



NO FREE LUNCH, BUT DINNER AND A MOVIE (AND CONTRACEPTIVES FOR DESSERT)?

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The panel at which this paper was delivered¹ was designed to explore the “aftermath” of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*² The reaction to the Court’s decision was vitriolic, to say the least, but it is important to understand what the Court actually held in the *Hobby Lobby* case before assessing whether the vitriol was warranted. In Part I, I review the circumstances leading to passage of the Patient Protection and Affordable Care Act and the implementing regulations that were challenged in the *Hobby Lobby* case. I then summarize and assess the Court’s holding on the several contested points of law at issue in the case, concluding that

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² 134 S. Ct. 2751 (2014).

the Court's legal analysis was correct. In Part II, I review various reactions to the decision, both from those in the media (informal and formal) and in the legal academy, contending that the criticisms of the decision were both misplaced and disingenuous but that they nevertheless reveal something very important about the contemporary dispute in the United States over the very nature and purpose of government. In Part III, I explore some faulty premises of the *Hobby Lobby* litigation and several unanswered questions that should be of particular interest to those who share the "classical liberal" views of the sponsors of the Symposium.

I. The *Hobby Lobby* Holding is Actually Quite Modest.

A. BACKGROUND: PASSAGE OF THE ACT

The Patient Protection and Affordable Care Act ("PPACA") was enacted by Congress in 2010 in what may now be the quintessential example of legislation as sausage-making—something better not seen in the making.³ Indeed, the abuse of process leading up to the passage of the PPACA is notorious. The bill was pushed through the Senate in a rare Christmas-eve vote in 2009,⁴ after the final votes necessary for passage were essentially "bought" with egregious provisions that violated the most basic premise that "law" is to be generally applicable.⁵ Nebraska's senior Senator, for example, obtained for his State a guarantee, dubbed the "Cornhusker kickback," that the

³ See, e.g., *Baker v. PPL Corp.*, No. 1:09-CV-0428, 2010 WL 419417, at *4 (M.D. Pa. Jan. 29, 2010) (attributing the quotation, "Laws are like sausages, it is better not to see them being made," to Otto von Bismarck).

⁴ Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES (Dec. 24, 2009), at A1, available at <http://www.nytimes.com/2009/12/25/health/policy/25health.html> (last visited Jan. 14, 2012).

⁵ *The Price is Right? Payoffs for Senators Typical in Health Care Bill*, FOXNEWS.COM (Dec. 21, 2009), <http://www.foxnews.com/politics/2009/12/21/price-right-payoffs-senators-typical-health-care>.

federal government would pay the full cost of expanded Medicaid coverage for Nebraska in perpetuity, a guarantee not granted to any other state.⁶ And the price for obtaining the vote of Louisiana's Senator, Mary Landrieu, dubbed the "Louisiana Purchase," was intended to be \$200 million in increased federal Medicaid funding for her State, but ended up being more than \$4 billion in increased aid due to poor draftsmanship of the statutory subsection.⁷

Moreover, unlike previous efforts at major social legislation, this one was approved on a straight party-line vote in the Senate and a nearly straight party-line vote in the House.⁸ The normal process of reconciling the Senate bill with an earlier, different version adopted by the House of Representatives was cast aside when a special election in Massachusetts resulted in the election of a new Senator who had campaigned to be the vote necessary to stop passage of the bill.⁹ House leaders then trolled for mechanisms that would allow the final bill to be adopted without having to return for a second vote in the Senate or requiring House members to cast a vote in favor of the objectionable parts of the Senate bill. At one point, the House even proposed simply "deeming" the Senate bill passed without actually holding a vote.¹⁰ Ultimately, the Senate version of the bill was

⁶ PPACA, P.L. 111-148, 124 Stat. 119, §10201(c)(4)(z)(3); see also Greg Hitt & Janet Adamy, *Senate Democrats Clear Health Hurdle*, WALL ST. J. (Dec. 22, 2009), at A7, available at <http://online.wsj.com/article/SB126132489013599195.html> (last visited Jan. 14, 2012).

⁷ PPACA, P.L. 111-148, 124 Stat. 119, § 2006; see also Avik Roy, *The \$4 Billion Typo in Obamacare's 'Louisiana Purchase'*, FORBES (Mar. 6, 2012), <http://www.forbes.com/sites/theapothecary/2012/03/06/the-4-billion-typo-in-obamacares-louisiana-purchase/>.

⁸ Pear, *supra* note 4, at A1.

⁹ See, e.g., Karen Tumulty, *Does Brown's Senate Win Mean the End of Health Reform?*, TIME (Jan. 20, 2010), <http://content.time.com/time/politics/article/0,8599,1954980,00.html> (last visited Sept. 12, 2015).

¹⁰ Adam Nagourney, *Procedural Maneuvering and Public Opinion*, N.Y. TIMES (Mar. 21, 2010), at WK1, available at <http://www.nytimes.com/2010/03/21/weekinreview/21nagourney.html?ref=healthcarereform> (last visited Jan. 14, 2012).

passed by the House, with the necessary votes secured by an arguably unconstitutional promise by the President not to enforce one of the provisions that was objectionable to some of those who otherwise supported the bill,¹¹ and a promise of “amendments” that would be classified as a “reconciliation” bill in order to circumvent Senate cloture rules.¹²

Equally egregious was the fact that the massive bill was rushed through so quickly that no one in Congress, or their staffs, had the opportunity to read it before passage. As then-Speaker Nancy Pelosi infamously noted at the time, “[w]e have to pass the [health care] bill so that you can find out what is in it, away from the fog of the controversy.”¹³ To this day, little nuggets of inanity are still being discovered.

One thing seemed clear at the outset, though. The bill delegated a lot of lawmaking power to various administrative agencies, so it was not just that Congress had to pass the bill before the country could know what was in it, but the agencies had to develop their own, much more comprehensive set of regulations before the full scope of the law’s requirements could become known. It is the latter process that first threatened and then assured the law’s passage,¹⁴ that gave

¹¹ Lori Montgomery and Shailagh Murray, *In Deal with Stupak, White House Announces Executive Order on Abortion*, WASH. POST (Mar. 21, 2010), available at <http://voices.washingtonpost.com/44/2010/03/white-house-announces-executiv.html> (last visited Jan. 14, 2012).

¹² Gail Russell Chaddock, *Republicans Rage Against Reconciliation for Healthcare Reform*, CHRISTIAN SCI. MONITOR (March 3, 2010), available at <http://www.csmonitor.com/USA/Politics/2010/0303/Republicans-rage-against-reconciliation-for-healthca-re-reform> (last visited Jan. 14, 2012).

¹³ Nancy Pelosi, Speech to the Legislative Conference for the National Association of Counties (Mar. 2010).

¹⁴ A group of pro-life Democrats objected to the Senate version of the bill, contending that it would lead to taxpayer funding of abortion. That concern was ostensibly put to rest by a presidential promise of an executive order that would prevent such a result. See Bart Stupak, *Why I wrote the ‘Stupak amendment’ and Voted for Health-care Reform*, WASH. POST (Mar. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032602921.html>. The controversy has nevertheless

rise to the *Hobby Lobby* case,¹⁵ and that continues to be the source of legal challenge.¹⁶

The bill that eventually became the PPACA was introduced by Senate Majority Leader Harry Reid (and others) by way of a complete gut and amend substitute of an existing bill previously approved by the House of Representatives, H.R. 3590.¹⁷ Section 1001 of the Act in its final form added the following provision to the Public Health Service Act (italics added to reflect the Mikulski amendment to Senator Reid's original proposal, discussed below):

Sec. 2713. Coverage of Preventative Health Services.

(a) In General. A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, *at a minimum* provide coverage for and shall not impose any cost sharing requirements for —

(1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force;

already spawned one Supreme Court case. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

¹⁵ See *infra* Part I.B.

¹⁶ See, e.g., *King v. Burwell*, 135 S. Ct. 2480 (2015).

¹⁷ Sen. Amendment 2786 (Nov. 19, 2009). Whether such a complete "gut and amend" of a House bill not raising revenue complies with the requirement in Article I, Section 7 of the Constitution that "All Bills for raising Revenue shall originate in the House of Representatives" — an issue made salient by the Supreme Court's holding in *NFIB v. Sebelius* that PPACA is a tax — is the subject of pending litigation in both the Fifth and D.C. Circuit Courts of Appeal. *Steven Hotze, et al. v. Sylvia Burwell, Secretary HHS, et al.*, No. 14-20039 (5th Cir., appeal filed Jan. 16, 2014; oral argument held Dec. 2, 2014); *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 2 (D.C. Cir. July 29, 2014, pet'n for reh'g filed Oct. 6, 2014).®

- (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and
- (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.
- (4) *with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.*
- (5) *for the purposes of this Act, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.*

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.¹⁸

Subsection 4 of that provision, the one requiring “free” preventative care and screenings for women, was not part of the original

¹⁸ Patient Protection and Affordable Care Act, P.L. 111-148, 124 Stat 119 (Mar. 23, 2010), codified at 42 U.S.C. § 300gg-13 (emphasis added).

health care bill introduced by Majority Leader Harry Reid on November 19, 2009. It was instead an amendment introduced by Senator Barbara Mikulski (co-sponsored by Senators Paul Harkin, Barbara Boxer and Al Franken) on November 30, 2009.¹⁹ Here is the entirety of Senator Mikulski's floor speech explaining why she proposed the amendment:

[A]s I reviewed the bill, I felt we could do more to be able to enhance and improve women's health care. That is what my amendment does. The essential aspect of my amendment is that it guarantees women access to lifesaving preventive services and screenings.

This amendment eliminates one of the major barriers to accessing care in the area of cost and preventive services. It does it by getting rid of, or minimizing, high copays and high deductibles that are often overwhelming hurdles for women to access screening programs. We know that screening is important and early detection is important because it saves lives. But it also saves money. It does it by reducing the top diseases that are killing women today, or certainly impairing their lives.

Today, according to the CDC, the top killers of women are cancer-breast cancer, cervical cancer, colorectal cancer, ovarian cancer. Also upfront and high on the list is lung cancer which, if identified early, can be treated with less invasive procedures and with lower costs. Another top killer of women is heart and vascular disease. And then there are the silent killers that often go undetected, such as diabetes,

¹⁹ SA2791, Sen. Mikulski (co-sponsored by Harkin, Boxer, and Franken) on Nov. 30, 2009. 155 CONG. REC. S12013-03.

which can result in terrible consequences, such as the loss of an eye, the loss of a limb, or the loss of a kidney.

We now have screenings that are proven to detect these diseases early. Guaranteed access to these screenings, as I said, will save money and lives.

If we look at where women are today, we find women often forgo those critical preventive screenings because they simply cannot afford it, or their insurance company won't pay for it unless it is mandated by State law. Many women right now don't have insurance at all—seventeen million women in the United States of America are uninsured—or when they are insured, they have to pay large out-of-pocket expenses.

Three in five women have significant problems paying their medical bills. Women are more likely than men to neglect care or treatment because of cost. Fourteen percent of women report they delay or go without needed health care. Women of childbearing age incur 68 percent more out-of-pocket health care costs than men, simply because of the maternity aspect.

Women are often faced with the punitive practices of insurance companies. No. 1 is gender discrimination. Women often pay more and get less. For many insurance companies, simply being a woman is a preexisting condition. Let me repeat that. For many insurance companies, simply being a woman is a preexisting condition. We pay more because of our gender, anywhere from 2 percent to over 100 percent. A 25-year-old woman is charged up to 45 percent more than a 25-year-old male in the same identified health status. A 40-year-old woman is charged anywhere from 2 percent to 140 percent more than a 40-year-old man with the same health status for the same insurance policy.

What does my amendment do? It guarantees access to those critical preventive services for women to combat their No. 1 killers. We will provide these services at minimal cost.

The overall cost of my amendment has been scored by CBO. It says the cost is \$1 billion. The majority leader, the Democratic leader, has provided opportunities to meet this cost. This amendment eliminates this big barrier of copayments and deductibles.

Let's talk about the benefit package. This benefit package is based on HRSA recommendations. It is based also on the recommendations of CDC. If this amendment passes, women will have access to the same preventive health services as the women in Congress have. If this passes, again, the women of America will have access to the same preventive services that we women in Congress have.

What does that mean? It means a mammogram, if your doctor says you need it; screening for cervical cancer, if your doctor says you need it; that check on diabetes, if your doctor is worried about you; and along with the symptoms related to menopause, there are other things, such as a loss of weight; and they may want to know at this juncture if you have diabetes. If you know that at 40, you are less likely to need kidney dialysis when you are 60.

The pending bill doesn't cover key preventive services, such as annual screenings for women of all ages to focus on our unique health needs. We know that for many people—for example, there are 15 million people in America with diabetes, and half are women. Often pregnant women with diabetes don't get the proper prenatal care. Heart disease is one of the top two leading causes of death in women—cancer and heart disease. Every year, over 267,000 women die from heart attacks. Women are generally unaware of their heart risks.

My amendment would, again, ensure heart disease screening for women. Remember that famous study that said “take an aspirin a day to keep a heart attack away.” It was done on 10,000 male medical residents, and not one woman was included. Thanks to a bipartisan effort, Bernadine Healy, NIH, and the women of the Senate, supported by the good guys of the Senate, were able to get that screening for women, get that evaluation. We know we manifest things differently than guys do. Now we are on our way to detection—if you can afford to have a doctor and if you can afford to have the screening.

My amendment also guarantees screenings for breast cancer—yes, for mammograms. We don’t mandate that you have a mammogram at age 40. What we say is discuss this with your doctor. But if your doctor says you need one, you are going to get one.

Studies have found mammogram screening decreases breast cancer among women by over 40 percent. Regular Pap smears reduce cervical cancer by 40 percent. This year, over 4,000 women will die of cervical cancer.

My amendment does focus on women’s health needs. Keeping a woman healthy not only impacts her own life but that of her family. It impacts her ability to care for her child or an aging parent.

Early detection saves money by treating diseases early. Screening tests for breast and cervical cancer cost about \$150, but the treating of advanced breast cancer is over \$10,000 and can even go much higher. The treating of early stages of cervical cancer is \$13,000 and can go much higher.

My amendment also leaves the decision of which preventive services a patient will use between the doctor and the patient. The health reform debate is focused on what you

should have when. We agree. Decisions should be made in doctors' offices, not in the office of a Member of Congress or the office of an insurance executive. The decision about what is medically appropriate and medically necessary is between a woman and her doctor.

The authors of the bill have done a very good job in protecting women in many areas. This actually refines and improves this particular issue. That is why I support the overall health reform bill providing universal access to health care for over 90 percent of the American people, ending those punitive practices of the insurance companies, stabilizing and strengthening Medicare, and improving quality in public health by using innovation and preventive services and quality. We can pass a health reform bill.

I conclude by saying that we will end the confusion about what is needed in the area of preventive health services for women when our coverage is often skimpy and spartan. We want to make sure what we do enables us to have access to these comprehensive services.

I hope this amendment is adopted unanimously. I believe good people on both sides of the aisle will believe in its underlying premise: that early detection and screening save lives and save money.

Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles in a way CBO believes is fiscally achievable. In the long run, I think by doing this it will mean a lot to families, and it will mean a lot to the Federal budget.

Mr. President, I yield the floor.²⁰

In short, Senator Mikulski claimed that her amendment would provide women with “lifesaving preventive services and screenings” such as mammograms, cervical cancer screenings, and screenings for other serious, life-threatening diseases, but in her entire statement, there is not a hint of a suggestion that the amendment would cover contraceptive services, and certainly not abortions – the mandates that gave rise to the *Hobby Lobby* case.

The next day, Senator Mikulski spoke again in favor of her amendment, focusing exclusively once again on the life-threatening diseases that would be prevented by greater access to preventative screenings – diseases such as breast, cervical, and ovarian cancer to which women are uniquely susceptible, as well as lung cancer, diabetes, heart disease and vascular disease. She made no mention of contraception or abortion in the nearly 1,000 word speech.²¹

Several other Senators also spoke in favor of the Mikulski amendment. Indeed, the floor debate was staged so that several of the female members of the U.S. Senate would each speak in turn for about five minutes in favor of the amendment.²² Every one of the speakers focused exclusively or nearly exclusively on the same preventative screenings of potentially life-threatening diseases that Sen-

²⁰ 155 CONG. REC. S11985-02 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

²¹ 155 CONG. REC. S12026-27 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski, 991 words).

²² *Id.* (statement of Sen. Boxer) (“The plan is, women colleagues will be coming to the floor. As they come, I will yield to them, until Senator Mikulski gets here, and then she will yield the time.”).

ator Mikulski had focused on. Out of the 4,207 words spoken in support of the amendment,²³ only 5 words—about one tenth of one percent—even arguably addressed contraception and abortion, and then only in euphemistic terms. Senator Barbara Boxer mentioned “family planning services” in her floor statement of 1727 words, and Senator Kirsten Gillibrand mentioned “family planning” in her 420-word floor statement.²⁴ But at the close of the discussion over her amendment, Senator Mikulski expressly disavowed any notion that the amendment would cover abortion services, or expand coverage for other “family planning” services beyond what was already covered by existing law:

I must say: Alert, alert, alert. We have just been informed that a shrill advocacy group is spreading lies about this amendment. They are saying that because it is prevention, it includes abortion services. There are no abortion services included in the Mikulski amendment. It is screening for diseases that are the biggest killers for women—the silent killers of women. It also provides family planning—but family planning as recognized by other acts. Please, no more lies. Let’s get off of it and save lives.²⁵

²³ *Id.* (statement of Senators Boxer (1727 words), Shaheen (333 words), Gillibrand (420 words), Hagan (383 words), and Murray (303 words). Senator Dodd also made a brief statement of 50 words in support of the amendment).

²⁴ *Id.* (statement of Senators Boxer and Gillibrand).

²⁵ *Id.* (statement of Senator Mikulski).

At the time, “family planning” services funded by other laws did not include abortion services—indeed, funding for abortions was explicitly prohibited²⁶—and no federal law mandated that employers provide contraceptive services.²⁷

B. HHS REGULATIONS ADD CONTRACEPTIVE AND ABORTION SERVICES TO THE EMPLOYER MANDATE.

Despite Senator Mikulski’s explicit disavowal on December 1, 2009, that the PPACA did not include abortion services or other family planning not already covered by existing federal law, federal regulators at the Department of Health and Human Services read the statutory language in subparagraph 4 as a broad delegation of authority to determine which services had to be included in basic insurance coverage without cost. In particular, the phrase “preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration” (“HRSA”), was treated as allowing HHS to mandate anything that it chose to include in the HRSA guidelines as “preventative” care.

HRSA, the division of the Department of Health and Human Services tasked by the statute with creating the preventative care guidelines, commissioned an outside non-profit group, the Institute of Medicine, to make recommendations.²⁸ On July 19, 2011, the Insti-

²⁶ See, e.g., Pub.L. 94-439, § 209, 90 Stat. 1434 (Sept. 30, 1976) (the original “Hyde Amendment,” providing that “[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term”).

²⁷ See, e.g., National Conference of State Legislatures, *Insurance Coverage for Contraception Laws* (Feb. 2012) (noting that, prior to the PPACA implementing regulations, federal law required insurance coverage of contraceptives only “for federal employees and their dependents,” although 26 states had laws requiring insurers that cover prescription drugs to also cover FDA-approved contraceptives).

²⁸ See Burwell, 134 S. Ct. at 2762, citing 77 FED. REG. 8725-8726 (2012).

tute published its recommendations in a report entitled “Clinical Preventive Services for Women: Closing the Gaps.”²⁹ At the outset of its report, the Institute of Medicine noted that it had broadly interpreted the statutory language, “preventive care and screenings,” to encompass all “measures—including medications, procedures, devices, tests, education and counseling—*shown to improve wellbeing*, and/or decrease the likelihood or delay the onset of a targeted disease or condition.”³⁰ It specifically noted that “The committee [responsible for the report] looked at women’s preventive service needs more broadly to account for women’s health and well-being.”³¹ Instead of just the common understanding of “preventative measures” dealing with “traditional indicators, such as morbidity and mortality,”—the kinds of life-threatening diseases repeatedly referenced by Senator Mikulski in her Senate floor speech supporting the amendment she had proposed—the Committee included in its understanding of “preventative measures” other things it thought to be “more generally supportive of a woman’s well-being.”³² “Cost-effectiveness was explicitly excluded” from consideration.³³

The committee’s broadened methodology led it to include “reducing unintended pregnancies” as one of its preventative goals, and to recognize the “systematic evidence reviews and other peer-reviewed studies, which indicate that contraception and contraceptive counseling are effective” means of achieving that goal. It then recommended to the HRSA for “consideration as a preventive service

²⁹ Available online at http://books.nap.edu/openbook.php?record_id=13181.

³⁰ *Id.* at 3 (emphasis added).

³¹ *Id.* at 4.

³² *Id.* at 6.

³³ *Id.* at 7.

for women: the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”³⁴

Less than two weeks later, on August 1, 2011, the HRSA adopted the Institute of Medicine’s recommendation almost verbatim. It did this without providing an opportunity for public comment on the Institute of Medicine’s recommendations. Indeed, it did this without ever providing an opportunity for public comment on the regulations implementing the women’s preventative services mandate at all.

When the Department of Health and Human Services published its first set of “interim final regulations” addressing PPACA a year earlier, seeking comment on a slew of regulations implementing other provisions of PPACA, it merely noted “that HRSA is developing guidelines related to preventive care and screening for women that would be covered without cost sharing pursuant to PHS Act section 2713(a)(4), and that these guidelines were expected to be issued no later than August 1, 2011.”³⁵ It did not request comments,³⁶ because at the time there was nothing to comment on.

Nevertheless, as the Department later noted, it “received considerable feedback regarding which preventive services for women should be covered without cost sharing.”³⁷ Apparently, the prospect of “free” stuff just for the asking, generated a lot of asks. But because HRSA had not yet proposed its guidelines mandating coverage for services not within the statutory language, there does not appear to

³⁴ *Id.* at 10.

³⁵ Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 FED. REG. 41726-01 (July 19, 2010).

³⁶ RIN 1545-BJ60, 77 FED. REG. 8725-01 (Feb. 15, 2012) (noting that “comments on the anticipated guidelines were not requested in the interim final regulations”).

³⁷ *Id.*

have been any comment questioning the HRSA's authority to go beyond the kinds of preventative care and screenings that Senator Mikulski described when she introduced her amendment.

The Department of Health and Human Services appears to recognize that its failure to provide for notice and comment on the HRSA guidelines is contrary to mandates of the Administrative Procedure Act ("APA").³⁸ On August 3, 2011—just two days after release of the HRSA preventative care guidelines—it announced in the Federal Register an amendment to the interim regulations it had announced back in July 2010. That amendment included a lengthy section explaining (or rather, rationalizing) why HHS felt it could ignore the notice and comment requirements of the APA, even while recognizing that "a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations, . . ."³⁹ HHS offered several reasons, but none of them are sufficient to exempt the regulations adopting the HRSA guidelines from the notice and comment requirements of the APA.

First, the Department asserted that "an exception [to the APA requirements] is made when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest."⁴⁰ It cited no authority for this proposition.

Second, the Department claimed that "[t]he provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority to issue interim final rules granted by section 9833 of the [IRS] Code, section 734 of ERISA, and section 2792 of the PHS Act."⁴¹ There is nothing in those three provisions that exempts HHS regulations from the APA; rather, the

³⁸ 5 U.S.C. 551, et seq. (2011).

³⁹ Interim Final Rules, RIN 0938-AQ07, 76 FED. REG. 46621-01, 46624 (Aug. 3, 2011).

⁴⁰ *Id.*

⁴¹ *Id.*

provisions simply give the HHS Secretary the authority to issue interim regulations implementing PPACA. Were that sufficient to curtail the requirements of the APA, then *every* regulation issued by every department of government would likewise be exempt from the APA. Obviously, that is not the law. The Department cited no authority for this extraordinary proposition, nor did it explain why, when it proposed interim regulations a year earlier to implement other parts of PPACA, it felt obliged to comply with the APA's notice and comment requirements that it now claims do not apply.

Third, the Department contended that "[e]ven if the APA requirements for notice and comment were applicable to these regulations, they have been satisfied."⁴² The "July 19, 2010 interim final rules implementing section 2713 of the PHS Act provided the public with an opportunity to comment on the implementation of the preventive services requirements in this provision," the Department contended.⁴³ But as noted above, the July 2010 interim final rules did not "implement" section 2713 of the Act; the notice merely announced that guidelines would be forthcoming. And, as the Department itself later acknowledged, "comments on the anticipated guidelines were not requested in the interim final regulations."⁴⁴ The fact that the Department received some unsolicited comments does not meet the APA's mandate, and even if the HRSA guidelines were "based on such [unsolicited] public comments," as the Department

⁴² By now, the Department's rationalization is starting to sound like the proverbial defense lawyer's defense of a client charged with murder: "My client was not even there, but if she was, she wasn't the one who pulled the trigger, but if she did, it was self-defense, and if not that, then she was crazy." Cf. Jane Velez-Mitchell, *More Police Interrogation Tapes Played in Jodi Arias Trial*, CNN Transcript (Jan. 16, 2013) ("Watch as Jodi changes her story from 'I wasn't there, I didn't kill Travis' to, 'Yes, I was there but two ninjas did it'"), available at <http://transcripts.cnn.com/TRANSCRIPTS/130116/jjvm.01.html> (last visited Sept. 12, 2015).

⁴³ Interim Final Rules, 76 FED. REG. at 46624.

⁴⁴ Final Rules, RIN 0938-AQ74, 77 FED. REG. 8725-01, 8726 (Feb. 15, 2012).

claimed,⁴⁵ the guidelines themselves were not subject to comment after they were issued.

The Department then claimed that providing “an additional opportunity for public comment” — it persisted in its false claim that it had previously requested public comment — “would be impractical and contrary to the public interest.”⁴⁶ Allowing for the notice and comment required by the APA would, the Department claimed, delay implementation of the HRSA guidelines, and therefore delay compliance with the statutory mandate of Section 2713(a)(4). “The requirement in section 2713(a)(4) that preventive services supported by HRSA be provided without cost-sharing took effect at the beginning of the first plan or policy year beginning on or after September 23, 2010,” the Department claimed,⁴⁷ but that is not true. The requirements established in recommendations or guidelines established pursuant to section 2713(a) were to become effective only after a “minimum interval” established by the Secretary following the time the recommendations or guidelines are issued, and that interval “shall not be less than 1 year.”⁴⁸ In other words, far from mandating that the preventative service requirements take effect on September 23, 2010, the statute actually prohibited them from taking effect until at least one year after the guidelines were adopted by HRSA.

Nevertheless, because complying with the statutory timetable “would mean that many students could not benefit from the new

⁴⁵ Interim Final Rules, 76 FED. REG. at 46624.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ § 2713(b). Technically, the 1-year interval requirement applies only to subsections (1) to (3), but that appears to be an obvious oversight, inadvertently not corrected when the Mikulski amendment added subsection 4. Moreover, reading subsection 4 without the interval requirement would produce the absurd result that the preventative services requirement for women would become effective before the guidelines identifying just what services were required could even be drafted, much less formally adopted.

prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year,”⁴⁹ the Department unilaterally waived the 1-year interval requirement. It “determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be contrary to the public interest because it could result in adverse health consequences that may not otherwise have occurred.”⁵⁰ It also waived the APA requirement that final rules not take effect until 30 days after their publication in the Federal Register, asserting (without citation of authority) that this requirement can also be waived “if an agency finds good cause why the effective date should not be delayed, and the agency incorporates a statement of the findings and its reasons in the rule issued.”⁵¹

The APA specifically requires that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date,” 5 U.S.C. § 553(d), and although it allows for an exception “as otherwise provided by the agency for good cause found and published with the rule,” 5 U.S.C. § 553(d)(3), the Agency did not bother to address governing D.C. Circuit precedent holding that the exception “will be narrowly construed and only reluctantly countenanced.”⁵² The exception is not an “escape claus[e]’ that may be arbitrarily utilized at the agency’s whim,” the D.C. Circuit has held.⁵³ Rather, it “should be limited to emergency situations.”⁵⁴ Be-

⁴⁹ Interim Final Rules, 76 FED. REG. at 46624.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *State of N.J., Dep’t of Env’tl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir.1980).

⁵³ *Am. Fed’n of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in *Administrative Procedure Act, Legislative History, 79th Cong. 1944–46 at 200, 201*).

⁵⁴ *Id.*

cause getting free contraceptives into the hands of co-eds a year earlier than the statute allowed (even assuming that the statute could be read broadly enough to cover contraceptives at all) hardly qualifies as the kind of “emergency situation” envisioned by the APA exception, the Agency had no authority to waive the 30-day effective date requirement.

So much for the Department’s compliance with procedural requirements mandated by law. Its substantive compliance fared no better. Among the “additional preventive care and screenings” that were listed in the HRSA guidelines published on August 1, 2011, triggering (after a 1-year interval) the statutory requirement for mandatory coverage without “any cost sharing requirements,” were “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁵⁵

Although the guidelines also included an exemption for churches, their integrated auxiliaries, and the exclusively religious activities of any religious order, the narrowness of which led to the *Hobby Lobby* challenge,⁵⁶ the substance of this particular guideline exceeded the scope of the statute, certainly as asserted by its author, Senator Mikulski. Contraceptive methods, whether FDA-approved or not, were not among the kind of preventative services that Senator Mikulski claimed were to be covered by her amendment. And even if one accepts that the brief references to “family planning” made by Senators Boxer and Gillibrand in floor statements demonstrated a legislative intent to include contraception in an amendment designed to provide free access to services and screenings that prevent life-threatening diseases, the HRSA’s inclusion in its guidelines of “all” FDA-approved contraceptive methods, which includes methods that

⁵⁵ RIN 1545-BJ60, 77 FED. REG. 8725-01.

⁵⁶ 77 FED. REG. 8725-26 (2012).

destroy a fertilized egg and therefore constitutes an abortion, simply cannot be squared with Senator Mikulski's explicit disavowal of "abortion" from her amendment's coverage.

So, at bottom, we have the Department of Health and Human Services issuing regulations beyond the statutory language, in violation of the notice and comment requirements of the Administrative Procedure Act, with an effective date that ignored the 1-year interval requirement of the statute as well as the 30-day requirement of the APA before they could be implemented. The narrowness of the religious exemption would not have generated the *Hobby Lobby* litigation—at least, not one raising the same religious liberty objection—had the HRSA guidelines themselves not reached more broadly than the statute envisioned. Together, however, the narrowness of the religious exemption and the broadening of the statutory mandate to include "all" FDA-approved contraceptive methods, including some that cause abortions, ran headlong into the religious beliefs of the owners of Hobby Lobby, setting up their constitutional claims under the Free Exercise Clause of the First Amendment and their statutory claim under the Religious Freedom Restoration Act.

C. THE *HOBBY LOBBY* HOLDING.

The Green Family runs their closely-held Hobby Lobby Corporation in accord with their religious beliefs. For example, they are closed on Sundays in order to honor the Sabbath, a decision that must pose particularly significant costs on them because of the weekend-retail nature of their business. Once HHS adopted its regulations based on the HRSA guidelines mandating that employer-sponsored health insurance plans include "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods" for women of childbearing age without "any cost sharing requirements," employers such as Hobby Lobby were obligated to provide insurance coverage for twenty contraceptive methods, including four that prevent implantation of and therefore destroy a fertilized egg. The Greens believe that the latter four methods of contraception amount to an abortion,

and the requirement that they fund such methods for their employees was a stark violation of their religious beliefs. The Greens challenged the regulations as a violation of right to the free exercise of religion, protected by both the First Amendment⁵⁷ of the Constitution and the Religious Freedom Restoration Act (“RFRA”).⁵⁸ The Court’s ruling addressed only the latter, and there were several lines of defense offered by the Government.

1. RFRA Protects Corporations as Well as Individuals, Even For-Profit Corporations.

The Government’s first line of defense was that RFRA does not even apply to businesses such as Hobby Lobby. It made several arguments to support this claim. First, the Government argued that RFRA’s protections did not extend to *for-profit* corporations such as Hobby Lobby.⁵⁹ Others argued, in briefs before the Court and in popular and scholarly articles, that RFRA did not cover corporations at all, non-profit and for-profit alike.⁶⁰ The Court easily dispensed with the latter argument, noting that it had already applied RFRA to non-profit corporations.⁶¹ It then dispensed with the former argument just as easily, noting that the clear text of RFRA and the Dic-

⁵⁷ U.S. CONST. AMEND. I.

⁵⁸ 42 U.S.C.A. § 2000bb-1.

⁵⁹ Brief for the Petitioners at 15–22, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

⁶⁰ See, e.g., Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, *Hobby Lobby*, No. 13-354 (U.S. Jan. 28, 2014); Thomas E. Rutledge, *A Corporation Has No Soul—the Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 32 (2014).

⁶¹ *Hobby Lobby*, 134 S. Ct. at 2768 (citing *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)). See also Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014).

tionary Act included “corporation” within the definition of “persons” who were protected by RFRA, and that there was no conceivable interpretation of the text that would allow RFRA to reach natural persons and non-profit corporations without also reaching for-profit corporations.⁶²

The Government next made the somewhat overlapping argument that for-profit corporations cannot exercise religion and therefore do not fall under RFRA’s protection.⁶³ Some scholars also made the related point that the very idea of a limited liability corporation requires that the corporate entity be treated as separate from its owners, who alone are capable of exercising religion.⁶⁴ The Court dispensed easily with these arguments as well, noting that under modern corporate law, States often authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners’ religious principles.⁶⁵

The third argument the Government offered in support of its contention that RFRA did not even apply was that Congress merely intended to restore free exercise of religion jurisprudence to what it had been before the Court’s decision in *Employment Division v. Smith*.⁶⁶ The Court rejected that argument as well, noting that it was supported by neither RFRA’s text, which is not so limited, nor by pre-*Smith* jurisprudence, which in fact did include cases protecting the free exercise rights of for-profit corporations.⁶⁷

⁶² Hobby Lobby, 134 S. Ct. at 2769.

⁶³ Brief for the Petitioners at 16–20, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

⁶⁴ See, e.g., Rutledge, *supra* note 60, n. 60.

⁶⁵ Hobby Lobby, 134 S. Ct. at 2771.

⁶⁶ Brief for the Petitioners at 18–19, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

⁶⁷ Hobby Lobby, 134 S. Ct. at 2772 (citing *Gallagher v. Crown Koshier Super Market of Mass., Inc.*, 366 U.S. 617 (1961)).

Finally, the Court also rejected the Government's contention that Congress could not have intended to include for-profit corporations within RFRA's protective umbrella because of the difficulty of ascertaining the "beliefs" of large, publicly traded corporations, noting both that the Government had not offered any example of RFRA claims ever being asserted by publicly-traded corporations and that existing state corporate law provides ready means for resolving any intra-corporate conflicts on the subject that might arise.⁶⁸

The Court's holding that RFRA applied to Hobby Lobby to protect the sincerely-held religious beliefs of for-profit corporations – at least closely-held for-profit corporations – was pretty straightforward and should not have been controversial. Indeed, one almost gets a sense, reading the Government's briefs on this aspect of the case, that it was grasping at straws in order to try to avoid the difficult burden of strict scrutiny that would flow if RFRA applied.

2. *Substantial Burden*

The Government's next line of defense was to contest whether Hobby Lobby met the RFRA trigger requirement, namely, whether the Government's contraceptive mandate "substantially burdened" the religious beliefs of Hobby Lobby and its owners. The Government's contention that the connection between the mandate to provide health insurance coverage for objectionable abortifacients and the actual act that Hobby Lobby's owners found to be morally wrong (the termination of fertilized embryos) was simply too attenuated to amount to a substantial burden came in for particularly harsh criticism by the Court. "This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the

⁶⁸ *Id.* at 2774–75.

very same religious objections as the Hahns and Greens and their companies,” the Court noted.⁶⁹

The connection between providing insurance and the moral wrong their religious views required them to avoid “is exactly the same” between the two cases, and yet the Government exempted the former in order “to protect” them “from having to contract, arrange, pay, or refer for such [contraceptive and abortifacient] coverage,” while asserting in the *Hobby Lobby* litigation that the exact same concerns were too insubstantial to amount to a religious burden. That Government’s “dodge” of the issue did not fly with the Court, because the Court rightly recognized that it crossed the line from permissible inquiry into sincerity of belief (which no one disputed in the case) to impermissible inquiry into the reasonableness of the Green’s beliefs.⁷⁰ Rather, the Court concluded: “Because the contraceptive mandate force[d Hobby Lobby] to pay an enormous sum of money – as much as \$475 million per year in the case of Hobby Lobby – if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.”⁷¹

3. *Compelling Interest Assumed.*

The Court did not determine whether the HHS mandate that employers provide contraceptive insurance coverage to their employees free of charge was a compelling governmental interest. Although it hinted that certain exceptions in PPACA may have undercut the claim of “compelling interest,” it chose not to adjudicate that aspect

⁶⁹ *Id.* at 2777.

⁷⁰ *Id.* at 2778 (citing *Smith*, 494 U.S., at 887; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969); and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 710 (1981)).

⁷¹ *Id.* at 2779.

of the case because it held that the HHS mandate was not narrowly tailored to further the interest, even assuming that it was a compelling one. In assuming away the compelling interest dispute, however, the Court avoided having to deal with some thorny, even troubling issues.

A compelling interest is normally one that the government pursues to the exclusion of other, merely important interests.⁷² One can imagine, for example, that a nation that was so overpopulated that it could not feed its existing population might believe that it had a compelling interest in encouraging or even mandating wide-spread use of contraceptives in order to reduce the birth rate. On the other hand, a nation suffering such a decline in birth rates that its very survival was at stake might determine that it had a compelling interest in the opposite direction – in banning contraception and thereby increasing the birthrate. Both such claims are of the kind normally associated with “compelling interest.” The prevention of life-threatening diseases – the thing Senator Mikulski said was the purpose of her amendment – would easily qualify as “compelling interest” under this Court’s standard methodology as well.

⁷² See, e.g., *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 119–21 (1991); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (holding that “the generalized classification” which a statute drew, barring non-labor picketing but not peaceful labor picketing, in order to protect residential privacy, “suggests that [the State] itself has determined that residential privacy is not a transcendent objective”); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited” (quoting *Florida Star v. B. J. F.*, 491 U.S. 524, 541 (1989) (Scalia, J., concurring in part and concurring in judgment))); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433–34 (2006). See also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996).

But what of the “expanded” notion of preventative services proposed by the Institute of Medicine and implemented through regulations by HHS? Does merely seeking to “improve wellbeing” qualify as a “compelling” governmental interest? That would qualify as a “legitimate” governmental interest sufficient to pass muster under rational basis review, certainly, and perhaps even as an “important” interest strong enough to pass intermediate scrutiny, although that is more debateable. But if “improving wellbeing” qualifies as a “compelling” interest, then the first prong of the strict scrutiny test would no longer be very strict at all.

Indeed, just about anything government does would pass this once-highest of judicial thresholds, particularly in light of the kind of deference on that question this Court afforded to the government in *Grutter v. Bollinger*.⁷³ After all, who in Congress does anything that, in their view, is not to advance the well-being of society in general, or of some smaller subset of society? Even a corrupt member of Congress, one who trades his vote for a bribe, understands himself to be enhancing the well-being of the beneficiaries of that vote (and earning a little of the “wellbeing” for himself in the process!).

Perhaps we are being unfair, though. HHS might well counter such a critique by asserting that its mandate does not seek to “improve wellbeing” on a “very broadly framed” scale, as the Court described it,⁷⁴ but merely to improve the well-being of women by providing “free” access to contraception and thereby help women retain better control of their reproductive lives.⁷⁵

⁷³ 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

⁷⁴ *Hobby Lobby*, 134 S. Ct. at 2780.

⁷⁵ One commentator has claimed that the Court “appears to have [merely assumed a compelling interest] primarily to avoid talking about contraception as a gender discrimination issue.” W. David Koeninger, *Removing Access to Health Care from Employer and State Control: The ACA As Anti-Subordination Legislation*, 44 U. BALT. L. REV. 201, 220 (2015). Although the article includes a citation to the majority decision, Hobby

Posing the issue of “compelling interest” in this fashion narrows the claim a bit, but it is not without difficulties of its own. If helping women to retain better control of their reproductive lives – or, more precisely, to avoid unwanted pregnancy – is a “compelling” interest, then all sorts of governmental action thought unthinkable for decades would become possible. A ban on sexual activity outside of marriage, or perhaps even a ban on sexual activity by any couple who had not certified that they were seeking to have a child, would be very narrowly tailored to further the asserted interest, for example, and might therefore be permissible, at least arguably.

The fact that such a ban would undermine important liberty interests would not invalidate the ban, as the very purpose of strict scrutiny is to determine whether the government’s interest is so compelling as to warrant restrictions on liberty that were narrowly tailored to achieve the government’s end. Indeed, a ban on sexual activity would be more effective, and therefore more narrowly tailored, to the end of avoiding unwanted pregnancy than “free” access to contraceptive insurance coverage. Not all women would avail themselves of the contraceptive services even if they were available, and contraception does not always work, in any event. But focusing on this “least restrictive means” example does help us clarify just what the asserted compelling interest really is: an interest in allowing women (and men) to engage in sexual activity free of the biological consequences of sexual activity. Not only is the claim that unfettered sex without responsibility is a “compelling” interest something that would make even the Roman hedonists blush, but a very plausible argument could be made that the real compelling interest lies in exactly the opposite direction. Discouraging rather than encouraging irresponsible sex by men, and preventing rather than fostering the

Lobby, 134 S. Ct. at 2779, there is nothing in the opinion – at that page or elsewhere – from which such an assumption can be drawn.

sexual objectification of women, would both seem to have a better claim to a “compelling” interest.

Maybe the key to HHS’s compelling interest claim can instead be found in the requirement that HHS-mandated contraceptive services be provided “without cost-sharing” – that is, made readily available to poor women who could not afford contraception on their own. If, as demonstrated above, sex without consequences/avoiding unwanted pregnancy is not a compelling interest when applied broadly, then one has to consider what, precisely, narrowing the scope to only poor women adds to the compelling interest equation. Particularly in light of the still strong correlation between race and poverty in this country, one cannot avoid the eugenics overtones of such a claim, and they are deeply troubling.

Maybe curtailing reproduction by “those” people might have held sway among elite opinion-makers in Margaret Sanger’s day,⁷⁶ but one would have hoped that our country had long since put an end to its unfortunate flirtation with such dangerous and racist ideas.

No wonder the Court chose merely to “assume” that the HHS contraceptive mandate aimed at a compelling governmental interest. Better not to ask such questions in polite company.

4. The HHS Mandate is not Narrowly Tailored.

Finally, the Court held that the HHS mandate was not narrowly tailored to further whatever compelling interest it assumed was being furthered. The government could have achieved its goals by directly funding contraceptive services rather than compelling religious employers such as the Green family to fund them in violation of their religious beliefs, and that was enough to defeat the Government’s assertion of narrow tailoring, particularly in light of existing

⁷⁶ See, e.g., ANGELA FRANKS, MARGARET SANGER’S EUGENIC LEGACY: THE CONTROL OF FEMALE FERTILITY (McFarland & Co., 2005).

precedent describing the least restrict means standard as “exceptionally demanding.”⁷⁷

The Government had not demonstrated that providing direct funding of contraceptive services to women employees of companies that had religious objections to paying for them was not a viable alternative, the Court held. HHS did not provide any estimate of the cost, or the number of employees who might be affected, or even contend that it could not provide such statistics. Rather, “[i]f . . . providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order,” as the Government claimed, the Court found it “hard to understand HHS’s argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.”⁷⁸ RFRA and its sister statute, RLUIPA, “may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs,” the Court noted.⁷⁹ “HHS’s view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law,” the Court added.

The Court also identified another less-restrictive alternative that HHS had already implemented elsewhere, namely, the accommodation that HRSA and HHS made for *non-profit* religious employers. Such employers could claim an exemption from the HHS contraceptive mandate if they certified that they were a non-profit organization that “holds itself out as a religious organization” and “opposes

⁷⁷ *Hobby Lobby*, 134 S. Ct. at 2780 (citing *City of Boerne*, 521 U.S. at 532).

⁷⁸ *Id.* at 2781 (emphasis in original).

⁷⁹ *Id.*, citing 42 U.S.C. § 2000cc-3(c) (RLUIPA: “[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”).

providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections.”⁸⁰ Once an employer invokes the exemption, the insurance carrier must exclude contraceptive services from the employer’s group plan but also “provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries.⁸¹ Whether that alternative is itself constitutional is the subject of still-pending litigation,⁸² but it at least offered a less direct burden on the employer’s religious beliefs that the mandate HHS tried to apply to for-profit companies.

II. THE VITRIOLIC RESPONSE TO THE DECISION.

No doubt egged on by Justice Ginsburg’s false claim in her dissenting opinion that the Court’s decision “would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage,”⁸³ pro-abortion groups accused the Court of preventing women from having access to birth control and of giving bosses the power to force their personal beliefs on their women employees. One participant in an online symposium hosted by *ScotusBlog* claimed that the decision was “stunningly bad for women’s health and starkly dismissive of women’s own religious beliefs,” giving corporations “a license to discriminate against their female employees by overriding those employee’s rights to contraceptive coverage.”⁸⁴ *The New York Times* even editorialized that the decision

⁸⁰ *Id.* at 2763 (quoting 45 CFR § 147.131(b), 78 Fed. Reg. 39874 (2013)).

⁸¹ *Id.* at 2763 (citing § 147.131(c)).

⁸² See *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013), *injunction pending appeal granted by* 134 S. Ct. 1022 (2014).

⁸³ *Hobby Lobby*, 134 S.Ct. at 2790 (Ginsburg, J., dissenting).

⁸⁴ Marcia D. Greenberger, *Hobby Lobby Symposium: A decision based on conclusory assertions and results-oriented reasoning*, SCOTUSBLOG (July 2, 2014), available at

granted “owners of closely held, for-profit companies an unprecedented right to impose their religious views on employees.”⁸⁵

And that was just the reaction from the mainstream left. The fringe left was utterly unhinged, among other things contending that Hobby Lobby is now as bad as the Taliban in trying to impose its religious views on others.⁸⁶ Numerous law review articles subsequently followed suit, contending, for example, that the decision allows employers “to exercise their religious freedom by reaching into some of the most intimate details of their employees’ lives and by dictating certain behaviors.”⁸⁷

<http://www.scotusblog.com/2014/07/hobby-lobby-symposium-a-decision-based-on-conclusory-assertions-and-results-oriented-reasoning/>.

⁸⁵ Editorial, *The Justices Endorse Imposing Religion on Employees*, N.Y. TIMES, p. A20 (July 1, 2014), available at <http://www.nytimes.com/2014/07/01/opinion/the-supreme-court-imposing-religion-on-workers.html>.

⁸⁶ See, e.g., Michael Stone, *Holly Hobby Lobby: New Face of American Taliban*, PATHEOS (July 6, 2014), available at <http://www.patheos.com/blogs/progressivesecularhumanist/2014/07/holly-hobby-lobby-new-face-of-american-taliban/>; cf. Steve Coll, “When the Taliban Meets Hobby Lobby,” THE NEW YORKER (July 1, 2014), available at <http://www.newyorker.com/news/daily-comment/when-the-taliban-meets-hobby-lobby>.

⁸⁷ W. David Koeninger, *Removing Access to Health Care from Employer and State Control: The ACA As Anti-Subordination Legislation*, 44 U. BALT. L. REV. 201, 222 (2015); see also *id.* at 219 (describing the Court’s *Hobby Lobby* decision as “squarely” supporting “the employer’s desire to define health and the use of health care as a means to control the behavior of workers”); *id.* at 221 (accusing Justice Alito as “assert[ing] strongly that a religious employer may discriminate against women in defining what health care it will provide for its employees”); *id.* at 222 (“the disparity in power between the owners of large corporations and their employees makes it likely that wealthy owners will enjoy religious liberty, but their employees will not”); Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J. L. & GENDER 193, 202 (2015) (contending that “[c]orporate conscience claims,” such as those advanced by Hobby Lobby, “and their subsequent judicial acceptance, relied on denying the relevance of the woman question,” and that “the Supreme Court made women immaterial to its analysis”); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 77 (2015) (contending that “the Establishment Clause requires a construction of RFRA that does not permit the imposition of significant harms on third parties—in this case, female employees and female dependents of all employees”); Jennifer Jorczak, “Not

In truth, the Court's decision did not allow the Green family (Hobby Lobby's owners) to impose their religious views on anyone, and it does not prevent any woman from obtaining contraception or abortion services. It only holds that an employer is not obligated to pay for those services directly out of their own funds, and then only if the employer is a closely held corporation whose owners have a sincerely held religious objection. That should hardly have been controversial.

This is, in my view, the most important aspect of the Court's decision. To be sure, the Government could have won its case by prevailing at either of the two prior steps in the analysis. Hobby Lobby would have lost if the Court had agreed that corporations are not covered by RFRA at all, and it would have lost if the Court had agreed that the HHS mandate did not really substantially burden anyone's religious exercise. Moreover, although each of those aspects of the Court's holding generated a great deal of controversy, the narrow tailoring holding, and the controversy over it, goes to more fundamental disputes about the very nature and purpose of government.

III. THE ASSUMPTIONS UNDERLYING THE *HOBBY LOBBY* LITIGATION AND THE CRITIQUES OF THE DECISION OFFER IMPORTANT

Like You and Me': Hobby Lobby, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights, 80 BROOK. L. REV. 285, 285 (2014) (contending that the decision places corporations above individuals and "tears at the fabric of our democracy"); Douglas Nejaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (contending that "complicity-based conscience claims" such as those advanced by Hobby Lobby, have "the potential to inflict material and dignitary harms on other citizens").

**INSIGHTS ABOUT CURRENT VIEWS ON THE ROLE OF
GOVERNMENT.**

The *Hobby Lobby* decision was thus a relatively narrow one, but it invites us to ask a number of additional questions not confronted in the litigation. For example, because the employer mandate for contraceptives and abortifacients was created by the regulatory agency and not by Congress itself (indeed, created, at least arguably, in direct contradiction of the intent of those who crafted the statutory language), does it violate the non-delegation doctrine, derived from the Constitution's requirement in Article I, Section 1 that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."⁸⁸ The doctrine has been toothless since 1936, but Justice Thomas has recently suggested in a trilogy of concurring opinions that its demise should be reconsidered.⁸⁹

Another question the *Hobby Lobby* litigation invites is to ask whether, because the mandate is a forced transfer of wealth from the employer to the employee rather than a forced payment by the employer into the general treasury, does it even qualify as a "tax," which was essential to upholding the individual mandate two years ago in *National Federation of Independent Business v. Sebelius*?⁹⁰ And if not a tax, is the employer contraceptive mandate constitutionally permissible as a regulation of commerce among the states, despite the holding in *N.F.I.B.* that the individual mandate was not a constitutionally valid regulation of interstate commerce?

Eighty years ago, the Court upheld an act of Congress mandating the payment of a minimum hourly wage – that is, a forced transfer of

⁸⁸ U.S. CONST., ART. I, § 1.

⁸⁹ See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring); *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1250-52 (2015) (Thomas, J., concurring in judgment); *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199, 1223, n. 6 (2015) (Thomas, J., concurring in judgment).

⁹⁰ 132 S.Ct. 2566 (2012).

additional wages from employer to employee – on the ground that such was necessary to avoid race-to-the-bottom and externality problems that flow from employers paying below subsistence wages.⁹¹ It is hard to see how such a rationale could be expanded infinitely to include every unfunded mandate Congress (or worse, the regulatory agencies) wish to impose on employers, without completely obliterating the notion that the federal government is one of limited, enumerated powers. And if it is neither a tax nor a regulation of interstate commerce, can the contraceptive mandate be upheld as an exercise of Congress’s power under Section 5 of the Fourteenth Amendment, even though Hobby Lobby is not a state actor? The holding that religiously-motivated employers had to be exempted from the mandate meant that the broader issue of the validity of the mandate itself did not need to be reached with this particular group of employers, but perhaps it should be.

A related set of questions flows from that first group. Why should the exemption the Court has now recognized be limited to the sincerely held religious liberty claims of owners of closely held corporations? Why not broadly held public corporations, if the corporate bylaws make religious views a governing part of the corporation’s purpose? It may be less likely that the shareholders of a large, publicly-held corporation would have the kind of shared sense of religious purpose manifested by the Green family with their closely-held corporation, but it is not at all difficult to imagine such a case.

Think of the analogous examples of shareholders buying stock in a company because they shared the company’s views on social justice, or environmental protection, or refusal to do business on grounds of one cause or another. Think Starbucks, or Ben & Jerry’s Ice Cream, or the many divestment campaigns that have hit shareholder meetings in recent decades. So if the “social justice” cause had

⁹¹ *United States v. Darby*, 312 U.S. 100, 115 (1941).

religious roots (and is embodied in the corporate charter or bylaws), it is hard to see a principled reason why the religious accommodation mandated by RFRA should not apply as much to the publicly-held corporation as it did to the closely-held one, even if such a case is less likely to occur.

Come to think of it, why should the exemption be limited to *religious* liberty claims? Why not other claims of sincerely held beliefs that occupy for their adherents the same preferred place that religious beliefs hold for the owners of Hobby Lobby?⁹² Think of a federal mandate that would force a corporation like Ben & Jerry's to violate one of its self-described "social justice" beliefs. Could the Government compel it to advance a cause with which it disagreed?

Relatedly, one should ask why the guarantee of the free exercise of religion found in the First Amendment was not adequate protection for Hobby Lobby? Why did it have to rely on the *statutory* protection in the Religious Freedom Restoration Act? The short answer is, of course, the Supreme Court's decision in *Employment Division v. Smith*,⁹³ which held that religious liberty loses to mandates imposed by generally applicable laws. But why should that be the case? It results in the perverse view that Hobby Lobby is free to exercise its religious liberty only by way of legislative grace, the very opposite of the pre-existing fundamental freedom of religion – of conscience – that the First Amendment recognized and was designed to protect.⁹⁴

⁹² Cf. *United States v. Seeger*, 380 U.S. 163, 166 (1965) (holding that the religious conscientious objector exemption in the Universal Military Training and Service Act extends to non-religious conscientious objectors who have a "given belief that is sincere and meaningful [that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God").

⁹³ 494 U.S. 872 (1990).

⁹⁴ U.S. CONST. amend. I; cf. Decl. of Independence, ¶ 2 (asserting as a "self-evident" truth that human beings are "endowed" with "certain unalienable Rights" "by their Creator" and not by government).

Perhaps the *Hobby Lobby* case will now invite a reconsideration of the *Smith* decision.

Finally, we should confront the much more profound question why it is that employers, whether religiously scrupulous or not, are being forced by the national government to provide “free” contraceptive benefits at all. The Court briefly hinted at this issue in its discussion of how the accommodation HHS was already providing to religious non-profits qualified as a less burdensome alternative to the HHS direct contraceptive mandate on for-profit religious employers: “HHS has concluded,” the Court noted somewhat disbelievingly, “that insurers that insure eligible employers opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the ‘costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women’s health.’”⁹⁵

The benefits are not free, of course, and only the most economically illiterate can think that they are. There being no such thing as a free lunch (or, in this case, *après-lunch* contraceptive protection), someone has to pay for them. If not the individuals who use them, then the employer, and the employer’s purchase of such benefits either comes out of the employer’s pocket by way of reduced profits, or is passed through to third parties – the employer’s other employees, perhaps (through reduced wages), or the employer’s customers (through higher prices). In an earlier time in our nation’s history, that principle was much better understood. In the landmark decision of *Calder v. Bull* two centuries ago, for example, the Supreme Court cited “a law that takes property from A and gives it to B” as an example of “An ACT of the Legislature (for I cannot call it a law)” that

⁹⁵ *Burwell v. Hobby Lobby*, 134 S. Ct. at 2782 n.38 (quoting 78 FED. REG. 39877).

“cannot be considered a rightful exercise of legislative authority” because it is “contrary to the great first principles of the social compact.”⁹⁶

Justice Chase’s opinion in the case is actually a précis on the nature of government in general, and of the American government in particular. “The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence,” he wrote, putting an emphasis on the word “property.” “The purposes for which men enter into society will determine the nature and terms of the social compact,” he added, implicitly inviting us to look back at the document by which our civil society was formed, the Declaration of Independence. That document describes rights, including the right to acquire and possess property as a component of the pursuit of happiness, as “unalienable.” Those rights exist prior to government, as gifts bestowed by our Creator, and protecting them is the very purpose of government. That basic conception of the purposes of government, set out in the Declaration, is “the foundation of the legislative power,” Chase added, and hence those purposes “will decide what are the proper objects of” government and what are its limits. In other words, there are some things that legislatures simply cannot do, because “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.”

⁹⁶ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

Having laid the theoretical foundation for legitimate government (or, more precisely, having summarized the theoretical foundation set out in the Declaration), Justice Chase then drew the logical conclusion: “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” He then gave several examples of his meaning, and one of them is particularly relevant to our *Hobby Lobby* discussion: “a law that takes property from A. and gives it to B.” Such a law “is against all reason and justice,” he said, “for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.” He then concluded this part of his opinion with a rhetorical flourish:

The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or *violate* the right of an antecedent lawful private contract; or *the right of private property*. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

The dispute in the case between Justice Iredell and Justice Chase was not whether a law that purported to take property from A and give to B was legitimate – both recognized that it was contrary to the very core purposes of the social compact. The dispute was whether the courts were independently authorized to strike down such a law in the absence of clear constitutional text. Chase thought yes; Iredell thought not. But on the particulars of the case, neither thought the

ex post facto clause was violated, and Chase also did not think a broader principle of natural justice was violated because the probated property at issue was subject to legal rules that the legislature had authority to pass. In other words, this was not a case of taking property from A and giving it to B, but Chase left no doubt what he would do with such a law should any legislature attempt to pass one.

Even Iredell, who rejected the broader claim for a rule of decision based on natural justice that had been proffered by Chase, believed that the “Governments of America” were more free of the danger that property rights might be abused in such a fashion than any governments that had ever existed, “in ancient or modern times.” Although he recognized that sometimes “private rights must yield to public exigencies” lest Government itself “be obstructed, and society itself . . . endangered,” such “exigencies,” rising to the level of societal endangerment, were a pretty high hurdle, particularly when viewed against the backdrop of political theorists on whom the American Founders drew extensively. In *The Law of War and Peace*,⁹⁷ for example, Hugo Grotius wrote that a monarch could take private property *only* when “the public welfare . . . require[d] it.” Samuel von Puffendorf described the related power of eminent domain as available only “when urgent necessity of the state demands.”⁹⁸ And in 1758, Emmerich de Vattel described the power as “[t]he right which belongs to the State, or to the sovereign, to make use of all property within the State for the public welfare *in time of need*.”⁹⁹

⁹⁷ HUGO GROTIUS, *THE LAW OF WAR AND PEACE* Vol. 2, Ch. XIV, § 7 (L. Loomis, trans., Walter J. Black 1949).

⁹⁸ SAMUEL VON PUFFENDORF, *SECOND BOOK ON THE DUTY OF MAN AND CITIZEN* 136 (Oceana Pub. 1964) (1673).

⁹⁹ 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 244 (James Brown Scott, ed., Carnegie Institute of Washington, 1916) (1758) (emphasis added).

That same high hurdle for the use of the “despotic” eminent domain power is also found in several of the critically important founding-era governmental charters. The Massachusetts Constitution of 1780, for example, limited the taking of property only for “public uses,” and only “[w]henver the *public exigencies* require.”¹⁰⁰ And Article 2 of the Northwest Ordinance limited the power to “public exigencies” that “ma[d]e it necessary, for the *common preservation*, to take any person’s property.”¹⁰¹

Justice Iredell also left no doubt in his opinion in *Calder v. Bull* that, as a judge, he would limit abuses of the eminent domain power where he could (i.e., where there was constitutional text limiting government). It is therefore hard to imagine that Justice Iredell would have allowed the specific “public use” limitation on the awesome—Justice William Patterson, in *Van Horne’s Lessee v. Dorrance*,¹⁰² called it “despotic”—power of eminent domain contained in the Fifth Amendment to be cast aside for something as nebulous as “public benefit,” such as when the “public benefit” is something that, in the government’s view (and absent some society-endangering exigency), might be achieved if private land was transferred involuntarily from own private owner to a different one (the claim in *Kelo*). And it is even more difficult to imagine that Justice Iredell would have permitted the use of the despotic power for purely private benefit (the underlying, unaddressed issue in *Hobby Lobby*).

Justice William Patterson’s opinion a few years earlier in *Van Horne’s Lessee v. Dorrance*, while riding circuit, advanced the same

¹⁰⁰ MASS. CONST. of 1780, Part I, art. X, reprinted in 2 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 958 (1878) (emphasis added).

¹⁰¹ *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 2, 1 Stat. 51, 53 n.a (July 13, 1787, re-enacted Aug. 7, 1789) (emphasis added).

¹⁰² *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dallas) 304, 311 (C.C.D. Pa. 1795).

theme. "The preservation of property . . . is a primary object of the social compact," he wrote, because "[n]o man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry."¹⁰³ Accordingly, the power "of taking private property," which "exists in every government," is available only "when state necessity requires." And he could not envision it ever being necessary to take property belonging to one citizen and giving it to another:

It is . . . difficult to form a case, in which the necessity can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it.¹⁰⁴

A generation later, Justice Joseph Story was still sounding the same theme:

We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.¹⁰⁵

The State and lower Federal Courts adhered, strongly, to the same position. "Necessity can never demand that the lands of A. shall be taken and given to B.," the North Carolina Supreme Court

¹⁰³ *Id.* at 310.

¹⁰⁴ *Id.* at 311.

¹⁰⁵ *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829).

held in *Den ex. dem. Robinson v. Barfield* in 1818.¹⁰⁶ “Can legislatures in this enlightened age, with written constitutions to restrain them, take from one and give to another his property with or without compensation?” asked the federal circuit court in Illinois in 1848, answering its own question by stating: “It is only necessary to state the proposition in its nakedness to meet refutation.”¹⁰⁷ “The private property of one citizen cannot be taken and given to another citizen, for private uses,” held the Maine Supreme Court in an 1855 case.¹⁰⁸ The Illinois Supreme Court similarly held a decade later that “private property cannot be constitutionally condemned and appropriated by the legislature to private uses.”¹⁰⁹ And the Ohio Supreme Court noted in 1840 that the power to redistribute property from one private party to another “would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state.”¹¹⁰

When the Supreme Court issued its infamous decision in *Kelo v. City of New London, Connecticut* a decade ago, that “great first principle of the social compact” had been relegated to Justice O’Connor’s dissenting opinion on the losing side of the five-four split decision, and now it appears to have disappeared from the *legal* landscape altogether. Happily, judging by the counter critiques making fun of the “free contraception” argument, it has not yet disappeared from the *citizenry*. My favorite: “My Jerk Boss Won’t Pay for My Groceries! I’m Going to Starve!” over at EagleRising.com,¹¹¹ although a

¹⁰⁶ 6 N.C. 391, 421 (N.C. 1818).

¹⁰⁷ *Arrowsmith v. Burlingim*, 1 F. Cas. 1187, 1189 (C.C.D. Ill. 1848).

¹⁰⁸ *Jordan v. Woodward*, 40 Me. 317, 323 (1855).

¹⁰⁹ *Nesbitt v. Trumbo*, 39 Ill. 110, 114 (1866).

¹¹⁰ *Buckingham v. Smith*, 10 Ohio 288, 297 (1840).

¹¹¹ Gary DeMar, *My Jerk Boss Won’t Pay for My Groceries! I’m Going to Starve!* EAGLERISING (July 3, 2014), available at <http://eaglerising.com/7130/jerk-boss-wont-pay-groceries-im-going-starve/>.

tweet from someone named Sean Davis is certainly a contender: “Get your politics out of my bedroom!” “Not a problem. I’m just going to grab my wallet before I leave.” “The wallet stays, bigot.”¹¹² As Charlie Brown would say, “Sigh.”

Some might see in this litany of questions a slippery slope to anarchy, to every individual becoming a law unto himself, but it actually poses fundamental questions about the very purpose of government and the legitimacy of the laws government enacts. We have become too much of an entitlement society even to see the underlying problem, but these mandates are not of the “cause no harm to others” variety that would render them legitimate (and would render individual exemptions from them problematic). They are instead of the “take from A to give to B,” robbing Peter to pay Paul variety. That’s a purpose of government rejected by our founding charter, which defines the legitimate purpose of government as securing to each individual the inalienable rights they have from their Creator.

The Sandra Flukes of the world might have the “liberty” to use contraceptives if they choose (whether that includes abortifacients is another matter entirely, but I’ll save that for another article), but forcing others to pay for their contraceptive use is not the exercise of liberty. It is, rather, the exercise of compulsion, for it denies liberty to others. Wouldn’t it be nice if, once the vitriolic dust kicked up by the left’s reaction to the *Hobby Lobby* decision settles, we as a society might actually reacquaint ourselves with that “great first principle of the social compact”? One can only hope.

¹¹² Sean Davis, Twitter (June 30, 2014), available at <https://twitter.com/seanmdav/status/483647455662055426>.