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To Proliferate Contraception, Regulators Repudiate the Right to a Moral Objection

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KEY TAKEAWAYS

Contraception unavoidably poses foundational questions about the beginnings and value of human life.

Only with great caution should the federal government ever impose one nationally binding answer to questions of great moral and philosophical significance.

Before finalizing any rule, agencies should seriously consider all potential costs and side effects resulting from the promotion of widespread contraceptive use.

Three federal agencies have proposed a new rule expanding the contraceptive mandate under the Affordable Care Act (ACA)[1] in what is at least the tenth round of rulemaking on the subject since the law's enactment in 2010.[2] Although contraception is already widely available both through employer-provided health plans and through government-subsidized programs, the latest rule proposes to expand contraception's availability still more by eliminating a small but culturally significant obstacle: the non-religious moral exemption to the contraceptive mandate.

For policymakers of a liberal caste, the link between contraception and increased autonomy is an article of faith that imbues the project of proliferating contraceptive use with its own moral imperative. Western democracies, with their tendency to enshrine personal choice as the measure of individual liberty, are

most vulnerable to this logic and thus most disposed to pursue this project to its limits as though the promised "pursuit of happiness" could not be realized until the federal government made every possible effort to distribute or subsidize contraception.

It is not enough, however, for the federal government to distribute and subsidize contraception. For the project of autonomy maximization to be realized, even non-governmental actors must participate. Private employers must become conduits for contraceptive coverage, and those who resist must be overcome by federal regulatory authority. Hence the agencies' long (though largely unsuccessful) effort to target employers who use the religious exemption and their current attempt to target the more limited number who use the moral exemption.

If it seems counterintuitive that a certain type of freedom can thrive only as the reach of regulatory power expands, the paradox has not escaped notice: "Ironically," as Patrick Deneen has observed, "the more completely the sphere of autonomy is secured, the more comprehensive the state must become."[3] A certain species of liberty—autonomy, call it what you will—depends not only on the existence of regulatory power, but also on its continued extension. Increased sexual autonomy, the underlying aim of contraception, appears to be such a species. But there is always a trade-off, and the freedom to assert a moral objection to contraception must therefore give way to the expanding domain of sexual autonomy.

The Administration's "Whole-of-Government" Reaction to *Dobbs*

President Joe Biden has spoken of his willingness to employ the "whole-of-government approach" to pursue his Administration's preferred ends, be they "advancing racial equity" or "combating climate change."[4] This approach entails commissioning the vast administrative machinery lodged within the executive branch to promulgate rules and standards that effectively legislate where Congress has dared not go.

That same approach is at work in this proposed rule. Congress, for its part, never mandated contraceptive coverage in the ACA; since 2010, the mandate has been developed and implemented by the federal administrative state. This long-standing project recently took on increased importance. In the wake of *Dobbs v. Jackson Women's Health Organization*,[5] where the Supreme Court determined that the Constitution contained no right to an abortion, the Administration became convinced that women's autonomy in matters of "reproductive health" was under threat, and thus the imperative

to secure it gained urgency. The Administration has already pressed various agencies into service to defend the cause of reproductive health; the Veterans Administration, for example, is now performing abortions for the first time in its history.[6] The agencies' proposal to eliminate the non-religious moral exemption to the contraceptive mandate and remove protections for issuers that may object to the mandate on religious grounds should be considered in that same vein. It is a smaller but significant part of this broader whole-of-government approach: the great bureaucratic backlash in reaction to *Dobbs*.

In their Notice of Proposed Rulemaking (Notice), the agencies opine that there is a "strong public interest in making contraceptive coverage as accessible to women as possible" and that this interest "outweigh[s]" the non-religious moral objections. The reasoning set forth to support this conclusion suffers from four serious defects such that even a more robust record from the public commentary process cannot salvage the agencies' proposal.

- The agencies unjustifiably assume that where contraceptives are concerned, there is no right to a moral objection that the federal government is bound to respect.

- The agencies make unsupported assumptions about the supposed causal relationship between the moral exemption and women's alleged difficulties in obtaining contraception.

- The agencies take an uncritical view of the benefits of contraception without considering the costs associated with promoting its widespread use.

- The agencies entirely undercut their supposed strong interest in expanding contraceptive access through forced insurance coverage by leaving millions of employees and family members covered under grandfathered plans completely free from any contraceptive mandate.

The agencies admit that they lack any data on the number of employers that use the moral exemption.[7] That number is undoubtedly small relative both to the number of employers the mandate already covers and to the number of employers using grandfathered plans still outside the mandate. The supposed gains in contraceptive access were this proposal adopted would therefore appear to be marginal at best.

What, then, justifies the complete disregard for the limited moral exemption that has been tolerable to multiple Administrations for more than a decade? Among the few organizations that have defended the moral exemption are several that also fought legal battles to overturn *Roe v. Wade* and *Planned Parenthood v Casey*. If the proposal has little practical impact on the availability of contraception, at least it might be effective as a form of cultural messaging and crude bureaucratic revenge. How often have we heard it said that if abortion isn't "safe," then neither are its opponents?

More broadly, the Administration thinks of itself as a liberator. Its role is to promote individual "freedom," not morality, so the thinking goes. Again, per Deneen, "one of the liberal state's main roles becomes the active liberation of individuals from any limiting conditions," and foremost "is the liberation from natural limitations on the achievement of our desires."[8] Thus, the proposed rule duly expands freedom both from the burdens of nature and from the burdens of supposedly narrow worldviews while depriving objectors of something to which the secular state attaches no value.

Whatever its real reasons, the Administration has failed to articulate a supportable basis for its intended rescission of the moral exemption. Therefore, the agencies would be acting arbitrarily and capriciously in limiting the religious exemption[9] and eliminating its companion moral objection. The agencies should reconsider their decision and retain the exemptions as currently codified.

Failure to Offer a Valid Reason for Eliminating the Moral Exemption

Agencies are required to "engage in reasoned decision-making, and... to reasonably explain...the bases for the actions they take and the conclusions they reach."[10] Here, the agencies explain that they are nixing the moral exemption because it is not protected by the Religious Freedom Restoration Act (RFRA), because it is not legally mandated by some other positive enactment, and because few individuals or organizations avail themselves of the exemption.[11] Collectively and individually, the agencies' reasons are inadequate.

The first two reasons are no reasons at all. The lack of RFRA protection may enable the agencies to eliminate the moral exemption, but it gives them no reason for doing so. The agencies' assumption that the moral exemption is not legally required is a dubious position that is explored further below, but even if it is taken as true, it too fails to provide a reason to eliminate the existing exemption.

Only the third assertion—that few use the exemption—offers anything approaching a reason to act as the agencies propose. Yet even that reason strongly supports keeping the moral exemption instead of eliminating it. The agencies assume that the value of a right diminishes when only a few people feel compelled to invoke it. Worse than that, the agencies predict that those few who now rely on the exemption will have little legal redress available once the right is taken away,[12] as though the importance of a right were measured by the litigation risk it could generate. This reasoning is entirely backwards. Rights are necessary to protect certain groups from the unchecked will of the majority and from whatever fashionable faction happens to overtake the institutions of government. Thus, the fact that the moral exemption protects a small group with an unpopular view militates in favor of defending, not diminishing, that right.

Furthermore, the Notice fails to offer anything more than a speculative connection between the action proposed and the end it is supposed to serve. The agencies assert that removing the moral exemption promotes their interest in "making contraceptive coverage as accessible to women as possible." As a strictly practical matter, the Notice fails to make a rational case for this assertion.

If few organizations rely on the moral exemption, then correspondingly few women could possibly have their access to contraception affected by the exemption's existence. The agencies have cited none. This is not surprising because many forms of contraception are already cheap, readily available, and heavily subsidized under the Title X program. Moreover, when it comes to the issue of contraceptives, the women working for organizations seeking moral exemptions are hardly a random cross section of American society. As prior decisions in mandate-related litigation note and as the agencies themselves acknowledge, "employees of these organizations [] typically share the views of the organizations" regarding the immorality of contraceptive use.[13] This makes the already tenuous assumption that the moral exemption actually impedes women's access to contraception still less reasonable.

The agencies' only response is to invoke the possibility that some female employees and perhaps some of their dependents do not view contraception as inherently immoral and that these hypothetical women face difficulties obtaining contraception because of the moral exemption.[14] Implicitly, the agencies also must speculate that this dissenting subset of women (if they in fact exist) lacks contraceptive access by some other means such as through another family member's health plan. But "unsupported speculation" is no basis for agency action; instead, the agencies must provide some "factual

basis for this belief" that the moral exemption itself erects demonstrable obstacles between contraception and women who actually want it but otherwise lack access to it.

Where an agency lacks a factual basis for the belief motivating its regulatory choice, it necessarily lacks the reasoned explanation required for the action to be valid. Without a well-founded evidentiary basis for the belief that moral exemption limits contraceptive access for women who actually want it, the agencies appear to be not so much addressing a legitimate problem as looking for an excuse to cut back protections afforded to those who dissent from the agencies' own moral views on the propriety of contraception. However small that group of dissenters may be, at least their existence is not a matter of pure speculation.

Three separate organizations either filed comments supporting a non-religious moral exemption in past rulemakings or brought litigation in federal court to defend that exemption.[15] Presumably, those and other groups and individuals will provide further testimony substantiating the burdens on conscience that would ensue if the agencies' proposal were implemented. Moreover, as the agencies acknowledge, there are no data establishing the actual number of persons and organizations that rely on the moral exemption, which means that the actual number of persons relying on the moral exemption is almost certainly higher. The agencies have no good reason to ignore the views of these organizations, even if they are few, while prizing the interests of women the agencies have been unable to identify.

Agencies' Overstatement of Interest in Maximizing Access to Contraception

The agencies have yet to demonstrate a meaningful connection between the moral exemption and the supposed problem of contraceptive access, but a more basic problem is the agencies' failure to provide any rational justification for the weight they give to contraceptive access and their assertion that "it is *necessary* to provide [women who work for objecting non-religious employers] with such coverage *directly* through their plan."[16]

Direct or "seamless" access to contraception through an employer-provided health plan is not a statutory right. "Congress...declined to expressly require contraceptive coverage in the ACA itself...and no language in the statute itself even hints that Congress intended that contraception should or must be covered."[17] In short, Congress itself took no specific position on contraceptive access in the ACA, let alone require that any such access be "seamless," a modifier that the Department of Justice seems to have invented

out of whole cloth.[18] Thus, in terms of statutory footing, the right of contraceptive access has a status no stronger than the right of moral objection.

Even such contraceptive access as exists under current agency rules is a patchwork riddled with "exceptions a-plenty,"[19] many, if not all, of which exceed the moral exemption in the number of women they affect. Between "grandfathered" health plans and plans provided by employers with fewer than 50 employees, "tens of millions of people" remain outside the reach of the contraceptive mandate.[20] This prompted Justice Samuel Alito to observe that:

> A woman who does not have the benefit of contraceptive coverage under her employer's plan is not the victim of a burden imposed by the rule or her employer. She is simply not the beneficiary of something that federal law does not provide. She is in the same position as a woman who does not work outside the home or a woman whose health insurance is provided by a grandfathered plan that does not pay for contraceptives or a woman who works for a small business that may not provide any health insurance at all.[21]

Though this explanation came in a case concerning the religious exemption, the explanation itself does not depend on that fact. Rather, it affirms that nowhere does federal law establish a right or even a strong interest in providing seamless access to contraception without regard to competing rights. Thus, it is not the case that all burdens and obstacles must give way in the face of the supposed need for seamless contraception access as the agencies assume.

Nor do recent developments in the law provide a reason for favoring contraceptive access to the complete exclusion of the right of moral objection. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, though cited frequently throughout the Notice, has little bearing on how accessible contraception should or should not be. That decision did nothing to affect the legality of contraception; on the contrary, it took great pains to distinguish the putative constitutional right to an abortion, which the Court rejected, from the right to private contraception use, which the Court recognized in *Griswold v. Connecticut*.[22] Far from restricting legal access to contraception, *Dobbs* simply permitted the states to reclaim their traditional authority to regulate the performance and availability of abortions.

Nonetheless, the Notice suggests (without supporting evidence) that *Dobbs* has driven increased demand for contraception.[23] Of course, general demand for something does not create a right to that thing unless that demand is channeled through the political process into law. And demand alone provides no basis whatever for overriding competing rights like the right of moral objection to contraception.

The Notice expresses particular concern that some combination of causes, *Dobbs* among them, has rendered contraception access more difficult for "low-wage," "non-white women."[24] The Notice contends further that the needs of these communities were "not given sufficient consideration" in prior rulemakings.[25] In fact, however:

> Existing federal, state, and local programs, including Medicaid [and] Title X… *already provide free or subsidized contraceptives to low-income women….* And many women who work for employers who have [] objections to the contraceptive mandate may be able to receive contraceptive coverage through a family member's health insurance plan.[26]

Thus, the need women in these communities have for more and freer contraception is doubtful even if it can be shown that these communities are affected directly by the moral exemption—another questionable supposition in the agencies' logic.

The vast exceptions to the contraceptive mandate and the slew of noncoercive alternatives the government has used to make contraception available pose a question: Why is the limited exception created by moral exemption intolerable in a scheme with so many gaps? The agencies never engage this question directly. Given the numerous alternatives and exemptions, it seems doubtful that the moral exemption itself can be blamed for limiting contraceptive access, and a regulation responding to a specific problem is "highly capricious if that problem does not exist."[27]

Nevertheless, the agencies maintain that the moral objection is a problem insofar as it may "inconvenience" women or, worse, cause "disruptions in care" for some unspecified period. Putting aside the fact that a "disruption in care" means that in most cases women will simply be potentially fertile for a time, the threat of inconvenience is hardly a reasonable justification for completely disregarding the deeply held moral and philosophical convictions of persons who dissent from the project of society-wide contraception use. Forced violation of one's abiding conviction is far more than an "inconvenience." Inconvenience and disruption are weak forms of an interest that is already less than compelling,[28] and they can be addressed through means other than ending the moral exemption such as the "alternative pathway" discussed in the Notice.[29] By employing noncoercive alternatives, the agencies would avoid using their own say-so to establish "a binding national answer to this religious and philosophical question" of whether contraception impermissibly interferes with the creation of human life.[30]

Legal and Historical Basis for the Right of Moral Objection

The agencies contend that the moral exemption is not legally required because there is no "need to heed the possibility of successful [RFRA] claims to a non-religious moral exemption," as "there is no moral-exemption statute similar to RFRA."[31] Again, it is a mistake to make separate statutory protection the *sine qua non* of a right.

Here, *Dobbs* is relevant not as a supposed driver of demand for contraception, but as a source of instruction on how to discern the nature and scope of unenumerated constitutional rights. Such rights are to be delineated by asking whether they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[32] Even before *Dobbs* placed renewed emphasis on the lens of history and tradition, scholarship explored the historical evidence for rights not to participate in or enable the ending of unborn life (which is what certain forms of contraception do[33]) and found that such a right has deep roots in our nation's history.[34]

The general right to a moral objection when it comes to issues affecting human life and death finds expression in numerous cases and statutes. For example:

- In *United States v. Seeger*, the Supreme Court appealed to our nation's "long recognition of conscientious objection to participation in war," which turns on "conscience" where a "duty to a moral power higher than the state *has always been maintained*."[35]

- Pre-*Dobbs* state laws also provided protections for those who refused to participate in, assist, or even facilitate an abortion based not only on religious grounds, but on moral or philosophical grounds as well.[36] These protections were not limited to surgical abortions; rather, they extended to the use of "emergency contraception" including any "medication or device intended to inhibit or prevent implantation of a fertilized ovum."[37]

- The Supreme Court noted in *Doe v. Bolton* that "a physician or any other employee has the right to refrain, for *moral* or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford *appropriate protection* to the individual and to the denominational hospital."[38]

Clearly, then, these conscience protections extended not only to those who did not want to perform an abortion, but also to those who objected to being forced to "refer," "assist," "arrange for," "accommodate," or "advise" someone concerning an abortion.[39] As Professor Mark Rienzi explains, the "speedy passage and near ubiquity of these laws demonstrate that a great majority of Americans at the time—regardless of their famously intense disputes as to the merits of the underlying abortion question—agreed that the government should not have the power to compel participation in abortions by unwilling individuals and institutions."[40] He concludes that "[i]n comparison with other rights the Court has recognized for substantive due process protection, this history alone is more than adequate to qualify the right not to kill [including through abortifacients] for constitutional protection."[41]

Under the Supreme Court's prevailing approach as articulated in *Dobbs*, such a right would derive from the Fifth and Fourteenth Amendments' protection of "liberty" and would not depend on the existence of a separate Free Exercise or RFRA claim.[42] Thus, the Supreme Court's jurisprudence dictates that agencies should consider the right to a moral exemption not just as a matter of equal protection, as courts did in *March for Life v. Burwell* and *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*[43] (both of which held that failure to accommodate a non-religious moral objection violated equal protection), but as a matter of due process as well.[44]

Consideration of the moral exemption in this light is not evident from the Notice. In discussing conscientious objection rights afforded through the "Church Amendments," the agencies now "find it significant that Congress chose not to apply those statutory provisions to...entities that are...similar to sponsors of private group health plans."[45] But by failing to explain why they find this significant, the agencies try to draw unqualified support from a dubious silence.

It is not for the agencies to base their actions on unexplained rationales or their decision to "respectfully disagree" with judicial rulings; rather the agencies must justify why it is rational and legally appropriate for them to countenance the moral objections of certain entities but not those of employers who remain obliged by law to obtain health plans for their employees. By falling back on the lack of RFRA protection alone, the agencies have failed to account adequately for the discrepancy in treatment.

Failure to Consider the Costs and Shortcomings of Promoting Widespread Contraceptive Use

Whenever an agency fails "to consider an important aspect of the problem" it is addressing, its action cannot be deemed reasonable.[46] To address one such

preliminary failure, the agencies ought to assess empirical research that calls into doubt the underlying assumption that contraceptive mandates are effective in reducing rates of unintended pregnancy or abortion.[47] This, however, is not the only matter that the agencies should have considered but failed to address.

The agencies' explanations reflect their uncritical acceptance of contraception as an unmitigated good for women's health and economic prospects, but other considerations and research complicate this picture. For instance, the Notice does not consider problems linked to widespread contraceptive use such as the U.S.'s long-term decline in fertility,[48] which remains persistently below replacement rate and is especially pronounced among minority women.[49] Persistent, long-term population decline poses significant challenges for federal and state governments, which may realize some short-term cost savings from the decline but ultimately will struggle with an aging population, a diminishing workforce, and a shrinking tax base.[50]

If, as research indicates, contraception is a factor in this decline, then the agencies should explain why "making contraceptive coverage as accessible to women as possible" outweighs the potential drawbacks of doing so. For example, it is incontrovertible that America's generally declining birth rates since the advent of chemical birth control have hastened the fiscal unsustainability of the Social Security program. It would be arbitrary and capricious for the agencies to count increased contraceptive coverage as an unalloyed good without examining the potential fiscal drawbacks that arise from the proposed rule's effects on overall fertility over the long term.

Furthermore, the agencies should address research indicating that contraceptive use correlates with lower marriage rates as well as higher rates of divorce and separation.[51] Communities with lower marriage rates often face more limited economic prospects because stable marriages correlate strongly with the ability to buy a home and achieve long-term financial security.[52] Again, before finalizing any rule, the agencies should seriously consider *all* of the potential costs and side effects resulting from the promotion of widespread contraceptive use. If the agencies are serious about addressing persistent inequalities afflicting certain underserved communities, then these factors deserve thoughtful consideration. An assessment that considers only the supposed benefits of contraception fails to satisfy the requirement of reasoned decision-making.

Conclusion

Governments and pharmaceutical companies alike market contraception as a means of augmenting individual autonomy, but contraception

exemplifies mankind's effort to wield the technical force of science against the enduring facts of nature. To pursue pleasure more effectively, or at least more frequently, science is employed to subdue nature and remove some portion of its power: namely, fertility.

Contraception now covers much more than basic latex condoms; the Food and Drug Administration recognizes no fewer than 17 separate types of contraception among which are sterilization surgery, "implantable rods," sponges, diaphragms, rings, various intrauterine devices, and an array of ingestible or injectable substances, some meant to prevent fertilization and others meant to prevent the fertilized egg from attaching to the uterine wall.[53] Medical science, it seems, has expended considerable effort on the development of a veritable arsenal of methods that couples can deploy to combat pregnancy.

Meanwhile, the policy campaigns to make these sometimes exotic methods as commonplace as toothpaste in a medicine cabinet have been no less diligent. But even in its most mundane and familiar forms, contraception unavoidably poses foundational questions about the beginnings and value of human life—questions the moral significance of which even the more prevalent use of contraception has not diminished.

Only with great caution should the federal government ever impose one nationally binding answer to questions of great moral and philosophical significance. When the need for such clarity arises, Congress, the institution most representative of and responsive to the sovereign citizens, should be the institution that exercises that awesome power.

The weight of these concerns should have counseled caution. Instead, the agencies have forgone restraint and interpreted Congress's decision not to impose a contraceptive mandate as an invitation to impose one of the agencies' own making. Now they propose to leverage the ACA's vague commands to compel conscientious objectors to be complicit in practices that interfere with and even end human life in the womb.

The agencies should reconsider the supposed wisdom of their project to maximize contraceptive access by imposing it on every last dissenter, no matter how few remain. Even if the agencies cannot be persuaded to abandon that project, its ends can be accomplished while maintaining respect for those whose deeply held convictions make them unable to participate in such an undertaking. The agencies should retain the moral exemption rule to contraceptive mandate and its companion religious exemption in their entireties.

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Endnotes

1. Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (Feb. 2, 2023) (to be codified at 26 CFR pt. 54, 29 CFR pt. 2590, and 45 CFR pts. 147 & 156), https://www.govinfo.gov/content/pkg/FR-2023-02-02/pdf/2023-01981.pdf. Cited Hereafter as Notice.
2. *See id.* at 7237–38 (surveying the past proposed, interim, and final rules addressing contraceptive coverage under the ACA).The agencies responsible for the Notice are the Internal Revenue Service in the Department of the Treasury, the Employee Benefits Security Administration in the Department of Labor, and the Centers for Medicare and Medicaid Services in the Department of Health and Human Services.
3. Patrick Deneen, Why Liberalism Failed at 38 (2018).
4. *See*, *e.g.*, Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity (Jan. 27, 2012), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/; Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 7009 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf.
5. 142 S. Ct. 2228 (2022).
6. Courtney Kube and Minyvonne Burke, *VA Performs Its First Abortion Weeks After Saying It Would in Certain Cases*, NBC News (Sept. 22, 2022), https://www.nbcnews.com/health/health-news/va-performs-first-abortion-weeks-saying-certain-cases-rcna49007.
7. Notice at 7249.
8. Deneen, *supra* note 3 at 49.
9. Although this *Legal Memorandum* focuses on the proposed elimination of the moral exemption, the agencies should not eliminate the protections for religious "issuers" under the religious exemption. Specifically, the agencies should not adopt the language in the proposed rule that reads: "Notwithstanding §§ 146.150 of this subchapter and 147.104, a health insurance issuer may not offer coverage that excludes some or all contraceptive services to any entity or individual that is not an objecting entity or objecting individual under paragraph (a) or (b) of this section, respectively." Issuers have rights under the Religious Freedom Restoration Act just as other objecting entities, and it would be arbitrary and capricious to hold otherwise.
10. Bhd. of Locomotive Eng'rs & Trainmen v. FRA, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020)) (cleaned up).
11. Notice at 7249.
12. *Id.* ("the reason for the distinction is that the Departments can account for the prospect of numerous RFRA claims with respect to a religious exemption, some of which might be meritorious, but there is no analogous need to heed the possibility of successful claims to a non-religious moral exemption, because there is no moral-exemption statute similar to RFRA.").
13. Notice at 7250. *See also* March for Life v. Burwell, 128 F. Supp. 3d 116, 127 (D.D.C. 2015) ("March's for Life's employees are, to put it mildly, 'unlikely' to use contraceptives").
14. Notice at 7249–50.
15. *See* Real Alternatives, Inc. v. Burwell, 150 F. Supp. 3d 419 (M.D. Pa. 2015); *March for Life*, 128 F. Supp. 3d 116; Americans United for Life Comment on CMA-9992-IFC2 at 10 (Nov. 1, 2011), available at http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0023-59496; AUL Comment on CMS-9968-P at 5 (Apr. 8, 2013), available at http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-79115.
16. Notice at 7243 (emphasis added).
17. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020).
18. Eric N. Kiffin, *Federal Departments Propose New Regulations for Contraceptive Services Mandate*, FedSoc Blog (Mar. 29, 2023), https://fedsoc.org/commentary/fedsoc-blog/federal-departments-propose-new-regulations-for-contraceptive-services-mandate ("[N]either in the ACA nor in the Women's Health Amendment did Congress assert any interest in 'seamless' access.... The term 'seamless' showed up first in DOJ briefing in Mandate cases as the Departments' lawyers were trying to defeat religious employers' claim that the Departments had other ways of getting women free contraceptives.").
19. *Little Sisters of the Poor*, 140 S. Ct. 2392 (Alito, J. concurring).
20. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700 (2014).
21. *Little Sisters of the Poor*, 140 S. Ct. at 2396 (Alito, J. concurring).
22. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2260–61, 2268, 2277 (2022).
23. Notice at 7243.
24. *Id.* at 7240–41.
25. *Id.* at 7241.
26. *Little Sisters of the Poor*, 140 S. Ct. at 2394–95 (Alito, J. concurring) (emphasis added) (internal quotation marks omitted).

27. Alltel Corp. v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988) (quotation marks omitted).
28. *Little Sisters of the Poor*, 140 S. Ct. at 2392 ("The ACA—which fails to ensure that millions of women have access to free contraceptives—unmistakably shows that Congress, at least to date, has not regarded this interest as compelling.") (Alito, J. concurring).
29. Notice at 7252.
30. *Hobby Lobby Stores*, 573 U.S. at 724.
31. Notice at 7249.
32. *Dobbs*, 142 S. Ct. at 2242.
33. *Hobby Lobby Stores*, 573 U.S. at 697–98 ("Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods…may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.").
34. *See*, *e.g.*, Mark Rienzi, *The Constitutional Right Not to Kill*, 62 Emory Law Journal 121 (2012); Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame Law Review 2 (2011). Of course, given that the rights to abortion and contraception were comparatively recent judicial innovations (1973 and 1965, respectively), the time frame for discerning the corresponding right to object to those practices is more limited and recent. Still, evidence of a right not to assist in obtaining morally objectionable medical interventions stretches back into the nation's first decades of existence, and related rights not to participate in killings generally benefit from a deeper historical record. *See* Rienzi, *The Constitutional Right Not to Participate in Abortions* at 43–44.
35. United States v. Seeger, 380 U.S. 163 (1965) (emphasis added).
36. Rienzi, *The Constitutional Right Not to Kill* at 149 nn.133, 136.
37. *Id.*
38. Doe v. Bolton, 410 U.S. 179, 197–98 (1973) (emphasis added).
39. Rienzi, *The Constitutional Right Not to Kill* at 152.
40. *Id.*
41. *Id.* at 128.
42. *Id.* at 127.
43. 128 F. Supp. 3d 116 (D.D.C. 2015); 758 F.3d 869 (7th Cir. 2014).
44. The doctrine of "substantive" due process underlying the *Dobbs* decision remains controversial. *See Dobbs*, 142 S. Ct. at 2302–04 (Thomas, J., concurring). While it is the method currently endorsed by a majority of the Supreme Court, a plausible alternative exists for protecting certain unenumerated rights in the Fourteenth Amendment's Privileges and Immunities Clause. *Id.* at 2302 (Thomas, J., concurring). An inquiry based on the Privileges and Immunities Clause would, however, still proceed through a close examination of our nation's history and tradition. *Id.* at 2248 n.2.
45. Notice at 7250.
46. *Little Sisters of the Poor*, 140 S. Ct. at 2383–84.
47. *See* Michael J. New, *Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes*, 13 Ave Maria L. Rev. 345, 353–68 (2015).
48. Issue Brief: *The Long-Term Decline in Fertility—and What It Means for State Budgets*, Pew Trusts (Dec. 5, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets.
49. *Id.* ("Many of the states with the sharpest fertility rate reductions have high concentrations of Hispanics, a group that experienced a particularly noticeable drop-off in fertility."); *see also* Lyman Stone, *Baby Bust: Fertility Is Declining the Most Among Minority Women*, Institute for Family Studies (May 16, 2018), https://ifstudies.org/blog/baby-bust-fertility-is-declining-the-most-among-minority-women.
50. *See* Pew Trusts, *supra* Note 47.
51. *See*, *e.g.*, Richard J. Fehring & Michael D. Manhart, *Natural Family Planning and Marital Chastity: The Effects of Periodic Abstinence on Marital Relationships*, The Linacre Quarterly (Feb. 1, 2021), available at https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1882&context=nursing_fac.
52. Steven Malanga, *Marriage, Then Mortgage*, City Journal (2023), https://www.city-journal.org/marriage-then-mortgage ("Today, fewer than one-third of black adults have spouses, compared with about 55 percent of the general population. … That vast difference alone, given the markedly higher rates of ownership among married couples, accounts for a significant part of the overall racial gap in homeownership. Nor is it hard to grasp the success of black married couples in the housing market when you consider that the poverty rate among black married families is currently just 7.2 percent—well below the 19 percent rate for all blacks.").
53. Notice at 7237, n.4 (stating that "contraception" and "contraceptive" include all methods "recommended by the HRSA-Supported Women's Preventive Services Guidelines."). Guidelines may be found at *Women's Preventive Services Guidelines*, Health Resources and Services Admin., https://www.hrsa.gov/womens-guidelines#note-5.