THE GOSPEL OF CITIZENS UNITED:

IN *HOBBY LOBBY*, CORPORATIONS PRAY FOR THE RIGHT TO DENY WORKERS CONTRACEPTION

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"[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires."
-- Justice John Paul Stevens, dissenting in Citizens United , 558 U.S. 310, 466 (2010)

"We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression. "*--Hobby Lobby Stores Inc. v. Sebelius, 723 F.3d 1114 (10th Cir., 2013), Judge Tymkovitch, United States Circuit Court of Appeals for the Tenth Circuit for the majority*

Introduction

If right-wing America had set out to design a Supreme Court case that combined all of its political fetishes, it could not have done better than to come up with *Hobby Lobby Stores Inc. v. Sebelius*, a devilishly complex assault on Obamacare, women's health care rights in the workplace, and the embattled idea that the Bill of Rights is for people, not corporations. The outlandish claims of the company involved would not have a prayer except for *Citizens United*, the miracle gift of 2010 that just keeps giving.

Hobby Lobby is a big business that wants to deny thousands of its female employees access to certain contraceptives, like Plan B and certain IUDs, which are supposed to be available to everyone under Obamacare but which the company says it finds theologically objectionable. Ironically, Hobby Lobby's private insurance plan fully funded these religiously incorrect forms of birth control for several years before the 2010 passage of the Patient Care and Affordable Care Act and the Department of Health and Human Services' issuance of its "Preventive Services" Rule, which made coverage for them obligatory. So it was the workings of Obamacare that apparently gave this business entity its corporate epiphany that these forms of birth control were sinful and the will to fight the contraceptives it had once been perfectly content to subsidize. Amazingly, this challenge produced an off-the-rails decision by the United States Circuit Court of Appeals for the Tenth Circuit that the company's "religious" rights had been violated.

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The Supreme Court has now taken up the case, which offers the five conservative Justices in the *Citizens United* majority the chance to:

• find that for-profit business corporations enjoy not just the **political** rights of the people but the **religious** rights of the people;

• declare that the "Preventive Services" Rule under Obamacare violates the federal Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., by compelling major business employers to fund religiously offensive contraceptive care for women employees;

• and grant business corporations a sweeping new religious pretext for escaping a wide range of federal laws in the future.

Photo by Nicholas Eckhart

Hobby Lobby has been consolidated with *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir., 2013), in which the United States Court of Appeals for the Third Circuit rejected the same package of arguments, advanced by a company owned by Mennonites, concluding simply that "for-profit, secular corporations cannot engage in religious exercise" and remarking that "we are not aware of any case … in which a for-profit, secular corporation was itself found to have Free Exercise rights."

It is a sign of the times that the Tenth Circuit refused such an obvious conclusion, one arising out of centuries of American jurisprudence about the corporation, and instead voted to give Hobby Lobby the power under RFRA to deny its women employees coverage for certain contraceptives. It is a sign of the perilous corporatist path we are on that the Roberts Court now seems poised to take these claims seriously and to baptize for-profit business corporations as pious citizens, giving them the selective power to discriminate against employees who want nothing more than an equal right to comprehensive health care services.

As we shall see, not only is the Hobby Lobby corporation not being forced to violate its religious rights here (it doesn't have any), but it is not even being forced to pay for the offending contraceptive coverage at all because it is perfectly free under Obamacare simply to pay taxes into the general program rather than to purchase insurance plans for its employees. Payment of the tax would be both a less costly alternative and one that removes the corporation's alleged discomfort about paying for certain kinds of birth control. But the case is sufficiently complex, as a matter of fact and law, that there are many opportunities for conservatives to obscure the reality and promote the brazen claim that corporations are persons and Obamacare is trampling their religious freedoms.

Citizens United: The Walls of Separation Come Tumbling Down

The American people have built two essential walls to protect the integrity of political democracy. The original one is Jefferson's "wall of separation" between church and state, embodied in the First Amendment religion clauses. This wall fosters and protects religious diversity and at the same time makes certain that neither secular government nor individual conscience will be overrun by religious power.

The second one is the wall separating corporate treasury wealth from campaigns for federal public office. This wall was built in federal and state law over the course of the 20th century by progressive movements to guarantee that democratic process and political leadership would not be overrun by private corporate wealth and power, the problem that confronted America in the First Gilded Age.

This wall between corporate wealth and democratic politics was bulldozed and nearly flattened in 2010 by the Supreme Court in *Citizens United*. In that watershed 5-4 decision, the Court granted for-profit business corporations the political free speech rights of the people under the First Amendment, wiping out dozens of federal and state laws, reversing key precedents, transforming corporate treasuries into campaign slush funds, and unleashing untold billions of dollars in the political process.

Now, in *Hobby Lobby*, conservatives on the Court are on the verge of taking a ferocious swing at the wall of separation between church and state, and their sledgehammer is none other than the Citizens United decision itself. Although the case is framed as whether corporations are "persons" under RFRA, the meaning of that important federal statute is determined with respect to the Supreme Court's Free Exercise precedent prior to its decision in *Employment Division v. Smith*,

Hobby Lobby President Steve Green addresses the Faith & Freedom Coalition Road to Majority Conference in Washington, June 15, 2013. REUTERS/Jonathan Ernst

494 U.S. 872 (1990). So the underlying question is necessarily whether corporations have Free Exercise rights.

Hobby Lobby comes from an *en banc* ruling of the United States Court of Appeals for the Tenth Circuit, which has advanced an extraordinary and dangerous conclusion: that a for-profit corporation operating more than 500 arts-and-crafts chain stores across the country and employing about 13,000 workers is actually a "person" engaged in the "exercise of religion" within the meaning of RFRA and, therefore, is immune from having to offer certain contraceptive coverage to its women employees under the Affordable Care Act. The basis for the ruling is that the five members of the Green family who own and operate Hobby Lobby have stated their commitment to "honoring the Lord in all we do by operating the company in a manner consistent with biblical principles." 723 F.3d at 1122. The Tenth Circuit found that, because Hobby Lobby has thus expressed itself "for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. **We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."** (emphasis added)

But Hobby Lobby is neither a "religious employer" nor a non-profit institution. It is a standard for-profit business corporation.

The Tenth Circuit thus not only found that this giant corporation was a "person" practicing its (his? her?) religion but that Obamacare has forced it to violate its sincerely held religious belief that life begins at conception. Specifically, it ruled that the law *substantially* burdened the corporation's "religion" by arguably obligating it, under its employer-sponsored health plan, to cover several forms of contraception—including two types of IUDs and the emergency contraceptives Plan B and Ella—that the corporation considers religiously objectionable.

Furthermore, in performing the analysis required under RFRA, the *en banc* court found that the United States had no compelling interest in making Hobby Lobby, a religiously pious and devout corporation, offer such contraceptives to its female employees against its professed sectarian principles. The comic dimension of the case is that Hobby Lobby's employee insurance policy was already covering the contraceptives it allegedly deplores when Obamacare became the law. In other words, the corporation only became exorcised and religiously activated on the contraceptives when it decided to oppose the new federal policy.

Business Corporations Have Never Had Religious Rights, and the Idea Is Absurd

The astounding nature of the decision becomes clear when we focus on the fact that Hobby Lobby is a regular business corporation, secular in its operations and devoted to profit-making purposes. It is neither a church nor a religious organization. It does not hire its workers based on religious preferences or practices. Under the Affordable Care Act, if Hobby Lobby *were* a church or a non-profit religious organization that had as its purpose the promotion of religious values, and if it primarily employed and served people along religious lines, it would be considered a "religious employer" and it would be *completely* exempted from the contraceptive-coverage requirement. Even if it did not meet those stringent

criteria, the company could still be exempt under the law if it were a non-profit institution that objected to contraceptive coverage for religious reasons, as do certain religious institutions of higher education.

But Hobby Lobby is neither a "religious employer" nor a non-profit institution. It is a standard for-profit business corporation. That is why the case is of such surpassing importance. It threatens to carry over *Citizens United's* transformation of corporations into "persons" for political spending purposes into the realm of religious worship and free exercise, with dramatic implications.

This whole business of humanizing and now ensouling corporations is a radical departure from conventional understandings of what a corporation is, going all the way back to the beginnings of the republic. In 1819, in the *Dartmouth College* case, Chief Justice John Marshall declared that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." 17 U.S. (4 Wheat.) 518, 636 (1819). Chief Justice Marshall thought that, being artificial creatures of the state, corporations had only the rights expressly or impliedly conferred upon them by the states chartering them. The Supreme Court proceeded over its history to reject claims that corporations enjoy many of the personal rights guarantees contained in the Bill of Rights, like the privilege against compulsory self-incrimination, see *Wilson v. United States*, 221 U.S. 361 (1911), or the right to privacy, see *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974). To be sure, corporations have enjoyed due process and equal protection property rights ever since the controversial *Santa Clara County v. Southern Pacific Railroad* decision of 1886, and ever since the *Citizens United* Court took a giant step to the right by declaring the political free speech rights of corporations under the First Amendment in 2010.

The question in *Hobby Lobby* is whether there is anything in the history or doctrine of Free Exercise jurisprudence, or the Religious Freedom Restoration Act, to indicate that corporations are to be treated as rights-bearing for religious purposes. As the Third Circuit found in *Conestoga Wood*, there is absolutely no history of courts providing free exercise rights to corporations, and the whole "purpose of the Free Exercise Clause 'is to secure religious liberty **in the individual** by prohibiting any invasions thereof by civil

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authority.'" 724 F.3d at 385 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) [emphasis added]). The Supreme Court has upheld the Free Exercise rights of persons and churches, but it has never upheld the Free Exercise rights of a private business corporation. As the Oklahoma District Court that was overruled by the Tenth Circuit put it so cogently: "General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions ..." *Hobby Lobby Stores v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012).

Corporations Can't Pray – Even If the Court Treats Them Like Gods

This is the crucial point. The author of the First Amendment, James Madison, argued that religious exercise was a freedom belonging to **individuals**, who have reason, conviction, and a relationship with God, and this freedom could not be tampered with by the state, the church, or any other institutional power. As he put it in his famous Memorial and Remonstrance Against Religious Taxation, quoting from the Virginia Declaration of Rights, "we hold it for a fundamental and undeniable truth 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . .' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."

The Court's campaign to treat corporations like "persons" for constitutional purposes actually gives corporations the power to **dominate** the political and private lives of citizens. *Citizens United* was decided in the name of free speech, but no person's right to spend his or her own money on political campaigns was enlarged by it in any way. The effect of the decision was to give CEOs the power to take unlimited amounts of money from corporate treasuries and spend it advancing or defeating political candidates and causes of their choosing. Its real-world consequence was thus not to expand the political **freedom** of citizens but to reduce the political **power** of citizens vis-à-vis huge corporations with vast fortunes. These corporations, endowed with limited shareholder liability and perpetual life, may now freely engage in motivated political spending to enrich themselves and their executives, leaving workers and other citizens behind. Adding insult to injury, most of the stock in large corporations is owned

Supreme Court

Citizens United Rally 2011

by large entities, like retirement funds, mutual funds, and foundations, which cannot take positions on political races but invest the money of real, live citizens in these corporate and political behemoths.

Similarly, *Hobby Lobby* was decided by the Tenth Circuit in the name of Free Exercise of religion and free individual choice, but the decision makes a mockery of religion and, in the real world, destroys the free individual choices of women who are denied their rights to full contraceptive care under the Affordable Care Act. Anyone who has the slightest bit of spiritual belief knows that the religionist's relationship with God is intensely personal and bound up in one's deepest values, beliefs, and ideas about the world. But, as Justice Stevens observed in dissent in the *Citizens United* case, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires." 558 U.S. at 466. Corporations cannot believe in God even if they are being treated like Chosen persons by the Supreme Court. Corporate religiosity is both an unconstitutional idea and a profoundly impious one.

The real-world effect of giving corporations religious rights under RFRA or the First Amendment is not to deepen the corporations' personal relationship with God, but to give their owners and managers the power to impose their religious and political beliefs on their employees — in this case, to deny their women employees free individual choices in reproductive and contraceptive care. *Hobby Lobby* (conveniently) involves only four contraceptive drugs which are alleged (falsely according to many experts) to be abortifacients, but if corporations get the right to deny **certain** contraceptives because of their religious beliefs, they will of course have the right to deny their employees access to all contraceptives because of religious beliefs. The Court has always emphasized that it does not police the content or consistency of religious beliefs and dogmas.

Indeed, it follows logically from the Tenth Circuit decision that corporations have a presumptive right to get out from under any federal law considered religiously objectionable, because RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). Thus, a secular corporation owned by Christian Scientists could presumptively refuse to pay for any insurance plan involving doctors or hospital care; a secular corporation owned by Jehovah's Witnesses could presumptively refuse to pay for any insurance covering blood transfusions; a secular hotel chain owned by Fundamentalists could insist, against the requirements of federal labor and employment law, that all employees join the church; and any hotel, motel, or restaurant owned by a member of the Aryan Nations' Church of Jesus Christ Christian, which forbids "race-mixing" as a matter of church doctrine, could claim exemption from the Civil Rights Act of 1964.

The fact that Hobby Lobby is a "closely held" family-owned corporation makes no difference, because all corporations are legally distinct from their shareholders in all cases, and the rights being asserted in *Hobby Lobby* are the rights of the corporation, not the owners. In any event, as a number of states point out in an *amicus* brief led by California, family-owned or controlled businesses account for more than 80% of

all American businesses, 60% of all U.S. employment, and one-third of all Fortune 500 companies. The religious rights that a small or family-owned corporation wins are the religious rights that a big or publicly held corporation will have. *See Citizens United*. There is definitely no constitutional difference between the status of a large corporation and a smaller one.

Saving Grace: The Whole Premise of the Case Is Flawed

It seems quite likely that the *Citizens United* five-Justice majority could vote for Hobby Lobby because the strongest pro-corporate Justices are also the weakest defenders of the separation of church and state. As usual, a high burden of hope rests with Justice Kennedy to pull the Court back from another jarring assault on constitutional democracy.

But even if the Court, disastrously, gets it wrong on the central question of whether for-profit business corporations can exercise religious freedoms, there is another chance for the Court to pull back from the brink at least on the Obamacare question. The whole premise of the litigation in *Hobby Lobby* is that federal law (specifically, the HHS "Preventive Services" Rule) compels the company to furnish employees with a health insurance package that covers the offending contraceptives, thus substantially burdening the company's alleged RFRA and Free Exercise rights. But this is a complete misunderstanding of how the law works because the company is not compelled to offer its employees any health insurance package, much less a package with specific contraceptives.

As Marty Lederman has pointed out in great detail in a trenchant blog post ("Hobby Lobby Part III—There Is No 'Employer Mandate'"), federal law and the HHS rule specifying covered contraceptives "do not impose any obligations at all on employers, such as Hobby Lobby and Conestoga Wood." Rather, federal law "requires virtually all **group health-insurance plans**, and **insurers of group or individual health insurance**, to include coverage for various preventive services, including 18 forms of FDA-approved birth control, without 'cost sharing' . ..." (emphasis added). However, it is true that if a plan or insurer fails to include the required items in a plan, the government can tax not only the plan and the insurer but the sponsoring employer as well.

A secular corporation owned by Christian Scientists could presumptively refuse to pay for any insurance plan involving doctors or hospital care; a secular corporation owned by Jehovah's Witnesses could presumptively refuse to pay for any insurance covering blood transfusions.

But here is the key point: as Lederman writes, **"federal law does not impose a legal duty on large employers to offer their employees access to a health insurance plan,** or to subsidize such a plan. There is no such 'employer mandate.'" (bold in the original). Rather, the Affordable Care Act imposes a tax on large employers in order to have them share in the cost of paying for the new national entitlement to health insurance. This is also how Social Security works: employers pay taxes to the government, which in turn pays Social Security benefits to individuals. However, unlike employers in the Social Security system, large employers in the ACA also *have an option to offer a health insurance*

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plan directly to their employees, which is what Hobby Lobby is doing, and then to escape the new tax entirely. But the courts that have been examining the issue have wrongly characterized this tax system as a series of fines or penalties on employers for not covering their workers. This is plainly wrong. In fact, the statute calls the direct payment to the government a "tax," and the tax payment that Hobby Lobby or any other large business would pay, for reasons Lederman explains in detail, "is almost certainly far less than the employer would spend on insurance premiums and/or outlays if it offered its employees a health-insurance plan."

Thus, as the Fourth Circuit Court of Appeals stated in the *Liberty University* case, the ACA "leaves large employers with a choice for complying with the law—provide adequate, affordable health coverage to employees" or else "pay a tax," a tax under the law which the Fourth Circuit, no liberal court, described as "proportionate" and not "punitive."

By explaining how the ACA really works with respect to the employers, Lederman properly frames the RFRA and constitutional questions. Since Hobby Lobby can simply pay its tax (and **save** money along the way), it must prove that payment of the ACA tax would itself constitute an impermissible "substantial burden" on its religious free exercise. That proposition is, of course, absurd since the company's tax dollars already go to support Medicaid and Medicare, and the Supreme Court has never found, nor could it find, that taxing people (or corporations!) to provide contraception or abortion services violates their religious free exercise rights. If that were the case, every Quaker pacifist in America would be getting a rebate for that portion of his or her tax dollars going to military spending, every Scientologist would be getting a rebate for psychiatric services paid for by the military or federal prisons, and every Christian Scientist would be getting a rebate for that portion of his or her taxes going to pay for any conventional medical care at all. It simply does not "substantially burden" anyone's religion to pay the government taxes for public services that they disagree with, such as war and military spending, the draft, Social Security, psychiatric services, or contraceptive education and coverage.

The Supreme Court in *United States v. Lee*, 455 U.S. 252 (1982), rejected an argument by an Amish employer that he should be exempt from paying Social Security taxes for his employees because it violated his religious

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faith, a decision that simply precludes any effort to assert that the Obamacare tax itself violates RFRA or Free Exercise. Furthermore, as Lederman observes, "a central component of plaintiffs' own RFRA arguments is that a 'less restrictive' means for government

Photo by Raychel Mendez via Flickr

to further its *interests without substantially burdening plaintiffs'* religious exercise would be for the government to use its own revenues to subsidize contraceptive use by Hobby Lobby and Conestoga Wood employees. Well, that is exactly what would occur if those employers were to choose to make a [tax] payment rather than offering their employees access to an employer plan." (emphasis in the original)

In short, even if corporations were persons with a religious conscience, and even if it authentically offended the religious sentiments of these corporate persons to have to pay a third-party health insurance provider for making certain contraceptives available to employees, there would still be no problem under RFRA or the Free Exercise Clause because the affected corporations can simply pay a tax instead.

The Religion of Business, the Business of Religion

Hobby Lobby is a case whose major claims would not have a prayer in any other Court at any other time. Yet, the *Citizens United* Court has made a religion out of business, so it is only natural that some people will now want to make a business out of religion.

But it is time for the Court to restore some reality to the conversation. Business corporations do not belong to religions and they do not worship God. We do not protect anyone's religious free exercise rights by denying millions of women workers access to contraception. And, as a matter of fact and law, employers are not being forced to purchase insurance plans at all for their workers because they can pay a simple and cheaper tax instead. The *Hobby Lobby* case is a tissue of misunderstandings, propaganda, and excruciating extrapolations from the *Citizens United* decision. It might be nice if the Court used the occasion of this train wreck of a case to rewind the tape on *Citizens United*. But some things may be too much even to pray for.

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