

The "least restrictive means" in theory or in reality?

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Yesterday I [posted about the Hobby Lobby decision](#), observing that it can't be both a broad precedent that will protect liberals' freedom of conscience along with conservatives' *and* a narrow ruling that isn't really a big deal.

Meanwhile, [the Supreme Court was clarifying](#) that whatever the ruling ultimately means, it definitely isn't quite as narrow as to apply to just the allegedly abortifacient contraceptives Hobby Lobby's owners object to. In fact it covers the contraception mandate generally. Monday's decision won't just let evangelical business owners refuse to cover IUDs; it will also let Catholic business owners refuse to cover the pill.

If indeed [the end result is the same accommodation the Obama administration made for religious nonprofits](#)—employees still get their no-cost contraception coverage, but directly from the insurer rather than via the employer—then all this may not be much of a practical setback for women's health. But [is it clear that HHS will be able to do this?](#) The White House is [suggesting a legislative approach instead](#). And the Court [may rule against the accommodation itself](#) sometime in the future.

Monday's ruling hinged in part on the majority's contention that the government has other ways of providing contraception coverage—ways less restrictive of religious liberty, a test imposed by the Religious Freedom Restoration Act. As an alternative, Justice Alito specifically suggested the accommodation already in place for nonprofits. But will this work? And will there be future rulings that rely on the government's theoretical ability to do x or y without restricting [the religious practice of corporations](#) even though the practical political barriers make such action unlikely?

As Eugene Volokh points out, [the precise meaning of RFRA's "least restrictive means" test remains pretty unclear](#). I'm not a legal scholar or a RFRA expert. But if anyone reading this is, I'd like to know how if at all the application of this test has ever differentiated between what the government could do in a perfect world and

what it might actually get done.

After all, the government could *theoretically* simply provide all citizens with comprehensive health insurance. A lot of us who want a single-payer system supported Obamacare anyway, because it was the best reform the politics allowed. It's a bit galling now to see conservatives rallying specifically around businesses that don't want to comply with the new law's demands—after all, we didn't want to place the demands on business in the first place. In a single-payer system, women could get their contraception coverage, and businesses could go to business church with a clean business conscience.

Among other things, this whole episode is a reminder that the complexity and far-reaching implications of Obamacare are not due to big government's inability to do things simply and right. They're due to the fact that public-private partnerships are the only politically viable way to create American social policy anymore, and public-private partnerships by definition have a lot of ins, a lot of outs, a lot of interested parties. You want simpler, cleaner health-care reform that doesn't place demands on business? I've got just the policy for you. But it's never going to happen. It's not something the government can do *in reality*.

Contraception coverage, on the other hand, may well be. But I worry about future claims by other God-fearing corporations.