
REPORTS OF ACCOMMODATION'S DEATH
HAVE BEEN GREATLY EXAGGERATED

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In *The Hobby Lobby Moment*,¹ Professor Paul Horwitz argues that the contraceptive mandate controversy undid thirty years of public support for religious accommodation (and even religion). On his account, our near-unanimous support for accommodation “seems to have weakened, if not collapsed” virtually overnight.² Horwitz lays the responsibility for the rejection of accommodation at the feet of political liberals and progressives. While women’s reproductive healthcare was at issue in *Burwell v. Hobby Lobby Stores, Inc.*,³ support for gay rights and same-sex marriage — he says — made the case explosive.⁴ These “culture war” issues collided with the reality of an increasingly religion-infused marketplace and rendered that marketplace “a site of social contestation rather than a refuge from the culture wars.”⁵

I agree with Horwitz that the contraceptive controversy destabilized our social and legal consensus. Horwitz, however, mistakes what that consensus was and misidentifies the cause of its collapse. In this Response, I argue that the consensus has long been *against* granting religious exemptions from generally applicable laws to commercial entities and to for-profit corporations in particular. Instead, our consensus favors equal citizenship of individuals and, as a result, limited rights for powerful commercial actors. The *Hobby Lobby* moment threatens this consensus.

I further propose that while the marriages of same-sex couples may have added fuel to the fire, it was the union of religious and economic conservatives that threw the marketplace into flux. Their religious-libertarian arguments persuaded the Court to extend accommodations into the commercial sphere in an unprecedented and potentially expansive way.

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¹ Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014).

² *Id.* at 170.

³ 134 S. Ct. 2751 (2014).

⁴ Horwitz, *supra* note 1, at 159–60.

⁵ *Id.* at 183.

I. CONSENSUS AGAINST CORPORATE RELIGIOUS EXEMPTION, DESTABILIZED

Today, large corporate employers demand the right to disregard their legal obligations and deny their employees contraceptive insurance coverage. Wedding vendors insist on exemptions from antidiscrimination laws so that they need not serve same-sex couples. According to Horwitz, opposition to these claims signals the demise of a long tradition of religious accommodation. But no such tradition exists with regard to profit-making enterprises.

Before the contraceptive litigation, courts resisted businesses' claims to religious exemptions. Both before *Employment Division v. Smith*⁶ and after the Religious Freedom Restoration Act⁷ (RFRA), even religiously affiliated nonprofit businesses did not win exemptions from employee- and consumer-protective laws, including insurance regulations and antidiscrimination laws.⁸ The Supreme Court, for example, did not excuse religious organizations from wage-and-hour laws despite their contrary religious beliefs.⁹ Lower courts easily dismissed the rare free exercise claim from for-profit corporations seeking to avoid legal obligations.¹⁰ The Supreme Court itself soundly rejected exemptions for for-profit employers from social-insurance requirements.¹¹ It also described as "patently frivolous" the claim that anti-discrimination laws interfered with the religious liberty of the for-profit Piggie Park BBQ and its owner.¹² Congress's enactment of RFRA did not upend this tradition, but rather sought to restore the standard of scrutiny that the precedent reflected.¹³

⁶ 494 U.S. 872 (1990).

⁷ 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁸ *See, e.g.*, *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 628 (7th Cir. 2000); *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1208, 1211 (6th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986); *Pines v. Tomson*, 206 Cal. Rptr. 866 (Ct. App. 1984). Even the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), distinguished between churches and secular entities and applied only to the ability of "a religious group" to hire and fire "one of the group's ministers." *Id.* at 699.

⁹ *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985).

¹⁰ *See, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

¹¹ *United States v. Lee*, 455 U.S. 252 (1982).

¹² *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

¹³ 42 U.S.C. § 2000bb(b)(1) (2012). As Professor Micah Schwartzman has argued, neither RFRA's statutory text nor its legislative history supports the radical theory adopted in *Hobby Lobby* that RFRA marks "a complete separation from First Amendment case law." Micah J. Schwartzman, *What Did RFRA Restore?*, RELIGIOUS FREEDOM PROJECT: CORNERSTONE (Sept. 11, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/what-did-rfra-restore> [http://perma.cc/C83E-XZJB] (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014)) (internal quotation marks omitted).

Nor have legislatures routinely exempted commercial entities. As a rule, even nonprofit religious organizations must follow laws binding on others in commerce. Where exemptions exist, they tend to be circumscribed. For example, under Title VII of the Civil Rights Act, religious organizations may prefer members of their religion in initial hiring decisions, but may not discriminate on the basis of race, color, sex, or national origin.¹⁴ Nor may they discriminate in compensation and benefits. A Catholic hospital, thus, may choose to recruit only Catholics for management positions, but may not seek out only non-Hispanic Catholics or offer Catholics a higher wage than others. Discrimination against consumers is even more disfavored. Public accommodations laws generally apply with full force to all businesses serving the public, religiously affiliated or not.¹⁵

Legislative exemption for for-profit corporations is virtually nonexistent. The contraceptive challengers could point only to the exception that proves the rule: statutes allowing hospitals to refuse to provide abortions.¹⁶

The legal landscape belies Horwitz's intuition that a rapid change is occurring in which "taken for granted" religious accommodation is jettisoned in favor of gay rights and insurance mandates. The majority of states passed contraceptive mandates nearly a decade ago. Almost all include substantially narrower religious exemptions than does the federal mandate.¹⁷ Nearly half of states prohibit discrimination on the basis of sexual orientation.¹⁸ None excuse for-profit businesses from compliance. While the legalization of same-sex marriage is relatively new (and swift), religious objectors resist existing antidiscrimination obligations, not marriage laws.

The social consensus also seemed settled *against* religious exemptions for for-profit entities. The American people have, for example, consistently endorsed the contraceptive mandate's original exemption, which was limited to churches, places of worship, and closely affiliated charities and excluded religious-nonprofit and secular-for-profit em-

¹⁴ See 42 U.S.C. § 2000e-1(a).

¹⁵ Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1192 & n.75 (2012) (compiling cases).

¹⁶ 42 U.S.C. § 300a-7(b).

¹⁷ GUTTMACHER INST., STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES AS OF OCTOBER 1, 2014, at 2 (2014), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf [<http://perma.cc/SXZ6-N429>].

¹⁸ *Statewide Employment Laws and Policies*, HUM. RTS. CAMPAIGN (Oct. 9, 2014), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/statewide_employment_10-2014.pdf [<http://perma.cc/9N7G-LM7Q>]; *Statewide Public Accommodations Laws and Policies*, HUM. RTS. CAMPAIGN (Oct. 9, 2014), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/public_accommodations_10-2014.pdf [<http://perma.cc/3WFL-26HY>].

ployers. In early 2012, a majority of people polled indicated that all other employers — regardless of any religious objections — “should be required to provide their employees with health care plans that cover contraception or birth control at no cost.”¹⁹ In 2014, the results of the same poll were virtually identical.²⁰

Similarly, to the extent *Hobby Lobby* is a “gay rights case” as Horwitz claims,²¹ the public in every state has expressed strong support for preventing sexual orientation discrimination for at least the past five years.²² There is no reason to think this consensus is contingent on religious exemptions for commercial entities. Support cuts across religious lines.²³ Even at a time when a significant majority believed that homosexuality was morally wrong, equal rights for gays and lesbians enjoyed overwhelming support (in 1989, seventy-one percent of people already supported nondiscrimination in employment).²⁴ Polls today show that at least eighty percent of Americans oppose allowing even small business owners to use religion to deny services to any of the categories of gay or lesbian, black, atheist, or Jewish individuals.²⁵

Our legal and social consensus is not hostile to religion, but rather reflects a contextual understanding of power dynamics. We understand that whereas individuals (and perhaps churches) occupy one end of the religious-accommodation spectrum, commercial businesses — for-profit, secular corporations in particular — stand at the other. As Professor Nelson Tebbe has argued, individuals’ rights to equal public status serve as a democratically endorsed constraint on the exercise of contrary rights by socially significant groups, such as commercial actors.²⁶ Indeed, according to a recent social psychology study, people across the political spectrum show an “extremely robust” tendency to

¹⁹ *PRRI/RNS Religion News Survey: March 7–11, 2012*, PUB. RELIGION RES. INST. 2–3 (Mar. 15, 2012), <http://publicreligion.org/site/wp-content/uploads/2012/03/PRRI-RNS-March-2012-Topline.pdf> [<http://perma.cc/4PJ4-PTSW>].

²⁰ *PRRI/RNS Religion News Survey: May 14–18, 2014*, PUB. RELIGION RES. INST. 1–2 (May 29, 2014), <http://publicreligion.org/site/wp-content/uploads/2014/06/May-2014-Topline.pdf> [<http://perma.cc/6CXC-SFJG>].

²¹ Horwitz, *supra* note 1, at 177.

²² Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 373 tbl.1, 383 (2009).

²³ Human Rights Campaign & Greenberg Quinlan Rosner Research, *Americans Offer Strong Support for Anti-Discrimination Laws* (Dec. 9, 2011), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/ENDA_Polling_Memo_Dec_2011.pdf [<http://perma.cc/33U8-D4YV>].

²⁴ *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx?version=print> (last visited Oct. 15, 2014) [<http://perma.cc/9KV8-65QY>].

²⁵ PUB. RELIGION RES. INST., *supra* note 20, at 3.

²⁶ Nelson Tebbe, *Associations and the Constitution: Four Questions About Four Freedoms*, 92 N.C. L. REV. 917, 925–26 (2014).

consider individuals to be more appropriate holders of religious rights than organizations, especially for-profit businesses.²⁷

Legislative accommodation of religion thus allows individuals to live out their religious beliefs — sheltering them from religious discrimination by employers,²⁸ unions,²⁹ landlords,³⁰ public accommodations,³¹ and federally funded educational institutions.³² By necessity, these individual rights limit the ability of for-profit businesses to impose religiosity. An orthodox Jewish boss must accommodate an evangelical Christian employee. A Catholic CEO cannot fire a Buddhist for failing to attend prayer meetings. Corporations have leeway to infuse the workplace and consumer experience with religion: closing on Sundays, posting religious messages, prohibiting the use of barcodes, or offering optional religious counseling. Their employees and customers, however, do not forfeit the law's protection.

Hobby Lobby destabilized this legal and social consensus against accommodation. For the first time, the Supreme Court exempted for-profit businesses from employee-protective law in the name of religion. In so doing, it struck at the heart of our deepest commitments as a nation — to equal citizenship in commercial life.

II. RELIGIOUS LIBERTARIANISM, TRIUMPHANT

Horwitz poses an intriguing question: what social movements sparked the recent, heated contests over religious exemptions? He fails, however, to identify arguably the most relevant social phenomenon — the union of religious fundamentalism and economic conservatism — and the religious-libertarian arguments it spawned.

Originally joined in a marriage of convenience to economic conservatives, Christian conservatives now espouse religious liberty arguments inflected with libertarian ideology. They increasingly align themselves with economic conservatives to resist regulation of commercial life.³³ In embracing the Tea Party, for example, fundamentalist Christians emphasize their view that “economic liberty and free enterprise are dependent on a social/moral regime of respect for, and protection of, human life beginning with conception and the hetero-

²⁷ Avital Mentovich, Aziz Huq & Moran Cerf, *The Psychology of Corporate Rights* 18 (July 16, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467372.

²⁸ 42 U.S.C. § 2000e-2(a) (2012).

²⁹ *Id.* § 2000e-2(c).

³⁰ *Id.* § 3604.

³¹ *Id.* § 2000a.

³² *Id.* § 2000d.

³³ See generally PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR* (2004) (connecting religious fundamentalism and attacks on social welfare).

sexual nuclear family.”³⁴ Free market ideology and Christian dogma combine in the form of religious libertarianism.

In the contraceptive litigation, these religious-libertarian arguments moved from off the wall to on the wall. The CEO of Eden Foods, for example, said: “I don’t care if the federal government is telling me to buy my employees Jack Daniel’s or birth control. What gives them the right to tell me that I have to do that?”³⁵ Conestoga Wood similarly invoked the importance of “our free-enterprise system.”³⁶ Opposition to redistribution also motivated corporate religious claims. For example, in its brief to the Supreme Court, Hobby Lobby admitted that “the ultimate question” is “who will pay for a third-party’s” contraceptives.³⁷ On this account, business owners seek a negative right to be left alone, while employees (or consumers in the case of same-sex marriage) demand a positive entitlement from them.

The libertarian ethos of the contraceptive cases found a receptive audience in the increasingly pro-business federal courts. Courts across the country granted accommodations to for-profit employers at substantial cost to their employees. And, of course, Hobby Lobby prevailed before the Supreme Court. The litigation benefitted from the Court’s narrow interpretations of employee-protective laws and expansive views of corporate personhood. It harnessed the judiciary’s particular hostility toward the Affordable Care Act. Conestoga Wood played on this point, calling the law “one of the most sweeping and intrusive laws ever enacted”³⁸ with potential to subject — as the dissent said in *National Federation of Independent Business v. Sebelius*³⁹ — “all private conduct . . . to federal control.”⁴⁰

The success of religious-libertarianism arguments necessarily presents new challenges to what had been a stable social consensus. As I argue elsewhere, the result of the social phenomenon of religious libertarianism is a legal doctrine of free exercise Lochnerism.⁴¹ Like liberty

³⁴ Angelia R. Wilson & Cynthia Burack, “Where Liberty Reigns and God is Supreme”: *The Christian Right and the Tea Party Movement*, 34 NEW POL. SCI. 172, 185 (2012).

³⁵ Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, SALON (Apr. 15, 2013), http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ [<http://perma.cc/525D-T45P>] (quoting Michael Potter).

³⁶ Petition for Writ of Certiorari at 29, *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-356), 2013 WL 5291412, at *29.

³⁷ Brief for Respondents at 59, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at *59.

³⁸ Petition for Writ of Certiorari, *supra* note 36, at 29.

³⁹ 132 S. Ct. 2566 (2012).

⁴⁰ *Id.* (quoting Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2649 (2012) (joint dissent)) (internal quotation mark omitted).

⁴¹ Elizabeth Sepper, Free Exercise Lochnerism (June 3, 2014) (unpublished manuscript) (on file with author).

of contract in *Lochner*, corporate religion forms a powerful tool for business interests and potentially threatens the entire regulatory state.

III. CONCLUSION

The market has long been a site of political and social contests — from Woolworth’s lunch counters to General Electric’s exclusion of pregnancy disability insurance to newspapers’ display of “Help Wanted, Men” ads. When it comes to religion in the market, however, the nation had reached a consensus. Powerful market actors were denied exemptions from compliance with the law in order to safeguard the full and equal citizenship of workers and consumers. The religion of a for-profit corporation could not justify imposing burdens on their employees, would-be customers, or the public at large.

Religious libertarians sent this national consensus into flux. The *Hobby Lobby* Court potentially undid it. Challenges to nondiscrimination laws by commercial actors — whether in the context of same-sex marriage or spousal benefits — are now plausible. Courts can no longer dismiss them out of hand. The *Piggie Park BBQ* case is “patently frivolous” no more.