

The Left's Hollow Complaints About Hobby Lobby

 realclearpolitics.com/articles/2014/07/12/the_lefts_hollow_complaints_over_hobby_lobby_123293.html

By **Peter Berkowitz** - July 12, 2014

Progressives are fond of saying that they stand for empathy and compromise, and are quick to blame conservatives for polarizing our politics. Their feverish reaction last week to the Supreme Court's thoughtful 5-4 decision in *Burwell v. Hobby Lobby Stores, Inc.* shows that progressives could use more of the virtues they claim as their own.

The case involves three family-run, for-profit corporations. Norman and Elizabeth Hahn and their three sons own and operate Conestoga Wood Specialties. David and Barbara Green and their three children run Hobby Lobby, a nationwide chain of arts and crafts stores, and an affiliated business, Mardel, a Christian bookstore.

In originally separate lawsuits, the Hahns and Greens contended that under the 2010 Affordable Care Act the Department of Health and Human Services promulgated regulations that unlawfully required their companies to pay for insurance plans that included four FDA-approved contraceptives that have the potential to prevent the implantation of a fertilized egg—two types of the so-called morning-after pill and two types of intrauterine devices. Facilitating the use of these contraceptives violated the Hahns' and Greens' sincerely held religious belief that life begins at conception. To the other 16 forms of FDA-approved contraception that HHS requires insurance providers to cover, however, the Hahns and Greens had no objection, and their companies' coverage of them was unaffected by the court's decision.

The five more conservative justices cautiously agreed with the Hahns and Greens that the regulations infringed their religious liberty. In the principal dissent, the four more liberal justices strongly disagreed. Progressive journalists went ballistic.

"This should be a real wake-up call to every woman in America that the Supreme Court is at war with women," thundered MSNBC's easily excitable Ed Schultz.

The usually less excitable Steve Coll, dean of the Columbia Journalism School, exclaimed in the New Yorker that the Hobby Lobby decision could empower Taliban-like Muslims to organize in America closely held corporations that could provide insurance coverage to employees that excluded polio inoculations.

Writing in Salon, left-leaning columnist Paul Rosenberg hit on the "theocracy" theme, too. Hobby Lobby's assertion of deeply held religious beliefs, he wrote, are "transparently bogus." What is really happening is religious "tyrants" are imposing "slavery" on the majority,

courtesy of five Supreme Court justices willing to rewrite “decades or centuries of precedent to further empower the most powerful elements in our society.”

The decision “is wrong!” tweeted syndicated columnist and frequent television commentator Donna Brazile. “Your boss will now get in your personal business.”

Well, no.

Writing for the majority, Justice Samuel Alito held that the HHS requirement that the Hahns and the Greens provide health insurance plans that include the four forms of contraception in question violated the Religious Freedom Restoration Act. Passed by a unanimous House and a nearly unanimous Senate, RFRA was signed into law by President Clinton in November 1993. RFRA prohibits the federal government from taking actions that impose substantial burdens on a person’s exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

The law reaffirms both the high importance the nation’s constitutional system attaches to religious liberty and its commitment to accommodation, balance, and calibration.

So too does Justice Alito’s carefully argued opinion, which, in response to the dissent’s wrongheaded criticisms, emphasizes a number of crucial points.

First, treating corporations as persons with rights involves a familiar form of legal reasoning whose purpose is to vindicate the rights of the persons who own and control corporations.

Second, there is no sound legal reason to deny to for-profit corporations the sort of exemption HHS had already implemented for nonprofit organizations.

Third, the exemption that the court upheld in *Hobby Lobby* was limited to “closely held” or family-run, for-profit corporations. The precedent is unlikely to be invoked by large publicly traded corporations because of the diversity of religious and nonreligious views of their owners.

Fourth, the majority opinion *assumed* that the government did have a compelling interest in providing cost-free access to contraception, including the four methods in dispute in *Hobby Lobby*.

Fifth, the court concluded that the federal government must honor the Hahns’ and Greens’ sincerely held religious beliefs because it had alternative means to accomplish its goal of ensuring women’s cost-free access to contraceptives. HHS, as the court pointed out, had already worked out an effective accommodation with nonprofit religious organizations.

Sixth, the court noted that the government could always directly pay for the contraceptives at issue in *Hobby Lobby*.

You would never guess from the harsh reaction, starting with the principal dissent authored by Justice Ruth Bader Ginsburg that, as Justice Alito stressed, the court's holding is "very specific." Nor would you have a clue that were the federal government to apply the accommodation created by HHS for nonprofit organizations to the closely held, for-profit corporations that brought the lawsuit, the impact, in Justice Alito's words, "on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."

Yet Justice Ginsburg characterized the decision as one of "startling breadth." This would have been an accurate description if the majority had held that, as the dissent baselessly declared, "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."

Unfortunately, Ginsburg's gross misstatement of the court's opinion appears to have been taken as gospel not only by Democratic politicians and liberal bloggers, but by establishment journalists who ought to know better.

A New York Times editorial preposterously proclaimed that *Hobby Lobby* gave "owners of closely held, for-profit companies an unprecedented right to impose their religious views on employees." Yet the decision in no way affected the religious *views* of employees. It left their conduct unaffected as well.

Writing in the Washington Post, columnist Ruth Marcus asserted that "the interests of the contraceptive users are almost entirely absent from the majority opinion." Her explanation was that the five men who signed it lack uteruses.

Marcus' underlying rationale appears to be that there is only one way to think like a woman. But as Ethics and Public Policy Center President Ed Whelan observes, numerous formidable women agree with the *Hobby Lobby* decision, including "Seventh Circuit judge Diane Sykes and D.C. Circuit judge Janice Rogers Brown (each of whom wrote opinions holding that the HHS mandate violates the RFRA rights of for-profit companies and/or their owners); the many talented lawyers who supported the challenges to the HHS mandate; and individual plaintiffs like Elizabeth Hahn and Barbara Green."

Writing also in the Washington Post, columnist E.J. Dionne deplored the majority's "profound class bias" supposedly exhibited in its having "focused on the liberties of the company's owners, not of those who work for them." In reality, the court fashioned a narrow holding that respected the company owners' liberties without interfering with their employees' rights.

Justice Sonia Sotomayor outdid the progressive press in the vehemence of her reaction to a related decision by her court, issued three days after *Hobby Lobby*. That decision temporarily exempts, pending further consideration by the courts, Wheaton College—a

religious institution—from participating in the accommodation for nonprofit organizations outlined in *Hobby Lobby*. Sotomayor accused her fellow justices of ruling in a way that “evinces disregard for even the newest of this Court’s precedents and undermines confidence in this institution.”

It is the recklessness of Sotomayor’s charge, however, that jeopardizes confidence in the Supreme Court. The decision she attacks expressly declared that the court was not ruling on the merits. Rather, it concluded that since the government *may* have an even less restrictive means for ensuring cost-free access to contraception than requiring Wheaton to deal directly with its insurance company to facilitate its employees’ receiving contraceptive services that violate its religious principles, further adjudication is necessary.

Why are progressives in the press and on the Supreme Court bent on attributing to conservatives who seek to accommodate both religious liberty and women’s freedom the crude view, as Heidi Stevens puts it in the Chicago Tribune, that power is “a zero-sum game” in which a win for defenders of religious liberty is necessarily a devastating loss for women?

In part, the left is worried about a slippery slope. As with their opposition to limitations on partial-birth abortions and to various state requirements qualifying the exercise of abortion rights, progressives seem to think that any accommodation of conflicting considerations opens the gates to total victory for conservatives.

Still more pronounced, however, is the evident aversion among prominent progressives to living in a society with those who disagree with them about religion and reproduction. So great is their distaste for the diversity of views characteristic of a liberal democracy and so strong is their resolve to control the conduct of others that they are willing to mischaracterize the other side’s opinions, warp the facts, and politicize the law.

Practicing more of the empathy and compromise they preach would enable progressives to make a valuable contribution to containing the polarization they bewail.

Peter Berkowitz is a senior fellow at the Hoover Institution, Stanford University. His writings are posted at www.PeterBerkowitz.com and you can follow him on Twitter @BerkowitzPeter.