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Contraception v. Religious Freedom: Hobby Lobby Heads to the Supreme Court

By Tracy Fessenden
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On March 25, the Supreme Court will hear arguments in two religious exemption cases, *Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialty Store v. Sebelius*, which challenge a provision of the Women's Health Amendment to the Affordable Care Act (ACA). This will be the second time the Court has ruled on challenges to Obamacare: In 2012, Chief Justice John Roberts surprised many on the left and the right by delivering the majority opinion in the decision that determined the ACA's individual mandate was not unconstitutional. That ruling turned not on the judicial resolution of any hot-button issue in the case but instead on a fairly staid reading of the Commerce Clause, to the effect that the cost of refusing insurance coverage took the form of a tax, not a punitive fine. *Hobby Lobby*, as the new, consolidated cases will be known, is being closely watched for raising all of the hot-button issues of the previous ACA ruling, *Citizens United*, and *Roe v. Wade* combined: What role should the government play in the conduct of our private lives? When does life begin? Are for-profit corporations persons with First Amendment rights? And most crucially for the exemption being sought in *Hobby Lobby*: When may the law impose a "substantial burden" on a person's religious exercise—to compel what a person's religion forbids, or forbid what a person's religion compels—as the "least restrictive means" of furthering a "compelling government interest"?

The Women's Health Amendment, spearheaded by U.S. Senator Barbara Mikulski and narrowly passed by Congress in late 2009, addresses the gender gap in health care coverage: according to the amendment, women pay an average of 68 percent more than men in out-of-pocket medical costs, largely for conditions relating to childbearing capacity. The amendment expands the range of ACA's requisite preventive services for women to include, without co-pay, well-woman care, screening for gestational diabetes, breastfeeding support, and—at issue in *Hobby Lobby*—FDA-approved forms of prescription birth control. Hobby Lobby's brief alleges that providing insurance coverage to employees for four forms of FDA approved-contraception—ella, Plan B, and two kinds of IUD—"makes [the plaintiffs] complicit in the practice of abortion," and that therefore "they cannot cover these four methods without violating their faith."

Hobby Lobby's thousands of female employees are not formal parties to the suit, but the outcome of the case directly affects them, and extends to the tens of millions of American women whose employment includes health insurance. If the Court rules in favor of exempting

Hobby Lobby from offering insurance that covers certain forms of contraception, then exemptions will likely be due employers who object to any and all forms of contraception on religious grounds—which are the objections at issue in the pending lower-court cases that *Hobby Lobby* was likely taken up by the Court to offer guidance in resolving. The colorful cast of friends-of-the-court who have filed briefs in the case, 84 in all, includes the *Santeria* Church of Lukumi Babalu Aye, Pastor Rick Warren, and the Cato Institute on the side of Hobby Lobby; the ACLU, the American College of Obstetricians and Gynecologists, and the Survivors Network of Those Abused by Priests lining up with the government.

Were contraception not at issue—were Hobby Lobby or another for-profit corporation to object on religious grounds to offering insurance coverage for blood transfusions, for example—would the case have gotten to the Supreme Court at all?

For the purposes of the relevant statute in the case, the Religious Freedom Restoration Act (RFRA), it *shouldn't* matter whether the plaintiffs oppose contraception as anti-abortion Christians or blood transfusions as Jehovah's Witnesses or even X-rays and certain treatments for cancer as religious objectors to radiation. This is because RFRA grants religious objectors extraordinary latitude in what constitutes a "substantial burden" on their religious exercise, and the courts very little latitude in deciding whether that particular exercise merits a presumptive exemption. Rather, RFRA charges the courts with deciding whether denying the exemption is the "least restrictive means" of serving a "compelling governmental interest." As legal scholar Eugene Volokh explains, a plaintiff's religious beliefs, in deference to which RFRA exempts the plaintiff from generally applicable laws that fail to meet this test, "need not be longstanding, … internally consistent, consistent with any written scripture, or reasonable from the judge's perspective. They need only be sincere." And RFRA applies, moreover, to "any exercise of religion, whether … compelled by … a system of religious belief" or not.

A decision in favor of the government in *Hobby Lobby* might rule that the provision for contraception coverage in the ACA does not, in fact, substantially burden the religious exercise of the plaintiffs—something of a wild card given the low threshold for substantial burden established by RFRA. Or it might find, in agreement with the dozens of religious authorities who filed amicus briefs for Hobby Lobby, that it does—plenty of laws *do* compel people to act otherwise than what their religion enjoins—but that it nevertheless remains the "least restrictive means of serving compelling government interests."

That's a plausible outcome if *Hobby Lobby* goes the way of other Supreme Court cases involving the religious rights of corporations. In *Braunfeld v. Brown* (1961), for example, Orthodox Jewish merchants claimed that Sunday closing laws burdened their Saturday Sabbath observance by forcing them to close a day longer than their Christian competitors. In *United States v. Lee* (1982), an Amish business owner sought exemption from having to pay Social Security taxes on his employees, because his religion discouraged government assistance, and Lee wished on those grounds to provide for his employees' needs himself. And in a case that reads like a collaboration between Flannery O'Connor and Ishmael Reed, *Newman v. Piggie Park Enterprises, Inc.* (1968), the white owner of a South Carolina barbecue chain claimed that anti-discrimination laws violated his religious exercise of refusing service to African-American customers on scriptural grounds. Each time the Court roundly or unanimously rejected the

plaintiffs' claims. The question for the Court in each case wasn't whether corporations have religious rights, but how and by whom the costs of accommodating those rights would be borne.

As the Court determined in *Lee* (1982), "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." In its brief in *Hobby Lobby* the government argues that in light of this history, which RFRA was passed into law in 1993 to clarify, RFRA could *not* have intended to extend religious exemptions to for-profit employers generally, and notes that the current plaintiffs fail to cite a single case that signals otherwise, apart from the contraception coverage litigation leading up to *Hobby Lobby*.

Yes, that's right—the *only* case law that Hobby Lobby cites in support of religious exemptions for for-profit employees are the mounting number of lower court decisions that found in favor of corporations who object to some or all forms of contraception on religious grounds.

So let's talk about contraception. As it happens, none of the forms of birth control to which Hobby Lobby objects, in its religious opposition to "abortion-causing drugs and devices," is understood legally, scientifically, or medically as abortifacient, that is, to work by causing abortion. How do we know this? Because the Affordable Care Act itself specifically allows plans to exclude abortion services while requiring coverage of all 18 FDA-approved forms of contraception. Federal regulation defines a pregnancy to encompass the period of time from implantation until delivery. Hobby Lobby nevertheless starts the clock earlier, in accordance with its owners' sincerely held belief that pregnancy begins before implantation, and so objects to four of the covered forms of contraception because they *might* prevent implantation. But neither the two IUDs nor the two forms of emergency contraception to which Hobby Lobby objects work primarily by preventing implantation, and scientific opinion is divided on whether any even do so as a secondary effect. It's hard to know, because prior to implantation embryos are virtually undetectable in a woman's body, and most fail to develop into pregnancies of which she is ever aware. How many embryos fail? If in vitro fertilization is any clue, two-thirds of all fertilized eggs never make it through the cell-division stage, and a sizeable percentage of those that do never successfully implant.

Still, the possibility that the forms of birth control to which Hobby Lobby objects might prevent implantation is real. But since all of them *do* work primarily by preventing fertilization in the first place, and since most users will intend this as their primary effect—i.e., to prevent fertilization so that implantation never becomes an issue—the Court could decide that, for the purposes of RFRA, the drugs and devices in question raise no more distinctive concerns than do the entire spectrum of drugs, including aspirin and caffeine, that *might* block implantation of a fertilized embryo, whatever their primary effect. And because the four methods to which the plaintiffs object are among the most effective, and currently the most cost-prohibitive—an IUD can cost a month's salary for a woman earning the minimum wage—denying their availability without cost sharing will likely increase the number of unwanted pregnancies and the number of abortions—something the government has a compelling interest in preventing. As the Guttmacher Institute argues in its amicus brief for the government, the religious exemption sought by Hobby Lobby would also "substantially burden women's ability to make childbearing

decisions in accord with their own religious and moral beliefs." Among these beliefs are sincerely held religious and moral objections to abortion that commit many women to choosing the most effective means of contraception available.

Hobby Lobby's owners nevertheless believe that providing insurance coverage for contraception "that risk[s] killing an embryo makes them complicit in the practice of abortion," and that therefore "they cannot cover these four methods without violating their faith." And plenty of employers, including some for-profit employers, object to *all* forms of contraception on religious grounds, whether they work by preventing implantation or not. For the purposes of RFRA, it's probably a moot point: a judge needn't agree with the plaintiffs that their beliefs in the matter are credible, that the law they object to is sinful, or that the complicity with evil they fear being drawn into is real. The job of the court is to decide whether the law "substantially burdens" their religious exercise and, if so, whether a "less restrictive means" of realizing a "compelling governmental interest" can be found.

So will the secular Court leave the door open to stripping contraception coverage from the ACA in deference to religious beliefs that need pass no other test than whether they are sincerely held? It might. I'm more convinced that it might after working with my colleague Linell Cady on an international project on secularism and sexual governance, which culminated in our edited volume *Religion, the Secular, and the Politics of Sexual Difference*. What emerged in the work of contributors to the project, in case studies from the U.S., France, Turkey, Egypt, India, Bosnia-Herzegovina, and elsewhere, was a story of *strengthened* religious control of women and sexuality under secular law.

In that narrative's broadest terms, the dividing line between religious obligation and secular law that emerges as a defining feature of modern states works largely in the service of gender and sexual regulation. This is so, as one of the book's contributors Joan Wallach Scott points out, because the emergence of a secular public sphere in the West "proceeds by defining religion as a matter of private conscience, just as it privatizes matters familial and sexual." What some historians extol as the "great separation" that marks the transition to modernity, the moment when politics was avowedly set off from religion, promises both to free a space of reason and deliberation, not dogma, for the exercise of democracy, and at the same time to protect religious belief from coercive intervention from the state. Sealed at a safe distance from allegedly universal reason, however, the private sphere is secured not only as the space of personal and potentially idiosyncratic belief, to which all in a secular democracy are entitled. It is also the space of sexuality, and, until their relatively recent, uneven, and incomplete political enfranchisement, the space of women.

The privatization of religion under the reign of secularism, then, leaves religion to find its strongest articulations in this private domain, the domain not only of legally protected belief but also of the control of gender and sexuality in the service of sincere religious conviction, or behind the screen of legally protected religious exercise. (It's telling that RFRA's most vocal opponents now include those who seek to remove barriers to justice for victims of child sexual abuse in religious organizations.) As contributor Saba Mahmood argues in the book, when "religious authority becomes marginal to the conduct of civic and political affairs, it

simultaneously comes to acquire a privileged place in the regulation of the private sphere (to which the family, religion, and sexuality are relegated)."

The standing legal accommodation of the objections of churches and their auxiliaries (like the Little Sisters of the Poor) to the contraception provision means that their female employees, regardless of their own religious commitments, will simply be denied, under law, the contraception coverage to which the ACA now entitles every other American woman. Hobby Lobby wants the same accommodation given to churches to extend to those who do their business in the marketplace—ruling otherwise, say twenty U.S. states, red and blue, in a joint amicus brief for Hobby Lobby, yields "a truncated view of religion [that] threatens to create a barren public square, empty of the religious beliefs of ordinary Americans." But if supporters of Hobby Lobby want to see more religion in public, they'll need to get used to seeing more sex in public—that is, to cease their appeal to private religious conviction as the privileged arbiter of others' conduct in regard to marriage, sexuality, and family life. Had Arizona Governor Jan Brewer not wisely vetoed S.B. 1062, which would have given businesses the right to refuse service to gay and lesbian patrons on religious grounds, the bill would, one hopes, have gone the way of *Piggie Park* on any legal challenge. So should *Hobby Lobby*, as a cover for sex discrimination dressed up as religious freedom.

But the Court is unlikely to say as much. So I'm pinning my hopes on another Justice Roberts-style save of Obamacare on a wonky point of tax law. That kind of ruling might go like this. The Hobby Lobby brief asserts that the ACA "imposes an 'employer mandate,' which requires certain employers to provide 'minimum essential' health coverage to employees." This "mandate," the brief alleges, "coerces" the plaintiffs "to violate their deeply-held religious beliefs under threat of heavy fines, penalties, and lawsuits." But Hobby Lobby misreads the law on this point. There is no legal requirement that Hobby Lobby provide employee health insurance that coerces its owners into violating their sincerely held beliefs because there is no legal requirement that employers offer their employees a health plan *at all*.

In other words, as legal scholar, tireless blogger, and generous correspondent Marty Lederman has substantiated in compelling detail, there *is* no employer mandate that constrains Hobby Lobby's religious exercise, and so their claim of substantial burden may in fact be too weak to stand. In RFRA terms, I need only be sincere in my belief that a law burdens my exercise of religion to make a credible case for accommodation. But what if the law to which I object doesn't exist, or I've wrongly interpreted it to require something of me it in fact does not? Military conscription, for example, may well violate my sincerely held religious beliefs. But I would not have a RFRA claim of substantial burden in the absence of a draft.

As the law now stands, large employers who choose not to offer insurance coverage to their employees must pay a "shared responsibility fee"—*not* the crippling fine they *would* pay if instead they provided insurance that failed to meet minimum federal standards. The shared responsibility fee, as spelled out in U.S. Code 4980H, is legally a tax, like Social Security, and not a fine. In last year's *Liberty University* case, the Court of Appeals for the Fourth Circuit explained that the shared responsibility fee imposed on large employers who choose not to offer health insurance "is proportionate" to the need to ensure universal coverage, "rather than

punitive." It "does not punish unlawful conduct"—instead, it "leaves large employers with *a choice* for complying with the law"—provide the insurance, or pay a tax.

If Hobby Lobby were to discontinue its health insurance coverage, its employees would join the millions of Americans who buy their insurance on an exchange, with generous government subsidies to those who qualify. This insurance would meet all federal standards for coverage, including contraception coverage for women.

Here's the Roberts save. The Fourth Circuit Court ruling, which the Supreme Court has allowed to stand, closely follows Justice Roberts's majority opinion in the Court's 2012 ACA ruling which held that there was no "individual mandate" to obtain health insurance—only the option of obtaining insurance or of paying a tax, either of which "citizens may lawfully choose." Should Hobby Lobby object to paying the shared responsibility tax on the grounds that it makes them complicit with the evil of providing contraception—well, too bad. Plenty of Americans are perfectly sincere in the conviction that some of the uses to which our tax dollars are put are unconscionable, and we're out of luck. We don't get RFRA exemptions for these objections because, as the Court ruled in *Lee* (1982), "the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the law."

The ruling I'm hoping for from the Court, then, would correct Hobby Lobby's misreading of the ACA's "employer mandate" and clarify its options of offering insurance coverage to its employees or paying a proportionate, non-punitive tax. That doesn't sound like a ringing vindication of women's right to make decisions about our reproductive lives without deferring to the inmost religious convictions of our employers. But for now, at least, it would be.

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