirteenth-century moralists" in the Church came to terms with private property, the legitimacy of the pursuit of profit by merchants, and the problem of differentiating money-lending and usury); Roover, *Scholastic Economics*, *supra* note 56, at 332 ("One should not mistakenly assume that scholastic economics exerted no influence on business morality. The Church sought to enforce its code of social ethics . . . through the courts, ecclesiastical and secular, and . . . through the confessional. In the Middle Ages, all over western Europe, usurers were constantly brought to court . . . [C]onfession was far from being an ineffective means of enforcement.").

were traditionally seen as insurmountable impediments to maintaining strict standards of religious purity in the marketplace. Money was viewed with particular suspicion. Precisely because they perceived that money is a medium that connects us and draws us into material relationships that make us dependent on one another and responsible for one another's actions, theologians and other religiously-inspired thinkers drew the conclusion that it's impossible to maintain strict standards of religious purity while participating in economic life.

They also drew the conclusion that government regulation is necessary to try to minimize the occurrence of immoral (sinful) conduct for which all participants in economic life would bear responsibility. The same vision of money that led to the conclusion that people bore responsibility for the actions of people whose pockets they lined also supported the conclusion that people's actions needed to be regulated. After all, if no one in the web of economic relations sinned, then no one else within that web would be responsible for "facilitating" sin. Thus, the logic of positive rights and money did not just support but positively *demand*ed government regulation. Economic regulations like traditional usury laws and just price regulations and laws regulating moral behavior can all be seen as responses to the doctrine of facilitating sin, according to which people bear responsibility for the immoral acts committed by the recipients of their payments (not only immediate recipients but "downstream" recipients of the money as well.).

Of course, few theologians were so naïve as to think that regulation would succeed in stamping out all immoral conduct. Regulation could minimize but never entirely eradicate the existence of sinful activity. So long as there were *any* immoral actors in the economy, their beliefs told them, other participants, whose money flowed to these bad actors, would be responsible for facilitating their sinful actions. And so the problem of facilitating sin through economic relations would remain.

This led to the consideration of two other possibilities, each of which proposed a different solution to the problem of facilitating sin. Both were borne of the same recognition that economic activity enmeshes us in webs of social relationships that make it impossible to maintain strict standards of religious purity. The only logical alternatives, given this view, are total separation from the worldly realm of economic and political relations (the better to conform to the highest standards of moral purity) or accommodation, meaning acceptance of the need to enter into relations of economic intercourse that inevitably redound to the profit of sinners. Religious separatists counseled withdrawal from political and economic

affairs on the view that only way to avoid dirtying one's hands (that is, facilitating sin) is to avoid participating in "worldly affairs" altogether.⁵⁹ The only remaining alternative, everyone recognized, was to give up the demand for perfect moral purity and accept the need to accommodate to the necessary impurity of economic (and political) relations.

This indeed was the birthplace of our modern doctrine of accommodation. Originally a theological doctrine, it was as much, or more, about religion having to accommodate irreligion and the material conditions that undermine religious purity (and purely individual responsibility) than it was about secular society having to accommodate religion. It was a theological doctrine that justified making accommodations to material conditions, including coexistence with people with lower religious and moral standards, as a necessity of political and economic life. Accommodation to religious difference and moral impurity was justified on the grounds that the only other alternative was the separatist approach of withdrawing from worldly affairs altogether, which was perceived to be beyond the capacity of most people. (Indeed, the separatist approach was never a majority approach and viewed by most orthodox thinkers as a dangerous heterodoxy.) The final postulate of this essentially pragmatic religious philosophy, which drove the nail in the separatist coffin, was that radical separatist measures so beyond ordinary human capacity could not possibly be part of God's plan. Separatists resisted this conclusion. But most traditional thinkers reasoned that if the only practical options were to observe the strictest standards of religious purity by separating from the world (the path of separatist asceticism) or to accommodate to the conditions of the fallen material world and accept coexistence with sinners (the path of pragmatist accommodation), then the path of accommodation must itself be divinely authorized (even though, paradoxically, that meant there was a divine sanction for the suspension of the strict standards of divine law).⁶⁰

What was not contemplated in this theological outlook, what *could* not logically be contemplated in this traditional outlook, was yet another option: insisting on maintaining the strictest standards of religious purity without withdrawing from worldly economic affairs. That option was not contemplated because the possibility of engaging in financial conduct

59. See Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1057 (2010) (discussing "doctrines of political quietism, which ostensibly renounce[s] politics in pursuit of a withdrawal from worldly affairs").

60. I have delved into these paradoxes elsewhere. See generally Stolzenberg, *Profanity of Law*, *supra* note 56.

without facilitating sin was understood to be logically precluded. It was logically precluded by the traditional understanding of money. The perception that money connects us, rather than separating us into separate individuals solely responsible for ourselves, was simply incompatible with the idea that one could engage in monetary transactions without facilitating sin. Either one had to accept the inevitability of being drawn into mutually facilitative relationships with sinners (the accommodationist path) or one had to withdraw from participating in economic relations altogether (the separatist path). The idea that one could both participate in economic life yet insist upon maintaining perfectly clean hands was clearly seen as being both illogical and impossible.

THE WAGES OF SIN

Against the backdrop of this traditional theological understanding, we can see more clearly the novelty—and essential inconsistency—of the Hobby Lobby position. Hobby Lobby's view of money and morality conforms neither to the tradition of religious separatism (which requires withdrawal from economic activity in order to achieve moral purity) nor to the tradition of religious accommodation (which requires accommodation *from* the religious, not just for the religious, and denies that the demand for moral purity *in* economic relations can be satisfied because of the fungible, material, connective, slippery nature of money). Instead, Hobby Lobby makes a literally impossible demand for the right to engage economically with others without engaging in economic transactions that facilitate "sin." It demands the right to be pure in an arena of human relations that is necessarily impure. It demands accommodation for a refusal to accommodate. Such a demand is, as traditional theologians have long recognized, ultimately impossible to satisfy.

A considerable part of the appeal of the case for exemptions from the contraceptive mandate derives from the selective application of the doctrine of facilitation. This has allowed the illusion to be produced that it is possible to satisfy the employers' demand for clean hands—and that it is possible to do so without denying the government alternative ways of delivering the benefit that the employers object to. Implicitly, if not explicitly, the case has been framed in a way that suggests that other modes of conveying resources to employees exist—paying them wages, for example, or paying taxes that are used by the government to provide them with coverage—that are not equally facilitative of the very same conduct (using contraception). But every act that conveys the resources to access contraception to employees is in principle subject to the same religious

duty that employers claim gives them the right to be exempt from financial legal obligations precisely because such acts are, by definition, acts of transferring monetary resources that facilitate access to contraception. Why, after all, do employers not also have the right to prevent their employees from using their *wages* on contraception? Logically, the rights and obligations that arise out of the duty not to facilitate sin can apply to *any* action that has the effect of providing “sinners” with financial resources that enable them to engage in their sinful conduct.⁶¹ As the comparison with material support cases shows, donations are no less acts of facilitation than employee contributions to benefit plans are and there is no reason in principle to exclude compensation in the form of wages from the category of acts that financially facilitate the sinful actions of others either.

But what would it take to vindicate the right not to facilitate sin as applied to wages? Logically, the only way to effectuate such a right is to ensure that people on the payroll don’t sin. Employers could be given the right not to pay employees who sin, or they could be given the right not to hire “sinners” and the further right to fire employees when they are discovered to have sinned. Or employees could be subjected to regulatory controls on their behavior that prevent them from sinning. Any one of such measures, each of which necessarily entails a radical invasion of the employee’s liberty, would serve to protect employers from becoming responsible for facilitating their employees’ sin. But there has to be *some* such measure—unless we are prepared to abandon the recognition of a right not to facilitate sin—because without some means of dictating that one’s employees obey certain moral standards, employers have no way to protect themselves from facilitating sin.

THE INCONSISTENCY OF *HOBBY LOBBY*

The selective application of the facilitation of sin doctrine to the contraceptive mandate makes it difficult to know whether the proponents of the exemption actually believe they have such a right not to facilitate the use of contraceptive services through the payment of wages. Recent cases of employers firing single pregnant woman—and claiming the right to exemptions from employment discrimination laws that forbid firing employees on grounds of failing to abide by religious moral standards—are disturbing evidence of the possibility that some employers are prepared to take the doctrine to its logical conclusion and not apply it selectively.⁶² It’s

61. Again, subject to intent requirements.

62. See Lipton-Lubet, *supra* note 6, at 383–84 (explaining that women have been fired from religiously affiliated schools “for being pregnant and unmarried or for conceiving with assisted

quite possible, however, (since we can't peer into the minds of people bringing these claims, we can only speculate), that some employers and supporters of the claim to a right to an exemption from the contraceptive mandate sincerely believe that they don't have the right to control how their employees use their wages. Indeed, that belief would be consistent with the commitment to the free market philosophy professed by many supporters of Hobby Lobby—and indicative of the fundamental contradiction in Hobby Lobby between the libertarian principles that shape its conception of rights and regulation and the religious duty not to facilitate sin.

THE FUNDAMENTAL CONTRADICTION

That contradiction exists within the very idea of the right to an exemption from regulations in order not to facilitate sin. As the wage example makes plain, a right not to be responsible for facilitating sin can only be protected by instituting a regulatory regime that controls what people do, or what people are enabled to, with their money. The idea that we have a right to control what people do because we are morally responsible for their actions (because we have facilitated their actions) is completely at odds with the idea of negative liberty, which holds that no one has the right to control what we do because we are solely responsible for our own actions. The right not to facilitate sin is not a negative liberty, a right to dissociate from people and their impositions, but just the opposite: a right to control the behavior of people from whom we cannot dissociate (unless we follow the path of radical separatism)—and a corresponding duty to submit our own behavior to collective controls. This is the logic that historically gave rise to this justification for government regulation: regulation imposing positive duties is necessary not only to prevent people from “sinning,” but, as important, to protect everyone else from being made responsible for their sins. It was well understood by traditional theology that the ability to enforce the corollary positive rights and duties embodied in regulations was necessarily imperfect and therefore must be accompanied by some degree of accommodation to the inevitability of facilitating sin. But it was expected that the regulation and accommodation would work together, with regulation serving to reduce the occurrence of sin (and its facilitation), and the principle of accommodation serving to

reproductive technologies”); Law, *supra* note 19, at 385 & n.124 (“[A] Christian school was not entitled to fire a pregnant, unmarried teacher, even though the school claimed that the teacher’s actions violated the church’s moral and doctrinal precepts.” (citing *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980))).

justify the acts of facilitating sin that could not be eliminated through regulation.

The argument for exemptions does not in fact reject the need for such regulation but, rather, arrogates the right to regulate to the most immediate link in the chain of money transfers, the employer. Such an approach is inconsistent with both a libertarian anti-regulatory philosophy and the pro-regulatory philosophy that issues from the theory of positive rights and duties embedded in the prohibition on facilitation. The positive nature of that right to an exemption, which is completely antithetical to libertarian principles of freedom from control, has been concealed by libertarian rhetoric that presents it as nothing more than the right to be exempt from government regulation. But at bottom, the right to an exemption from the contraceptive mandate constitutes nothing less than a right to dictate to the government how (or perhaps even if) funding for contraceptive coverage will be delivered and how (or if) such funding will be collected.

It may also turn out to entail a right to dictate behavioral standards to employees unless alternative means are found of providing employees with the coverage that their employers refuse to provide. This is the question left hanging after the Supreme Court's interim ruling in *Wheaton College v. Burwell* a mere four days after the holding in *Hobby Lobby* was handed down: will the Court actually require that alternative means of delivering the benefit to employees be implemented?⁶³ Justice Alito reasoned that the government lacked a justification for denying the exemption in *Hobby Lobby* because there are alternative means of delivering the benefit of contraceptive coverage to employees that are "less restrictive," meaning that they don't involve the employer in an act of facilitating the delivery the benefit.⁶⁴ But are there?

So long as the doctrine of facilitation is applied selectively, it's easy to imagine that alternative methods of delivering benefits aren't subject to the objection that benefits payments are. After all, *Hobby Lobby's* own lawyer suggested that an acceptable alternative was for the government to pay for

63. See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (stating that "[n]othing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives," while maintaining that the "likelihood of success" standard for granting an interim injunction was satisfied by *Wheaton College's* assertion that the procedures established to ensure that obtaining an exemption is coupled with the provision of contraceptive coverage by another entity—the very process that *Hobby Lobby* invoked as a less restrictive alternative—is itself an act of facilitating sin, and therefore *Wheaton College* should not be obliged either to provide coverage for contraception to its employees or to participate in a process that triggers the assumption to provide contraceptive coverage to its employees by another entity).

64. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

the contraceptive services directly or, alternatively, to pass the obligation on to the employer's insurance carriers, which lends support to the idea that these alternatives are in fact "less restrictive" of the employer's religious rights.⁶⁵

But just because Hobby Lobby didn't contend—and perhaps doesn't even believe—that these alternatives violate its duty not to facilitate sin doesn't mean that another employer wouldn't make that claim. Indeed, *any* act on the part of the employer that guarantees that the same financial benefit will be delivered to the same recipients is, as a logical matter, an act that "facilitates" the delivery. Even as passive an "act" as notifying the party responsible for providing coverage or just signifying *acceptance* of an exemption falls under the capacious concept of facilitation.

Regardless of who the substitute funder is, or what the alternative delivery system is, so long as the employer participates in the receipt of an exemption that is made contingent on the provision of a substitute delivery system, and so long as the employer does anything, or fails to do anything, other than actively obstructing the provision of a substitute, the employer will be engaging in *some* act that triggers the provision of the substitute—and thereby facilitates the very same "sin." The act that triggers the provision of a substitute might be a different financial act on the part of the employer, for example, the payment of a fine or an "employer shared contribution payment" or just regular taxes that are used by the government to provide funding for the services. Or it might be a nonfinancial act that triggers the assumption of the obligation to pay for contraceptive services on the part of someone else, such as the giving of notice to an insurance carrier or to the government so that the party responsible for providing the coverage in lieu of the employer is able to perform that responsibility. But whatever the means of payment for the services is, and whatever the act on the part of the employer that activates the payment is, if it is an act that guarantees that money will be transferred to the employee for the specific purpose of making up for the loss of employer contributions, then it is an act that facilitates "sin." Even to merely *accept* such an outsourcing arrangement is to knowingly accept the commission of sinful, murderous acts by other people. For, on the distinctly nonlibertarian assumptions that underlie the religious doctrine of facilitation of sin, one is just as responsible for the foreseeable consequences of what one has outsourced as one is for the consequences of actions one commits directly or for which

65. See Hobby Lobby Oral Argument, *supra* note 9, at 84 ("The government paying or a third-party insurer paying is a perfectly good least restrictive alternative.").



one provides material support. That indeed is the main idea behind the proscription on facilitating sin: there is no possibility of maintaining clean hands and *not* facilitating sin if one participates in economic relations with others. Any form of religious accommodation that allows the government to pursue its legitimate interests requires the party being accommodated to do some accommodating as well (even if the act of accommodation is as minimal as “accepting” the provision of the accommodation knowing that it entails the provision of coverage of contraception by another party).

Some—perhaps many—adherents of the doctrine against facilitating sin may accept the need to engage in such relatively minimal acts of participation in the system. In other words, they may supplement—and to that degree substitute—the demand for religious purity with a principle of accommodation. On this basis, they may not classify such acts as acts of facilitation that are prohibited by their religion. But in principle, any act of accommodation that allows the system to work can be seen as an act of facilitation. And that means that when the *right* not to facilitate “sin” through financial action is judicially-protected, it must be extended to support the recognition of a burden on the right of any employer who objects to acting in a way that ensures the provision of financial resources to employees, whatever the nature of the act that serves that function is.

A MOST COMPELLING INTEREST (META-STRICT SCRUTINY)

The existence of alternative methods of delivering the same financial benefit is an illusion produced by the refusal to apply the doctrine of a duty not to facilitate sin consistently. There is no sin in inconsistency. Indeed, I would argue we all would be better off if the proponents of religious exemptions were *less* consistent in the application of their moral principles. That is the path of accommodation, which accepts that moral standards of behavior cannot be applied with perfect rigor and consistency if we are to engage in mutually facilitative relationships with other people. The problem with applying the doctrine of facilitation inconsistently is not that it applies moral standards inconsistently but rather that it creates the illusion that moral standards can be applied with total rigor to one’s economic conduct. It creates the illusion that granting private actors the right to apply standards of moral purity to their economic activities will not preclude the availability of alternative methods of delivering the benefit. This prevents us from seeing not only that such “less restrictive alternatives” are a logical impossibility, but also what the full scope of the government’s interest in enforcing laws that create such burdens is.

We—and the Court—must not be deceived by inconsistent

applications of the doctrine of facilitation into thinking that that doctrine doesn't apply equally to *every* act on the part of people who participate in economic life. Taxes, for example, are no less facilitative of "sin" than benefits contributions are, if they are used to fund public subsidies for health plans that cover contraception. And taxes are therefore no less subject to the claim of a right to an exemption. Indeed, a number of commentators have recognized that the logical implication of *Hobby Lobby* is a right not to pay taxes if the government uses tax-dollars to fund "sin."⁶⁶

But it has long been settled—and no one yet has had the temerity to claim that we should unsettle the doctrine—that there is no right of conscientious objection to taxes. Paying taxes may be deemed to facilitate sin—indeed, it is undeniable that paying taxes does facilitate the programs which tax dollars go to support—but that doesn't give taxpayers the right to an exemption from their tax obligations because, the Court has long recognized, recognizing such a right would undermine the very ability of the government to impose taxes and to determine what programs tax revenue will support. The state interest threatened by the claim of a right to religious exemptions from tax obligations goes beyond any particular program that religious objectors claim to be sinful. The interest that religious exemptions to taxes threaten to undermine is the government's very *authority* to determine how to revenue will be collected and how it

66. See Cummings, *supra* note 20, at 519 ("The reasoning of *Hobby Lobby* about RFRA could be applied to any federal tax that regulates Further, there is more potential than might at first appear for application of RFRA to presumably non-regulatory taxes like the income and Social Security taxes, which the opinion calls 'national systems of taxation.'"). But see *id.* at 520 ("If the Affordable Care Act were a single payer national health system funded . . . out of general tax revenue . . . and *Hobby Lobby* had attacked the same coverage rules in such a single payer plan, *Hobby Lobby* most likely would have lost under the opinion's reasoning about a national system, unless it turned out that a national system was not the least restrictive method."). I take Cummings to be contending that if the Court had followed its reasoning in *United States v. Lee*, 455 U.S. 252 (1982), it would reject claims to a right to a religious exemptions from taxes used to pay for a single payer system that covers services deemed to be sinful, while granting exemptions from "any federal tax that regulates, as does the tax at issue in the [*Hobby Lobby*] case." Cummings, *supra* note 20, at 519. But Cummings himself suggests that this distinction drawn between regulatory and non-regulatory taxes may well turn out to be illusory since, on the Court's reading, "RFRA functions like a treaty override of the [tax] code," requiring even general, presumptively non-regulatory taxes to meet the test of no less restrictive alternative. *Id.* at 519. Thus, Cummings concludes, "as applied to tax, that might mean allowing designation of income tax payments to some spending purposes and not to others, if the Court determined that would not undermine the national tax system." *Id.* at 520. In sum, Cummings views *Hobby Lobby* as posing a "major threat to federal taxation" and says that "*Hobby Lobby* stands for the principle that RFRA can apply to any federal general revenue tax . . . if it regulates . . . which encompasses a huge range of federal taxes." *Id.* at 522. Crucially, he regards it as a distinct possibility that "the presumably non-regulatory general revenue tax," which "under the opinion's brief discussion in dictum . . . seem[s] safe from RFRA claims," could be subject to "recharacterization" due to the "inherently regulatory effect of income taxes," making them vulnerable to RFRA claims to exemptions. *Id.*

will be expended, that is, the authority to determine where, to what, and to whom, and from whom money will flow.

But this is the very same thing that is implicated by the challenge to the contraceptive mandate. Although, as a formal matter, employer contributions are not taxed and revenue from employers is not collected by the government and deposited into its coffers, the government nonetheless is steering employer dollars towards the support of certain benefits and effectively using those dollars to help subsidize those benefits, through the use of tax exemptions and tax deductions for employers which make the provision of compensation in the form of benefits rather than higher wages economically desirable for both employers and employees. Furthermore, the alternatives provided under the ACA to the provision of health plans that comply with the mandate are all just alternative ways—more direct ways—of getting employers to contribute revenue that the government can use to help fund public subsidies for health insurance. The “employer shared responsibility payment” is just that—a fee (in essence, a tax) collected from employers who elect not to provide health plans, which is used by the government to substitute for the public subsidies that employees get when their employers do provide a health plan.⁶⁷ Even the fines that are assessed when employers provide health plans that exclude contraceptive coverage can be understood as serving the function of substituting for the provision of such coverage by the employer. The employer is, in fact, contributing to the funding of coverage for contraceptive services under each one of these alternative arrangements; they are all just different methods of “collecting” employer contributions and dedicating them to the support of health insurance plans that cover all the health services that the government has decided should be covered for everybody.

It is indicative of the confusion surrounding the analysis of *Hobby Lobby* that the very same substitute for employer contributions that Justice Alito deemed to be a “less restrictive” alternative that should be adopted (to wit, direct government funding of contraceptive coverage paid for by revenue collected from taxpayers) was treated, in the context of analyzing the “coercive” nature of the ACA regulations, as one of the options whose cost unduly pressured employers into providing compliant plans. In fact, that alternative is neither “less restrictive” of the employer’s right not to facilitate sin, nor any more (or less) “coercive” than the contraceptive mandate itself. Each is just another way whereby the government can get

67. See *supra* note 29 and accompanying text.

employers to contribute revenue to the support of health insurance. Although each one is a choice, the employer has no choice but to pick one of them and thereby contribute revenue to the support of health insurance coverage for all of the health services that the government had deemed to be necessary.

Seen as one among the several alternative courses of action that the ACA allows employers to choose from, each of which serves the same function of providing funding for health insurance plans, the option of making contributions to employee benefits plans looks a lot more like the employer shared responsibility and other taxes than like wages.⁶⁸ If an employer were to claim a right to an exemption from the obligation to make a shared responsibility payment on the grounds that it facilitates the sin of using contraception, it would undoubtedly be denied under the same principle that holds that no one has a right to be exempt from the obligation to pay their taxes. The same logic should apply to the other methods of collecting revenue from employers prescribed by the ACA. Regardless of whether employer contributions to benefit plans are properly viewed *as* a tax, the government's interest in enforcing the financial obligations imposed by the ACA is similar in nature to its interest in collecting taxes. The ACA is less concerned with enforcing the mandate *per se* than ensuring that employers contribute to the funding of compliant health insurance plans in some fashion or other: either by paying money directly to the government, which it can dole out in the form of public subsidies, or by transferring funds directly to the employees.

To recognize a right not to facilitate government programs because of moral objections to the program is to deny the government's right to raise revenue and determine how that revenue will be used. A right that gives private employers the power to interfere with that ability is not a negative right, but rather, a right to dictate to the government how it will raise revenue and on what that revenue will be spent. Such a right cannot be recognized—and applied consistently—without undermining government altogether.

It is precisely because there is no alternative way of funding coverage for the services that isn't open to the same religious objection that paying for benefits is that the government has a "meta-interest" extending beyond

68. A more radical view would be that even wages can be viewed as means by which the government distributes revenue and thus wages also are analogous to taxes in this regard. I am sympathetic to this position, which is essentially the logical extension of the legal realist critique of private rights, but my argument does not depend on accepting it and I am not advancing that view here.

the defense of the contraceptive mandate to encompass its fundamental ability to determine how the revenue will be collected and where it will be directed. Oliver Wendell Holmes said of regulatory takings “government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁶⁹ This is a classic example of the kind of “meta” balancing that I am arguing should be applied to claims to religious exemptions from financial obligations like (but not limited to) the contraceptive mandate. The interest that Holmes identified is not the government’s interest in the particular regulation being challenged as a taking in a particular case, but rather, as he put it, the government’s interest in being able to regulate at all. As subsequent commentators on regulatory takings doctrine have recognized, the threat to the government’s ability to exercise its police powers comes not just from having to compensate a property owner for the negative economic effects of a regulation in a particular case—in effect, to grant the property owner an exemption from the regulatory burden. The administrative costs—just having to entertain every claim to compensation or an exemption—would undermine the ability of the government to “go on,” i.e., to govern.

Much the same analysis could be applied to “regulatory taxes.” (And, as at least one tax scholar has cautioned, there is nothing to prevent general taxes from being recharacterized as regulatory taxes as well).⁷⁰ Government could no more “go on”—that is, engage in collecting revenue, determining how revenue is best collected, and directing that revenue toward the provision of the benefits it has determined to provide—if it had to remedy every impairment of religious rights created by the government program than if it had to remedy every impairment of property rights created by regulation. In both instances, it is a macro-interest on the part of the government (in being able to regulate, being able to collect and direct revenue, at all) that is imperiled by just allowing claims to be made. In both instances, the only way to prevent government from being completely paralyzed is by precluding case-by-case balancing of the interests on either side and imposing a categorical rule in favor of the government precluding such individual claims. In neither case does such a categorical approach depend on denying the existence of the burden or the impairment of individual rights. To the contrary, the government’s interest is macro precisely because the government actions in question *do* impair individual

69. *Pa. Coal v. Mahon*, 260 U.S. 393, 413 (1922).

70. *See supra* note 66 and accompanying text (discussing Jasper Cummings’s views on *Hobby Lobby*).

rights (property rights in the case of regulatory takings, religious rights in the case of financial mandates that facilitate the provision of services religious objectors believe to be sinful). It is only because property and religious rights *are* infringed that the government faces a potentially paralyzing threat if remedying those infringements is deemed to be a constitutional (or under RFRA, a statutory) obligation. The government's interest in avoiding paralysis is thus not merely compelling but just the kind of macro-interest that justifies concluding that (in an appropriately specified domain of cases), the countervailing rights of the right of the individual will *always* be outweighed and therefore no future application of strict scrutiny need or should be entertained.

If pronouncements like “there is no substantial burden” or “a corporation is not a person with free exercise rights” are simply shorthand for this conclusion, there is nothing objectionable about them; but then, it should be well understood that that is what these formulations are: not ontological claims about the (non) existence of burdens or corporate personhood, but policy claims about the balance of interests that *always* obtains in this domain of cases (and is therefore unnecessary to calculate on a case-by-case basis).

Some may contend that this kind of meta-strict scrutiny is just the kind of reasoning advanced in *Employment Division v. Smith* (where the Court swept aside strict scrutiny)⁷¹—and rejected by RFRA. Underlying RFRA is the belief that allowing people to bring claims for relief from laws that burden religion will *not* bring government to a halt. Indeed, it is surely true that some types of burdens—for example, not being able to engage in the ritual use of peyote or not being able to wear a head-covering or a beard in conformity with religious obligations—can be judicially accommodated without paralyzing government or causing its disintegration. But money is different. Money is different because of its material, fungible character which links people together in chains of responsibility which make it impossible to enforce *any* financial obligation without requiring people to facilitate the actions of others—actions which may be deemed to be sinful and therefore subject to the prohibition on facilitating sin. It is money's fungible nature that makes it impossible for the courts to draw the line between acceptable and unacceptable forms of financial facilitation (even if people draw such lines themselves) and likewise makes it impossible to insulate people from facilitating actions they deem to be sinful without undermining the ability of government to govern. This distinctive feature of

71. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

money, which gives rise to the government's macro-interest in being able to impose and enforce financial obligations, has been occluded by the other side of money's character, its expressive side, which individuates one case from another as it individuates responsibility for any particular monetary act. Because of money's double character, it is easy to lose sight of its material, fungible nature. But that is the aspect of money that animates religious objections to financial mandates, and when it is this aspect that constitutes the burden (as it should be recognized it does), the government interest lying behind laws that impose such a burden is nothing less than the interest that the government has in regulating the flow of money—just the kind of macro-compelling interest that both precedent and principle justify recognizing as grounds for issuing a categorical prohibition—a categorical rule that meets the demand to demonstrate a compelling state interest and the absence of a less restrictive alternative, but obviates the need to meet that demand afresh in every (or any) future case.

Both sides of the exemption debate have good reasons to avoid case-by-case adjudication. Opponents of religious exemptions worry that courts will underestimate the strength of the government's interests in particular programs. But proponents of religious freedom also worry, with good reason, about courts undervaluing religious interests or failing to recognize them at all. Each side can point to the opposite side's arguments in the contraceptive mandate cases as Exhibit A of these inverse dangers. A great virtue of a categorical rule against granting religious exemptions from financial mandates like the contraceptive mandate is that, by precluding case-by-case applications of strict scrutiny, it avoids them both.

Of course, from the point of view of proponents of religious exemptions, this comfort is indeed cold. What difference does it make whether claims to exemptions are rejected on the ground that there is no substantial burden involved in "merely" having to make a payment to someone as opposed to being rejected on the ground that such burdens are necessarily outweighed by the government's needs in every single case in which a financial obligation is involved?

As an expressive matter, I would say a world of difference. In the former argument, the existence of the harm to religious believers is denied (sometimes even ridiculed). In the latter, although *protection* from harm is denied, the existence of the harm at least is recognized. And with that recognition comes a corollary recognition of the real nature of the interests of the government—the macro-interests—that are at stake.

MONEY IS SPECIAL

Much of the literature in the field of religion clause jurisprudence is devoted to the question of whether religion is special. I have argued in this Essay that *money* is special. And furthermore, belying the facile proposition that “people have to check their right to religion at the marketplace door,” money has long been a central focus of religious practice and religious thought. Indeed, it is remarkably difficult to find free exercise and establishment clause cases that aren’t in one way or another about money—about entitlements to government benefits, to tax exemptions, or to public funding for religious institutions. The dominance of money issues in the religion clause docket is testimony to religion’s longstanding interest in money and to the ongoing necessity to think through the problem of how to reconcile participating in economic life with standards of morality and the basic tension between negative and positive rights. No good comes from dismissing the seriousness of these issues or the seriousness of the ideas that lie behind the doctrine of facilitation. Much good is to be gained by grappling with the special, slippery, dual character of money.

The ultimate contradiction of *Hobby Lobby* is that it takes the traditional religious insight into the positive nature of money that makes us mutually responsible for one another but rejects the prescriptions for government regulation and accommodation that this religious insight produced—and logically entails. It demands perfect moral purity and consistency in the application of religious moral standards, but also demands that those standards be applied to an inherently impure arena of life that *can’t* be reconciled with such rigorous moral standards. It demands moral consistency (albeit inconsistently), instead of consistently accepting the necessity of moral inconsistency, which is to say, the path of accommodation—the only path that is logically (and some would say morally) consistent with participating in the inherently impure realm of economic relations.



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