**Hobby Lobby, Women’s Rights, and a Slippery Slope To Theocracy [(Read the full decision).](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf)**

By Anne L. Schneider, PhD

C:\Users\frys\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\FZB6ZJLW\MC900383584[1].wmf Religious freedom is a fundamentally important value in American democracy, but the Hobby Lobby decision (*Burwell v. Hobby Lobby Stores* and *Conestoga Wood Specialties v. Burwell)* upsets the delicate balance between free expression of religion and the fundamental rights of all persons to equal treatment before the law.

This decision allows the owners of a corporation not only to impose their religious values on their employees, but also to deny their women employees the full coverage for contraception they are entitled to under the Affordable Care Act.

When religious beliefs begin to trump the rights of others, as this decision permits, people need to engage in rational, non-ideological thinking about where democracy ends and theocracy begins. It is time for this conversation to begin.

As those of us in Arizona know, there are those who would use the Religious Freedom and Restoration Act (RFRA) to permit discrimination on religious grounds by businesses as well as individuals, even though this was not the intent of the act itself.

**The Ruling**

C:\Users\frys\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\GIOTO8B8\MC900391156[1].wmf The Supreme Court ruled June 30, 2014 that the religious beliefs of the owners of a family-held corporation are more important than the rights of its women employees to the full contraception benefits under the American Care Act. Justice Kennedy, who cast the swing vote in the 5-4 decision, seems to say that this is very narrow ruling, applying only to contraception; others disagree. Justice Ginsberg called it a decision of “startling breadth.”

The majority opinion was not decided on the basis of the first amendment providing for freedom of religion (for the owners of the corporation), but rather on the Religious Freedom Restoration Act of 1993 that was initially intended to protect religious expression of individuals. As Justice Ginsberg noted in her dissent this right of religious expression has “never before been extended to for-profit corporations” not even those that are “closely held.” [The IRS defines “closely held” as 50 percent or more of the assets held by fewer than five persons.] [Access the law here](http://www.law.cornell.edu/uscode/text/42/2000bb-1)

The majority opinion was written by Justice Alito and joined by four other justices – all men, all appointed by Republican presidents. All three women justices were part of the dissent, as was Justice Breyer. All were appointed by Democratic Presidents.

**The Religious Freedom Restoration Act (RFRA**)

The RFRA was passed by a Democratically-controlled Congress in 1993 (almost unanimously) in response to a Supreme Court decision (*Smith*) that had allowed an Oregon court to prosecute two American Indians who had used peyote (an illegal drug at the time) in a religious ceremony. At the time, it seemed the RFRA was carefully limited as it prohibits the government from substantially burdening a person’s religious freedom unless there is (1) a compelling government interest, and (2) is the least restrictive means of furthering that compelling governmental interest. Another case, Religious Land use and Institutionalized Persons extends this to any exercise of religion.

**Hobby Lobby**

Hobby Lobby is an arts and crafts retail store with approximately 13,000 employees in the United States. It is owned and operated by the Green family, who in the incorporation papers in Oklahoma cited service to the Lord as part of their purpose. Family members hold all of the offices of the company. Nevertheless, incorporation makes clear that the corporation itself is separate from its owners and its hiring policies explicitly welcome people of all faiths and religions. David Green, the president, is the son of a fundamentalist minister.

Hobby Lobby claimed that four of the 20 contraception techniques covered by the ACA violate their religious beliefs. These include the “morning after” pill, Plan B, Ella, and IUDs. They contend these contraceptive methods are a form of abortion.

**The Majority Opinion**

Be careful what you wish for! Policies may have unintended consequences.

C:\Users\frys\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\BF8TEQ97\MC900078622[1].wmf The majority opinion said almost nothing in the written decision on the question of sincerity of the religious beliefs. This was simply assumed. Also, the majority opinion paid very little attention to whether the ACA “burdened” that religious freedom. It simply mentioned that the beliefs were sincerely held and that if the company did not cover the health care costs of its employees, it would be required to pay a fine. Apparently, that was all that was needed to constitute “burdened.” The defense argued that ACA does not require the women to actually use contraceptions, it only requires that insurance offered to them must cover the 20 FDA- approved methods of contraception.

The majority attempted to limit its decision by contending that corporations could not opt out of just any law, or just any part of the ACA, but only the part pertaining to contraception. This is a puzzling part of the decision since no rationale was given for why contraception should be grounds for not having to obey the law, but other things such as opposition to blood transfusions or other medical procedures would not also be exceptions.

The opinion explicitly extends the RFRA to for-profit corporations saying that these are organizations of people and that the rights they enjoy are actually the rights of the people in the corporation. The opinion does not seem to notice that employees are also part of that corporation and that for-profit corporations, unlike churches and religious non profits, do not have a homogeneous “religious belief” that is being “burdened.”

**The Heart of the Majority Argument**

The majority decision was based primarily on the contention that there are other “less restrictive options” that the government could have used, rather than requiring contraceptive coverage as part of ACA. They claimed that the government could pay for the coverage of these contraceptive methods or that the Department of Health and Human Services (HHS) could extend the rule it already used to provide an exemption to churches and to religious non profits that they did not have to provide contraceptive coverage. This rule exempts the organization, but requires the insurance companies to provide contraceptive services, anyway, using the argument that there is no net cost to the insurance company since the medical costs of unintended pregnancies was about the same or even greater than the cost of these contraceptives. Insurance companies were not happy with this “accommodation,” but they did agree to it.

**There is a “less restrictive option,” but will it be politically possible for it to be used to obtain coverage for these women?**

At the heart of the case: the ruling enables the free expression of religion by the owners of the corporation to trump the religious rights of the employees and also to trump the right of women to all of the health care benefits available under ACA. Why? Because there is a less restrictive alternative – let the public pay for it, or require the insurance companies to pay for it.

The irony here is that the women of Hobby Lobby may get all of the contraceptive coverage that ACA offers; but the company will not have to pay for it.

**The Dissent**

The dissent is nothing short of a brilliant essay by Justice Ruth Ginsberg. Her opening statement is worth quoting in full: (Page 1 and 2 of her dissent).

*“In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See ante, at 16–49. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt­ outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling a religion-based exemption, the government, i.e., the general public, can pick up the tab. See ante, at 41–43.1*

*The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommoda­tions so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb et seq., dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommo­dation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.*

She later points out that the majority decision does not even say that this accommodation is constitutional!

**Some Interesting (and Disturbing) Statements**

In attempting to limit the decision just to contraception coverage, the majority opinion offers some interesting insight into whose interests are important and whose interests are not. Here’s a quote about using religion for other kinds of discrimination

*In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance­ coverage mandate must necessarily fall (sec) if it conflicts with an employer’s religious beliefs. Other coverage require­ments, such as immunizations, may be supported by dif­ferent interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.*

*The principal dissent raises the possibility that discrim­ination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See post, at 32–33. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the work­force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that criti­cal goal. Page 46*

Although this statement was intended to limit and constrain the ruling, women should take no solace in it as it clearly says that women’s interests, and the religious interests of women who work for this company are not important enough to be considered. As Cecile Richards said, “It is better today to be a corporation than to be a woman.” Birth control is somehow different than other interests and it is clearly a lesser interest. The male majority on the court seemed unaware that a woman’s ability to participate fully in the work force depends heavily on her ability to control her own reproduction.

**What “Less Restrictive Alternatives”?**

The ruling says that there are less restrictive alternatives, but what are these? The government has not agreed to pay these costs, and has not at this time extended the HHS ruling exempting churches and religious non profits to for-profit corporations. Will the women of Hobby Lobby receive these benefits? That remains to be seen.

Justice Ginsberg says that this ruling will open the flood gates so that many other companies that are “closely held” corporations can opt out of this portion of the ACA. The court did not endorse any specific definition of “closely held” but the IRS defines it as having five or fewer stockholders who own 50% or more of the company.

Another 70 or so companies also are suing trying to not have to include the contraceptive coverage.

**Where Does It Stop?**

An even more troubling possibility is that this is not the end game. Will companies be able to claim that it is a violation of their religious expression for the government or the insurance companies to offer this contraception coverage to their employees? The company policy does not include it, but if the company offers health insurance at all, the government or the insurance companies will be required to provide what the company will not. Thus, the company might claim that the accommodation itself is still a “burden” by requiring them to indirectly contribute to the “sinfulness” of their employees.

Here is how Justice Ginsberg answers the question of where this stops:

*And where is the stopping point to the “let the govern­ment pay” alternative? Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U. S. 290, 303 (1985), or according women equal pay for sub­stantially similar work, see Dole v. Shenandoah Baptist Church, 899 F. 2d 1389, 1392 (CA4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?26 Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See ante, at 3–4, 9–10, 43–45. “At a minimum,” according to the Court, such an approach would not “impinge on[Hobby Lobby’s and Conestoga’s] religious belief.” Ante, at 44. I have already discussed the “special solicitude” gen­erally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.*

**The Final Word**

Mother Jones picked out what it believes are the 8 best things said by Justice Ginsberg in her dissent

Here are eight best quotes from Ginsburg's dissent in Burwell v. Hobby Lobby:

* *“In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.*
* *"The exemption sought by Hobby Lobby and Conestoga would…deny legions of women who do not hold their employers' beliefs access to contraceptive coverage"*
* *"Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community."*
* *"Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults."*
* *"It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage."*
* *"Would the exemption…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[?]…Not much help there for the lower courts bound by today's decision."*
* *"Approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the [Constitution's] Establishment Clause was designed to preclude."*
* *"The court, I fear, has ventured into a minefield."*

**Theocracy?**

A theocracy is typically defined as government ruled by religious leaders relying on religious law rather than secular law, particularly democratically-developed law. There are a host of theocracies in the world today; and fortunately, the U.S. is not one of them. However, the language of some political parties (e.g., Texas) and some candidates (Michael Huckabee, 2012) refer to the U.S. as a “Christian” nation and candidates have argued that U.S. law needs to follow more closely Christian law as found in the Bible.

When public policies such as RFRA are interpreted in such a way that enables religious beliefs of a few to outweigh the equal protection of the law to many, then another chip has been inflicted on the separation of church and state. This is a conversation that needs to begin. “Religious” claims should be subjected to the same kind of rational analysis and logical application of ethical principles as all other claims. Religion should no longer be given a free pass when it becomes part of a public policy discussion.

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