



# Restoring the Balance

A Progressive Vision of Religious Liberty Preserves  
the Rights and Freedoms of All Americans

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# Introduction and summary

Religious freedom is a core American value. In fact, 88 percent of Americans agree that religious liberty is a founding principle afforded to everyone in this country, even those who hold unpopular religious beliefs.<sup>1</sup> Throughout U.S. history, both courts and legislatures have worked to balance the twin components of religious liberty: the right to worship and practice one's faith and the right not to be coerced into following beliefs that are not one's own. Nearly two-thirds of Americans also believe that a strict separation between church and state must be maintained.<sup>2</sup> This balance is a careful one and requires attention to, and respect for, the vibrant and dynamic plurality of beliefs and practices in the United States. However, the U.S. Supreme Court's 2014 *Hobby Lobby* decision has unfortunately put these values and the very real protections they represent at risk.

Many right-wing groups and individuals—including coalitions of Catholics and evangelicals that built strategic partnerships during the rise of the New Right in the 1970s and 1980s—have increasingly appealed to religious liberty as a tactic to advance conservative political and legal goals across the country. These efforts have grown both in number and scope over the past several years, with increasing calls for exemptions from a host of laws. Such groups also often cite religious beliefs as justification for discriminatory behavior.<sup>3</sup>

The 2009 passage of the Affordable Care Act, or ACA, and its subsequent inclusion of mandated contraceptive coverage in employer-sponsored insurance plans created a lightning rod that united anti-government sentiment with dangerously expanded views of what constitutes religious liberty. More than 100 nonprofit and for-profit groups filed lawsuits against the Obama administration, seeking to avoid the ACA's mandate on religious grounds. Many refused to relent even when the administration extended accommodations to religiously affiliated nonprofits.<sup>4</sup> A number of these groups were represented by right-leaning legal defense organizations that are explicitly interested in resisting broader expansions of reproductive and lesbian, gay, bisexual, and transgender, or LGBT, rights.<sup>5</sup> Two of those suits,

*Burwell v. Hobby Lobby Stores Inc.* and *Conestoga Wood Specialties Corp. v. Burwell*, finally reached the U.S. Supreme Court as a consolidated case in 2014, referred to here simply as *Hobby Lobby*. In its *Hobby Lobby* decision, the Supreme Court ruled that closely held for-profit corporations have religious liberty—a right normally applied to individuals or religious organizations—and that the religious beliefs of some corporations trump the religious liberty and health of their employees.<sup>6</sup>

The plaintiffs’ lawyers based their case on the 1993 Religious Freedom Restoration Act, or RFRA, a federal statute that forbids the government from substantially burdening the free exercise of religion unless it has a compelling interest and is doing so through the least restrictive means possible.<sup>7</sup> However, the case was distinct from previous RFRA claims in several ways.

First, as written in an earlier appeals court ruling against Hobby Lobby’s claims, there had not been “any case ... in which a for-profit, secular corporation was itself found to have free exercise rights.”<sup>8</sup> Second, appeals for exemption from federal laws under RFRA generally stem from individuals seeking protection for religious belief or practice. In *Hobby Lobby*, the plaintiffs were seeking exemption from a law—the mandated provision of contraception coverage in employee insurance policies—in order to prevent someone else from making a choice that the plaintiffs deemed religiously unacceptable. This latter distinction, what legal scholars Douglas NeJaime and Reva Siegel called a “complicity claim” in a recent *Yale Law Journal* article, raises a particular challenge that illustrates just how deeply the *Hobby Lobby* decision cuts at the fabric of the role of religious liberty in America’s pluralistic democracy.<sup>9</sup>

In a pluralistic society such as ours, the interests of multiple parties are sometimes in competition, and courts play a key role in sorting out these conflicts. As a matter of law in religious liberty cases, this requires striking a balance that avoids causing others to bear the burdens of one’s own chosen religious beliefs and practices. According to NeJaime and Siegel, “Complicity claims are ... about how to live in community with others who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third-party harm.”<sup>10</sup>

This report argues that the *Hobby Lobby* decision represents a dangerous precedent that enables third-party harm. With its ruling, the Supreme Court widened the playing field for those who could use religion as a weapon to justify discrimination, increasing the chances that others will be harmed by the enforcement of this flawed

interpretation of religious liberty. In the *Hobby Lobby* case, the decision shifted the balance of power in favor of an employer’s religious beliefs, essentially imposing those beliefs on its employees and ignoring employees’ rights to be free from others’ religious beliefs and their consequences.

The *Hobby Lobby* ruling expanded how third parties are and could be harmed by the expression of another’s religious beliefs. Some ways are very direct and immediate, while others depend on the outcomes of future court cases or law-making. For example:

- *Hobby Lobby* immediately and negatively affected the lives of women and dependents of the company’s employees by denying them access to critical health care. Employees at other closely held companies also face this harm.
- The expansion of RFRA protections to for-profit corporations and the loosening of what qualifies as a substantial burden have led to the dubious use of *Hobby Lobby* as precedent to initiate and defend a wide range of lawsuits and complaints.
- The expansion of state-level RFRA— and companion pieces of legislation aimed at allowing discrimination—exploits religious liberty to advance a conservative political and social agenda for rolling back reproductive and LGBT rights.

A number of legal and policy changes are needed to restore religious liberty in America so it is once again consistent with the nation’s history and fundamental values—as well as public opinion. Building on the recommendations outlined in an earlier CAP report, “A Blueprint for Reclaiming Religious Liberty Post-*Hobby Lobby*,”<sup>11</sup> these changes include:

- Amending the federal RFRA to prevent third-party harm
- Passing comprehensive nondiscrimination protections for LGBT Americans at the local, state, and federal levels
- Passing state laws to increase access to preventive health care services

Both states and the federal government should enact these recommendations and ensure equal protection of the law, equal respect for the varied religious beliefs of a diverse nation, and equal access to the workplace, the marketplace, and the health care all Americans need to thrive.



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