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The *Hobby Lobby* Ruling

It doesn't get at the heart of the problem bequeathed us by New Deal–era jurisprudence.

By John Daniel Davidson

Yesterday the Supreme Court ruled in *Burwell v. Hobby Lobby* that closely held corporations cannot be required to provide contraception coverage in employees' health insurance. Opponents of Obamacare's contraception mandate claimed victory, as did opponents of the law more generally, as well as many Americans with deep religious convictions.

Hobby Lobby, a family-owned business that has grown from a mom-and-pop operation in the 1970s to a chain of 514 stores that employs more than 21,000 people, is the largest company to challenge the health-care law. The company's statement of purpose says the board of directors is committed, first and foremost, to "honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."

So it's easy to see why the owners objected to Obamacare's requirement that employers pay for forms of contraception that some consider tantamount to abortion, like the morning-after pill.

But at the heart of the contraception-mandate debate is a question that has little to do with health insurance or contraceptives and everything to do with the scope of government regulation. Conservatives rejoiced in the Court's decision, but no matter how it ruled the result was bound to be unsatisfying because it could not address the root of the problem: Pervasive, systematic regulation of private activity *requires* the violation of rights and liberties the Constitution was meant to protect.

Hobby Lobby offers a fine example of why this is so, and why the Court's attempt to address the fundamental problem with Obamacare's contraception mandate ultimately fell short. Hobby Lobby sought shelter from the mandate under the Religious Freedom Restoration Act of 1993 (RFRA), which stipulates that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest."

The purpose of the RFRA was to create a statutory right where a constitutional right doesn't exist — or, at least, is no longer held to exist. The Court's 1990 ruling in *Employment Division v. Smith* upended 30 years of precedent and returned the Court to a standard it first applied in *Reynolds v. United States*, in 1878. In that case, the Court found that a Mormon polygamist in the Utah

Territory could not claim that his First Amendment right to free exercise of religion justified his violation of a federal anti-polygamy law. The Court's reasoning, in *Reynolds* and later in *Smith*, was that a generally applicable criminal law does not raise any free-exercise issues whatsoever. That is, the Constitution's free-exercise clause protects religious beliefs but not necessarily religiously motivated actions that run afoul of neutrally enforced federal laws, even if such laws indirectly impede the exercise of religion. Put bluntly, it means that a religious sect can't claim a free-exercise right to, say, perform a human sacrifice or engage in ritual sex with minors. Because laws against murder and rape are uniform and do not target any particular religion, they raise no free-exercise questions and cannot be challenged on those grounds.

The *Smith* ruling, however, provoked outrage in Washington, and Congress responded by passing the RFRA, which sought to return religious-exercise cases to a pre-*Smith* standard. In practice, this meant that federal, state, and local laws that interfere with religious exercise would have to serve a "compelling state interest." That standard treats free exercise as a fundamental right, one of the rights of conscience embedded in the First Amendment. The burden of proof is therefore on the government, which must show that a compelling state interest is served by any law that imposes a significant burden on an individual's religious conduct.

The trouble with such a standard is that in practice it requires judges to enmesh themselves in policy debates that should be settled by elected legislatures, and to wade into religious matters about which they have no special expertise or authority. In *Smith*, the court was asked to decide whether Oregon could prohibit the use of peyote in a religious ceremony as part of a general prohibition on the drug, and whether the state could then deny unemployment benefits to two people fired for using it. In his majority opinion, Justice Scalia dispenses with the argument that the Court must apply a "compelling state interest" standard, arguing that although such a standard is appropriate in cases involving racial discrimination or government regulation of free speech, in this case it would produce "a constitutional anomaly":

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Scalia was in effect objecting to a process that would involve judges in a never-ending balancing act between X (does this seem like an important religious practice for these people?) and Y (does this seem like a law that serves a "compelling" state interest?). Such a process would not only produce inconsistent jurisprudence and bizarre outcomes, but it would also oblige judges to weigh

the importance of a religious belief or practice, something they cannot reasonably be asked to do.

All of this illustrates two closely related problems that bear directly on *Hobby Lobby*: (1) the government can regulate our commercial activities — that is, nearly any activity — in almost any way it sees fit; and (2) we don't have a First Amendment right to be exempt from certain laws because of religious objections to them. Congress's solution was to push back against the ruling in *Smith* and create a religious right by statute, the RFRA, that the Supreme Court had deemed not to exist in the Constitution.

But none of this really gets to the heart of the matter, which is that laws like Obamacare are possible only because we have accepted the underlying premise of the New Deal era's commerce-clause jurisprudence: Government can regulate private activity in a comprehensive, systematic way and justify doing so on the slimmest constitutional pretext. What the owners of Hobby Lobby should have objected to is being forced by the government to purchase something on their employees' behalf, not that the particular thing they were being forced to purchase happened to violate their religious beliefs.

Obamacare itself is entirely a product of that commerce-clause jurisprudence. The Affordable Care Act sought to regulate — one might even say micromanage — commercial activity by forcing employers not just to pay for contraceptive coverage for their employees but to pay for specific forms of contraception, as defined by the secretary of health and human services.

The Obama administration argued that "Hobby Lobby is a for-profit, secular employer, and a secular entity by definition does not exercise religion." Hence, the reasoning goes, the owners forfeited all claims to free exercise by deciding to go into business. Since Hobby Lobby is engaged in commerce, and Congress can regulate commerce pretty much as it likes, the contraception mandate should stand. The qualms of the religious, in this view, are "too attenuated to qualify as a substantial burden." The working assumption here is that commerce belongs to the government: If you go into business, you must do as we say.

To many Americans, the idea that the government can force business owners to pay for something that violates their religious convictions is repugnant. So is the idea that there is no First Amendment right to be exempted from generally applied laws that happen to impede religious practice. And yet this problem can't be solved by enlisting judges to balance the claims of religion with the claims of the public interest, as in the *Hobby Lobby* case. You might like the way the ruling went this time, but it could have gone the other way, and it might the next time. There's nothing to stop a future majority of the Court from deciding that some religious beliefs are more important than others, and the government must have its way.

That is the situation we have created by allowing Congress to regulate our affairs so broadly and thoroughly, and by allowing the Court to abdicate its duty to protect property rights and economic liberty. At the end of the day, we are left with laws like the ACA, which has nothing to do with

religion per se but nevertheless nearly resulted in the suppression of the exercise of religious duties.

That is, the chickens of the New Deal have long since come home to roost. Once the Court took the leap that even activity that "indirectly" affects interstate commerce could be regulated by Washington, as it did in *Wickard v. Filburn* (1942), there was no going back. The expansion of the commerce power has since eroded virtually any constitutional means of defense against the government's ability to control our commercial activities — including those motivated or prohibited by religious belief.

If we really want to solve the problem at the heart of *Hobby Lobby*, we'll have to go back further than *Smith*, and we'll have to stop relying on statutory tourniquets like the RFRA. We'll have to reconsider the frightening power that was unleashed nearly 80 years ago, when FDR threatened to pack the Court and the justices capitulated. By ruling in FDR's favor in *NLRB v. Jones*, the Court set us on the long road to pervasive government regulation, making laws like the ACA inevitable.

Conservatives can breathe a sigh of relief that *Hobby Lobby* came out their way and the administration was knocked down a peg, but they should not bask in the glow of victory for long. After all, more regulations and mandates, some of which will surely violate religious convictions, are already on the way.

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