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BURWELL V. HOBBY LOBBY: PROTECTING RELIGIOUS FREEDOM IN A DIVERSE SOCIETY

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INTRODUCTION

The U.S. Supreme Court decision in *Hobby Lobby* affirms that Americans do not relinquish their right to free exercise of religion when operating a closely-held family business. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court ruled that the government may not force religious objectors to provide coverage for four potentially life-ending contraceptive drugs and devices in their family business employee health plans.

As a part of the implementation of the Patient Protection and Affordable Care Act (PPACA), the U.S. Department of Health and Human Services (HHS) sought to provide all women access to no-cost contraception. The government pursued this policy goal by mandating that nearly every health insurance plan cover all twenty FDA-approved contraceptive drugs and devices, including four that have

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the potential to end unborn human life. The evangelical Green family, owners of Hobby Lobby, and the Mennonite Hahn family, owners of Conestoga Wood Specialties, do not object to all birth control.[1] Covering these four potentially life-ending means of contraception, however, would have violated their deeply held religious beliefs.

The Supreme Court affirmed these families' right not to be coerced against their convictions on the basis of the federal Religious Freedom Restoration Act (RFRA). Using the strict scrutiny prescribed by RFRA, the Court concluded that the government could have used other means to pursue its policy of providing no-cost contraception to women rather than forcing these employers to advance its goal.

The Religious Freedom Restoration Act is an important law for balancing competing interests in an increasingly pluralistic society. The Supreme Court's application of RFRA in *Burwell v. Hobby Lobby* is an example of the legal protection it provides for the free exercise of religion. Properly considered as a reference during the design of public policy, RFRA can also serve policymakers as a compass to avoid such conflicts in the first place. In sum, RFRA provides a critical set of tools for Americans to navigate public life together despite our deep differences.

THE HISTORY AND PURPOSE OF THE RELIGIOUS FREEDOM RESTORATION ACT

Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 with overwhelming bipartisan support. The legislation was sponsored by then-Rep. Charles Schumer, D-N.Y., Sen. Edward Kennedy, D-Mass., and Sen. Orrin Hatch, R-Utah. The House unani-

[1] Conestoga Wood Specialties' case was consolidated with Hobby Lobby's by the Supreme Court, *see* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

mously passed RFRA; the Senate vote was 97-3. The law was supported by a very broad, ideologically diverse, and ecumenical coalition of sixty-eight groups that included the American Civil Liberties Union, Americans for the Separation of Church and State, and the National Association of Evangelicals, along with Christian, Jewish, Muslim, Sikh and other groups.[2] President Bill Clinton signed RFRA into law on Nov. 16, 1993.

One of the factors that led to RFRA's enactment was the 1990 Supreme Court decision in *Employment Division v. Smith.* The Supreme Court held that a governmental burden on the free exercise of religion is acceptable if it is incidental to a generally applicable law that is neutral toward religion. The underlying logic is that religious objectors must seek a specific legislative exemption in each statutory situation. *Smith* was an aberration in an era of Supreme Court jurisprudence, characterized by *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972), in which the Free Exercise Clause was generally interpreted as requiring a religious exemption unless the government can prove a compelling interest pursued through the least restrictive means for denying such an exemption.[3]

Congress passed RFRA in response to *Smith*, reestablishing in statute the standard of strict scrutiny in free exercise cases that the Court had previously generally upheld in practice. RFRA prohibits the government from substantially burdening religious freedom unless it can demonstrate that it has a compelling interest for doing so, and that it has pursued that compelling interest through the least restrictive means.

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[2] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994).

[3] Eugene Volokh, *What Is the Religious Freedom Restoration Act*, THE VOLOKH CONSPIRACY (Dec. 2, 2013), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/.

The original RFRA applied to both federal and state law, but the Supreme Court held in *City of Boerne v. Flores* (1997) that the state application was beyond federal authority. With regard to federal law, RFRA remained in force. A number of states have since passed their own RFRA statutes, and proposals for RFRAs continue to be introduced in additional states.

The legislative intent of RFRA was the subject of an amicus brief submitted in the *Hobby Lobby* case by a number of Members of Congress who had taken part in enacting RFRA in 1993. They argued that the Obama administration failed to comply with RFRA when formulating and implementing the women's preventive health services coverage under the Patient Protection and Affordable Care Act (PPACA). The federal legislators denounced the government's action and explained the congressional reasoning behind RFRA:

> The government's refusal to apply RFRA throughout the administrative process has resulted in a mandate that violates RFRA and turns the law of religious freedom upside down. RFRA places a heavy burden on the government and protects religion by default. But the HHS mandate places a heavy burden on religion and protects the government by default.[4]

The federal legislators' brief also highlights their particular intention in the 1993 law with regard to the place of religious liberty protection in our politics. That purpose, they explained, was "to establish one blanket default rule that would insulate religious liberty from the shifting fortunes of interest-group politics."[5] They go on to

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[4] Brief for the Legislators as Amicus Curiae, *Burwell*, 573 S. Ct., http://www.becketfund.org/wp-content/uploads/2014/01/13-354-13-356-bsac-Senators.pdf.

[5] *Id.*

describe RFRA's cross-cutting application through all federal law and regulation, creating a special deference toward religious liberty.

The legislative history is replete with recognition across the wide range of supporters about the importance of this protection. Rev. Dean M. Kelley, Counselor on Religious Liberty for the National Council of Churches, testified before a House subcommittee in 1990, "The Religious Freedom Restoration Act is designed to put the rules back the way they were and to restore the Free Exercise Clause to its place of honor and effect at the head of the Bill of Rights."[6] Rep. Nancy Pelosi (D-CA) described the significance of the restoration of strict scrutiny as the appropriate standard of review: "[RFRA] is important because it protects an individual's religious freedom from unnecessary Government interference. It provides for the reestablishment of fair standards to determine if Government intervention is necessary."[7]

PROTECTING RELIGIOUS FREEDOM PROMOTES TOLERANCE IN A PLURALISTIC SOCIETY

In a society deeply divided on a number of significant issues, RFRA supplies critical tools for balancing our competing beliefs, interests, and values. Ongoing, high-pitched debates over controversial issues like public policy related to reproduction can make the stakes seem higher than they need to be. The *Hobby Lobby* decision reminds us that it is not only frequently possible but prudent to accommodate religious objections to a prevailing policy.

Religious diversity has increased over the history of the United

[6] *The Religious Freedom Restoration Act of 1991 Hearing on H.R. 5377 Before the H. Comm. On the Judiciary*, 101st Cong. (1990), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf.

[7] 103 *Cong. Rec.* 2356 (1993), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2013/10/20/cr-h2356-63-1993.pdf.

States, even as government intervention in matters of the daily lives of citizens has grown. The occasions for government policies and personal beliefs to clash have multiplied. In such an environment, public policy should make reasonable accommodations for individuals to speak and act consistent with their faith at home, in religious congregations, at work, or elsewhere in the public square.

Policymakers should from the outset design policy to respect religious freedom. When they neglect to do so, or when unforeseen consequences of policy arise, RFRA provides a balancing test to weigh government interests and citizens' rights. The federal RFRA statute articulates two purposes for the law. The first is to reestablish strict scrutiny, "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened." The second is to provide for judicial redress in case of government violation of this rule.[8]

RFRA does not give license for every religious claim to automatically trump any government interest. The infringement must amount to a substantial burden on the free exercise of religion. For the government's part, it must demonstrate a compelling interest, pursued through the means least restrictive to the religious liberty of the objector.[9] In some instances, for example, the government may prevail by appealing to its compelling interest in matters of public safety. The *Hobby Lobby* opinion itself articulated the case-specific nature of its analysis: "[T]his decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must

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[8] Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2013).

[9] Ed Whelan, *Inept NYT Op-Ed Defending HHS Mandate – Part 1*, NAT'L REV. ONLINE (Feb. 27, 2012), http://www.nationalreview.com/bench-memos/292018/inept-inyti-op-ed-defending-hhs-mandate-part-1-ed-whelan.

necessarily fall if they conflict with an employer's religious beliefs."[10] RFRA simply provides the recourse and standard for competing religious and government interests to be weighed in court when they conflict.

The late Sen. Ted Kennedy (D-MA) affirmed the law in this regard in a 1992 statement:

> [RFRA] creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail. [RFRA] simply restores the long-established standard of review that had worked well for many years, and that requires courts to weight free exercise claims against the compelling-state-interest standard.[11]

In *Hobby Lobby*, the Court concluded that, "under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful."[12] The Court determined that the government failed to meet the least-restrictive means requirement because it could have used other approaches to advance its policy objective of providing no-cost contraception to women rather than coercing these employers. Indeed, the administration showed examples of such alternatives in its varying approaches to religious objectors based on their institutional status, exempting a narrow category of churches and their auxiliaries and proposing an accommodation for non-profit groups (discussed further below).

The *Hobby Lobby* decision does not prevent the Obama administration from pursuing its goal of providing no-cost contraception

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[10] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2758 (2014).

[11] 102 *Cong. Rec.* 9822 (1992), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/cr-s9821-23-1992.pdf.

[12] Brief for the Legislators as Amicus Curiae, *supra* note 4.

through other means. Nor does the decision in any way limit women's freedom to choose the full range of FDA-approved contraception.

Meanwhile, the Greens and the Hahns may continue to run their family businesses without violating their faith. One need not share these families' religious convictions about the protection of unborn human life to agree that they should not be forced to violate those beliefs by subsidizing potentially life-ending drugs and devices through their health plans.

In short, as applied in *Hobby Lobby*, RFRA effectively defused a clash of interests and values that, left unchecked, would have led to increased social discord. It also would have further subjected the fundamental right of religious free exercise to the kinds of political controversy RFRA's drafters sought to avoid:

> By failing to follow RFRA when considering the scope of religion-based exemptions from the contraceptives mandate, the government guaranteed that impassioned political considerations would take the place of reasoned legal consideration. That is exactly what RFRA proponents worried would happen in the absence of RFRA.[13]

As a society, we may not always be able to agree on fundamental issues, but RFRA has helped us agree on good rules for how to disagree.

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[13] Brief for the Legislators as Amicus Curiae at 12, Burwell v. Hobby Lobby,134 S. Ct. 2751 (2014) Nos. 13-354 & 13-356.

RFRA APPLIES TO AMERICANS WHO GO INTO BUSINESS

The Obama administration and defenders of the HHS mandate lodged a number of arguments against the claims brought by the Greens and Hahns. HHS contended that to apply RFRA to these for-profit entities would be to expand the law "far beyond anything Congress contemplated."[14] The government argued that a for-profit corporation is not a person and cannot exercise religion. It further insisted that the mandate did not impose a substantial burden. In addition, lower courts had concluded that since for-profit corporations exist to make money, that excludes the exercise of religion.[15]

Clearly the scope of RFRA extends to the HHS mandate, as the legislators who passed the 1993 law made clear in their *Hobby Lobby* brief. "Nothing in the Patient Protection and Affordable Care Act excludes the implementation of the women's preventive health services coverage requirement from the Religious Freedom Restoration Act," they explain. "RFRA therefore directly controls the government's exercise of its rulemaking authority to implement the women's preventive health services coverage requirement."[16] Despite the requirement to consider the rule in light of RFRA, then-Secretary of Health and Human Services Kathleen Sebelius testified before the Senate Finance Committee on Feb. 15, 2012 that she did not ask the Justice Department for an analysis of religious liberty issues related to the mandate.[17]

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[14] Brief for the Legislators as Amicus Curiae at 1-2, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) Nos. 13-354 & 13-356.

[15] *Burwell*, 134 S. Ct. at 2756-57 (2014) ("Conestoga, Hobby Lobby, and Mardel…cannot exercise…religion…and Amici supporting HHS argue that…dropping insurance coverage eliminates any substantial burden imposed by the mandate.").

[16] *See* 42 U.S.C. § 2000bb-3(b) in Brief for the Legislators as Amicus Curiae, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) Nos. 13-354 & 13-356.

[17] *President's Budget for Fiscal Year 2013, Before the S. Fin. Comm, 112 Cong.*, S. HRG. 112-733 (2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg79764/pdf/CHRG-112shrg79764.pdf.

As to the claim that RFRA's protection of a "person's" free exercise did not extend to Hobby Lobby and Conestoga Wood as corporations, the Court referred the government to the Dictionary Act. "Person," according to that act, includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." [18] Indeed, the Court noted, HHS acknowledged that "person" applied to non-profit organizations in its *Hobby Lobby* brief. The discrepancy in the administration's interpretation between non-profit and for-profit application led the Court to conclude: "No known understanding of the term 'person' includes some but not all corporations."[19]

As the Cato Institute points out in its brief on the *Hobby Lobby* case, the government's effort to distinguish between the corporation and the families who own them in the application of RFRA fails from the start. After all, "legislation regulating a corporation also restricts the religious liberty of the individuals who founded, own, and direct the affairs of that corporation."[20]

In response to the suggestion that corporations are solely for the pursuit of profit, the Court's decision noted that businesses frequently engage in activities beyond those seeking profit. Indeed, charitable contributions, environmentally conscious policies, and remuneration and benefits above prevailing standards come at some cost to corporations. "If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well," wrote Justice Alito for the Court.[21]

Moreover, the government acknowledgement that RFRA's protection extends to non-profit organizations compounds the religious

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[18] Dictionary Act, 1 U.S.C. § 1 (2012).

[19] *Burwell*, 134 S. Ct. at 2769.

[20] Brief for the Cato Institute as Amicus Curiae at 2, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) Nos. 13-354 & 13-356.

[21] *Burwell*, 134 S. Ct.. at 2771.

liberty problems of its position. As Mark Rienzi of Columbus School of Law at Catholic University of America explains:

> The argument for denying religious freedom in the for-profit context rests on a claimed categorical distinction between for-profit and non-profit entities. Yet a broad examination of how the law treats these entities in various contexts severely undermines the claimed categorical distinction. Viewed in this broader context, it is clear that denying religious liberty rights for profit-makers would actually require singling out religion for disfavored treatment in ways forbidden by the Free Exercise Clause and federal law.[22]

Where RFRA enacted one comprehensive standard for all, the government's HHS mandate "erected a three-tiered approach to religious objectors that provides third-class treatment to those at the bottom of the government's invented hierarchy and violates RFRA's single religious-protective standard."[23] The long and convoluted rulemaking process for the HHS mandate, which began on Aug. 3, 2011, eventually categorized employers with religious objections in three groups: exempt, non-exempt but accommodated, and non-exempt and non-accommodated.[24] The administration restricted the exemption from the mandate to churches and their auxiliaries. For religious non-profits, the administration outlined an accommodation, though one that has not relieved the religious objections of

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[22] Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 1, (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229632.

[23] Brief for the Legislators as Amicus Curiae at 8, 134 S. Ct. 2751 (2014) Nos. 13-354 & 13-356.

[24] *Id.*at 15.

many. For-profit entities like Hobby Lobby and Conestoga Wood Specialties had no accommodation whatsoever under the mandate.[25]

As the federal legislators' brief argued and the Court concurred, "[T]he government's carve-out of a category of 'persons' from protection under RFRA is entirely improper under the law."[26] The legislators make their intention clear by explaining, "The statute's reach was purposefully broad because a primary goal of the statute was to provide a single standard for the protection of all religious exercise.[27]

Furthermore, the argument that the mandate did not result in a substantial burden on the Greens' and Hahns' religious freedom was rejected by the Court. As the majority opinion reasoned, "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price." That price amounted to an estimated $1.3 million per day for Hobby Lobby, the fine HHS was set to impose for non-compliance with the mandate. "If to see what would," the Court determined.[28]

PATIENT-CENTERED, MARKET-BASED HEALTH CARE BETTER PROTECTS RELIGIOUS FREEDOM AND INDIVIDUAL LIBERTY

The specific religious liberty conflict that reached the Supreme Court in *Hobby Lobby* is the result of PPACA's disregard for individual liberty in general. The health care law rests on a series of inescap-

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[25] Elizabeth Slattery and Sarah Torre, *Obamacare Anti-Conscience Mandate at the Supreme Court*, HERIT. LEGAL MEMORANDUM, February 13, 2014, http://www.heritage.org/research/reports/2014/02/obamacare-anti-conscience-mandate-at-the-supreme-court.

[26] Brief for the Legislators as Amicus Curiae, *Burwell*, 134 S. Ct. (Nos. 13-354 & 13-356).

[27] *Id.*

[28] *Burwell*, 134 S. Ct. at 2759.

able mandates: it prescribes what individuals must buy, what employers must offer, and what insurance plans must cover.[29] Millions of Americans have seen their health care choices diminished under the law, including choices about keeping their health plans and their doctors.[30]

The conflicts for conscience created by PPACA are a subset of its general infringement on liberty. In many states, for example, citizens do not have the choice of a health plan that does not subsidize abortion.[31] Meanwhile, the HHS mandate is an early instance of a PPACA benefit mandate that has created a problem of conscience for many, but it will most certainly not be the last such instance if America continues on the path toward increasingly centralized government decision-making in health care.[32] Increasingly complex financing frameworks, cumbersome regulatory regimes, and centralization of decision-making over allowable health care options are introducing new moral challenges. In such a context, moral questions surrounding beginning and end of life issues are already highly divisive. The biomedical research revolution, including therapeutic genetic applications, is sure to introduce many more controversies and unprecedented ethical dilemmas as medical science and technology advance.

This makes it imperative that government show even greater deference toward religious liberty in health care. At a more basic

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[29] Edmund Hailsmaier, *A State Lawmaker's Guide to Health Insurance Exchanges*, HERITAGE BACKGROUNDER, March 21, 2011, http://www.heritage.org/research/reports/2011/03/a-state-lawmakers-guide-to-health-insurance-exchanges.

[30] *Id.*

[31] Sarah Torre, *Obamacare's Many Loopholes: Forcing Individuals and Taxpayers to Fund Elective Abortion Coverage*, HERIT. BACKGROUNDER, January 13, 2014, http://www.heritage.org/research/reports/2014/01/obamacares-many-loopholes-forcing-individuals-and-taxpayers-to-fund-elective-abortion-coverage.

[32] Jennifer Marshall, *HHS Mandate: Only the Beginning of Obamacare's Conscience Problems*, HERIT. COMMENTARY, June 16, 2014, http://dailysignal.com/2014/06/16/hhs-mandate-beginning-obamacares-conscience-problems/.

level, it means that proper regard for religious freedom will be best secured when health care policy adequately respects individual liberty. This will require a fundamental redirection and reform of federal and state health policy.

As a society, we will continue to debate the boundaries of what policy should outlaw, prescribe, and permit when it comes to health care. Given the nature of a free society and the sheer multitude of health care decisions being made today, and in the future, it is implausible that all such judgments will be determined by public policy. Rather, the vast majority of these decisions should be matters of personal choice, made by individuals in conjunction with physicians, family, friends, and clergy.

Americans should be free to make such health care decisions on the basis of conscience. This freedom includes the right of Americans to determine how their money is spent on health insurance, currently the main mechanism for financing health care, and what benefits, treatments, and procedures will be funded through their health insurance policies. Whatever Americans' disagreements on controversial health and moral issues, all Americans should be able to agree that protecting patients' freedom of conscience in health care is a worthy goal in a free society.

There are structural obstacles to achieving that goal. In reality, most Americans do not have that kind of personal control over their health care dollars and decisions, largely because of the financing and regulation of health insurance. Choices about plans and coverage are normally made by employers, insurance executives, and increasingly by government officials. Health insurance is a third-party payment arrangement. Rather than directly paying medical providers, individuals pay premiums—often through their employer or a government agency—to a third party (i.e., insurers), who then reimburse doctors and hospitals. Third-party payers and the insurers who administer health care plans determine what health benefits, medical treatment or procedures are, or are not, to be included in insurance coverage. They set the terms and conditions for reimbursement of

doctors, hospitals and other medical professionals through the insurance contracts, or the rules and regulations that govern those contracts.

Government's role in setting the terms and conditions of insurance contracts has greatly expanded. PPACA has exacerbated the deficiencies of private third-party dynamics in health care by imposing yet another layer of decision-making in the hands of government administrators. The effect is that health care decisions and the control over health care dollars are even further removed from individuals. The economic problems with this model have been thoroughly analyzed by health policy analysts and economists. But the crucial moral and ethical problems that this process introduces by distancing the individual, as well as physicians and other medical professionals, from key decisions are far less well understood and deserve much greater attention from both the general public and public officials.

In deference to the principle of personal liberty, individuals and families should be free to choose health plans that reflect their values. They should be able to choose which health plans and what kinds of medical care their insurance premiums will cover. They should have the freedom to select health care professionals on the basis of their compatibility on ethical and moral matters. Trust between doctors and patients is essential and shared perspectives on medical care cultivate such trust.[33]

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[33] Research suggests that the compatibility between patients' and physicians' beliefs about medical care influences patient satisfaction, and that patients are more likely to trust their doctors if their beliefs are compatible. See Edward Krupat, Ph.D., John Hsu, M.D., Julie Irish, Ph.D., Julie A. Schmittdiel, and Joe Selby, M.D., *Matching Patients and Practitioners Based on Beliefs About Care: Results of a Randomized Controlled Trial*, 10 AM. J. MANAG. CARE 11, 814–822 (2004); and Edward Krupat, Ph.D., Robert A. Bell, Ph.D., Richard L. Kravitz, M.D., David Thom, M.D., Ph.D., and Rahman Azari, Ph.D., *When Physicians and Patients Think Alike: Patient-Centered Beliefs and Their Impact on Satisfaction and Trust*, 50 J. FAM. PRACT. 12, 1057. (2001).

The current arrangement—with key decisions left to employers, insurance administrators, and government officials—leaves the individual with no assurance that these third parties will make decisions reflecting the individual patient's ethical, moral or religious convictions. As the Catholic Medical Association has noted, while the number of Americans who are uninsured looms large, "the number of Americans…who cannot obtain coverage that matches the varying needs of the life cycle, or more important, who cannot obtain coverage that accords with their fundamental moral beliefs—is far larger."[34]

To correct this limitation on personal choice, health policy reform should shift the system from the existing third-party payment model that separates individuals from health care dollars and decisions to a consumer-driven system in which individuals and families own and control their own health plans and can carry those health plans through different stages of life. To find a plan that meets their needs and reflects their values, they should be able to choose from among traditional employer-based plans, as well as individual health plans, or health plans sponsored by professional associations, unions, faith-based and other affinity groups.

Association health plans, based on personal membership, could develop core principles common to the consumers and providers participating in the plan. Such plans might limit providers to those committed to a clear set of ethical principles. Throughout American history, religious institutions have actively engaged in the provision of social services, including health care and risk-sharing and insurance networks.[35] Churches and faith-based groups are also known

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[34] Health Care in America: A Catholic Proposal for Renewal, Cath. Medical Ass'n (Sept. 2014).

[35] Robert E. Moffit, Jennifer Marshall, and Grace Smith, *Patient's Freedom of Conscience: the Case for Values-Driven Healthplans*, HERIT. BACKGROUNDER (May 15, 2006)

for engaging on the individual and community levels in providing for a wide range of health needs, such as preventive measures, aid for the poor and uninsured, assisted living for the elderly, and hospice care for the dying. That standing and experience would equip many faith-based organizations to sponsor or endorse health plans of their own, enabling them to play a direct role in the delivery of care and acting in accord with the wishes and values of those who are financing that care.

Other private groups with values across the ideological spectrum could also organize association health plans. A group like People for the Ethical Treatment of Animals (PETA) might form or endorse a plan committed to no animal testing. Holistic health groups could create provider networks based on their care preferences.

To clear the way for such diverse options, there should be no discrimination in ether law or regulation. For example, federal and state tax codes should treat all types of health plans equally. Today the tax code's exclusion of health benefits from taxation applies only to employer-provided coverage. Tax relief should extend to health insurance purchased and owned by individuals as well as employers.

Reforming the federal and state regulations governing the financing and delivery of health care is another important step toward a more consumer-based environment. Because of the complex and changing legislative and regulatory environment that dictates much of health care today, powerful and well-financed special interests can override the personal preferences of individuals and families in shaping the direction of health care policies. Currently, the focus is on federal regulation, which has centralized regulatory control over health insurance under the national health law. To correct this, the bulk of health care regulation should first be restored to states, as it

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http://www.heritage.org/research/reports/2006/05/patients-freedom-of-conscience-the-case-for-values-driven-health-plans#_ftn69.

primarily was prior to the enactment of PPACA. States should then open up health insurance markets and eliminate insurance rules that too often prevent consumers from finding plans tailored to their personal needs and consistent with their values at an affordable price. Meanwhile, Congress should eliminate barriers to the purchase of health insurance across state lines, opening the door to more diversity of options on a nationwide basis.

The protection of religious liberty in the case of the Green family of Hobby Lobby helps to promote diversity and freedom in health care. The freedom of such employers to formulate health plans consistent with their values is an important application of individuals' right to associate. By extension, it also reinforces the individual right to make similar choices about one's own health care in a reformed policy environment that would allow one practically to do so.

Individuals and families should have the freedom to choose and own their health insurance policies. Policymakers should create a level playing field for different kinds of health plans. Reforms should allow civic, religious, and other associations to sponsor health plans on equal footing with employers. Policymakers have the opportunity to make health insurance markets and public assistance in health care more responsive to individuals' needs and preferences, including their ethical and moral values.

CONCLUSION

The Supreme Court determined that RFRA applies to closely-held family businesses like Hobby Lobby and Conestoga Wood, not just to individuals or non-profit religious groups. Clearly the Obama administration failed to take account of religious liberty concerns and the strict standard RFRA demands in the design of the HHS mandate. The number of plaintiffs challenging the HHS mandate in court

demonstrates this design flaw.[36] RFRA was intended to resolve such conflicts, and in *Hobby Lobby,* it worked.

Better policymaking would avoid these infringements on fundamental liberties in the first place. RFRA is relevant in this regard as well, and it can act as more than a balancing test in court. That test is also a tool to evaluate policy design before implementation. RFRA's framework should help policymakers judge whether policy proposals are in line with the fundamental right of free exercise. In this way, RFRA can act as a deterrent to policy that would create religious liberty conflicts.

The underlying framework of PPACA erodes not only religious freedom, but individual liberty, in its numerous mandates on individuals, employers, and insurers. Centralized healthcare decision-making is prone to disregard individual freedom. Policymakers can better guard religious liberty and freedom generally by pursuing market-based, patient-centered healthcare reform. Individuals' and families' freedom to choose health care that meets their needs and reflects their values is important for Americans across the ideological spectrum.

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[36] *See HHS Mandate Information Central*, BECKETFUND.ORG, http://www.becketfund.org/hhsinformationcentral/.