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## The ACA's Contraceptive Mandate: Religious Freedom, Women's Health, and Corporate Personhood

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## VIEWPOINT

# The ACA's Contraceptive Mandate Religious Freedom, Women's Health, and Corporate Personhood

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**The Supreme Court** on June 30, 2014, decided *Burwell v Hobby Lobby Stores, Inc*—a deeply divisive case. Holding that the federal government cannot lawfully mandate “closely held” for-profit corporations to provide contraceptive coverage, the Court split 5-4 along ideological lines.<sup>1</sup> The Court thus entered a political quagmire at the intersection of religious freedom, women's health, and corporate personhood.

The Affordable Care Act of 2010 (ACA) requires specified employer group health plans to cover preventive care and screenings for women without cost-sharing. Department of Health and Human Services (HHS) rules mandate coverage of 20 Food and Drug Administration–approved contraceptive methods. However, HHS exempts religious employers (eg, churches) but not for-profit organizations. HHS offers religious nonprofits an “accommodation,” whereby insurance companies exclude contraception coverage

Having found that RFRA applies to corporations, the Court said the contraception mandate “substantially” burdens their religious freedoms. The mandate, according to Justice Alito, coerces companies to fund services to which they are morally opposed. The Court assumed the government had a “compelling interest” in ensuring reproductive services but said HHS could achieve its purpose less restrictively. The federal government, for example, could directly fund the 4 contraceptive methods or use the same “accommodation” HHS offered to nonprofit religious organizations, namely requiring insurers to cover those services.

## Women's Health, Well-being, and Equal Rights

The Court's 49-page opinion is solicitous of corporate rights and religious freedoms while mentioning women only 13 times. In stark contrast, Justice Ruth Ginsburg's dissent symbolically quotes Sandra Day O'Connor, the Court's first female justice: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>2</sup> Justice Ginsburg's passionate dissent reveals the virtually unbridgeable fissure among the Justices, reflected in US politics and culture.

Reproductive services are vital to women's health and lives,<sup>3</sup> expanding their social and economic opportunities. Reproductive services reduce unintended pregnancies and facilitate treatment, with 99% of all sexually active women using birth control at some point.<sup>4</sup> Poor women, moreover, are unlikely to afford reproductive services, especially long-acting contraception with high initial costs. Justice Ginsburg wrote, “the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage,” and “almost one-third of women would change their contraceptive method if costs were not a factor.” Reproductive freedoms, of course, are also vital to families and society given the high social costs of unplanned pregnancies.

## A Clash Between Religious Freedom and Women's Rights

The Court assumed the contraception mandate created a “substantial burden,” deferring to the companies' subjective beliefs, which are unfounded in fact. The 4 contraceptive methods to which they objected avert pregnancy by delaying or preventing ovulation. Scientific evidence does not support the claim that emergency contraception works by preventing implantation.<sup>5</sup> The corporate owners remained free to practice their re-

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from the employer's plan, but the insurance companies must provide separate coverage without cost-sharing to the employer, its health plan, or women.

In the *Hobby Lobby* case,<sup>3</sup> closely held for-profit corporations holding Christian beliefs that life begins at conception challenged the mandate of 4 contraception methods they believe prevent a fertilized egg from attaching to the uterus, tantamount to an abortion. These 4 methods include 2 forms of emergency contraceptive pill, which can be taken within 3 to 5 days after sex, and intrauterine devices (IUDs), which are inserted into the uterus to prevent pregnancy. The latter are long-acting, reversible, and highly effective forms of contraceptive but can also be used for emergency contraception.

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits government from “substantially” burdening a person's “exercise of religion” without a “compelling interest” and requires the “least restrictive” means to achieve that interest. Holding that HHS violated RFRA, the Court first found that RFRA applies to closely held for-profit corporations. The Court reasoned that corporations are “persons” capable of “exercising religious freedom.” Justice Alito, writing for the Court, said RFRA protects individuals—the company's shareholders, officers, and employees.

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ligion and speak out against contraception. They would play no part in the decision to use contraception, which is solely a matter for the woman and her physician. The companies, moreover, could have avoided any moral dilemma by paying a tax instead of providing insurance, with employees then eligible to secure full coverage on the insurance exchange.

The exercise of religious liberty imposes a burden on the rights and health of female employees, who may not share their employer's beliefs. If family planning services became unaffordable, the reproductive autonomy and well-being of women would be placed at risk. At the same time, the company effectively would be treating female employees unequally, as there would be no comparable coverage exclusions for men.

### Corporate Personhood

*Hobby Lobby* equates corporations with "persons" capable of practicing religion, but corporate personhood is a legal fiction. A corporation is simply a business entity created by law, which affords owners and shareholders advantages, such as limited liability. The corporation's prime purpose is to make a profit, not to exercise human freedoms. In exchange for the advantages received, there is good reason to require corporations to abide by laws of general applicability, such as administering government benefit schemes and not discriminating.

The Court's ruling is limited to "closely held" corporations, but it never defines that term. Justice Alito equates "closely held" with family-owned businesses. Yet 90% of corporations are closely held, some of which are large: for example, Hobby Lobby has 13 000 employees.<sup>6</sup> Justice Alito asserts that publicly traded companies would not make RFRA claims but, if they did, the Court's reasoning appears to apply to them. In fact, the Court has conferred rights on multinational corporations in multiple realms—defending commercial speech and campaign financing. The trend toward corporate personhood has constrained public health regulation, ranging from advertising prescription medicines to marketing junk food, tobacco, and alcohol.<sup>7</sup> The Court has stressed corporate rights, often to the detriment of individuals.

Religious beliefs, moreover, extend beyond abortion—for example, opposing vaccinations, blood transfusions, or psychotropic

drugs or objecting to providing health care coverage to same-sex spouses. Justice Alito asserted that *Hobby Lobby* does not apply to these medical services and would not undermine civil rights laws but never explained why. The Court's reasoning could extend to multiple realms of medical practice, leading Justice Ginsburg to call *Hobby Lobby* "a decision of startling breadth."

### Opening the Floodgates of ACA Litigation

If a Supreme Court decision is supposed to give a measure of legal certainty, *Hobby Lobby* does anything but that. Currently some 50 cases are pending in the courts, and the Court's decision leaves considerable ambiguity: do large corporations have religious freedoms, is HHS' accommodation acceptable, and does the decision apply to medical services beyond contraception?

In *Hobby Lobby*, the court endorsed an "accommodation," or legal exception to the rule, requiring an employer merely to sign an insurance form stating it is a nonprofit religious organization that objects to contraception. The day after the case came down, the Court issued a temporary emergency injunction against enforcement of this accommodation—provoking a stinging rebuke from all 3 female justices.<sup>8</sup> "Those who are bound by our decisions usually believe they can take us at our word," Justice Sotomayor wrote. "Not so today." Wheaton, a Christian college, argued, "signing the form would impermissibly facilitate abortions and is therefore forbidden." (The Court issued a similar order in favor of Little Sisters of the Poor, an order of Roman Catholic nuns, in January.) "The Court," said Sotomayor, ignores a simple truth: "The government must be allowed to handle the basic tasks of public administration in a manner that comports with common sense."

*Hobby Lobby* does not undermine the core components of the ACA such as affordable access to services. The decision, however, does potentially affect women's reproductive health and could signal a "chipping away" at the margins of this historic health care entitlement. Beyond the ACA, the case solidifies a growing trend in Supreme Court jurisprudence defending corporate personhood, which is becoming a major impediment to public health regulation.

#### ARTICLE INFORMATION

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