US Supreme Court backs Christian college against contraception mandate

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On Thursday, in the wake of its decision in the *Hobby Lobby* case, granting for-profit corporations the right to cite religious concerns to opt out of the requirement in the Affordable Care Act that their employee health plans cover contraceptive care, the US Supreme Court issued an order that further undermines workers' rights and the separation of church and state. This order effectively puts an exclamation point on Monday's *Hobby Lobby* decision, confirming that the Obamacare contraception mandate is in tatters.

The order was entered in a case called *Wheaton College v. Burwell*, which involved that college's "religious objections" to the Affordable Care Act (widely known as Obamacare). The Obama administration had established a mechanism for processing religious objections to the health care law, namely a form entitled "EBSA Form 700." The Supreme Court, in less than two pages (available here), held that Wheaton College does not even need to fill out the form. All the college need do to exempt itself from the law is to send a letter to the government identifying itself as religious.

The Supreme Court majority's provocative intervention split the court along gender lines and prompted a 15-page dissenting opinion from the three female justices: Elena Kagan, Sonia Sotomayor and Ruth Bader Ginsburg.

The dissenters criticized as ludicrous the "theory that its filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects." The form that Wheaton College claims is a "burden on religious liberty" is one page, front and back.

"I have deep respect for religious faith, for the important and selfless work performed by religious organizations," Sotomayor wrote on behalf of the dissenters. "But the Court's grant of an injunction in this case allows Wheaton's beliefs about the effects of its actions to trump the democratic interest in allowing the Government to enforce the law."

The Wheaton College decision highlights the extent to which the Obama administration and the more moderate justices have been, as the expression goes, "hoisted by their own petard." It was not the right-wing majority on the Supreme Court, but the Obama administration that first granted organizations with religious affiliations the ability to "opt out" of the contraception mandate.

In February of 2012, the administration announced that churches and certain religiously affiliated nonprofit organizations would be permitted to exempt themselves from the law on religious grounds. (See: "Obama caves in to Catholic Church, religious right on contraceptives"). The Supreme Court's right-wing majority in the *Hobby Lobby* case did nothing more than seize upon what the Obama administration had already given them.

In his speech announcing the concessions, Obama made reference to women's rights to health care. But he concluded, "We've been mindful that there's another principle at stake here—and that's the principle of religious liberty, an inalienable right that is enshrined in our Constitution. As a citizen and as a Christian, I cherish this right."

The *Hobby Lobby* decision—and even more so, the *Wheaton College* decision—make clear that the reactionary outcome in the Supreme Court was facilitated by the Obama administration's cowardly compromises. Further, while the *Hobby Lobby* case was being litigated, the Obama administration and its lawyers—and the so-called "liberal" justices—refused to mount a defense of the contraception mandate on the grounds of the separation of church and state.

With the *Wheaton College* decision, the huge scope of Monday's *Hobby Lobby* decision is coming into view. The decisions together represent a direct assault on the Establishment Clause, which appears in the first part of the First Amendment, the first of ten amendments to the US Constitution that constitute the Bill of Rights. The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion."

The Obama administration and the moderate justices were

not in a position to raise the Establishment Clause because of the concessions to religion that had already been granted in 2012. The right-wing majority on the Supreme Court—consisting of Samuel Alito, Antonin Scalia, John Roberts, Clarence Thomas and Anthony Kennedy—took full advantage of this weakness. Writing for the majority in the *Hobby Lobby* case, Alito gleefully made extended reference to the "exemptions from the contraceptive mandate for religious employers" that the Obama administration had already granted.

Together with the Declaration of Independence's proclamation that "all men are created equal" and the constitutional guarantee of "due process of law," the Establishment Clause separating church and state embodies one of the most important democratic and secular principles advanced by the American Revolution.

The Virginia Statute for Religious Freedom (1777), drafted by Thomas Jefferson and a key influence on the Establishment Clause, declared that "our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry." As Jefferson later explained, the purpose of the Establishment Clause was to build "a wall of separation between Church and State."

Jefferson's wall is being reduced to rubble. Now, the High Priests of the Supreme Court (of which six of nine are Catholics) have granted themselves the authority to issue decisions on religious questions, including which "religious objections" to legislation are legitimate and which are not. With this decision, the Supreme Court has launched itself into new and purely ecclesiastical territory, which no previous Supreme Court dared to enter.

Universities, corporations and other self-proclaimed religious institutions can now—simply by sending a letter—purport to "opt out" of any legislation that they claim interferes with their religious views. The implications of the decision are not limited to drugs or devices that, according to those seeking to evade the contraception mandate, lead to abortion. Following the *Hobby Lobby* decision, the floodgates are opened, for example, for Christian Scientists to object to providing vaccinations and blood transfusions, Catholics to object to other forms of contraception, and Scientologists to object to psychiatric treatment of any kind.

Nor are these newly enshrined "religious objections" to be limited necessarily to the Affordable Care Act. What will be next? Corporate "religious objections" to workplace discrimination laws, environmental regulations, health and safety laws? Doubtless, corporations and institutions of all kinds are poised to inundate the federal courts with similar "religious objections," which federal judges (repurposed as grand inquisitors) will now be tasked with evaluating.

The *Hobby Lobby* and *Wheaton College* decisions stand entirely outside the democratic legal tradition of the United States.

First, the decisions are part of a trend of expanding "corporate constitutional rights." As a preliminary matter, the idea that a corporation—a legal entity chartered by the state—is entitled to "religious liberty" is utterly specious.

While the Supreme Court discovers new rights in the Constitution for corporations to enjoy, for the rest of the population the Bill of Rights has more or less ceased to exist. The military-intelligence apparatus is engaged in unrestrained mass spying in flagrant violation of the Constitution, the police beat and kill citizens on the streets with impunity, and the Obama administration asserts the power to assassinate US citizens in cold blood.

Second, there is absolutely no legal basis for the assertion that it violates the "religious liberty" of employers when their employee health plans include coverage for contraception. Nobody is forcing the employers to use or not use contraception. If any rights are in peril, it is not the "religious liberty" of employers, but the rights of women and families to contraception and abortion—and to privacy in general—which have been upheld in Supreme Court decisions of an earlier period, such as *Roe v. Wade* (1973).

This new "right" of corporations to refuse to provide health care to women is in the same tradition that once allowed businesses to claim a "right" to refuse to admit Jews, or serve blacks, or employ women. Fifty years since the Civil Rights Act, the theoretical foundations for such "rights" are being infiltrated back into the legal system, with the Obama administration playing an instrumental role.

The *Wheaton College* decision concludes a Supreme Court term that featured sharp attacks on core democratic principles amid the steady expansion of the government's repressive apparatus. In addition to the *Hobby Lobby* decision, significant Supreme Court decisions this term included *Plumhoff v. Rickard* (granting immunity to police officers who shot and killed an unarmed driver and his passenger from behind), *Town of Greece v. Galloway* (further undermining the Establishment Clause by upholding prayer at town meetings), and the decision not to review a lower court order forcing *New York Times* journalist James Risen to reveal his confidential sources.