

The Chosen Free

By Kat Heiden

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The *New York Times* headline sums it up nicely: “Supreme Court Rejects Contraceptive Mandate for Some Corporations.” Within this straightforward statement, however, lies an important and surprising keyword: “some.” “Some” suggests that the Court’s decision applies to certain companies with certain characteristics. In this case, that defining characteristic is the business owners’ religious beliefs. The decision ensures that these individuals’ religious freedom is maintained. In doing so, it also violates the freedom of countless female employees by preventing them from accessing the contraception that, per the Affordable Care Act, they have a legal right to obtain at little to no cost. The Court’s decision suggests that religious freedom is somehow more valuable than these workers’ freedom to make decisions about their own health and futures. This fact alone is a fatal flaw in the decision, yet there are several others. In a country where we pride ourselves on “liberty and justice for all,” the *Burwell v. Hobby Lobby* (formerly known as *Sebelius v. Hobby Lobby*) decision applies that liberty selectively, with religious business owners as its “chosen” free people.

If religious employers refuse to include contraception as part of employee health plans, many women can no longer make a choice about whether or not to obtain it. They are stripped of this freedom because without insurance, contraception can be prohibitively expensive. For example, according to Planned Parenthood, an intrauterine device (one of the most effective forms of birth control available) can cost \$500-900 if paid for entirely out of pocket. For a woman making minimum wage, as many workers at retail stores such as Hobby Lobby do, this could mean nearly a month’s full-time wages.

A woman’s decision to exercise her freedom of choice and obtain birth control does not impede anyone else’s freedom. No one will be forced to use birth control just because she has chosen to do so. Before, during, and after the woman makes this choice, the freedom to practice religion will remain intact for all Americans. However, that does not mean we can force people to live under our personal religious guidelines. Disturbingly, the *Burwell v. Hobby Lobby* decision suggests that imposing religious beliefs on others is a freedom to be protected.

Burwell v. Hobby Lobby not only applies the concept of freedom unequally, it also relies heavily on the idea of corporate personhood to underscore its religious favoritism. As Justice Ginsburg noted in her dissent to the decision, “the Court’s expansive notion of corporate personhood invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faiths.” The majority opinion justifies this by stating:

Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

There is a contradiction in this passage that again shows the selective freedom at work in the *Burwell v. Hobby Lobby* decision. The majority defines “people” as including shareholders, officers, *and employees*, and justifies corporate personhood as a way to protect those people’s rights. Yet the employee’s right to contraception is denied in favor of her employer’s “right” to impose his or her own religious beliefs. By treating religious employers differently than

employees of the same corporation, the justices in the majority adhere to only a select portion of their own corporate personhood definition.

To be fair, that selectivity in the context of American freedom is not always a bad thing. In fact, selectivity and freedom are often entwined: private schools are free to select their students, clubs are free to select their criteria for membership, and private citizens are free to select many things, including religious beliefs. However, the Supreme Court is a public body whose purpose is to better define, interpret, and apply law in service of *all* Americans. They cannot select which Americans they serve. In principle, the Court makes our country more free by working to ensure that all laws are just. No one law should be considered better or more important than another because every law serves as a means to an important end: the application of justice to preserve our freedom. Laws that do not achieve this are supposed to be struck down.

The *Burwell v. Hobby Lobby* decision does not strike down an unjust law or create a new one. It simply chooses the application of one existing law over another. The Religious Freedom Restoration Act (RFRA) is favored over the Affordable Care Act. In a more egregious misappropriation of the Court’s power to apply the law, RFRA is also essentially chosen over the First Amendment’s Free Exercise Clause. Justice Ginsburg speaks to this point in her dissent:

“The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993, dictated the extraordinary religion-based exemptions [to the Free Exercise Clause] today’s decision endorses.”

Decisions like *Burwell v. Hobby Lobby* favor some Americans’ freedoms over others, which is extremely problematic. Freedom is the core belief that unites our United States and it is

too precious to be applied unevenly by anyone, especially the highest court in the country.

Freedom here is not only for some. It is not only for a chosen few. In America, liberty and justice must truly be for all.