



Discrimination? Corporate Loopholes? Law Avoidance? *Hobby Lobby's* Potentially Slippery Slope

By Joshua Field March 24, 2014

This term, the Supreme Court will rule on whether the religious beliefs of the owners of Hobby Lobby Stores, Inc., a for-profit, secular corporation, can be used as justification to deny the company's employees the contraceptive health coverage they are entitled to under the Affordable Care Act, or ACA. The U.S. Constitution, federal laws such as the Religious Freedom Restoration Act, and an exemption to the ACA's contraception rule¹ have historically protected faith-based entities—such as churches and religiously affiliated hospitals and universities—from taking actions at odds with their religious beliefs.

The right to the free exercise of religion, however, has never been a right that secular businesses claimed to possess,² and it has never been part of religious liberty for a business to foist its owner's religious views on its employees or customers. The infamous *Citizens United* case held that corporations are entitled to First Amendment rights in the form of political donations.³ This term, *Hobby Lobby Stores, Inc. v. Sebelius* may go even further, expanding the religious liberties traditionally enjoyed by individuals and religious entities to a secular corporation.

Why should we care? Consider the potentially slippery slope of *Hobby Lobby*. A poorly decided *Hobby Lobby* decision has the potential to go beyond “corporations are people, my friend.”⁴ It has the ability to dramatically transform religious liberty from a fundamental value that protects genuine religious beliefs into a loophole that can be used to discriminate, dictate women's health choices, evade federal protections, and promote unfair advantages in the corporate world.

A Supreme Court decision in favor of Hobby Lobby Stores, Inc. could lead to:

- **Letting your boss into your bedroom.** A bad *Hobby Lobby* decision would empower corporate leadership to make determinations about their employees' health care decisions, allowing business owners' religious views about family planning to burden decisions that employees are entitled to make for themselves.⁵

- **A blueprint for codifying discrimination into law.** Although Gov. Jan Brewer (R) vetoed legislation Arizona lawmakers passed that would have enabled business owners to discriminate against the lesbian, gay, bisexual, and transgender, or LGBT, community, a bad *Hobby Lobby* decision would effectuate the law that caused such controversy. If the Supreme Court agrees with the plaintiffs in these cases that corporations aren't just people but also people of faith, the outcome will be very similar to what would have happened if Congress had taken the bill Gov. Brewer just vetoed, passed it at the federal level, and President Barack Obama then signed it into law—except, of course, no one on the Supreme Court was actually elected to make law.⁶

- Nearly half the states in the country have public accommodations laws that protect people from discrimination based on their sexual orientation.⁷ With a bad *Hobby Lobby* decision, corporations may try to argue that these laws burden their religious liberties and deny services to those who they believe are at odds with their religion.⁸
- A bad *Hobby Lobby* decision could open the door to similar denials of equal compensation, health care access, and other equitable treatment for LGBT people, people with HIV, and anyone else whose family life or health needs diverge from their employers' religious convictions.⁹

- **Power for corporations to use the Religious Freedom Restoration Act, or RFRA, to evade federal law.**¹⁰ Because RFRA—the statute at issue in *Hobby Lobby*—applies to federal law and federal government operations, a corporation could argue that its religious beliefs enable it to refuse to comply with the law. Employers could use a bad *Hobby Lobby* decision to:

- *Deny more than contraception.* Jehovah's Witnesses do not believe in blood transfusions, Christian Scientists eschew modern medicine entirely, Scientologists are opposed to psychiatry and drugs associated with psychiatry, some Evangelical Christians are opposed to the HPV vaccine, and certain fundamentalist factions of Christianity, Judaism, and Islam are opposed to the use of all vaccinations.¹¹ Secular corporations that claim these religious beliefs could use a bad *Hobby Lobby* decision to argue that they are exempt from covering their employees for these medical procedures.
- *Discriminate in hiring practices.* Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, color, national origin, or religion.¹² But if for-profit corporations have religious beliefs, they will be able to argue that they have the right to sidestep Title VII and hire only those who share the same religious values.
- *Avoid hiring pregnant women.* The Pregnancy Discrimination Act, which is part of Title VII, protects against sex discrimination on the basis of pregnancy,¹³ but for-profit corporations may try to use their newly found religious rights to fire unmarried pregnant employees.
- *Discriminate in housing decisions.* The Fair Housing Act makes it illegal to discriminate on the basis of sex, race, color, national origin, or religion, unless you qualify for certain religious organization exemptions.¹⁴ If for-profit corporations have religious rights,

then property-management firms may choose not to rent or sell to those engaging in lifestyles at odds with their religious values, such as cohabitation before marriage.

– *Avoid pension protections for employees.* Some religious institutions currently offer pension plans that are exempt from federal protections, which has left some workers completely exposed when these noninsured plans run into trouble or are underfunded.¹⁵ Under the legal theory being advanced by *Hobby Lobby* and others, for-profit corporations could seek similar exemptions to pension laws and other workplace protections and regulations under the guise of religious liberty.

- **A victory in the right's organized attack on the ACA.** The ACA provision at issue here is its guarantee to provide gender-specific, preventive services at no charge to individuals. If corporations can evade this guarantee, the right will have successfully chipped away at the important coverage the ACA provides.¹⁶
 - **Loopholes that corporations can use to avoid providing health care.** A *Hobby Lobby* ruling that invites some corporations to avoid compliance with generally applicable federal rules on religious grounds would exempt them from regulation. This would allow for-profit corporations that succeed in receiving accommodations to reap significant financial benefits unavailable to secular competitors, resulting in an uneven regulatory playing field and market-distorting effects.¹⁷
 - **Complications in corporate governance.** A bad *Hobby Lobby* decision could threaten the legal protections that corporations provide. Shareholders rely on the corporation's separate existence to shield them from personal liability. A bad *Hobby Lobby* decision would chip away at the separation between shareholders and the corporation that they own, calling into question the existence of the corporate structure—and the protections it provides.¹⁸
- A religious corporation could also lead individuals motivated by religion to seek to establish an official religious component to an otherwise secular corporation and could draw corporate stakeholders into divisive debates over contentious social issues and jeopardize effective corporate management.¹⁹

Religious liberty is a fundamental right and one that must be honored to protect individuals, faith-based entities such as churches, and organizations explicitly established to further the exercise of religion. Indeed, American voters know that existing laws and the Constitution already robustly protect religious liberty.²⁰ As you can see above, however, applying the protections that an individual or religious entity deserves to a secular corporation has the potential to fundamentally change our national concept of religious liberty, turning it into a loophole rather than a fundamental right.

Religious liberty should mean religious liberty for everyone. That includes the freedom from having the theological doctrines of our bosses or those of business owners in our communities forced upon us.²¹

Joshua Field serves as the Deputy Director of Legal Progress, the legal policy program at the Center for American Progress.

Endnotes

- 1 Tara Culp-Ressler, "Obama Administration's New Birth Control Rules Already Gaining Support Among Catholic Leaders," ThinkProgress, February 2, 2013, available at <http://thinkprogress.org/health/2013/02/02/1529501/catholic-leaders-obamacare-rule/>.
- 2 David H. Gans, "Discrimination, Inc.," Constitutional Accountability Center, February 26, 2014, available at <http://theus-constitution.org/text-history/2509/discrimination-inc>.
- 3 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
- 4 C-SPAN, "2012 Politics At Iowa State Fair," YouTube, August 11, 2011, available at <https://www.youtube.com/watch?v=Ezh8ujX6T0A>.
- 5 Ian Millhiser, "How Something Good Could Come Out Of Arizona's Awful 'License To Discriminate' Bill," ThinkProgress, February 21, 2014, available at <http://thinkprogress.org/justice/2014/02/21/3317071/good-come-arizonas-awful-license-discriminate/>.
- 6 Ian Millhiser, "An Upcoming Supreme Court Case Could Impose Arizona's Anti-Gay Bill On The Entire Country," ThinkProgress, February 28, 2014, available at <http://thinkprogress.org/justice/2014/02/28/3347081/upcoming-supreme-court-case-impose-arizonas-anti-gay-entire-country/>.
- 7 American Civil Liberties Union, "Non-Discrimination Laws: State by State Information - Map," available at <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last accessed March 2014).
- 8 Julia Mirabella and Sandhya Bathija, "Hobby Lobby v. Sebelius: Crafting a Dangerous Precedent" (Washington: Center for American Progress, 2013), available at http://www.americanprogress.org/wp-content/uploads/2013/09/Hobby_Lobby.pdf.
- 9 Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., et al. in support of the Government, *Conestoga Wood Specialties Corporation, et al., v. Kathleen Sebelius, Secretary of Health and Human Services, et al.*, United States Court of Appeals For The Third Circuit (January 28, 2014) (Nos. 13-354 and 13-356) available at http://www.lambda-legal.org/sites/default/files/sebelius_us_20140128_amicus-lambda-legal.pdf.
- 10 Julia Mirabella and Sandhya Bathija, "Hobby Lobby v. Sebelius: Crafting a Dangerous Precedent" (Washington: Center for American Progress, 2013), available at http://www.americanprogress.org/wp-content/uploads/2013/09/Hobby_Lobby.pdf.
- 11 Ibid.
- 12 Civil Rights Act of 1964 § 7, 42 U.S.C. §2000e et seq (1964).
- 13 The Pregnancy Discrimination Act of 1978 42 U.S.C. § 2000e-2(a).
- 14 The Fair Housing Act, 42 U.S.C. §§ 3601 – 3619.
- 15 Adam Geller, "Law Shields DC Churches, Leaves Pensions Unprotected," Associated Press, October 5, 2013, available at <http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected>.
- 16 Tara Culp-Ressler, "Republican Officials Won't Give Up The Fight Against Obamacare's Contraception Mandate," ThinkProgress, September 18, 2012, available at <http://thinkprogress.org/health/2012/09/18/864611/republicans-appeal-contraception-mandate/>.
- 17 Brief of the U.S. Women's Chamber of Commerce and the National Gay & Lesbian Chamber of Commerce as Amici Curiae in Support of Kathleen Sebelius et al., *Conestoga Wood Specialties Corp., et al., v. Kathleen Sebelius, et al.*, U.S. Courts of Appeals for the Tenth and Third Circuits (January 28, 2014) (Nos. 13-354 and 13-356) available at <https://www.aclu.org/files/reproductivefreedom/012814/01.28.14%20Amicus%20Curiae%20Brief%20U.S.%20Women%27s%20Chamber%20of%20Commerce.pdf>.
- 18 Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *Conestoga Wood Specialties Corp., et al., v. Kathleen Sebelius, et al.*, U.S. Court of Appeals for the Tenth and Third Circuits (January 2014) (Nos. 13-354 and 13-356) available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amicu_cclp.authcheckdam.pdf.
- 19 Brief of the U.S. Women's Chamber of Commerce and the National Gay & Lesbian Chamber of Commerce as Amici Curiae in Support of Kathleen Sebelius et al., *Conestoga Wood Specialties Corp., et al., v. Kathleen Sebelius, et al.*
- 20 Maureen McCarthy, "New HRC/Third Way Poll: Americans Believe Marriage Equality Poses No Threat to Religious Liberty," HRC Blog, August 1, 2013, available at <http://www.hrc.org/blog/entry/new-hrc-third-way-poll-americans-believe-marriage-equality-poses-no-threat/>.
- 21 Joshua Dornier, "Religious Liberty for Some or Religious Liberty for All?" (Washington: Center for American Progress, 2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/12/ReligiousLiberty.pdf>.