The Clashes of Values that Leviathan Foments

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Kathleen Brady's book *The Distinctiveness of American Religion in Law: Rethinking Religion Clause Jurisprudence* is a fascinating exposition of the changing role that religion plays in a rapidly secularizing society. What's so special about religion? Why should courts treat it differently from non-religious belief systems? Why do we still mostly speak of religious free exercise and not so much freedom of conscience or other formulations of broader ideological protections? Why, for example, does an institution like the Hosanna-Tabor Evangelical Lutheran Church and School get exempted from employment-discrimination laws but not the Cato Institute (which is just as opposed to government incursions on how it wants to operate)?

The answers are complicated, although impingements on religious liberty increasingly have the same cause as impingements on secular liberty: an overweening state whose regulatory tentacles reach more and more into that part of the public sphere that is non-governmental. The government, especially a federal government liable to be insensitive to state and local contexts, foments clashes of values where none existed previously. At the same time, the culture has shifted in an illiberal way such that certain views and behaviors—which don't otherwise threaten public order or the state—have to be stamped out with the force of law, rather than tolerated or even celebrated.

Religious diversity, like political diversity, just doesn't count any more. Look at the recent conflagrations over state Religious Freedom Restoration Acts (RFRAs). Few today remember that the federal RFRA was passed by a unanimous vote of the House of Representatives in 1993; in the Senate the vote was 97 to 3, with the majority led by such Rightwing religious zealots as then-Representative Chuck Schumer (D-NY) and Senator Ted Kennedy (D-MA). The bill was backed by the ACLU and the President who signed it into law was a Democrat, Bill Clinton.

Indeed, the reason we're even "rethinking religion clause jurisprudence," to quote Brady's subtitle, is because people's attitudes toward both religion and government have shifted. The growing enforcement of centralized ideological conformity, as I'll describe below, is a real

innovation in the use of governmental power. The issue isn't that Congress is taxing, spending, and borrowing more than it ever has—that's a different problem—but that it's forcing more mandates into what used to be private decisionmaking. It's shifting the boundary between the private and public spheres, and the shift tramples individual agency and narrows the choices that people are allowed to make in pursuit of their particular version of the good life.

Whole swaths of life, from education and health care to commercial enterprises and eleemosynary concerns, are now overseen by those who operate the levers of power. As the scope of government regulation increases, decisions that were once left to families and managers are now used as collateral in the political deal-making process.

With inflexible top-down commands that ignore the unpredictable consequences of any given regulation, government officials display what Friedrich Hayek described as the fatal conceit of pretending that they have the knowledge necessary to make important life decisions for everyone. No choice is too low: the government "nudges" citizens to make "better" choices about whom to hire, what to teach their children, how many calories to drink, and how to plan for retirement. All these efforts are meant to shape minds that will ultimately eschew reactionary political views and retrograde cultural preferences and adopt the "appropriate" moral code.

This shrinking of civil society causes citizens to fracture into groups that fight one other through governmental channels for scraps of entitlements or exemptions. RFRA, the key to the decision in *Burwell v. Hobby Lobby* (2014), is itself a perfect example of this begging for rights from the government. Because the government could do just about anything, religious individuals and institutions had to secure an exemption in order to do what they should have been free to do anyway. Thus the government—Congress in the case of RFRA, the President in the context of various waivers and accommodations—becomes the source of our liberty rather than its protector and guarantor.

To make matters worse, the late Justice Antonin Scalia, a devout Catholic who professed allegiance to constitutional text in his decisions, laid the foundation for this particular problem. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," he wrote in *Employment Division v. Smith*, the 1990 case that led to RFRA. Scalia was right there, but for decades the judiciary has neglected to draw a proper constitutional distinction between what the government can and cannot legitimately regulate. It's that distinction that's at the heart of the ongoing contraceptives-mandate litigation, not legal tiffs over "least restrictive means" to achieve a "compelling state interest."

The Catholic bishops' complaint about Obamacare was right as far as it went. They said the law's contraception mandate continues to involve needless government intrusion in the internal governance of religious institutions and to threaten government coercion of religious people and groups to violate their most deeply held convictions.

But pleading for special exemptions did not get them very far because they had supported the main goal of the legislation. It was the effort to socialize American health care that was the problem, not one small part of the bill's regulatory apparatus. Having supported the larger goal, the bishops ought not be surprised that religious freedom was crushed along with many other liberties.

Obamacare's contraception mandate is not the only recent example of the subversion of individual rights. A similar phenomenon has been seen in the spillover from the gay marriage debates, with people being fined for not working at same-sex commitment ceremonies, like the Oregon bakery, the Washington florist, and, most famously, the New Mexico photographer. There is a clear difference between arguing that the government has to treat everyone equally—the actual legal dispute regarding state marriage licenses—and forcing individuals and businesses to endorse and support practices with which they disagree. After all, despite gay-rights activists' comparing their struggle to the Civil Rights movement, New Mexico is not the Jim Crow South, where state-enforced segregation meant that black travelers had nowhere to eat or stay. There are more than 100 wedding photographers in the Albuquerque area, many of whom proudly advertise their gay-friendliness.

As long as those in power demand that people adopt politically correct beliefs or else exit the public sphere, these issues will continue to arise. Marriage itself is an area where government regulation has created needless social tensions. If there weren't state licensure, individuals would be able to assign whatever contract and property right to whomever they liked, have whatever civic or religious organization consecrate their union, and let the common law take care of the rest.

Education is another good example. The curricular battles over evolution and creationism, or the amount of time devoted to arts versus sciences, or debates over methods of discipline or extra-curricular offerings could all be defused if the government gave parents more choice over how to educate their kids.

Many of our culture wars are a direct result of government trying to force one-size-fits-all public policy solutions onto a diverse nation.

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

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with

gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?

But the solution to this problem of special treatment is not for government to deny exemptions to all so that all are equally coerced. Instead, a solution must be found that aligns with the American principle that the state exists to secure and preserve liberty. To wit, government must recognize the right of all individuals to act according to their consciences, which includes, among many other things, the right to run their businesses (and to contract with others, or not) as they see fit. It also includes employers' being able to decide whether and how much to pay for employees' health care—and to make these decisions for any reason or no reason at all.

In other words, instead of restricting or repealing RFRA, lawmakers should expand it to cover all of our freedoms. It could be called the Omnibus Freedom Restoration Act, or OFRA—not because religious freedom isn't special (the religion clauses exist for a reason) but because in this context, it's just one aspect of the broader "bundle of liberties" under attack.

Of course, the Constitution itself is meant to play this role. Yet attempts by government to enforce a collectivist morality continue, and not just because of the political forces and incentives that drive both elected and appointed officials. The judiciary is also to blame, for being too deferential for too long to governmental prerogatives.

It is beyond the scope of this essay to recapitulate the "long war for control of the Supreme Court," to use the subtitle of Damon Root's excellent 2014 book, *Overruled*—which Kurt Lash reviewed for *Law and Liberty* here and here, with later exchanges about it with Root—but suffice it to say that the courts are supposed to be a bulwark against the political branches and the administrative state alike. This role includes enforcing constitutional limits on the growth of the federal government's sphere of influence, as well as steadfastly protecting individual rights against federal or state violation. Playing this role properly requires a judiciary that's engaged and active, as distinct from either restrained or "activist."

Hobby Lobby was one case where the Supreme Court stood up for individual rights, especially religious rights—but only under an unusual statutory exemption, and only just barely. The Left's reaction to the decision shows that there are many people who are perfectly comfortable begging an all-powerful government to respect their positive rights rather than vindicating their inherent possession of rights that the government can't legitimately invade in the first place. They've lost sight of Jefferson's admonition that a government big enough to give you everything you want is big enough to take away everything you have. Or, as Madison wrote in *Federalist* 51, "you must first enable the government to control the governed; and in the next place oblige it to control itself." That's exactly what the Constitution's enumerated powers were designed to do; they're simply no longer being enforced.

If the Supreme Court were serious about constitutional structure, the *Hobby Lobby* case—and the religious-nonprofit cases consolidated under the name *Zubik v. Burwell*, which it's

considering this spring—would never have existed because nearly the entire Affordable Care Act is a constitutional nonstarter. The same holds for much else that government does to direct our lives, pit groups of citizens against each other, and weaken community ties.

As it is, the courts have not enforced constitutional limits for decades, and so we're left seeking exemptions, whether under the Free Exercise Clause, RFRA, or elsewhere. As Georgetown law professor Randy Barnett has said, all these special carve-outs—for individuals, for classes, even for states—are just an attempt to impose *external* constraints on government that are supposed to compensate for the evisceration of the Constitution's *internal* limits. Passing the omnibus freedom-restoration act I mentioned would really be the equivalent of adding the phrase "and we mean it" to the end of every constitutional provision.

The most basic principle of a free society is that the government can't willy-nilly force people to do things that violate their consciences. Americans understand this point intuitively. Some may argue that in *Hobby Lobby* there was a conflict between religious freedom and reproductive freedom, so the government had to step in as referee—and women's health is more important than minority religious preferences. But that's a false choice, as President Obama would say. Without the federal Health and Human Services rule, women are still free to obtain contraceptives, abortions, and anything else that isn't illegal. They just can't force their employer to pay the bill.

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

We largely agree—at least within reasonable margins—that certain things are "public goods" whose provision falls under the government's purview, such as national defense, basic infrastructure, and clean air and water. But social programs, economic regulation, and so much else that government now dominates at the expense of individual liberty and responsibility are subjects of bitter disagreements precisely because these things are individual freedoms, and we feel acutely, as Americans, when our liberties have been attacked.

The trouble is that when government is the body that grants us freedoms instead of the one that protects them, it becomes much less clear exactly what those freedoms are. As time goes on, every liberty we thought we had is up for discussion—and regulation. Those who supported the owners of the Oklahoma-based Hobby Lobby stores before the Supreme Court were rightly concerned that people are being forced to do what their deepest beliefs prohibit. But that's all part of the new, collectivized territory.

Kathleen Brady's rethink of "the distinctiveness of religion in American law" is a masterful text that should be read by every law student and student of public affairs. I just wish it hadn't been necessary for her to write it.

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