



## Why libertarians have it totally wrong on the contraceptive mandate

By Dante Atkins  
March 30, 2014

This past Tuesday, the Supreme Court [heard oral arguments](#) in the combined cases of *Hobby Lobby Stores v. Sebelius* and *Conestoga Wood Specialties Corp. v. Sebelius*—referred to colloquially and hereinafter as the Hobby Lobby case. At issue before the highest court in the land is the question of whether for-profit businesses can lay claim to having a religion, and if so, whether the contraceptive mandate provision of the Affordable Care Act places an undue burden on religious employers because they would be forced to provide medical insurance that is required to cover care that violates the doctrine of the employing entity, regardless of whether the employee desires the care or not.

A decision for plaintiffs in this case would not just represent a setback on access to contraception, but would [open up](#) a Pandora's Box of negative policy consequences. As Justices Kagan, Ginsburg and Sotomayor aptly pointed out, accepting the arguments of the plaintiffs would not simply gut the contraceptive mandate. Even worse, it would provide precedent for any employer to refuse to cover any type of medical care on religious grounds, or even seek religious exemptions to unrelated laws such as nondiscrimination clauses or the minimum wage. This would force courts to consider employers' claims for exemptions on a case-by-case basis, resulting in a host of frivolous litigation that would force judges into the impossible position of evaluating the sincerity of each individual's religious conviction.

It goes without saying that the theocratic right wing is fully in support of the plaintiffs in these cases. After all, the war on a woman's reproductive freedom that used to be more exclusively reserved for the continued debate over abortion rights has now extended to birth control, which used to be so uncontroversial a topic that even Hobby Lobby [has previously covered it](#) for their employees without objection. But the religious right has an ally in the fight to deny women guaranteed coverage of contraception: economic libertarians.

Read on below the fold.

Economic libertarians tend to oppose the contraception mandate on the grounds that requiring coverage of contraception is an unjust coercion by the government against employers, and that women whose employers refuse to have contraception coverage can simply either find another job or pay for it on their own. As Kevin Vallier [wrote](#) a couple of years ago regarding the mandate as applied to the Roman Catholic Church:

Defenders of the mandate insist that a woman's reproductive liberty is significantly restricted if her employer refuses to pay for contraception. This is false. To see why, abstract. Is A's liberty to X restricted if A's boss refuses to pay for X? Especially when X is cheap and readily available? And when A can choose another employer? And when A's government could provide X directly without using force against a voluntary association? No, no, no, and no.

This issue came to a bit of a head in online media circles the previous week when Emily Crockett, a reporting fellow at *RH Reality Check*, tweeted a [video](#) produced by UltraViolet about the Hobby Lobby case. Timothy Lee, a libertarian technology writer formerly of the *Washington Post* and newly hired at Ezra Klein's journalism startup *Vox*, [made the mistake](#) of responding that:

Luckily people are free to pay for their own birth control.

Crockett offers a systematic deconstruction of the first two points of Vallier's narrative as more concisely expressed by his fellow libertarian Lee. To begin with, employers are not paying for birth control at all. Rather, the employee is earning it through her labor and the insurance premiums she pays. Secondly, contraception is not actually as inexpensive as Vallier and Lee (both men, unsurprisingly) seem to think it is:

Insurance is required to do certain things for us in return for those often exorbitant premiums, and right now one of those things is providing coverage of numerous forms of basic primary health care, including basic contraceptive and reproductive health care, without a copay. Not free.

Simply put, people who say women are getting "free birth control" don't know what they're talking about. Premiums aren't cheap, nor is birth control if we don't have insurance; it can easily run from \$600 or more per year just for prescriptions, never mind doctor's visits.

Women who don't have much money to begin with aren't as "free" to spend it, as Lee assumes; indeed, 55 percent of women report experiencing a time when they could not afford to use birth control consistently. Not using birth control consistently (depending on how inconsistent you are and how false your sense of security is) is, in the worst cases, probably not much better than not using it at all.

Vallier's third point about a woman simply being able to choose a different employer could perhaps be seen as rational from the perspective of an ivory tower academic who seems to view people and employers as, in the [immortal words](#) of Charlie Stross, frictionless spherical humanoids of uniform density who can simply choose at will to associate and dissociate with employers as we see fit. That perspective, however, is not so applicable to reality. In the real world and the actual economy, unemployment is still high and underemployment is even higher. So is it a viable option for most women to change jobs and uproot their lives just because their employer doesn't offer the full health coverage they deserve? No, no, no, and no.

But it is Vallier's last point about the government providing contraception instead that is most particularly intriguing. From a theoretical perspective, it is fascinating that a political ideology

that typically favors individual freedom from government would rather require that taxpayer dollars pay for contraception instead of requiring employers to provide plans that cover contraception with no co-pay. Still, this is a thing that exists: a kinder, gentler libertarianism, [here eloquently expressed](#) by yet another male technology writer (Julian Sanchez, a fellow at the CATO Institute). Sanchez views contraception as a commodity similar to food, and advocates for a government program that would subsidize contraception in the same way we subsidize food through the Supplemental Nutrition Assistance Program (SNAP), or provide heating assistance through similar models.

There's so much wrong with this analogy, however that it's hard to know where to start.

To begin with, the SNAP program subsidizes only the most basic food necessities, and the costs for these necessities are relatively stable, and also do not include the requirement of a prescription, consultation with a physician. This is not how contraception works: certain methods work best on a case-by-case basis; no matter how often conservatives [talk about](#) the generic pills available at Target as a panacea that invalidates the need for the contraception mandate, sometimes the more expensive options are the ones that work the best, or the only ones that work at all; and it usually takes a consultation with a physician and a prescription to obtain the care that works. Imagine how well SNAP would work under the current model if deciding what cereal you were going to buy had to be determined in consultation with a doctor and required a prescription, and some shoppers could simply make do with Kix while others required filet mignon. Needless to say, the cash grant system would not work with nearly the efficiency it does now with those layers of complexity added onto it.

Further, the subsidy system also imposes an artificial value judgment on the reasons why a woman would use contraception in the first place. Under Sanchez' hypothetical subsidy system, a woman who is not eligible for a subsidy would be ineligible to receive coverage of any kind for birth control if she were simply using it to prevent pregnancy, but would be eligible to have it covered by medical insurance if she could document that it were being used to treat a particular medical condition:

That is surely a debate worth having on its own terms. But it strikes me as a bit odd that so little attention is given to the question of whether an insurance model really makes sense for contraception qua contraception—when it is not prescribed for some independent medical purpose.

Now, Sanchez is clearly not morally opposed to contraception. He is, in fact, arguing for a public subsidy for it. But the attempt to distinguish between uses of contraception that are worthy of being covered by insurance and those worthy only of a low-income subsidy is counterproductive and dangerous. By creating this two-tiered bifurcation, Sanchez and those who subscribe to his model are regrettably playing into a religious conservative argument that contraception is not a legitimate medical need: it's tantamount to saying that, hey, if it's medicine, sure, you can get it covered by insurance—but if they're just your dirty little slut pills, then you're on your own if you make too much for a public subsidy. This may not be the intention, but it's an inescapable conclusion. And even if a case could be made that simply preventing pregnancy is a less legitimate and moral reason to use contraception than treatment of manifested medical conditions, it makes no sense to create a two-tiered funding structure that seeks

to distinguish between the two. Women who take birth control to regulate fibroids or dysmenorrhea use it in the exact same way, with the exact same costs, as women who use the same method simply as pregnancy prevention—a fact which automatically introduces a moral judgment into any attempt to discriminate by reasons for usage. Perhaps libertarians have more in common with religious conservatives than they would care to admit?

The reason contraception operates within the health insurance system rather than with a cash grant subsidy system is that *it is part of professional medical care*, and not simply a commodity that is available for purchase and subsidy should society so desire. It also exists within the health insurance system because it is an actuarial hedge against other more expensive conditions—pregnancy of course, which is expensive to care for, but even diseases such as fibroids and feminine cancers. Under a proposed subsidy system, women who make too much to qualify for a subsidy but who require more expensive forms of contraception might simply choose to do without, especially in an era of economic uncertainty, which would increase the risks of unwanted pregnancies and other more expensive conditions that contraception can help prevent.

And that is exactly what the contraceptive mandate is specifically designed to avoid. There is a reason that contraception is just one of the many preventive items the Affordable Care Act mandates be covered without co-pays. They are mandated as part of insurance coverage, despite the fact that their costs are relatively stable over time, precisely because we as a society have passed a law designed to encourage people to take advantage of these preventive measures. Even though the cost of an annual checkup is fairly stable, we wouldn't dream of removing it as a benefit and converting it to a subsidy model, like libertarians are proposing for contraceptive care, because these are things we are actively encouraging people to take advantage of. The same goes for contraception, even if that offends the suddenly-delicate sensibilities of libertarian male technology writers.

My personally preferred solution would be to require any man who says that women should pay for their own contraception to pay each woman he sleeps with for a portion of the monthly cost of the birth control he just took advantage of. To echo Vallier, that would be a highly justified use of force against a voluntary association.

*(disclosure: Emily Crockett and the author have a personal relationship.)*