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Hobby Lobby: Government Can't Violate Religious Liberties Willy-Nilly

This decision has nothing to do with big business, freedom to use contraceptives, or preferencing religious liberty above everything else.

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By now you've no doubt heard that the Supreme Court ruled corporations can fire women who use birth control and that religion trumps all other values in constitutional jurisprudence. At least that's what my Twitter feed tells me.

But what was at stake in *Burwell v. Hobby Lobby* actually has nothing to do with the power of big business, the freedom to use any kind of legal contraceptive, or how to balance religious liberty against other constitutional considerations. Much like *Citizens United* (which struck down restrictions on corporate political speech without touching campaign contribution limits) and *Shelby County* (which struck down Section 4(b) of the Voting Rights Act because it was based on obsolete voting data that didn't reflect current realities as constitutionally required), *Hobby Lobby* is doomed to be misunderstood. The case now enters the "war on women" echo circus—as if half the plaintiffs challenging the Affordable Care Act's contraceptives mandate weren't women—or possibly some more bizarre corner of the Obamadämmerung.

Indeed, if you walked by the Supreme Court when its final opinions were coming down, you'd be excused for thinking that the justices were about to rule on some mega-case combining gay rights, abortion, and the death penalty. But no number of rainbow flags or "keep your rosaries off my ovaries" chants could change the fact that *Hobby Lobby* was actually a rather straightforward question of statutory interpretation regarding whether the government was justified in this particular case in overriding religious liberties.

The Supreme Court evaluated that question and ruled 5-4 that closely held corporations can't be forced to pay for all of their employees' contraceptives if doing so would violate their religious beliefs. There was no constitutional decision, no expansion of corporate rights, and no weighing of religion versus the right to use birth control.

It All Began With Government Aggression

Let's unpack that. This case began when the Department of Health and Human Services included 20 contraceptives as part of the "minimum essential coverage" that all health insurance plans had to satisfy to comply with Obamacare's employer mandate. A host of employers objected on religious grounds to four of the items on that list because these particular methods of contraception prevent a fertilized egg from implanting in the uterus.

Now, whether you call such devices and pills "abortifacients" or not is a question of semantics. I don't have a problem with them, but David and Barbara Green, the founders and owners of the arts-and-crafts emporium Hobby Lobby Inc.—who consider it part of their Christian duties to provide good healthcare to their employees—hold that preventing embryonic implantation violates their religious beliefs. Yet not complying with the mandate would mean paying $1.3 million in *daily* fines.

So the Greens sued the government, asserting their rights under the Religious Freedom Restoration Act of 1993. RFRA is a statute passed unanimously in the House and 97-3 in the Senate, and signed by President Clinton. Its lead sponsors included then-Rep. Chuck Schumer (D-NY) and Sen. Ted Kennedy (D-MA). These religious zealots' intent was to reverse a 1990 Supreme Court ruling—written by that heretical secular humanist Justice Antonin Scalia—that approved the constitutionality of generally applicable laws that burdened religion so long as they didn't specifically discriminate against religious people. (If objectors wanted an exemption, they would have to seek it from the legislature.)

Burdening Free Consciences

When someone makes a RFRA claim, courts look first at whether the government action at issue imposes a "significant burden" on religious exercise. If it does, then the government must show that it nevertheless is pursuing a "compelling interest" and uses the "least restrictive means" of serving that interest. The burden here was quite clear (see above; even the government didn't contest the sincerity of the Greens' beliefs), and the Court ultimately *assumed* that the government's asserted interests in "public health" and "gender equality" were compelling—as vague as those are, and whose importance is undermined by Obamacare's exemptions and grandfather clauses. So the case came down to the "least restrictive means" (sometimes called "narrowly tailored") prong.

And that's where the government lost. It simply didn't show—couldn't show—there was no way to provide free or cheap birth control without burdening believers. For example, the government could pay for the four disputed contraceptives itself, or provide a tax credit, or indeed make the kind of regulatory accommodation that it has for certain nonprofits. (Some of these religious groups, most notably Little Sisters of the Poor—the best-named plaintiff ever—are still litigating that accommodation because it involves signing a form that they feel makes them complicit in the underlying sin, but the Greens' beliefs differ.) Instead, HHS chose to continue forcing folks to do its bidding.

That's it. Nobody has been denied access to contraceptives, and there's now more freedom for all Americans to live their lives how they want, without checking their conscience at the office door. The mandate fell because it was a rights-busting government compulsion that lacked

sufficient justification. (One wag tweeted that former HHS Secretary Kathleen Sebelius—who must be happy to no longer have her name on the case—called the ruling a moral victory because the government loss wasn't unanimous, as last week's were.)

Shocker: People Own Companies

Oh, I suppose before I end this explanation of a rather simple case, I should address the hubbub about corporate rights, which is really an academic exercise regarding how many mandates can dance on the head of a beleaguered citizen. See, RFRA applies to all "persons," which is a legal term that, unless Congress specifies otherwise, includes non-human entities. But a for-profit corporation can't really exercise religion, can it? Well, it's certainly true that Hobby Lobby doesn't have knees to pray on or a soul to save, but it's hard to say that it doesn't operate according to certain religious ideals. For example, Hobby Lobby closes on Sunday, doesn't sell shot glasses, takes out ads suggesting that readers seek Jesus, and refuses to "back-haul" beer on its trucks, foregoing considerable profits. Indeed, neither the profit motive nor business structure change anything; modern law uniformly lets corporations pursue *any lawful purpose.*

None of these considerations undermine RFRA's solicitude for the rights of humans—including owners, officers, and shareholders. As Justice Samuel Alito put it in his majority opinion, "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control these companies."

So let's put this "corporations aren't people" misdirection to rest. At least for closely-held companies, if you pierce their corporate veils, it's their owners who'll bleed. I join the Court's practical skepticism that a publicly traded company could align all stakeholders' beliefs in a way sufficient to assert a RFRA claim, but in theory even a member of the Fortune 500 could announce some religious mission while complying with securities disclosures. Anyway, don't progressives want corporations to act with "social responsibility"?

The larger conclusion to draw from this episode: The essence of freedom is that government can't willy-nilly force people to do things that violate their consciences. Americans understand this point intuitively. Some may argue that there's a conflict here between religious freedom and women's rights, but that's a "false choice" (as the president likes to say). Without the HHS rule, women are still free to obtain contraceptives, abortions, and whatever else isn't illegal. They just can't force their employer to pay for them.

Moreover, while the focus of the contraceptive-mandate cases is the intersection of corporate rights and religious liberties, there's a bigger issue here. This is just the latest example of the difficulties inherent in turning healthcare—or increasingly our economy more broadly—over to the government. As my colleague Roger Pilon has written, when something is socialized or treated as a public utility, we're forced to fight for every "carve-out" of liberty. Those progressive Catholics who supported Obamacare—and the pro-life Democrats who voted for it—who are now appalled by certain HHS rules should have thought of that before they used the government to make us our brother's keeper.

The more government controls—whether healthcare, education, or even marriage—the greater the battles over conflicting values. With certain things, such as national defense, basic infrastructure, clean air and water, and other "public goods," we largely agree, at least inside reasonable margins. But we have vast disagreements about social programs, economic regulation, and so much else that government now dominates at the expense of individual liberty. Those who supported Hobby Lobby before the Supreme Court are rightly concerned that people are being forced to do what their religious beliefs prohibit. But that all comes with the collectivized territory.

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