



**FROM STATUS TO CONTRACT TO
STATUS:
BURWELL V. HOBBY LOBBY AND THE
PRIMITIVISM OF POLITICS**

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In *Burwell v. Hobby Lobby*,¹ the Supreme Court was called upon to play referee in a dispute that should never have happened. That dispute—ostensibly between women seeking access to birth control through their employers and religious-based employers—was manufactured by a bizarre set of laws that incentivized the creation of our employer-based health care system. Those laws and regulations thus pitted employers and employees in an unnecessary fight over the characteristics of that employer-based health insurance.

While *Hobby Lobby* and *Conestoga Wood Specialties* did and should have won, there are deeper lessons to be taken from the case. *Hobby Lobby* should remind us that the principles of a free society can help avoid unnecessary conflict and strife by simply defining and delineating our rights and responsibilities. When societies

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¹ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

move away from the “simple rules for a complex world” that characterize properly limited government, what results is often increased and unnecessary conflict.² In other words, the overly politicized world resembles the primitive one, defined by battles between competing tribes over politically achieved exemptions, disbursements, and special solicitude.

In this essay, I will discuss two factors that helped create the unnecessary clash of interests in *Burwell v. Hobby Lobby*, and, in general, that helped create what I call “the primitivism of politics.” One factor is the development—or rediscovery—of a status-based society. A status-based society is one in which competing groups vie for mutually exclusive alternatives—i.e. what one group wins the other group loses. In a status-based society, group membership and coordinated action is vital to achieving one’s goals.

The second factor: bad laws that help create synthetic groups that fight over political outcomes. Don’t hate the players, hate the game—or, more specifically, hate how the rules of the game help determine both the behavior and the composition of the opposing parties. Bad policies will often—if not usually—invent problems out of thin air—such as the “struggle” between religious employers and women seeking access to birth control. In so doing, those policies will also help invent the groups that fight over which policy will be in place.

For example, a bad policy regulating the national haircut would create the long-hair and short-hair factions, each trying to impose their views on the other. Where once there was peace in the matter of haircuts—that is, when individual rights and responsibilities were clearly delineated—there is now war. Perhaps some pundits will bloat about the “War on Hippies,” while other pundits will accuse the long-hair faction of fighting against the inherent conservative values of the short crop. In the end there is a manufac-

² See, generally, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1997).

tured political battle royale, a demolition derby of competing teams fighting for a trophy in a battledome built and designed by misguided and growing government.

I jest, but I am also quite serious. Sometimes comedy and satire are the only things that can hold up a non-distorting mirror to society. During *Burwell v. Hobby Lobby*, women seeking access to birth control through their employer and religious employers were thrown into the political battledome. Pundits and political cheerleaders chose their sides and donned their team colors. Their unnecessary struggle obscured the bad government policies that pulled the strings. In this essay, I will try to refocus the conversation on the reasons for the fight rather than the fight itself.

FROM STATUS TO CONTRACT TO STATUS

In his 1861 classic *Ancient Law*, British jurist Henry Sumner Maine famously wrote that “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”³ In the “primitive society,” “[m]en are regarded and treated, not as individuals, but always as members of a particular group.”⁴ Maine observed that, in primitive societies, relationships were usually defined by the status of those involved, particularly family status. Society progressed, however, when people moved from “a condition of society in which all the relations of Persons are summed up in the relations of Family,” to one in which “all these relations arise from the free agreement of individuals.”⁵

While societies progress by moving from status to contract, political systems will sometimes regress back to a status-based society, thus going from status to contract to status. Few would doubt, for

³ HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Reprint ed. 1982) (1st ed. 1861) (emphasis original).

⁴ *Id.* at 183.

⁵ *Id.* at 170.

example, that North Korea is a status-based society. In totalitarian regimes, those with status enjoy advantages over nearly everyone else.

Hobby Lobby featured a status-based struggle on both sides. On one side stood the employers, fighting to obtain the status of a religious-based employer and the exemptions that came with it. On the other side stood women seeking access to birth control through their employers, a group that received special solicitude in terms of regulations defining the “minimal essential coverage” that was to be provided “without cost sharing.”⁶

The Affordable Care Act helped further guarantee that health care in America would no longer “arise from the free agreement of individuals.”⁷ Instead, one’s place in the health-care landscape—as either an employer or employee—would be defined by group-membership rather than by relying on status-indifferent rights and responsibilities of individuals.

The American government has, of course, moved far away from using simple rules to delineate the rights and responsibilities of individuals. Instead, we live in an increasingly politicized world where rights and responsibilities can vary depending on a politically defined status. Thus do we find, for example, the Little Sisters of the Poor, a Catholic organization dedicated to “offer[ing] the neediest elderly of every race and religion a home where they will be welcomed as Christ, cared for as family and accompanied with dignity until God calls them to himself,”⁸ currently struggling to obtain an exemption from the employer mandate of the Affordable Care

⁶ For a further description of the legal landscape see *Burwell*, 134 S. Ct. at 2762-63; 77 Fed. Reg. 8725.

⁷ MAINE, *supra* note 3, at 170.

⁸ *Little Sisters of the Poor Mission, Virtues and Values 2012*, available at <http://www.littlesistersofthepoor.org/ourmission/misison-statement> (last visited Oct. 22, 2014).

Act.⁹ If they are unable to obtain one, they will have to either pay a fine or provide insurance to their employees covering certain contraceptives that violate their religious beliefs.¹⁰ Their case is currently pending before the Tenth Circuit.¹¹

The Samaritan Health Care Ministry, however, a Christian health care cost-sharing society, did receive an exemption—a statutory one—from the Affordable Care Act’s individual mandate.¹² It wasn’t easy to get, though. While the law was being written, “House lawmakers weren’t inclined to grant the ministries an exemption, but the bill’s authors in the Senate were willing to accommodate.”¹³

Also given exemptions to the individual mandate were the Old Order Amish and the Old Order Mennonites.¹⁴ In order to receive the religious conscientious exemption they, and anyone else seeking an exemption, had to be certified by the Secretary that it is the practice of the group, “and has been for a period of time which he [the Secretary] deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his [the Secretary’s] judgment is reasonable in view of their general level of living.”¹⁵ Also, for some reason, they must have been continually in existence since December 31, 1950.¹⁶

⁹ See *Little Sisters of the Poor v. Sebelius*, BECKET FUND FOR RELIGIOUS LIBERTY, available at <http://www.becketfund.org/littlesisters/>.

¹⁰ See, 26 U.S.C. § 4980H(a).

¹¹ In January, Justice Sonia Sotomayor enjoined the government from enforcing the mandate against Little Sisters pending the resolution of their appeal. See *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014), available at http://www.supremecourt.gov/orders/courtorders/012414zr_6jgm.pdf.

¹² 26 U.S.C. § 5000A(d)(2)(B).

¹³ Tom Howell, Jr., ‘Obamacare’ alternative: health-sharing ministries offered a way out, WASH. TIMES, June 6, 2013, available at <http://www.washingtontimes.com/news/2013/jun/6/obamacare-alternative-exemptions-offer-way-out>.

¹⁴ *Id.*

¹⁵ 26 U.S.C. § 1402(g)(1)(D).

¹⁶ *Id.* at § 1402(g)(1)(E).

This is what a status-based society looks like. Arbitrary rules, discretionary judgments, and political power (such as the Samaritan Health Care Ministry's ability to push Congress for an exemption) determine whether, in the government's view, someone belongs to a "bona fide" religious organization. Left out are those who are members of smaller sects, those who have personal, deeply felt objections to the policies, or even those who fundamentally disagree with the practices of Western medicine and prefer homeopathy or Ayurvedic medicine. Without extraordinary efforts requiring the resources and political clout of a group, those people will be forced to pay for medical care that violates their consciences.

LET'S GET READY TO RUMBLE: WHY EMPLOYERS AND EMPLOYEES FIGHT OVER HEALTH CARE

Why do so many Americans get health insurance through their employer? This has become so common that it no longer strikes us as bizarre. Yet few people would include this feature in a health care system designed from scratch. How did we get here? What rules did the government create that put religious-based employers and women seeking access to birth control through their employers into the political battledome?

First mistake: During World War II, the government imposed wage and price controls.¹⁷ Many, if not most, economists will tell you this is a bad idea.¹⁸ Nevertheless, the government marched bravely into the abyss thinking, as usual, that the immediate, politically salient problem was more important than the long-term consequences.

¹⁷ Robert B. Helms, *The Tax Treatment of Health Insurance: Early History and Evidence, 1940-1970*, in *EMPOWERING HEALTH CARE CONSUMERS THROUGH TAX REFORM* 1, 11 (Grace-Marie Arnett ed., 1999).

¹⁸ See, e.g., THOMAS SOWELL, *BASIC ECONOMICS* 39-65 (4th ed., 2011).

Those wage controls incentivized companies to start providing benefits, such as health insurance, as part of compensation packages.¹⁹ This, of course, is the predictable outcome of drawing a line above which wages can't go.²⁰ Those employees worth more than the price ceiling were compensated in some other way.²¹

Second mistake: As many people started to get insurance through their jobs because "business firms offered fringe benefits as a way to compete for scarce labor under wartime wage controls," the IRS temporarily codified a tax preference for employer-supplied insurance in 1943 and then rescinded it in 1953.²² Congress, however, overturned the IRS in 1954.²³ As a result "[i]ndividually purchased insurance and employer-provided insurance do not compete on a level playing field."²⁴ That thumb on the scale slowly helped push us into the strange, employer-based system we're in today.²⁵ As reported by the CBO, 76% of insurance-eligible employees are enrolled in employer-based programs.²⁶

Third mistake: The preference for employer-based insurance was one of many factors that pushed the United States toward an insurance-centered health care system where insurance is seen as synonymous with health care. As David Goldhill writes:

As late as 1954, only a minority of Americans had health insurance. That's when Congress codified tax rulings that employer contributions to employee health plans were tax deductible without the resulting benefits being taxable to

¹⁹ JOHN C. GOODMAN, PRICELESS: CURING THE HEALTHCARE CRISIS 137 (2012).

²⁰ See, SOWELL, *supra* note 18, at 39-65.

²¹ *Id.*

²² *Id.*

²³ *Id.*; see 26 U.S.C. § 106(a).

²⁴ GOODMAN, *supra* note 19, at 137.

²⁵ *Id.* at 123-39.

²⁶ CONG. BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2014-2023 (2013), available at <http://www.cbo.gov/budget-options/2013/44903>.

employees. Not only did this seemingly minor tax benefit encourage the spread of traditional catastrophic insurance, it had the unintentional effect of making employer-funded health insurance the lowest-cost way of financing any type of health care. Over time, employer-based comprehensive insurance crowded out alternative methods of paying for health care expenses until it became the default mechanism for most employed Americans.²⁷

But insurance is not synonymous with health care. It is merely a method by which some people pay for some health care.²⁸

Real Insurance *insures* against an unpredictable future.²⁹ Just as car insurance shouldn't pay for oil changes, health insurance generally shouldn't pay for predictable expenses like birth control. While a free-market health care system would likely feature the option to buy health insurance that covers predictable expenses, there wouldn't be a mandate that certain predictable expenses be covered (otherwise it wouldn't be a truly free market). Increased government regulations on insurance and the lack of a thriving and competitive market pushed the cost of insurance up and, due in part to the effect of the moral hazard of third-party payers, also pushed the price of medicine up.³⁰

As a consequence, it became increasingly difficult to get effective, cheap medicine without insurance.³¹ The unemployed were also often uninsured. Between 2009-10, the CDC reported that only 48.1% of unemployed adults between 18-64 had insurance, com-

²⁷ DAVID GOLDHILL, *CATASTROPHIC CARE: HOW AMERICAN HEALTH CARE KILLED MY FATHER - AND HOW WE CAN FIX IT* 26 (2013).

²⁸ GOODMAN, *supra* note 19, at 123-25.

²⁹ *Id.* at 123.

³⁰ *Id.* at 67-94.

³¹ *Id.*

pared to 81.4% of employed adults.³² People began discussing the “crisis” in American health care created by the uninsured.³³

So, the story so far: Having manufactured a world where people get insurance through their jobs and get health care through insurance, those in charge of this bizarre world then decided that their surreal experiment was not surreal enough, and they thus doubled-down on the employer-based insurance model with the fourth mistake, the Affordable Care Act.

Fourth mistake: The Affordable Care Act fixes none of these problems. Instead it so heavily buys into the erroneous belief that insurance equals health care that it pretends to solve the problem of lack of health care by mandating that people buy insurance.³⁴ This is like trying to solve hunger by mandating that people buy food insurance rather than producing more and cheaper food. A voucher that says you’re guaranteed food is not the same as actual food.

But it gets worse. As a further subterfuge, the politicians who passed Affordable Care Act avoided telling the American people the true costs of the act by mandating that individuals buy insurance and that employers provide insurance or face fines.³⁵ Congress could have directly taxed people and subsidized the uninsured. This would have avoided the particular clash of interests that was seen in *Hobby Lobby*. Instead, they placated the insurance companies

³² CENTER FOR DISEASE CONTROL, NCHS DATA BRIEF NO. 83, HEALTH AND ACCESS TO CARE AMONG EMPLOYED AND UNEMPLOYED ADULTS: UNITED STATES, 2009-2010 (2012), available at <http://www.cdc.gov/nchs/data/databriefs/db83.htm>.

³³ See, e.g., INSTITUTE OF MEDICINE, REPORT BRIEF, AMERICA’S UNINSURED CRISIS: CONSEQUENCES FOR HEALTH AND HEALTH CARE (2009), available at <http://www.iom.edu/~media/Files/Report%20Files/2009/Americas-Uninsured-Crisis-Consequences-for-Health-and-Health-Care/Americas%20Uninsured%20Crisis%202009%20Report%20Brief.pdf>.

³⁴ 26 U.S.C. § 5000A.

³⁵ See Brief of the Cato Institute, et. al as Amici Curiae Supporting Respondents at 31-33, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (11-398), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/HHSvF-Brief.pdf>.

by ordering every American to purchase their product and ordered most businesses to supply that product.³⁶

CONCLUSION

In sum, the government's intimate involvement with the health care system for 70 years has brewed up a boiling cauldron of interest clashes. Hobby Lobby and other religious employers are faced with mandates with which they disagree; citizens are faced with mandates that force them to purchase health insurance which often violates their rights of conscience (think, for example, of those opposed to Western medicine); and all of America's multifarious people with conflicting values are poured into a government created health-care battledome and forced to fight it out in the courts.

Many people wonder why Hobby Lobby gets an exemption and others with deeply held beliefs don't. They wonder how courts can be called on to make principled distinctions between deeply held beliefs. Those are valid questions. But those questions help us reverse-engineer the principles of a free society. A free society is like an operating system that helps diverse, civilized people live together cooperatively rather than combatively. Politics and over-politicization, on the other hand, inevitably push us to live combatively rather than cooperatively, especially when it comes to issues like health care.

Seventy years of government intervention in health care have manufactured conflicts out of thin air. Washington, D.C. is increasingly becoming a tribal war of all-against-all because of laws like the Affordable Care Act.

Welcome to the new world. Welcome to the primitivism of politics.

³⁶ 26 U.S.C. § 5000A; 26 U.S.C. § 4980H.