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## Law and Religion Collide: Supreme Court Punts High-Profile Case Concerning the Legality of Ensuring Female Contraception Insurance in the Face of Religious Objections

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DIALOGUE BY LAW

# LAW AND RELIGION COLLIDE

Supreme Court punts high-profile case concerning the legality of ensuring female contraception insurance in the face of religious objections.

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What should we do when the law conflicts with a person's religious obligations? Should the government be required to exempt the person from having to comply with the law? Or should the person be required to abide by the law even if it means violating his or her faith?

If you think the government should always exempt religious objectors, think again. What if the objectors insist on practicing human sacrifice, performing female genital mutilation, or marrying off girls before they've reached puberty?

Perhaps you think the government should never exempt religious objectors. But would you still feel this way if the government prohibited all alcohol consumption so that Catholics couldn't get wine for Communion, or if the government banned all male circumcisions as medically unnecessary? (Don't forget that San Francisco almost voted on a ballot measure to ban circumcisions, which proponents described as a "painful and damaging surgery to an unwilling patient.")

Congress tried to strike an appropriate balance between religious liberty and respect for the law when it enacted the Religious Freedom Restoration Act ("RFRA") in 1993. RFRA provides that the government can "substantially burden" a person's religious exercise only when the government has a "compelling interest" for doing so and there is no other way to further the government's interest.

RFRA applies only to the federal government, but many states have their own "mini-RFRA" laws with similar provisions. These are laws that photographers and florists have cited when refusing to abide by state or local anti-discrimination laws that require them to serve same-sex couples.

The Supreme Court issued a major decision on RFRA in 2014 when it considered the objections of two family-owned corporations (Hobby Lobby and Conestoga Wood Specialties) that refused to provide their employees with insurance coverage for certain contraceptives. The Affordable Care Act ("ACA") required the companies to provide health insurance for their employees, and regulations required this insurance to include all FDA-approved contraceptives.

The companies, and the families who owned them, said that some of these contraceptives destroyed a fertilized egg, which their religion equated with the taking of a human life. They therefore refused to provide coverage for these contraceptives and sought an exemption under RFRA.

The Supreme Court split 5 to 4. The five conservative justices ruled in favor of the companies. The four liberal justices dissented. The conservatives readily accepted that the law "substantially burdened" the corporations' religious exercise. The dissenters found this remarkable since the law applied only to the corporations, not to the owners, and the dissenters didn't think that for-profit corporations practiced religion. They also thought that the burden on the corporations' religious practice was attenuated because the women employees, not their corporate employers, made the decision to use contraceptives. But the majority accepted the corporations' contention that merely facilitating employee contraceptive use was a substantial burden on their faith.

The conservative justices were willing to assume that the government had a "compelling interest" in ensuring that women had access to contraceptives, but they found that there was a less restrictive means of furthering this interest. The Court noted that the ACA already had an exemption for non-profit religious groups, like Catholic hospitals and universities, which allowed these organizations to notify either the government or their insurance companies that they objected to providing contraceptive coverage. Once this notice was given, a non-profit's insurance company was required to provide contraceptive coverage to the non-profit's employees without charging the em-

ployer. This may sound unfair to insurance companies, but they were expected to recoup these expenses from the savings resulting from fewer unintended pregnancies.

The conservative justices saw no reason why the government couldn't offer this same workaround to for-profit companies like Hobby Lobby. Indeed, the workaround seemed like the perfect solution. It ensured women access to contraceptives without burdening their religious employers.

Or so it seemed. Then the next round of challenges to the contraception mandate began. This time the challenges were brought by the religious non-profits who were already eligible for the workaround. What could they possibly object to?

The non-profits said that the mere act of giving notice to the government or insurance companies to activate the workaround was a substantial burden on their faith. Because the notice was the trigger that caused insurance companies to provide contraceptive coverage for employees, the non-profits believed that they were still facilitating contraceptive use and were thus morally complicit in this sinful behavior.

If Justice Antonin Scalia were still on the Supreme Court, there might have been 5 justices who accept the non-profits' argument. But without Scalia, the justices are likely split 4 to 4.

In these situations, the Court can declare itself evenly split, which does not set any national precedent and upholds the lower court decisions. In this instance, that would mean the non-profits would lose in seven federal courts of appeals and win in one.

But the justices seem eager to avoid these split decisions. So they search for ways to cobble together a majority, even if it means issuing an opinion that decides very little.

Last Monday, the Supreme Court took this narrow approach in the cases involving the religious non-profits. It sent the cases back to the lower courts with instructions for the judges to encourage the parties to find a solution that is satisfactory for all.

Whether such a solution actually exists is another matter. The parties can probably solve the notice problem, but the non-profits are also insisting that the contraceptive coverage be completely separate from the employers' insurance policies and that women employees be required to "opt-in" to receive the coverage. The government objects to both of these requirements, which it says will frustrate the government's objective of ensuring that women receive contraceptive coverage "seamlessly . . . with the rest of their health coverage."

Assuming the parties can't agree, how would you rule? Should the law have to accommodate these religious non-profits, or should the non-profits have to accommodate the law?

Personally, I would choose the latter. When Congress enacted RFRA, it said it wanted judges to strike "sensible balances" between religious liberties and government interests. In this instance, the government has already tried to accommodate the religious sensibilities of these non-profits by offering the workaround. For the non-profits nevertheless to insist that they can't even give notice of their religious objections, and to then further dictate how insurance companies must issue their policies and require women to "opt-in" is crossing the line from protecting their own beliefs to imposing their beliefs on others. The government has already struck a sensible balance. RFRA should require nothing more.

Religious groups sometimes think that RFRA and mini-RFRA laws give them a "get out of jail free" card that allows them to ignore any law that they claim burdens their faith. But as even Justice Scalia rightfully observed, allowing religious objectors to be exempted from any law that burdens their faith would make every conscience "a law unto itself." And "[a]ny society adopting such a system," he warned, "would be courting anarchy."

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