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Diana Hassel's Post

Gender Divide on the Supreme Court

Posted by Diana Hassel on 10/13/2014 at 11:02 AM

In what has now become a familiar end of term development, the U.S. Supreme Court in June 2014 expanded the rights of corporations, in this instance to include the right to exercise religion.

In a more unusual development, the female justices, joined by Justice Breyer, filed a scathing and critical dissent. And in unusually candid comments in the media Justice Ginsburg stated that the men on the Court had a “blind spot” when it came to women and that they did not understand the ramifications of their decision in *Burwell v. Hobby Lobby*. In addition to the sometimes sharp political differences that already exist on the Court, it seems, that at least when it comes to women’s rights, another contentious divide has opened up, this time based on gender.

Hobby Lobby concerned a claim under the Religious Freedom Restoration Act (RFRA) by a closely held for profit corporation, operating more than 500 retail stores with more than 15,000 full time employees, that its exercise of religion was substantially burdened by the Affordable Care Act (ACA). The ACA requires that the medical insurance provided by employers include coverage for a wide range of contraceptives. Hobby Lobby argued that because its owners believe that certain types of contraceptive methods are immoral, requiring the corporation to purchase such coverage places a substantial burden on its exercise of religion. The Court’s decision both allowed the for-profit corporation to bring its claim and concluded that Hobby Lobby would likely succeed on the merits, reasoning that the government could not show that mandating corporations such as Hobby Lobby to provide the coverage was the least restrictive way to accomplish government goals.

In her dissent, Justice Ginsburg characterizes the Court’s decision as one “of startling breadth” and states that “until today, religious exemption had never been extended to any entity operating in the ‘commercial, profit-making world.’” She further emphasizes that “‘[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.’” Justice Ginsburg concludes that allowing corporations such as Hobby Lobby to be exempted from the ACA’s requirements “would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage.”

The *Hobby Lobby* decision was followed shortly by *Wheaton v. Burwell*, in which the Court extended its protection from the ACA's contraceptive coverage requirements. The ACA provides an accommodation for the religious beliefs of non-profit religious organizations such as religious colleges, hospitals and other charities, offering such entities an exemption from the requirement of contraceptive coverage. Wheaton claimed that filing the form necessary to claim the exemption would implicate the college in providing contraceptive coverage and therefore would substantially burden its exercise of religion under RFRA. The Court issued an injunction relieving Wheaton from the requirement to use the form. Justice Sotomayor's angry dissent, joined by Justices Kagan and Ginsburg, accuses the majority of "going back on its word" in *Hobby Lobby* and argues that the relief granted by the Court "evinces disregard for even the newest of this Court's precedent and undermines confidence in this institution."

As a result of the dissents in *Hobby Lobby* and *Wheaton*, articles with titles such as, "Supreme Court Women Lash Out at Birth Control Decision;" "Female Justices Issue Fierce Dissent;" and "War on Women Comes to Supreme Court" have been common in the media. As the new term begins, stay tuned to find out whether the gender divide on the Supreme Court continues to grow.