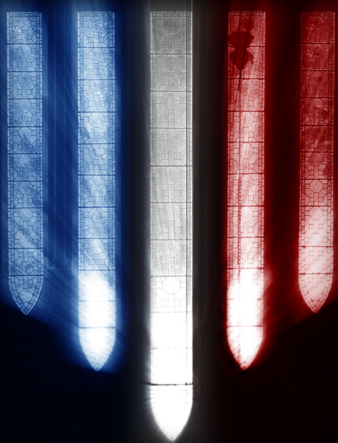


DEEP COMMITMENTS

THE PAST, PRESENT, AND FUTURE
OF RELIGIOUS LIBERTY

EDITED BY TREVOR BURRUS AND DAVID MCDONALD



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17. Final Thoughts

Ilya Shapiro

I can't do justice here to the deep and important discussions that resonate throughout this book, ranging from first principles and the history of religious toleration, to the special relationship between religion and education, to the role that the courts play in adjudicating the cultural flash points that increasingly bring religious believers into conflict with the secular world. What I want to focus on instead is how modern battles over religion in the public square are a microcosm of the constant tension between civil society and an overweening regulatory state.

Take the contraceptive-mandate cases, *Burwell v. Hobby Lobby* (2014, regarding for-profit companies) and *Zubik v. Burwell* (2016, regarding religious nonprofits).¹ These cases had all the makings of Supreme Court blockbusters: birth control and sexual liberation, religious freedom, corporate rights, the power of employers, and the rights of workers. The government claimed that this was about ensuring that all women had access to contraception. Many in the media (and several senators), purporting to be concerned about women's rights, claimed that the issue was whether employees would have access to birth control despite their employers' religious objections.

Those on the other side argued that the case concerned every American's right to freely exercise religion. David and Barbara Green, who own the Hobby Lobby chain of arts-and-crafts stores, had long provided health care benefits to their employees (they believed it was their Christian duty), but they had not paid for abortions. The Affordable Care Act (actually a regulation interpreting that law's

instruction to cover “preventive care”) required them to pay for their employees’ contraceptives—including those that can prevent the implantation of fertilized eggs, which the Greens consider to be an abortifacient and therefore against their religious beliefs. Nonprofits like the Little Sisters of the Poor had different objections, but nobody disputed that they were religious organizations to begin with.

These cases, however, were not ultimately about the freedom to use legal contraceptives or the power of big business—or even about how to balance religious liberty against other constitutional considerations. *Hobby Lobby* involved a fairly straightforward question of statutory interpretation regarding whether the government was justified in this particular case in overriding certain religious objections. *Zubik* asked whether the government was doing all it could to accommodate religious organizations, as the law required. The Supreme Court evaluated these questions and ruled that (1) closely held corporations can’t be forced to pay for every kind of contraceptive for their employees if doing so would violate their religious beliefs, and (2) a better accommodation could be forged. In both cases, under the Religious Freedom Restoration Act of 1993, the government failed to show that it had no less burdensome means of accomplishing its stated goal (providing female workers with “no-cost access to contraception”).

There was no constitutional decision, no expansion of corporate rights, and no weighing of religion versus the right to access birth control. Nobody was denied access to contraceptives, and there is now more freedom for all Americans to live their lives as they wish, in accordance with their beliefs, without being forced to check their conscience at the office door.

Justice Ruth Bader Ginsburg’s dissent in *Hobby Lobby*, however, paints a different picture. According to her, by refusing to pay for certain kinds of contraceptives, employers were imposing their religious beliefs on their employees. This understanding was the basis of the “Not My Boss’s Business Act” that Senate Democrats proposed to overturn the ruling.

Thus, as Megan McArdle noted at *Bloomberg View* after the *Hobby Lobby* ruling, these cases present the unusual situation in which both sides think that someone else's views are being imposed on them.² Normally in political disputes, the debate is over the economic or moral justifications for a particular policy, or whether the regulatory benefits outweigh the economic costs. But in the discussion of Obamacare's contraceptive mandate, one side says that not paying for contraceptives is equivalent to the imposition of religious beliefs, while the other says that the coercion lies in being forced to buy something it doesn't want to buy.

While we can argue about whether requiring people to buy certain goods or services is a good idea, Obamacare clearly forces employers to buy them. An exemption from such a mandate is hardly coercive, and such an exemption would harm third parties *only if* we think those third parties have a right to force others to pay for their goods or services.

That "if" is the crux of the matter—and not just as it relates to Obamacare, gender equality, or the particularities of any case. Americans have become so used to government providing all manner of goods and benefits that resisting state action has begun to look anomalous. The right to freely exercise religion, among many other individual liberties, is thus an exception to the general rule of government power.

The left's outcry over religious free-exercise cases is evidence of a more insidious process whereby the government foments social conflict as it expands its control into areas of life that we used to consider public yet not governmental. This conflict is exceptionally fierce because, as McArdle put it, "the long compromise worked out between state and religious groups—do what you want within very broad limits, but don't expect the state to promote it—is breaking down in the face of a shift in the way we view rights and the role of government in public life."³

Indeed, it is government's relationship to public life that is changing—in places that are beyond the intimacies of the home

but are still far removed from the state, such as churches, charities, social clubs, small businesses, and even “public” corporations that are nevertheless part of the private sector. Under the influence of the Obama administration, the left wove government through these private institutions, using them to engineer American life according to its vision. The key to this far-reaching agenda is the conceit that it is the government that grants rights.

Through an ever-growing list of mandates, rules, and “rights,” the government is regulating away the “little platoons” of our civil society. Civil society, so important to America’s character, is being smothered by the ever-growing administrative state that, in the name of fairness and equality, takes away rights in order to standardize American life from cradle to grave.

This dynamic is just the latest example of the difficulties inherent in turning health care (and our economy more broadly) over to the government. It also represents a larger, more destructive trend, enabled by the Supreme Court’s ratification of expansive federal power—for instance, reading the General Welfare Clause as a grant rather than as a restriction of authority and applying the Interstate Commerce Clause to intrastate non-commerce. The assumption underlying these expansions is roughly what former Democratic representative Barney Frank told the 2012 Democratic National Convention: “government is simply the name we give to the things we choose to do together.”

One of the major problems here, as my colleague Roger Pilon has written, is that when something is socialized or treated as a public utility, we are forced to fight for every “carve-out” of freedom from its rules. So the more we “choose to do together” through the coercive hand of the state, the less we can do in our private capacities, together or separately.

Historically, these efforts to carve out exceptions have been relatively direct and obvious, a function of conventional political arguments over taxing, spending, and the role of government:

the money we pay in taxes can't go to consumer goods or political advocacy or anything else we may value. Notably, it also can't go toward nongovernmental education or health care, so government programs in those areas enjoy a tremendous advantage over their would-be private competitors.

The government has recently moved past this conventional means of crowding out civil society, changing and narrowing the rules of the game such that private institutions are allowed to continue operating only as long as they follow a prescribed list of behaviors and mores. Obamacare is the apotheosis of this trend: it relies on conventional, government-expanding transfer payments, of course. But the heart of the legislation is a tangled web of "shalls" and "shall nots" that reshapes the health care industry—and thus about a fifth of the economy.

Critics of the health care law have framed the *Hobby Lobby* case as involving an attack on religious liberty, and while that is certainly correct with regard to the cases that reached the Supreme Court, the dispute is indicative of a much larger problem. The Obama administration could have made all the lawsuits go away if it had simply decided to use one of the alternatives identified in Justice Samuel Alito's majority opinion. For example, the government could pay for the disputed contraceptives itself, or provide tax credits, or, for those who wouldn't object to signing a form, make the kind of accommodation it offered certain non-profits. There are many other possibilities, including imposing the mandate on *insurers*, not employers.

The Justice Department chose instead to pursue a scorched-earth strategy, which indicates that providing no-cost contraceptives was not the administration's main motivation. Instead, the goal seems to have been to force religious employers to conform to the "we're all in it together" ethos. The administration's decision not to compromise in any way is a shot across the bow of anyone who might deviate from this understanding of the government's role in society.

Although progressives may cheer such coercion in this situation, they fail to appreciate the precedent it sets. Indeed, the more the federal government ventures onto the cultural battlefield, the more both liberals and conservatives will issue mandates and regulations toward ideological ends. Through this kind of excessive regulation, then, the government crowds out individual conscience and the voluntary institutions of civil society by conditioning participation in essential economic activity on the relinquishment of certain other rights.

And the bigger government grows as a whole, the more the regulatory apparatus flexes its muscle. At the same time, political appointees and bureaucrats prefer this method of power dealing: they gain prestige and influence handing out favors, increasing their power without consideration for the “off-balance-sheet” costs to society.

The growing enforcement of centralized ideological conformity is a real innovation in the use of government power. The issue isn't that Congress is taxing and spending and borrowing more than it ever has, but that it's forcing more mandates into what used to be private decisionmaking. It is shifting the boundary between the private and public spheres, trampling individual agency, and narrowing the choices that people are allowed to make in pursuit of their particular version of the good life.

Whole swaths of life—from education and health care to commercial enterprises and eleemosynary concerns—are now overseen by those who operate the levers of power. In other words, as the scope of government regulation increases, decisions that were once left to families and managers are now used as collateral in the political deal-making process. And powerful interests take advantage of an uncoordinated general public.

The Religious Freedom Restoration Act (RFRA), which was central to the contraceptive-mandate cases, is a perfect example of how we now have to beg government for our rights. Because the government can do just about anything, religious individuals and

institutions had to secure an exemption to do what they should have been free to do anyway.

To make matters worse, Justice Antonin Scalia, a devout Catholic, laid the foundation for this particular problem. “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,” he wrote in 1990 in *Employment Division v. Smith*, the case that led to RFRA. Justice Scalia was right there. But, for decades, the Supreme Court neglected to draw a proper constitutional distinction between what the government can and can’t regulate. That distinction is at the heart of the contraceptive-mandate litigation.

The Catholic bishops’ complaint about the government’s enforcement of Obamacare was right as far as it went: “[The contraceptive mandate] continues to involve needless government intrusion in the internal governance of religious institutions and to threaten government coercion of religious people and groups to violate their most deeply held convictions.” But pleading for special exemptions did not get them very far, as they had supported the main goal of the legislation. It was the effort to socialize American health care that was the basic problem, not one small part of the bill’s regulatory apparatus. And having supported the larger goal, the bishops should not be surprised that religious freedom was crushed along with many other liberties.

Looking beyond Obamacare’s restrictions on liberty, we see the same thing in the spillover from the gay-marriage debates, with people being fined for not working at same-sex commitment ceremonies—the Oregon baker, the New Mexico photographer, and the Washington florist. There is a clear difference between arguing that the government has to treat everyone equally—the actual legal dispute regarding state marriage licenses—and forcing private individuals and businesses to endorse and support practices with which they disagree. It is disappointing but not surprising that Elane Photography lost its case, despite New Mexico’s own state-level RFRA, and that the Supreme Court

denied review of that state's high-court ruling. Despite gay-rights activists' comparing their struggle to the civil rights movement, New Mexico is not like the Jim Crow South, where state-enforced segregation meant that black travelers had nowhere to eat or stay.

As long as those in power demand that people adopt politically correct beliefs or cease to engage in the public sphere, these issues will continue to arise. Marriage itself is an area where government regulation has created needless social clashes: Without state licensure, individuals could assign whatever contract and property right to whomever they liked, have whatever civic or religious organization consecrate their union (if they wished), and let the common law take care of the rest. Education is another good example: The curricular battles over evolution and creationism, or the amount of time devoted to arts versus sciences, or debates over methods of discipline or extracurricular offerings could all be defused if the government allowed parents more choice over how to educate their children. Many of our culture wars are a direct result of government trying to force one-size-fits-all public policy solutions onto a diverse nation.

While the debate over the contraceptive mandate centered on a statutory safety valve that prevents capricious impingements on religious freedom, the larger matter of government's rending of the social fabric remains. Justice Ginsburg, in her *Hobby Lobby* dissent, expressed serious doubts about the idea of exemptions from government regulation:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?⁴

Instead of concluding from this list of hypothetical situations that *nobody* should get exemptions from government mandates, the more obvious solution would be to allow everyone to have the same freedom to choose how to live his or her own life.

The solution to this problem of special treatment is not for government to deny exemptions to all such that all are equally coerced. Instead, the approach consistent with the American principle that the state exists to secure and preserve liberty is for government to recognize the right of *all individuals* to act according to their conscience. That includes, among many other things, the right to run their businesses—including contracting with others (or not)—as they see fit. It means being able to decide whether and how much to pay for their employees' health care and to make those decisions for any reason, religious or secular, or no reason at all.

Hobby Lobby was one case in which the Supreme Court stood up for individual rights—but only under an unusual statutory exemption, and just barely. The left's reaction to that ruling shows how little they understand, as presidents Gerald Ford and Ronald Reagan said, that a government big enough to give you everything you want is powerful enough to take away everything you have. Or, as James Madison wrote in "Federalist 51," "you must first enable the government to control the governed; and in the next place oblige it to control itself." That is exactly what the Constitution's enumeration of powers was designed to do—limit power. That principle is simply no longer being enforced.

The most basic principle of a free society is that government cannot force people to do things that violate their conscience. Americans understand this point intuitively. Some may argue that in the contraceptive-mandate cases there was a conflict between religious freedom and reproductive freedom, so the government had to step in as referee—and that women's health is more important than religious preferences. But that's a false choice, as President Barack Obama liked to say. Without the contraceptive mandate, women are still free to obtain contraceptives,

abortions, and anything else that isn't illegal. They just can't force their employer to pay the bill.

The problem that *Hobby Lobby* and *Zubik* exposed isn't that the rights of employers are privileged over those of employees. It's that no branch of our federal government recognizes *everyone's* right to live his life as he wishes in all spheres. Instead, we are all compelled to conform to the collectivist morality that those in charge of government have decided is right.

Americans largely agree—at least within reasonable margins—that certain things are collective needs and their provision falls under the purview of the federal government, such as national defense, basic infrastructure, clean air and water, and a few other such “public goods.” But most social programs, many economic regulations, and so much else that government now promulgates are subjects of bitter disagreements precisely because these things implicate individual freedoms. And we feel it acutely, as Americans, when our liberties have been attacked.

The trouble is that, when government grants us freedoms instead of protecting them, the question of exactly what those freedoms are becomes much less clear, and every liberty we thought we had is up for discussion—and regulation. Those who supported the religious believers in the contraceptive-mandate cases were rightly concerned that people are being forced to do what their deepest values prohibit. But that's all part of this new, collectivized territory.