

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

Nomi Maya Stolzenberg

In late November, shortly after the Supreme Court granted cert in *Hobby Lobby*,<sup>1</sup> 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.”<sup>2</sup>

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 said “even love has not turned more men into fools than has meditation on the nature of money.”<sup>3</sup> But we risk still more 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

---

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

<sup>2</sup> Linda Greenhouse, *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?pagewanted=all&r=0>.

<sup>3</sup> Karl Marx, *A Contribution o the Critque of Political Economy*, Charles H. Kerr & Company, 73 (1904).

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. From another point of view, however, (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.<sup>4</sup> 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).<sup>5</sup>

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 (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

---

4

<sup>5</sup> See the discussion of traditional religious views, at pp. , *infra*.

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 the existence of a burden are rooted in the religious doctrine against the "facilitation of sin"<sup>6</sup> and the progressive doctrine of economic coercion,<sup>7</sup> 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.

---

<sup>6</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2757 (2014); 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).

<sup>7</sup> William H. Page, *Legal Realism and the Shaping of the Modern Antitrust*, 44 Emory L.J. 1, 11 (1995).

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. Think, for example, about Hobby Lobby's lawyer suggesting, as a "less restrictive alternative," that the government should fund contraceptive services directly,<sup>8</sup> (a suggestion that Justice Alito incorporated into his opinion),<sup>9</sup> while the government's lawyer countered this suggestion by insisting that funding has to be provided by the private employer.<sup>10</sup> 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.<sup>11</sup> Similarly, in their debate over whether or not "merely having to pay 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

---

<sup>8</sup> Oral Arguments in the Supreme Court of the United States, *Sebelius v. Hobby Lobby Stores, Inc.* No. 13-354, and *Conestoga Wood Specialties Corp. v. Sebelius* No. 13-356, (March 25, 2014).

<sup>9</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2782 (2014).

<sup>10</sup> Oral Arguments in the Supreme Court of the United States, *Sebelius v. Hobby Lobby Stores, Inc.* No. 13-354, and *Conestoga Wood Specialties Corp. v. Sebelius* No. 13-356, (March 25, 2014).

<sup>11</sup>

views,<sup>12</sup> while its opponents made the standard libertarian argument that the formal existence of choice and rights negates the existence of coercion.<sup>13</sup>

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 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 it. 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,<sup>14</sup> 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

---

<sup>12</sup> Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 482 (1988).

<sup>13</sup> See *infra* FN 25.

<sup>14</sup> *Wheaton College v. Burwell*, No. 13A1284, 2014 WL 3020426 (U.S. July 3, 2014); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S.Ct. 1022 (2014).

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. In the case of the contraceptive mandate, however, the fear is misguided for reasons to be explained below

There are, indeed, many different ways of describing the interest that the government has in enforcing in 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 ).<sup>15</sup> At bottom, however, the interest that the government has in enforcing the ACA regulations is its basic interest in determining how public funds will be spent and how the revenue to support that spending will be collected—in other words its basic interest in “taxing,” “spending,” and governing

Two things have made this difficult to see. First, the financial mechanisms implemented by the ACA are incredibly complicated. This masks the fact that, though technically benefits are a form of private 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. The state’s interest in being able to safeguard its

---

<sup>15</sup> Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 373 (1998).

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. 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—a fact that, due to our confusion about money, many people have failed to perceive

#### "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, another of which 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 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.<sup>16</sup> 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 a fringe benefit. 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 System 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. It also amounted to a massive system of public subsidies.<sup>17</sup> In effect, the federal government has been funding health insurance

---

<sup>16</sup> Alex Blumberg & Adam Davidson, *Accidents of History Created U.S. Health System*, National Public Radio (Oct. 22, 2009); Laura A. Scofea, *The Development and Growth of Employer-Provided Health Insurance*, Monthly Labor Review, 3-10 (March 2014); John E. Murray, *Origins of American Health Insurance: A History of Industrial Sickness Funds* (2007).

<sup>17</sup> 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 Journal, 511-30, June 2011) [http://ntj.tax.org/wwtax/ntjrec.nsf/009a9a91c225e83d852567ed006212d8/957e28330a12ba61852578ab004e2e49/\\$FILE/PSI03-Gruber.pdf](http://ntj.tax.org/wwtax/ntjrec.nsf/009a9a91c225e83d852567ed006212d8/957e28330a12ba61852578ab004e2e49/$FILE/PSI03-Gruber.pdf).



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, where only some received publicly subsidized health insurance while the rest had to make do without public subsidies,<sup>18</sup> and a truly universal system of publicly subsidized health insurance.

#### 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

---

<sup>18</sup> Except for Medicaid and emergency care.

market), it is difficult to imagine the meaningful limits on government power in the marketplace.”<sup>19</sup>

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 employers’ coffers. But to

---

<sup>19</sup> Jay Sekulow, *Hobby Lobby Case—Three Reasons Why Corporations Must Have Religious Freedom*, Fox News, <http://www.foxnews.com/opinion/2014/03/25/hobby-lobby-case-three-reasons-why-corporations-must-have-religious-freedom/> (last visited July 27, 2014).

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 exemptions; it 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 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 it is 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: 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.<sup>20</sup>

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 comply and pay a fine; or forego the provision of health insurance employers and pay the “employer shared responsibility payment” instead.<sup>21</sup> 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

---

<sup>20</sup> Employer deductions.

<sup>21</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 U.S.C.A. § 4980H (2014). 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 of the Treasury, <http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx> (last retrieved February 20, 2014).

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.<sup>22</sup> Even if the costs are substantial,<sup>23</sup> they assert, business owners can't 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 that view. 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.<sup>24</sup> On this view, a right is legally protected if it is formally recognized, regardless of

---

<sup>22</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2770 (2014).

<sup>23</sup> Whether or not they are is contested.

<sup>24</sup> Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *Political Science Quarterly*, Vol. 38, No. 3, 470, 476 (1923); William H. Page, *Legal Realism and the Shaping of the Modern Antitrust*, 44 *Emory L.J.* 1, 9 (1995).

whether economic disadvantages (or 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.<sup>25</sup> Progressives also recognized that less extreme forms of economic disadvantage can compromise choice and constitute legally cognizable "burdens."<sup>26</sup> Against conservative resistance, this position was gradually integrated into various areas of legal doctrine by last century's *liberal* Court.<sup>27</sup> In the field of religion, the theory of economic coercion was adopted in *Sherbert v. Verner* (the case that produced the standard codified by RFRA)<sup>28</sup>, which held that a Saturday Sabbath observer's ability to exercise his religion was burdened even though there was no law requiring people to work on Saturdays. 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.<sup>29</sup>

### Mere Money

---

<sup>25</sup> William H. Page, *Legal Realism and the Shaping of the Modern Antitrust*, 44 Emory L.J. 1, 13-14 (1995).

<sup>26</sup> Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 486-86, 534 (1988).

<sup>27</sup> William H. Page, *Legal Realism and the Shaping of the Modern Antitrust*, 44 Emory L.J. 1, 2 (1995).

<sup>28</sup> *Sherbert v. Verner*, 374 U.S. 398, 410 (1963)

<sup>29</sup> *Id.* at 403.

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 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,<sup>30</sup> 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

---

<sup>30</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014) (citing Failure to meet certain group health plan requirements, 26 U.S. C. § 4980D).

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 plans 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?<sup>31</sup>

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 employer's responsibility for their use. Once again, defenders of the mandate are relying on libertarian

---

<sup>31</sup> See, e.g., *Gilardi*, 2103 WL 5854246, at 29 (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." "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." (Sebelius Reply Brief at 3).



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. If this is hard to see, that's only 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: Professor Ghachem's astute analysis of the laws against material support for terrorist organizations.<sup>32</sup> 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 Professor Ghachem observes also have led to

---

<sup>32</sup> Ghachem

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 both the case of wages and benefits, it 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.

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 render compensation for services rendered.<sup>33</sup> 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 are separate questions.<sup>34</sup>

Most crucially, the concepts of "facilitation of sin" and "material support" both depend on what Professor Ghachem calls the "fungibility" argument.<sup>35</sup> The fungibility of money serves to eliminate the possibility of distinguishing "innocent"

---

<sup>33</sup> It may make a difference if there is an intent requirement.

<sup>34</sup>

<sup>35</sup>

from legally or religiously prohibited uses of the money by the beneficiary of the contribution, and channeling contributions only to the former.<sup>36</sup> 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.<sup>37</sup>

#### Money Doesn't Always Talk

As Professor 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.<sup>38</sup> 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, Hobby Lobby's opponents have analyzed the "facilitation of sin" claim as a complaint about compelled speech. 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

---

<sup>36</sup> Ghachem

<sup>37</sup> A similar analysis has been applied to the devotion of public funds to religious schools under the Establishment Clause. See Ghachem.

<sup>38</sup> Ghachem

think it does.<sup>39</sup> Indeed, the 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

---

<sup>39</sup> *Catholic Charities*, "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 and to counsel them to refrain from using such methods." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 206 (2001) (superseded by *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 112 Cal. Rptr. 258 (2001)).

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.<sup>40</sup> Material support may occur without or against my intentions. By contrast, symbolic support (i.e., 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.

#### Money's Double Character

The fact that money can accomplish both is a reflection of money's unique double character. Seen from one angle, money is an empty vessel, transparent, fungible, content-free. It has material value but no symbolic or propositional content. Seen from another angle, money is filled with expressive content. Precisely because it is an empty vessel, it can be filled with whatever content the disposer of the money wants. As it is said, "money talks."

Some financial acts convey only the material side of money's double character. Others convey both, even though the premises of the symbolic endorsement and material support theories contradict each other. In the terrorism

---

<sup>40</sup> That doesn't mean that we cannot make intent a requirement of the legal wrong of material support. To the contrary, criminal facilitation laws all have mens rea requirements. 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.

context, if the expressive character of money were recognized, it would serve to sequester charitable donations from money used to commit terrorist acts. But the fungibility of money is taken to defeat its character as a symbolic expression of the grantor's desires and beliefs, converting it into a purely material medium whose use, expressive and otherwise, is controlled solely by the recipient. So too, the fungibility of money defeats the expressive content of the employer's contribution to the employees' health care plan. It's hard to maintain that the employer is sending a message that he endorses the reproductive health policies embodied in the health care plan when the original author of that message is not the employer, but rather, the regulatory agency that enacted the policy and the employer serves merely as a conduit through which the money needed to implement the policy flows.<sup>41</sup>

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 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

---

<sup>41</sup> One might argue

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.<sup>42</sup>

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.<sup>43</sup> 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

---

<sup>42</sup> When the speech act/monetary contribution is compelled there is room to argue that the speech and the intentions they express are attributable to the agent that is compelling it (i.e., the government) and not to the party making the contribution.

<sup>43</sup> Difficult is, of course, not the same as impossible. See note 9, *supra*.



intentions and control.<sup>44</sup> 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 deconstructionist conceives of it changes its meaning as it passes from one auditor to another.

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

---

<sup>44</sup> See Jessie Hill, "Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time."

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 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 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, material theory of rights.

#### Progressives Should Be Progressive

Intuitive as it is, this understanding of the connective, cultural, positive, material function of money seems to have deserted many of Hobby Lobby's opponents. In their confrontation with the burden claim, they stuck to the view that facilitation equals endorsement, or alternatively dismissed the idea of facilitation as preposterous.<sup>45</sup> This resistance may have been a legal strategy or it may reflect a bias against conservative religious views. (Talk about the financial facilitation of

---

45

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 money 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 claiming that they are being compelled to express their *endorsement* of the contraceptive services. Their 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 demonstrate the consequences that would follow if the Court were to apply the

principle of a right not to facilitate sin *consistently*. In the absence of such a demonstration, Hobby Lobby's inconsistent applications of the principle have been allowed to stand. That has obscured the true consequences of accepting the principle and the government interests that those consequences threaten.

#### The Traditional Theology of Money<sup>46</sup>

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.<sup>47</sup> 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 moral and economic relations, which is in no small measure a product of the fact that money has always been a central concern of traditional religious thought.<sup>48</sup> 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 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

---

<sup>46</sup>

<sup>47</sup>

<sup>48</sup> Leading scholars of the history of religious philosophy and leading scholars of the history of economic philosophy

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 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 (i.e., facilitating sin) is to avoid participating in "worldly affairs" altogether. The only 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 asceticism) or to accommodate to the conditions of the fallen material world and accept coexistence with sinners (the path of 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).<sup>49</sup>

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 without facilitating sin was understood to be precluded. It was 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

---

<sup>49</sup> I have delved into these paradoxes elsewhere. See *The Profanity of Law, Law and the Sacred* (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds., Stanford U. Press, 2007); *Theses on Secularism*, 47 San Diego L. Rev. 1041 (2010); *Political Theology With a Difference*, forthcoming in *Irvine Law Review*; *Divine Accommodation: The Theology of Secularism and Liberal Accommodation* ( ).

relationships with sinners (the accommodationist path) or one hand to withdraw from participating in economic relations altogether. The idea that one could both participate in economic life yet insist upon maintaining perfectly clean hands was clearly seen as 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 it makes a literally impossible demand for the right to engage economically without 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, 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—paying them wages, for example, or paying taxes that are used by the government to provide them with coverage—are not equally facilitative of the very same conduct (using contraception) and therefore equally subject to the same religious duty that employers claim gives them the right to be exempt from legal obligations that require them to engage in acts of financial facilitation. 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 apply to *any* action that has the effect of providing “sinners” with financial resources that enable them to engage in their sinful conduct.<sup>50</sup> And as the comparison with material support cases shows, donations and compensation in the form of wages are no less acts of facilitation than employee contributions to benefit plans.

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 sinners, or they could be given the right not to hire “sinners” and the 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

---

<sup>50</sup> Again, subject to intent requirements.

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 believe they have the right not to facilitate the use of contraceptive services through the payment of wages, taxes, or other modes of delivering the same benefit. 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 that some employers are prepared to take the doctrine to its logical conclusion and not apply it selectively.<sup>51</sup> It's 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 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.

---

51

### 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 a case 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. Such corollary positive rights and duties cannot be enforced without regulation.

The argument for exemptions does not reject the need for 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* 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? Justice Alito reasoned that the government lacked a justification for denying the exemption because there are alternative means of delivering the benefit of contraceptive coverage to employees are "less restrictive," meaning that they don't involve the employer in an act of facilitating the delivery the benefit. 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 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.

But just because Hobby Lobby didn't contend 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 even 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 payments" 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. 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 provides material support. There is in short no possibility of maintaining clean hands. 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) And any such accommodation is itself rightly seen as an act of facilitation.

#### A Most Compelling Interest

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."

But it has long been settled—and no one yet has claimed 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 expended, that is 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. Even the fines that are assessed when employers provide



health plans that exclude contraceptive coverage can be understood to serve 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.

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 is it any more (or less) “coercive” than the contraceptive mandate itself. Each is just another way whereby the government can get 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 alternatives 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. 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 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 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 very ability 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.

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 another, but rejects the prescriptions for government regulation and accommodation that this religious insight produced—and logically entails. It demands perfect moral purity 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.

### 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 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.