



Supreme Court Rejects Obamacare Contraception Mandate

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On Tuesday the Supreme Court delivered another rebuttal of the Obama administration's implementation of Obamacare by ruling against the controversial contraception mandate. [Ilya Shapiro of the Cato Institute explains the case here:](#)

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 ...

When someone makes a RFRA [Religious Freedom Restoration Act of 1993] 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. ... 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.

In the aftermath of the decision, [the left is talking up possible methods to push back against Hobby Lobby and other employers](#) or [do an end-run around the policy issues involved](#). But what may become a possible solution on the right is a [broader embrace of Louisiana Gov. Bobby Jindal's advocacy for the sale of birth control pills over the counter to adults](#). [James Antle](#) and [Philip Klein](#) and [others on the right](#) and [on the left](#) are embracing the idea. [I make the case here for the idea](#):

There are a number of objections to this, but I find them to largely amount to unconvincing paternalism. The chief argument advanced is that standard oral contraceptives mess with hormones and have all sorts of side effects. This is, of course, true! But: dangerous side effects are rampant within all sorts of other over the counter drugs. Women can think for themselves and make decisions with their doctor and pharmacist about what drugs they want to take – and the evidence shows they are good at self-screening. In fact, it would actually increase the ability to mitigate and respond to unanticipated side effects, since changing tracks will no longer require a doctor's visit and getting a new prescription. Assuming that women won't or can't take responsibility for themselves to consult with a doctor unless required to by arbitrary government policy is absurd.

It's obvious why libertarians like the idea of OTC birth control. Conservatives should like it because it removes the responsibility for redistributive payment from themselves while demonstrating that yes, they really aren't about banning things or preventing access to birth control. And liberals should like it because it will lower the drop-out rate, which is currently largely driven by the requirement to re-up the prescription as much as every few months. The American College of OB-GYNs supports it, Louisiana Gov. Bobby Jindal and Colorado Rep. Cory Gardner support it, most of the world already has it, and making it official policy would lower prices, lower health care costs, and make consumers more cost conscious. All of these are good things.

[A recent Reason-Rupe poll found that 66% of those surveyed supported the idea, versus 30% opposed](#). We'll see if more politicians take up this cause in the future as a way to shift responsibility to individuals and to remove divisive birth control fights from the political sphere.