

“Hobby Lobby” contraception ruling

US Supreme Court attacks First Amendment, workers’ rights

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The United States Supreme Court ended its October 2013 term with a 5-4 ruling allowing private corporations to deny their workers insurance for birth control, coverage otherwise required under the Affordable Care Act (ACA, also known as Obamacare), as long as the corporate owners claim their religious beliefs oppose contraception.

The thoroughly reactionary ruling in *Burwell v. Hobby Lobby* infringes on the access of workers to health care while boosting Christian fundamentalism in violation of the prohibition against the establishment of religion, spelled out in the first clause of the First Amendment of the US Constitution (the first of the ten amendments that comprise the Bill of Rights).

Hobby Lobby Stores, Inc., a retail chain with 600 locations and over 13,000 employees owned by multimillionaire evangelical Christian David Green, and Conestoga Wood Specialties Corporation, a cabinetmaker that employs 950 people and is owned by Mennonite Christians, filed separate lawsuits consolidated for review in the Supreme Court.

Both companies asked for an injunction exempting them from enforcement of the so-called “contraception mandate,” the ACA regulation requiring that birth control coverage be included in employee health plans.

The consequences of a lack of birth control coverage can be significant. Birth control medications can cost \$45 per dose, and an intrauterine device (IUD), which is among the most reliable and safe forms of contraception, can cost more than \$1,000, including the office visit and insertion, a sum equal to a month’s full-time pay for a worker earning the minimum wage.

The majority opinion, authored by Associate Justice Samuel Alito and joined by equally right-wing Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy, purports to rest on the Religious Freedom Restoration Act (RFRA), legislation enacted in 1993 to protect the free exercise of religion following a Supreme Court ruling that allowed the

government to deny unemployment benefits to Native Americans who were fired for consuming peyote in connection with their religious practices.

The RFRA prohibits the US government from imposing a law or regulation that “substantially burdens” a religious activity or practice, unless the measure “constitutes the least restrictive means of serving a compelling government interest.”

According to Alito, “the owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the [ACA] mandate, they believe they will be facilitating abortions,” thus imposing a “substantial burden on the exercise of religion.”

The argument that the ACA regulation mandating contraception coverage violates freedom of religious expression of employers who oppose birth control on religious grounds is specious and without legal or constitutional foundation. Prior to Monday’s ruling, there has never been a Supreme Court decision recognizing the authority of an individual, much less a corporation, to deny benefits to others guaranteed by law because of their personal beliefs.

Yet that is precisely what the Supreme Court has now sanctioned.

There are almost 50 other private businesses that have sued the Obama administration seeking similar exemptions. Many assert a blanket objection to all forms of contraception, not just supposed abortifacients.

Moreover, there is nothing in principle to prevent employers from citing Monday’s ruling to oppose providing insurance for other medical procedures for workers, such as vaccinations and blood transfusions, or using “freedom of religious expression” to justify refusing to hire African Americans, Muslims, Jews or gays.

The cowardice and duplicity of the Obama administration

and the Democratic Party have played a critical role in enabling the court to impose this ruling. While claiming to defend abortion rights and the right of women to have access to birth control, the Obama White House has at every step caved in to right-wing attacks on the contraception provisions of the ACA from religious groups.

In 2012, Obama backed down when the Catholic Church and other organizations balked at Christian-affiliated hospitals and other nonprofits honoring the birth control mandate of Obamacare. Instead of upholding the law and the First Amendment separation of church and state, Obama changed the ACA regulations to accommodate the right-wing religious attackers. He allowed these groups to avoid paying for such coverage for their employees, and instead required insurance firms to do so, ultimately at taxpayer expense.

In oral arguments before the court last March, Alito directly asked the administration's solicitor general, Donald Verrilli, whether the Obama administration was claiming that a ruling in favor of Hobby Lobby and Conestoga Wood Specialties would impact the First Amendment's ban on any establishment of religion by the state. Verrilli answered that the administration was not making such a claim.

In his ruling, Alito seized on these efforts by the White House to appease the Christian right and built his argument around them. He began by adopting the unprecedented position that for-profit, private corporations, as "persons" in the eyes of the law, could assert religious interests and were therefore covered by the RFRA.

He then cited the Obama administration's 2012 capitulation to right-wing and religious forces on the birth control issue. Since the Obama administration "has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations," Alito wrote, there is "no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections."

In other words, Obama should simply extend his exemption for religion-based nonprofits to closely held private corporations such as Hobby Lobby and Conestoga that assert similar objections.

The effect of this would be to expand the public, taxpayer subsidy to employers to accommodate the owners' asserted religious beliefs—a clear violation of the First Amendment ban on the establishment of religion.

Moreover, the Supreme Court's proposed expanded opt-out rule would encourage businesses to lodge objections to contraception on religious grounds. Companies that did so could thereby lower their premiums on health plans relative to employers that complied with all of the ACA's requirements, thus increasing profits and gaining a

competitive edge.

Nor is there any guarantee that Alito's proposal that the Obama administration expand its contraception subsidy program to private companies would actually be enacted and, if so, would survive the inevitable right-wing political and legal challenges.

Associate Justice Ruth Bader Ginsburg wrote a lengthy dissent, which she summarized from the bench. She called the majority's ruling one "of startling breadth," which "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."

According to Ginsburg, the majority's ruling "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."

In other words, the supposed free exercise of religion for billionaire Hobby Lobby owner David Green means the "freedom" to impose his personal religious views and practices on the intimate lives of workers and their families, who must depend on employer-funded plans for their health needs.

As explained by Louise Melling, deputy legal director of the American Civil Liberties Union (ACLU), "For the first time, the highest court in the country has said that business owners can use their religious beliefs to deny their employees a benefit that they are guaranteed by law."

Associate Justices Sonia Sotomayor, Stephen Breyer and Elena Kagan joined Ginsburg's dissent, Breyer and Kagan parting ways only on Ginsburg's assertion that "the exercise of religion is characteristic of natural persons, not artificial legal entities" such as the corporations.

The four so-called "liberals" on the court, while in agreement that the contraception mandate does not impose an undue burden on the free exercise of religion by corporate owners, like the White House did not defend the coverage on First Amendment grounds. In her decision, Ginsburg relegated the establishment clause of the First Amendment to a footnote, stating meekly that "the government's license to grant religion-based exemptions from generally applicable laws is constrained by the establishment clause."



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