

Hobby Lobby and the Future of Freedom

Ilya Shapiro

LAST YEAR'S *BURWELL V. HOBBY LOBBY* CASE had all the makings of a Supreme Court blockbuster: birth control and sexual liberation, Obamacare, religious freedom, corporate rights, the power of employers, and the rights of workers. The government claimed the case 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 case was about whether the employees of a company could use birth control despite their bosses' 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 believe it's 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 abortifacients and therefore against their religious beliefs. In *Hobby Lobby*, the Greens wanted to get a religious exemption from that contraceptive mandate.

The Hobby Lobby case, however, was ultimately not about the freedom to use legal contraceptives or the power of big business, or even

ILYA SHAPIRO is a senior fellow in constitutional studies at the Cato Institute, editor-in-chief of the Cato Supreme Court Review, and co-author of Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution (Palgrave Pivot 2014).

the question of how to balance religious liberty against other constitutional considerations. Much like *Citizens United v. FEC* (which removed limits on associational political speech but did not adjust campaign-contribution limits) and *Shelby County v. Holder* (which struck down Section 4(b) of the Voting Rights Act because it was based on obsolete voting data that didn't reflect current realities), *Hobby Lobby* is doomed to be misunderstood.

In fact, *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. The Supreme Court evaluated that question and ruled that closely held corporations can't be forced to pay for every kind of contraceptive for their employees if doing so would violate their sincere religious beliefs. More precisely, under the Religious Freedom Restoration Act of 1993, the government failed to show that it had no less burdensome means of accomplishing its stated goals (in this case, providing female workers with "no-cost access to contraception") than to force people who run their businesses according to religious tenets to pay for the four contraceptives (from a list of 20) that violate those tenets.

There was no constitutional decision, no expansion of corporate rights, and no weighing of religion versus the right to use 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 consciences at the office door. The contraceptive mandate was struck down because the government was circumscribing religious liberty without sufficient justification.

Justice Ruth Bader Ginsburg's dissent, however, paints a different picture: "No doubt the Greens and Hahns [the Mennonite owners of fellow plaintiffs Conestoga Wood Specialties] and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs." According to this understanding of the case, by refusing to pay for certain kinds of contraceptives, the plaintiffs 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 ruling, *Hobby Lobby* presents a highly unusual case in which both sides think

that someone else's views are being imposed on them. 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 their employers' not paying for contraceptives is equivalent to the imposition of their religious beliefs, while the other says that the coercion lies in being forced to buy something they don't want to buy. This debate is something new.

While we can argue about whether it's a good idea to require people to buy certain goods or services—be it birth control or anything else—it's clear that Obamacare forces employers like Hobby Lobby and Little Sisters of the Poor 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 anything particular to the Hobby Lobby case. Americans have become so accustomed to government power as the norm—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. Congress had to pass a statute, the Religious Freedom Restoration Act, to ensure that such exceptions could continue to be made.

Justice Ginsburg's dissent and the accompanying left-wing outcry 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 particular conflict was exceptionally fierce because, as McArdle put it, "the long compromise worked out between the 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."

Indeed, it is government's relationship to public life that is changing—in the places that are beyond the intimacies of the home but still far removed from the state, like 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 is weaving government through these private institutions, using them to shape American life according to its vision. The key to this far-reaching agenda is the conceit that the government grants fundamental rights. In *Hobby Lobby*, the Ginsburg argument—and that of the Greens to the extent that they relied on RFRA—rested on the premise that the rights they were defending were not unalienable rights because they are men (and women) created equal, but privileges bestowed upon them by the grace of government.

Through an ever-growing list of mandates, rules, and “rights,” the government is regulating away the “little platoons” of our civil society. That 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.

HOBBY LOBBY AND BIRTH CONTROL

The focus of *Hobby Lobby* was the intersection of corporate rights and religious liberty, but this case was just the latest example of the difficulties inherent in turning health care (and increasingly our economy more broadly) over to the government. It also represents a larger, even more destructive trend, enabled, in part, by the Supreme Court’s past ratification of expansive federal power—reading the General Welfare Clause as a grant rather than a restriction of authority, for instance, 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: “There are things that a civilized society needs that we can only do if we do them together, and [when] we do them together, that’s called government.”

One of the major problems with this, as my Cato Institute colleague Roger Pilon has written, is that when something (like health care) is socialized or treated as a public utility, those who question its wisdom are forced to fight for every “carve-out” of freedom from its rules. After all, the government has a monopoly on the legitimate use of force—the power to prohibit, regulate, and mandate, and, crucially, the power to tax, which is, as Chief Justice John Marshall wrote in the 1819 *McCulloch v. Maryland* decision, “the power to destroy.” The government’s monopoly enables it to squeeze out other actors. So the more we “do together”

through the coercive hand of the state, the less we can do otherwise, together or separately.

Historically this squeezing-out has 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 non-governmental education or health care or welfare, so government programs in those areas — no matter their efficiency or effectiveness — enjoy a tremendous advantage over their would-be competitors.

The government has recently moved past this conventional crowding-out of civil society by 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. *New York Times* columnist Ross Douthat boiled down this new approach to government authority: “Play by our rules, even if it means violating the moral ideals that inspired your efforts in the first place, or get out of the community-building business entirely.”

Obamacare is the apotheosis of this trend: Though it relies on conventional, government-expanding transfer payments, 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. For example, insurers can no longer insure properly (using risk-management calculations) because they are no longer allowed to treat different risks differently, so the government has guaranteed them a certain level of profit. There aren't enough premium payments to cover this guaranteed profit, however, so employers are required to expand coverage and individuals are forced to buy coverage or else pay a tax.

Critics of the health-care law have framed the Hobby Lobby case as an attack on religious liberty, and while that is certainly correct with regard to the case that reached the Supreme Court and the follow-on contraceptive-mandate litigation, the dispute is indicative of a much larger problem. The Obama administration could have made all the lawsuits go away — relating to for-profits, nonprofits, corporations, and all other kinds of employers — 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 nonprofits, or many other possibilities, including simply imposing the mandate on *insurers*, rather than on employers.

The fact that the Justice Department instead chose to pursue a scorched-earth strategy indicates that providing no-cost contraceptives was not the administration's sole or even main motivation. Instead, the goal of the Obama administration seems to have been to force the Greens, the Hahns, and other religious employers to conform to the "we're all in this together" ethos. The administration's decision not to compromise in any way—even with those who objected only to emergency contraceptives—is a shot across the bow of anyone who might deviate from this understanding of the government's role in society.

While progressives may cheer such coercion in this situation, they fail to appreciate the precedent it sets for the future. The party in control of the health-care bureaucracy (and every other government program) will almost certainly change eventually, and Democrats are not the only ones with a desire to use government power to advance their agenda. The logic behind today's HHS regulations could be applied in any number of ways to enforce values very different from the ones held by those in power now. The only precedent the administration is truly setting is one of far-reaching government control.

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. The more rules the state imposes, the less freedom there is for alternate expressions of the common good, for the other sorts of "villages" that it takes to raise children, and for better, less burdensome ways of achieving *any* goal.

A REGULATORY REPUBLIC

Through this kind of excessive regulation, the government is crowding out individual conscience and the voluntary institutions of civil society by conditioning participation in essential economic activity on the relinquishment of certain other rights.

In some cases, it appears to be offering people a choice between living their lives according to certain beliefs and engaging in commerce. In others, it merely dramatically limits the choices involved in either. The requirement that employers provide health insurance at all impinges

on the way many business owners might want to run their businesses; not only does the government require employers to provide insurance, it stipulates exactly how it is provided and what it covers. For instance, simply paying employees more so they can buy their own health insurance is forbidden by the employer mandate. And the choice to do so would make little sense anyway, given the long-standing tax credit that induces most employers to provide a standard health policy. (This tax benefit is also the reason why the private insurance market is so weak.) Furthermore, employers are limited as to which options to offer; there is a set minimum level of coverage that must be met, but over-generous coverage will be taxed as a “Cadillac plan.”

In this way, government is more than a monopoly; it defines the scope of the legal market. Through regulation, it can force people to comply with the preferences of the majority, the elite, or the industries that have captured the regulators. The relatively marginal preferences of religious organizations regarding certain health- and life-related matters are the tip of the iceberg. The more that government regulates, the more individual autonomy is smothered.

This has not always been case, but for decades now, and especially since the beginning of the Obama administration and the passage of Obamacare, regulations have become a major source of government power and control. And the bigger government grows as a whole, the more the regulatory apparatus flexes its muscle. The roots of this trend are exposed by public-choice theory: The federal government controls the largest levers of power, so it is often more profitable for companies like insurers and drug makers to spend money winning favorable government action (what economists call “rent-seeking”) than innovating, marketing, and selling products. Many industries have found it is easier and more worthwhile to secure beneficial regulations — which cost the government nothing and therefore present fewer political consequences — than subsidies or even tax breaks. At the same time, political appointees and bureaucrats also 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 incurred by the public.

There is a lot of money to be made in interfering with private decision-making, and interest groups have a coordination advantage over the general public when pursuing legislation or rules that benefit

them to the detriment of the rest of society. As coordinated interests profit, private citizens lose, as there is no one to defend more generalized goods like efficient markets and individual liberty.

This is a problem at the federal level because the federal government, as the founders designed it, is institutionally equipped to handle only certain national problems by exercising certain enumerated powers. It is no coincidence that the founders gave Congress the power to regulate only truly national things, like the military, borders, currency, interstate commerce, piracy, and the postal service. The Constitution notably did not grant the new national government a general police power, for instance, even though it needed more authority than the Articles of Confederation had allowed, because the federal government had no business interfering with state, local, and individual preferences regarding how best to pursue happiness. Alexander Hamilton — who wouldn't be mistaken for a Tea Party radical then or now — thought it ridiculous that the federal government would ever want to wield the kind of power it now takes as a given. He wrote in *Federalist No. 17*:

Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

State and local governments with their general police powers are, of course, just as capable of fomenting social clashes and crowding out civil society as the federal government is. But they are far less likely to do so because they are physically and ideologically closer to the people they govern. Smaller jurisdictions that are closer to the people can more accurately weigh the costs and benefits of a policy and the values of its constituents, meaning that smaller jurisdictions are superior at matching policy to constituent preferences — which is, after all, the goal of democratic, representative government.

Unfortunately, Hamilton was mistaken in his judgment that federal officials would be unlikely to have the “disposition . . . to usurp the powers” of administering private justice and other local concerns. This blind spot has proven as severe as Madison’s misjudgment that factions would counteract each other — rather than logrolling to enact separate items of particular concern at the expense of the general welfare. And as both of these dynamics play out, the government consumes the public sphere and constrains the private.

PRIVATE AND PUBLIC SPHERES

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 — that’s a different sort of problem — but that it’s forcing more mandates into what used to be private decision-making. It is shifting the boundary between the private and public spheres and consequently trampling individual agency, 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 charitable concerns, are now overseen by those who operate the levers of power. In other words, as the scope of government regulation increases — as both the private *qua* individual and private *qua* non-governmental spheres shrink — 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.

With inflexible, top-down commands that ignore the unpredictable consequences of any given regulation, government officials display what Friedrich Hayek described as the fatal conceit of pretending that they

have the knowledge necessary to make important life decisions for an entire populace. This goes beyond misguided economic design that fails to account for dispersed knowledge, as when central planners refuse to allow the pricing mechanism to allocate capital efficiently. It has become a case of centralized *judgment*. No choice is too low for notice: The government “nudges” citizens to make “better” choices about whom to hire, what to teach their children, how many calories to drink, and how to plan for retirement. All these efforts are meant to shape minds that will ultimately eschew reactionary political views and retrograde cultural preferences and adopt the appropriate, government-approved moral code.

This shrinking of the private sphere causes citizens to fracture into groups that fight one another through government channels for scraps of entitlements or exemptions. This is terribly wasteful: The resources spent on such advocacy could better be spent on creation, innovation, and economic development generally. Instead, we end up with one-size-fits-all policies that can't react to dynamic market shifts and that stifle creativity and individual liberty. Everyone is ultimately poorer when “we're all in this together,” dependent on the government for whatever agency it allows us to maintain over our lives.

The Religious Freedom Restoration Act, which was key to Hobby Lobby's claim, is a perfect example of this begging of rights from the government. Because the government can do just about anything, religious individuals and institutions—a special-interest group, albeit a fairly large one—had to secure an exemption in order to do what they should have been free to do anyway. Thus the government—Congress in the case of RFRA, the president in the context of various waivers and accommodations—becomes the source of our liberty rather than its protector and guarantor.

To make matters worse, Justice Scalia, a devout Catholic who professes allegiance to constitutional text in his decisions, 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. Scalia was right about that case, but for decades the Supreme Court has neglected to draw a proper constitutional distinction between what the government can and cannot regulate. It is that distinction that is at the heart of the

contraceptive-mandate litigation — not academic exegeses regarding what rights individuals can exercise through the corporate form or even legal tiffs over “least restrictive means” to further a “compelling state interest.”

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 problem, not one small part of the bill’s regulatory apparatus. Obamacare merely turned health care into a badly managed public utility, but the ultimate goal of centralization was clear. And having supported the larger goal, the bishops cannot be surprised that religious freedom was crushed along with many other liberties.

And again, Obamacare’s contraceptive mandate is not the only recent example of the collectivization of individual rights — which is to say, the limiting of personal freedom and destruction of individual liberty in favor of some larger conception of the common good. A similar phenomenon has been seen in the spillover from the gay-marriage debates, with people being fined for not providing services for same-sex weddings and commitment ceremonies, as in the cases of the Oregon baker, the Idaho chapel, and, most famously, the New Mexico photographer. 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 the state high-court ruling. After all, 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. There are more than 100 wedding photographers in the Albuquerque area, many of whom proudly advertise their gay-friendliness.

As long as those in power demand that people either 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 offers other good examples: The curricular battles over evolution and creationism, or the amount of time devoted to arts versus sciences, or debates over methods of discipline or extra-curricular offerings could all be defused if the government gave parents more choice over how to educate their kids. Many of our culture wars are a direct result of government trying to force one-size-fits-all policy solutions onto a diverse nation.

The same applies to attempts at economic control. Consider, for example, the forced unionization of public-sector workers. If a person wants to be a teacher or police officer or county clerk, in many states he has to join the union and thereby fund its extra-curricular political activities. The Supreme Court has been chipping away at some of the most extreme mandates in this regard; in fact, in last term's *Harris v. Quinn*, the Court halted the forced unionization of home health-care aides, which will likely prove more significant jurisprudentially than *Hobby Lobby*. But many people are still forced to support causes they would rather not fund.

The push for increasing disclosure of political advocacy is yet another example of these attempts to nudge individuals into politically acceptable thinking; one's duty to the collective is used as a justification for burdening long-protected rights to private civic engagement. Such calls for disclosure are meant to chill unpopular speech, not educate voters or reduce corruption as proponents of disclosure argue. Government transparency is important for maintaining voter confidence regarding the integrity of elections and the legitimacy of those who exercise political power, of course, but enabling boycotts and other retaliation against people who hold unpopular views does not further the goal of transparency. Moreover, these sorts of regulatory burdens fall hardest not on billionaires and large corporate interests—who have armies of lawyers and accountants—but on grassroots movements, upstart campaigns, and private volunteers. Proposals for campaign-finance reform today are often fundamentally about giving the government the power to monitor and therefore control who speaks, how much, and about

which subjects. They are a blatant attempt to impose through the back door what the Supreme Court has repeatedly told Congress it can't do directly: restrict political speech.

If how you want to educate your children, what you want to buy, and even your religious beliefs and political views are subject to government oversight and correction, the sphere of individual liberty is very small indeed.

FREEDOM AND THE SUPREME COURT

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)?

Instead of concluding from this list of hypothetical situations that *nobody* should get exemptions from government mandates — that everyone should live according to the lowest common denominator of social ordering — the more obvious solution seems to be to allow everyone to have the same freedom to choose how to live his own life.

Without excessive mandates and regulations, many of the problems they attempt to solve would be easier, not harder, to address. Without Obamacare, for instance, employers would be free to provide whatever health coverage they liked, in competition with other employers who offered different coverage and those who offered no coverage but paid higher salaries. Without Dodd-Frank, banks would be free to lend to customers according to risk evaluations based on local knowledge rather than mechanical rubrics. They would also be free to focus on making good business decisions instead of handling the extra paperwork

required for regulatory compliance. Without the recent “guidance” from the Department of Education regarding how colleges should contend with sexual-assault claims, school officials and police would be free to deal with civil and criminal infractions without forgoing due process or imposing Orwellian speech and behavioral codes.

When all these restrictions are taken together, it is easy to see why people of all ideological stripes rail against the faceless establishment’s stifling rules. Add up those transaction costs, and it is clear why economic growth has been sluggish. Contrary to what Elizabeth Warren and others on the far left claim, not only are we unable to regulate our way to job creation, the costs that government imposes in the name of uniformity harm the very enterprise whose production of wealth progressives require in order to sustain their redistributive project. Americans shouldn’t have to get permission from a government agency before they can buy, build, invest, or hire. The Constitution contemplates a sea of liberty with islands of government; the American economy should not be a sea of mandates with islands of exemptions.

Instead of worrying about inventing the right products, targeting the right markets, and hiring the right people, too many businessmen spend their time trying to get the Justice Department to sue a competitor, or the Energy Department to guarantee a loan, or HHS to mandate that consumers buy their product. When government doesn’t just enforce the rules of the game but actively controls the conditions of the field, exemptions and discretionary relief from the omnipresent possibility of coercion is the most anyone can hope for.

The solution to this problem of special treatment is not, as *Hobby Lobby*’s critics argue, 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 consciences. 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.

In other words, instead of restricting or repealing RFRA, lawmakers should expand it to cover *all* our freedoms. It could be called the

Omnibus Freedom Restoration Act, or OFRA. Unfortunately, but unsurprisingly, there is no interest group pushing against *general* threats to individual liberty (the nature of interest groups being decidedly specific), so no OFRA will likely ever exist for the ordinary American to invoke to get the government out of his personal decision-making.

Of course, the Constitution itself is meant to play this role. Yet attempts by government to enforce a collectivist morality continue, and not just because of the aforementioned political forces and incentives that drive both elected and appointed officials. The judiciary is also to blame, for being too deferential for too long to government prerogatives. It is beyond the scope of this essay to recapitulate the “long war for control of the U.S. Supreme Court,” to use the subtitle of Damon Root’s recent book, *Overruled*, but suffice it to say that the courts are intended to be a bulwark against both the political branches and the administrative state. This role includes enforcing constitutional limits on the growth of the federal government’s sphere of influence—especially its regulatory powers, which are supposed to be more limited than its powers to tax and spend—as well as steadfastly protecting individual rights. That means having a judiciary that’s engaged and active, as distinct from either restrained or activist.

Hobby Lobby was one case where the Supreme Court stood up for individual rights, but only under an unusual statutory exemption, and then just barely. The left’s reaction to that decision shows that there are many people who are perfectly comfortable—or even prefer—begging their rights from an all-powerful government rather than possessing rights that the government can’t invade in the first place. They’ve lost sight of Jefferson’s apocryphal admonition that a government big enough to give you everything you want is big enough to take away everything you have. Or, as Madison wrote in Federalist No. 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 enumerated powers of the Constitution were designed to do; they are simply no longer being enforced.

If the Supreme Court were serious about enforcing constitutional structure, the Hobby Lobby case would never have existed because nearly the entire Affordable Care Act is a constitutional non-starter. The same holds for much else that government does to direct our lives,

pit groups of citizens against one another, and weaken the ties of community and civil society. Many congressional actions are not within the scope of the enumerated powers and simply should not be allowed to stand.

Instead, since the courts have failed to enforce constitutional limits for decades, we are left seeking exemptions, whether under the Free Exercise Clause, RFRA, or a host of other clauses and provisions. As Georgetown law professor Randy Barnett has said, all these special carve-outs—for individuals, for classes, even for states—are just an attempt to impose *external* constraints on government power that are supposed to compensate for the evisceration of the Constitution’s *internal* limits. Passing an Omnibus Freedom Restoration Act would really be the equivalent of a constitutional amendment that would add a large “and we mean it” to the end of the Constitution.

REASSERTING OUR LIBERTY

The most basic principle of a free society is that the government can’t easily force people to do things that violate their consciences. Americans understand this point intuitively. Some may argue that in *Hobby Lobby* there was a conflict between religious freedom and reproductive freedom, so the government had to step in as referee—and women’s health is more important than minority religious preferences. But that is a false choice, as the president often says. Without the HHS rule, women are still free to obtain contraceptives, abortions, and anything else that isn’t illegal. They just can’t force their employers to pay the bill.

If you conceive of rights accurately, there is no clash of individual rights in any circumstance other than when the government declines to consistently recognize and protect *everyone’s* rights equally. The problem that the *Hobby Lobby* ruling exposed isn’t that the rights of employers (corporate or otherwise) are privileged over those of its employees. It’s that no branch of our federal government recognizes everyone’s right to live their lives as they wish in all spheres. Instead, all people are compelled to conform to the collectivist morality that those in charge of government have decided is right.

We 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 other “public goods.” But social programs,

economic regulation, and so much else that government now dominates at the expense of individual liberty and responsibility are subjects of bitter disagreements precisely because these things affect individual freedoms, and, as Americans, we feel it acutely when our liberties have been attacked.

The trouble, however, is that when we think 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 Hobby Lobby before the Supreme Court were rightly concerned that people are being forced to do what their deepest beliefs prohibit. But that is all part of this new, collectivized territory.