"Least Restrictive Means": *Burwell v. Hobby Lobby*

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INTRODUCTION

The Affordable Care Act ("ACA") requires health insurance policies to provide coverage for "additional preventative care" for women as specified by the Department of Health and Human Services ("HHS").[1] In 2011, HHS promulgated the "Women's Preventative Services Guidelines," which mandated including the 20 Food and Drug Administration-approved forms of contraception without cost sharing in all insurance plans ("contraception mandate").[2] Simultaneously, HHS created an accommodation ("existing accommodation") for non-profit religious employers[3] that oppose providing coverage for some or all contraception. Those entities can self-certify their religious objection to their insurers who will then provide coverage separate from the group's plan.

Hobby Lobby, Inc. and Conestoga Wood Specialties, Inc. are for-profit corporations. Therefore, they are ineligible for the existing accommodation and must comply with the contraception mandate. Even though both are closely held by owners whose Christian beliefs consider four of the contraception methods to be

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[1] 42 U.S.C. § 300gg-13(a) (2010).

[2] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Apr. 16, 2012).

[3] The regulations adopted the following definition of a religious employer: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code," which "refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." *Id.* at 8726.

abortifacients,[4] the ACA and accompanying HHS regulations force them to choose among compliance in violation of the owners' religious beliefs, no longer providing insurance and facing significant fines ($2000/employee/year),[5] or continuing to provide substandard insurance and facing a tax penalty ($100/employee/day).[6]

In *Burwell v. Hobby Lobby Stores*,[7] the last decision from the 2013–14 term, the Supreme Court ruled 5-4 (along traditional liberal/conservative lines) that the contraception mandate as applied to closely held corporations violated the Religious Freedom Restoration Act ("RFRA"). RFRA requires the Government to demonstrate that rules that substantially burden religious exercise serve a "compelling government interest" and do so by the "least restrictive means."[8] Writing for the Court, Justice Alito concluded that closely held corporations can exercise their owners' religion, that the penalties represent a substantial burden on that exercise, and that the contraceptive mandate is not the least restrictive means of ensuring gender parity.

This Comment examines *Hobby Lobby*'s least restrictive means ("LRM") test. After presenting the contours of the Court's past LRM tests, I examine Justice Alito's application of the test in *Hobby Lobby*. Even though his analysis is comprehensive, I argue that it avoids engaging with the Government's objections to Hobby Lobby's proposed alternative by examining two separate alternatives. That pivot between alternatives limits the Court's ruling to an exceedingly narrow holding that enables its subsequent (seemingly contradictory) holding in *Wheaton College*.[9] In addition to methodological inconsistencies, I also argue that the Court's consideration of a public option alternative and its

[4] *See* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2764-65 (2014).
[5] 26 U.S.C. § 4980H(c)(1) (2010).
[6] 26 U.S.C. § 4980D(b)(1) (2005).
[7] 134 S.Ct. 2751 (2014).
[8] 42 U.S.C. § 2000bb-1(b)(2) (1993).
[9] *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

substantive analysis of the cost of Hobby Lobby's proposed alternative set troubling precedents for future LRM tests.

THE LEAST RESTRICTIVE MEANS TEST

The LRM test is a component of "strict scrutiny" analysis, which is the most stringent standard of judicial review.[10] Courts apply strict scrutiny[11] most commonly for claims that a law or regulation infringes on fundamental rights,[12] including due process, First Amendment protections, and dormant Commerce Clause claims.[13] However, despite the LRM test's frequent use,[14] neither courts nor scholarship have thoroughly explicated its doctrinal contours.

Examining the Supreme Court's applications of LRM analysis from the past twenty years reveals four requirements for potential alternatives to a challenged law or regulation:

1. The alternative must be *less restrictive* than the challenged law or regulation.
2. The alternative must be *fiscally feasible*.
3. The alternative must be at least *as effective* as the challenged law or regulation.
4. The alternative must be *legally viable*.

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[10] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).

[11] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798-801 (2006) (offering a brief history of the development of strict scrutiny). Although it is beyond the scope of this comment, strict scrutiny arguably fits into the framework of legal proportionality. *See, e.g.*, Richard G. Singer, *Proportionate Thoughts About Proportionality*, 8 OHIO ST. J. CRIM. L. 217, 250 n.6 (2010).

[12] *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.").

[13] *See, e.g.*, Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003); *see also* David Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment*, 83 W. VA. L. REV. 375 (1981) (presenting what is widely acknowledged as the best history of the LRM test).

[14] *See generally* Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW § 16-16 (1978).

Prior to *Hobby Lobby*, decisions invoking the LRM test considered some subset of these four considerations. The remainder of this section examines each one in turn.

The Superlative "Least." The core of the LRM test considers whether there are any alternatives that would be less restrictive than the challenged law or regulation. Taken literally, the burden of proving that a particular policy is truly minimally burdensome is extraordinarily high, such that many have dubbed strict scrutiny "strict in theory, fatal in fact."[15] Indeed, if the LRM test began and ended with comparative restrictiveness, a "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."[16]

In addition to the nearly infinite set of alternatives one could invent, the "least" requirement is harsh because the restrictiveness of the status quo under the challenged law or regulation is known whereas the restrictiveness of alternatives is inherently speculative. Given that courts appropriately defer to individuals regarding their religious beliefs,[17] it is nearly impossible for the Government to refute a challenger's claim that a given alternative would be less restrictive. Therefore, in the religious freedom context (and in *Hobby Lobby*) the Government instead argues that the alternative is deficient relative to one or more of the considerations examined below.

Financial Feasibility. The Court sometimes considers the financial feasibility of the proposed alternative, particularly

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[15] *See, e.g.*, Winkler, supra note 10 at 794, *citing* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[16] *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Justice Blackmun, dissenting).

[17] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial.").

relative to the cost of the existing regulation or law. In *United States v. Playboy Entertainment Group*,[18] the Court invalidated a requirement that cable television operators scramble or block from 6 AM to 10 PM channels "primarily dedicated to sexually-oriented programming."[19] The Government contended that the alternative, allowing viewers to order signal blocking on a case-by-case basis, would be cost prohibitive and lead to providers cancelling Playboy (a greater restriction than the Government's preferred daytime restriction).[20] The Court acknowledged the potential for additional costs, but dismissed the government's concerns since Playboy Inc. had offered to absorb the cost. As this case[21] demonstrates, the Court will consider challenges to alternatives on the basis of the alternatives' financial feasibility.[22]

Comparable Effectiveness. Along with financial feasibility, an additional requirement in identifying alternatives is that they must be at least as effective as the challenged regulation or law. In *Reno v. American Civil Liberties Union*,[23] the Court struck down provisions of the Communications Decency Act of 1996[24] that criminalized transmitting indecent Internet communications on First Amendment grounds. Even though the Government had a compelling interest in protecting children from harmful materials, the Court held that there were alternatives, including distinguishing

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[18] 529 U.S. 803 (2000).

[19] *See* 47 U.S.C. § 561 (1996) ("[T]he distributor shall limit the access of children . . . during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it."); 47 C.F.R. § 76.227 (1999) (specifying the 6 AM to 10 PM window).

[20] *Playboy Entm't Grp.*, 529 U.S. at 824 (2000).

[21] *See also United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating the Stolen Valor Act, 18 U.S.C. § 704(b) (2005), which criminalized falsely claiming to have received a military decoration because, *inter alia*, the Government's claim of the impracticability of the preferred alternative, an online database of recipients, was conclusory and not substantiated).

[22] Analysis of financial feasibility is not limited to direct costs. Indeed, the Court sometimes considers other externalities impacting alternatives' feasibility, such as administrability. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 762 (1990) (Justice Brennan, dissenting) (describing the minimal administrative burden of alternatives to a total ban on solicitation outside of Postal Offices).

[23] 521 U.S. 844 (1997).

[24] 47 U.S.C. § 223(a)(1)(B) (1996).

between commercial and non-commercial communications, that "would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[25] *Reno*[26] suggests that proposed alternatives must be at least as effective as the existing rule to qualify as a bona fide alternative.

Legal Viability. Related to financial feasibility is the requirement that the proposed alternative pass constitutional muster and, in the case of regulations, be within statutory limits. Often this requirement is presumptive and the parties do not contest the constitutionality or legality of the proposed alternative. Indeed, in *McCullen v. Coakley*, the Court noted that it "would be odd to consider . . . possible alternatives if they were . . . unconstitutional."[27] An analogous requirement applies when the challenged rule is a regulation, not a statute. In *United States v. Kokinda*, the Court upheld a Postal Service regulation prohibiting solicitation on sidewalks in front of Post Offices, implying that any alternative regulation would need to be validly promulgated through rulemaking.[28] In addition, the Court only considers whether there are *available* less restrictive alternatives.[29] Any reasonable understanding of "available" includes being legally and constitutionally viable.

THE LEAST RESTRICTIVE MEANS TEST IN *HOBBY LOBBY*: METHODOLOGICAL INCONSISTENCIES

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[25] *Reno*, 521 U.S. at 874 (1997). *See also F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 395 (1984) (arguing that a broadcast disclaimer noting editorialization would be as effective as forbidding TV stations from editorializing).

[26] *See also United States v. American Library Association*, 539 U.S. 194, 207 n.3 (2003) (upholding libraries' use of pornography filtering software on their computers because alternatives including moving computers to more secluded areas and utilizing privacy screens would make it easier, not harder, to access pornography).

[27] 134 S. Ct. 2518, 2530 (2014).

[28] *See Kokinda*, *supra* note 21 at 735.

[29] *See, e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) ("[T]he court should ask whether the challenged regulation is the least restrictive means among *available*, effective alternatives.") (emphasis added).

After concluding that the contraception mandate constitutes a substantial burden on Hobby Lobby's and Conestoga Wood's owners' religious exercise, Justice Alito considers whether the contraception mandate is the least restrictive means for the Government to achieve its goals. Unlike the precedents cited above, each of which applies only one or two of the considerations, *Hobby Lobby*'s LRM test applies all four to potential alternatives to the contraception mandate.

In their briefs, Hobby Lobby and their amici most frequently advocated a "public option" as an alternative: "the most obvious less-restrictive alternative is for the government to pay for its favored contraceptive methods itself."[30] The Court begins its LRM analysis by echoing the petitioners: "[t]he most straightforward [alternative] . . . would be for the Government to assume the cost" of providing contraception.[31]

Applying the *first consideration*, restrictiveness, to the public option alternative, Justice Alito quickly reiterates the uncontested point that it "would certainly be less restrictive of the plaintiffs' religious liberty" than the contraception mandate.[32] The Court then moves to the *second consideration*, financial feasibility. Through speculative and qualitative arguments (discussed below), the Court implicitly finds that the public option is financially viable by

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[30] Brief for Respondent-Appellee at 58, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) (No. 13-354). *See also* Brief for Petitioner-Appellant at 63-64, Conestoga Wood Specialties Corp. v. Sebelius (No. 13-356) ("The government already subsidizes contraception on a massive scale. Nothing prevents it from expanding access to federal programs, such as Medicaid, that serve the young, unmarried, undereducated, and low-income women who are most at risk for unintended pregnancies. It could also provide additional funding to state contraceptive programs that serve such groups. Alternatively, the government could offer a tax credit to any women it believes suffer from the cost of buying their own contraception. It could devise a free or heavily-subsidized contraceptive-coverage plan to be made available on the government's healthcare exchanges or through multi-state plans. It could also give insurance or pharmaceutical companies incentives to offer contraceptives to vulnerable populations.") (citations omitted).

[31] *Hobby Lobby*, 134 S.Ct. at 2780.

[32] *Id.* This is consistent with the fact that the Government did not contest this conclusion and the petitioners and their amici frequently cited it as a less restrictive alternative.

concluding that its cost "would [likely] be minor when compared to the overall cost of ACA."[33]

At this point, the Court has not engaged with the Government's primary objections to the public option, which concern the third and fourth considerations, comparable effectiveness and legal viability. Instead of moving on to those arguments, the Court dismisses them by pivoting to a different alternative: expanding the existing accommodation (an alternative neither Hobby Lobby nor its amici proposed).

The Government had argued that a public option would not meet the *third consideration*, comparable effectiveness, because unlike the contraception mandate it would impose additional barriers to access, leading to fewer covered women.[34] In response, Hobby Lobby et al. argued that comparable effectiveness is not germane to LRM analysis.[35] Instead of following Hobby Lobby's lead, the Court found that a public option's effectiveness was irrelevant because *expanding the existing accommodation* would not impose additional burdens on women (it operates in conjunction with existing employer-provided health insurance).[36]

The Court executes a similar pivot in response to the Government's argument for the *fourth consideration*, that establishing a public option is *ultra vires*.[37] Once again, Hobby Lobby and Conestoga Wood argued that legal viability is not

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[33] *Id.* at 2781.

[34] *See* Brief for the Respondent-Appellee at 56, Conestoga Wood Specialties Corp. v. Sebelius, (No. 13-356) ("[I]mposing additional barriers to women . . . by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.").

[35] *See* Brief for Petitioner-Appellant at 64, Conestoga Wood Specialties Corp. v. Sebelius (No. 13-356) ("Less restrictive alternatives undermine the government's case even if they . . . are less directly effective.").

[36] *See Hobby Lobby*, 134 S.Ct. at 2782.

[37] The Government argued this somewhat circuitously by noting that Congress chose to utilize private plans (and implicitly *not* a public option) and that a public option would create a new federal program (implicitly beyond the ACA's bounds). *See* Brief for the Respondent-Appellee at 56, Conestoga Wood Specialties Corp. v. Sebelius, (No. 13-356); Brief for Petitioner-Appellant at 57, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (No. 13-354).

germane to LRM analysis,[38] and once again the Court declined to follow their lead. Instead, Justice Alito once again responded to the Government's argument by noting that HHS presumably believes that *the existing accommodation* is not *ultra vires*, since HHS developed it.

On a methodological level, by examining each of the four considerations, Justice Alito's LRM test confirms that all four are important and valid parts of a LRM analysis. Unfortunately, by taking two incomplete analyses and asserting they add up to a whole, the Court simultaneously undermines that framework.[39]

In addition to inducing methodological murkiness, Justice Alito's jurisprudential sleight of hand foreshadows *Wheaton College*,[40] where the Court, three days after *Hobby Lobby*, granted a preliminary injunction against the existing accommodation on RFRA grounds. Specifically, Justice Alito's opinion acknowledges that both a public option and expanding the existing accommodation are less restrictive than the contraception mandate, but he pointedly does not specify which alternative is less restrictive than the other. In addition, the Court even explicitly limits its finding by holding that the existing accommodation is less restrictive to the petitioner's religious belief *against funding insurance for contraceptives*, not any other religious belief they may hold (e.g. filing the form required by the existing accommodation).[41] This narrow holding makes it easy to envision

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[38] *See* Brief for Respondent-Appellee at 58, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) (No. 13-354) (implying that statutory authorization is not relevant since RFRA implicates Congress, and therefore new government programs, in its analysis).

[39] Holding that a public option is less restrictive and financially feasible and that expanding the existing accommodation is legally viable and equally effective does not demonstrate that there is a single, RFRA compliant, less restrictive alternative to the contraception mandate.

[40] *Supra* note 8.

[41] *See Hobby Lobby*, 134 S. Ct. at 2782 (2014) ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. *At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion* . . . .") (emphasis added).

HHS expanding the existing accommodation and being challenged on RFRA grounds that a public option would be less restrictive.[42]

The Court's pivot between alternatives also allows it to utilize the public option selectively while strategically avoiding the corollary requirement of legality. There would undoubtedly have been an apoplectic reaction if Justice Alito had struck down the contraceptive mandate on the basis that the ACA delegated to HHS the authority to create a "socialist" public option. Shifting between alternatives gives the Court the advantages of each while allowing it to avoid each one's undesirable dimensions.

THE LEAST RESTRICTIVE MEANS TEST IN *HOBBY LOBBY*: SUBSTANTIVE INACCURACY AND DANGEROUS PRECEDENT

Justice Alito's decision also sets two dangerous precedents for future LRM tests: consideration of a public option as an alternative and qualitative analysis of financial feasibility.

Public Option. The Court's LRM test establishes the precedent that a valid alternative is to shift the burden from individuals to the Government. This is problematic because it is hard to imagine a situation where a government program would not be less restrictive than any rule. The Court makes a reasonable point that drawing a line between expanding existing programs and establishing new ones is difficult in general,[43] but *Hobby Lobby* seems like a particularly clear-cut example where HHS lacks authority to establish a public option. Before *Hobby Lobby*, the natural check on LRM alternatives was legal (and financial) feasibility. By pirouetting around such considerations, the Court removes that barrier and opens the door to challenges based on the most farfetched potential government program alternative.

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[42] The pending challenge to the existing accommodation, which it seems likely that Hobby Lobby et al will join, is most likely the reason why they did not advocate the existing accommodation as a less restrictive alternative, to avoid the appearance of flip flopping.

[43] *Hobby Lobby*, 134 S.Ct. at 2781.

Financial Feasibility. As noted above, the Court attempts to describe the cost of a public option, but troublingly does so without actual quantification. Instead, the Court simply posits that "it seems likely" that the cost "would be minor when compared with the overall cost of ACA."[44] Justice Alito does not justify this comparison, leaving confusion as to what is the correct object of comparison—the ACA, the federal budget, health care spending, or something else. In addition, the analysis does not quantify "minor"—it could be 1%, 10%, 50%, or any other proportion of the total. It is unprecedented for a LRM test to weigh the cost of an alternative against the entire cost of the program; doing so here appears to be a politically-driven comment against the size of the ACA rather than substantive legal analysis.

In lieu of quantification, Justice Alito defends his "minor" costs conclusion by noting that two of the four challenged contraceptive methods are "emergency" contraception.[45] That logic conflates "emergency" with minimally used and inexpensive. Had the Court sought quantification, it would have found that from 2006-2010 one in nine women used such contraception[46] and that the cost of emergency contraception is significantly higher than *ex ante* contraception.[47] In addition, extrapolation from data on publicly funded contraception indicates that it would cost around $9.3 billion per year to provide contraception to all who need it,[48] which is roughly 7% of the ACA's total 10-year Congressional

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[44] *Id.*

[45] *Id.* at 2780-2781.

[46] NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, NCHS DATA BRIEF NO. 112, USE OF EMERGENCY CONTRACEPTION AMONG WOMEN AGED 15-44: UNITED STATES, 2006-2010 (2013) *available at* www.cdc.gov/nchs/data/databriefs/db112.htm.

[47] *Compare The High Costs of Birth Control*, Center for American Progress, Feb. 15, 2012 *available at* www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/ and *Emergency Contraception*, Bedsider (Aug. 19, 2014), http://bedsider.org/methods/emergency_contraception#costs_tab.

[48] *See Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INSTITUTE (Aug. 2014), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Sept. 9, 2014).

Budget Office estimate.[49] Only a fraction of that would be borne by the government in any public option, but nonetheless, it is dismaying for the Court to countenance speculation instead of analysis, particularly given the ease of quantifying financial feasibility.

CONCLUSION

In *Hobby Lobby*, the Court indicates that when applying the LRM test, less restrictive alternatives to existing rules must be at least as effective, financially feasible, and legally viable. However, when applying the test, the Court inconsistently, yet strategically, shifts between alternatives and creates methodological murkiness. The Court strikes down the contraceptive mandate without establishing an RFRA-compliant alternative, leaving the door open for extensive future demands for religious exemptions from the ACA and other laws.

The Court's failure to cite a single cost for a single contraceptive method or even articulate the principles for ascertaining financial feasibility unfortunately confirms the critique that the LRM test is no more than a qualitative, watered-down cost-benefit analysis.[50] In addition, by conferring validity on the public option alternative, the Court vastly expands the set of possible future alternatives to compliance with generally applicable laws.

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[49] *See Hobby Lobby*, 134 S.Ct. at 2781.

[50] *See* Sykes *supra*, note 13 at 404; *see also* Tribe, *supra*, note 14 at § 12-30.