New Rights and Odd Claims in the Hobby Lobby Oral Argument

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When looked at from the perspective of women's rights, the oral arguments in the *Sebelius v. Hobby Lobby* and *Conestoga Wood v. Sebelius* cases before the Supreme Court were curious. These cases represent two corporations' combined challenge to the Affordable Care Act (ACA) requirement that employer health plans must include no-cost coverage for the federal government's complete list of approved contraception methods. In the objections to the contraceptive coverage policy, we saw assumptions of rights that don't exist; little acknowledgment of the rights at stake; and arguments that are counterintuitive, to put it mildly.

A RIGHT TO AVOID PAYING FOR MEDICAL COVERAGE THAT INCLUDES ABORTION?

There was an undercurrent in the conservative justices' questions that was so unsettling it was hard to ignore. For example, Justice Anthony Kennedy insisted on pursuing a hypothetical in which he treated a requirement to pay for abortion as beyond the pale. To Donald Verrilli, Jr., the solicitor general representing the Obama administration, Kennedy stated: "Under your view, a profit corporation could be forced … in principle to pay for abortions." The implicit point was that such a legal requirement is so outlandish that the government's contraception policy would be illegal by extension.

has stayed technically legal while other crucial aspects of abortion availability—including the providers' ability to offer the procedure and women's capacity to afford it—are receiving precious little federal support against encroaching state forces. This equivocal backing for the constitutional right to abortion access is borne out when one considers that Justice Kennedy was one of the three justices in the *Planned Parenthood v. Casey* decision whose reasoning helped turn back the justices who would have overruled much of *Roe v. Wade*.

More recently, though, the conservative justices have become more aggressive in putting women in their place, e.g., as less valuable than a fetus. In *Gonzales v. Carhart*, the plurality decided that the

the statement by the lawyer for the for-profit corporations, Paul Clement, who asserted that this case is "easier than most" because "it's so religiously sensitive, so fraught with religious controversy." Actually, the courts are not supposed to rank religious beliefs. Under the Establishment Clause, Evangelical and Catholic leaders' objections to women's reproductive healthcare are no more religiously important or sensitive than those of Jehovah's Witnesses to blood transfusions. Is abortion care really more controversial than faith-healing parents who let their *live* children die or become permanently disabled from a lack of medical care? Abortion is highly politicized, but this does not make religious beliefs against it more important, relevant or persuasive

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No Supreme Court case has ever held that there is a free exercise right not to pay for abortions. No such case was ever needed, because the religious lobby against abortion is so powerful that it has obtained statutory exemptions across the board. The Hyde Amendment—a rider barring federal funding for most abortions—has been attached to Congressional appropriations bills since 1976, a mere three years after *Roe v. Wade* was decided. But setting aside these statutory exemptions, there is no First Amendment argument that would require making an exemption available from healthcare funding that includes abortions, which, after all, are medical services protected by *Roe*.

Somehow, a woman's long-settled right to obtain an abortion in consultation with her doctor has been transmogrified into an alleged right of corporations to refuse to provide coverage that includes abortion. This seems like a rights shell game, in that abortion care

government could take the side of the fetus, rather than protecting a pregnant woman's rights:

"The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had 'undervalue[d] the State's interest in potential life.'"

With a 5–4 decision, the court proceeded to uphold the federal ban on intact dilation and extraction, a method used in later abortions, which has no exception for a woman's health. While the court left open the possibility that a woman whose health is actually endangered might have a case against the statute, a majority of the court sent a strong signal that has encouraged predisposed states to enact some of the most demeaning and restrictive antiabortion statutes since the advent of *Roe*.

The attitude that abortion is its own special religious category was reflected in

than other religious convictions. This supposed hierarchy of beliefs, which makes beliefs against a woman's right to choose paramount, is another manifestation of the insidious backlash against women by certain religious entities that our country is enduring in this era.

A RIGHT TO DEFINE MEDICAL SCIENCE?

Another odd element of this case is that Hobby Lobby is objecting to certain forms of birth control on the assertion that they are "abortifacients," even though medical science firmly and definitively rejects such a claim. That raises the question of whether the Religious Freedom Restoration Act (RFRA), or any other federal law, requires the government to treat as sincere a claim that is provably, scientifically wrong.

It is one thing for the courts to accommodate a believer's sincere convictions regarding the soul, eternal life and God. It is quite another to provide accommodation for a belief that incorporates a

demonstrably false scientific claim in the context of a medical care statute. The ownership of Hobby Lobby does not believe in abortion. Okay. But the medications to which it objects—two intrauterine devices and two forms of emergency contraception—don't cause abortions and, therefore, there is no substantial burden to the owners, the threshold required by RFRA. As the Ninth Circuit noted in *Navajo Nation v. US Forest Service*, it is not enough to allege merely a "subjective, emotional religious experience."

In fact, the contraceptive coverage issue for Hobby Lobby is closer to the evolution cases we have seen decided in accordance with the Establishment Clause than it is to any free exercise case. Use and Institutionalized Persons Act) instructed the courts to take into account harm inflicted on third parties by the believers' demand to trump the law. The problem was summarized nicely by Justice Kennedy, who pointed out that the employers' stance "put the employee in a disadvantageous position. The employee may not agree with these religious … beliefs of the employer. Does [sic] the religious beliefs just trump? Is that the way it works?" (With this question, when you add it to his abortion questions, which would take him in a different direction, it becomes quite apparent he holds the balance on this case, as he so often does.)

The problem might lie with those justices who do not give pride of place to the needs of women who would be harmed by

Normally, the Supreme Court waits to take a case until the issues have long percolated, which gives the court the benefit of arguments that have been well-honed in litigation and upon which numerous judges have weighed in with various approaches to the issues. That did not happen with the Affordable Care Act cases, and it is unfortunate. Had the Supreme Court waited, they would also have, in all likelihood, the precedent of cases where civil rights organizations, on behalf of female employees, raised Title VII claims against for-profit corporate employers that exclude contraception from workers' coverage. A fuller picture might have emerged then, with the women who have been affected and discriminated against taking a central place in the courtroom and outcome, as the per-

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HARM TO THE FEMALE EMPLOYEES—DOES IT MATTER?

It's not that the oral argument never touched on the effect an exemption for the corporations would have on female employees—the discussion was rife with references to the fact that Hobby Lobby and Conestoga Wood's positions harm their female employees. Solicitor General Verrilli repeatedly pointed out that the Supreme Court's First Amendment decision in *United States v. Lee* required courts to consider harm to others that might result from a judgment in a free exercise case. Justice Ruth Bader Ginsburg added that their unanimous decision in *Cutter v. Wilkinson* (which she wrote) involving the same standard (under the Religious Land an exemption for Hobby Lobby, Conestoga Wood or any other corporation. That seemed to be where Justice Scalia was headed when he posited that RFRA does not explicitly state that the courts are to "balance the interest of the religious objector against the interest of other individuals." Yet, he cannot be completely serious about that point. RFRA imposes a burden on the government to prove its law serves a "compelling interest," and it would be nonsensical to say that the government's interest never involves the interests of others. In fact, it usually does. In this case, the relevant Affordable Care Act provision was enacted to protect women's health, as the hefty study that spurred the provision established beyond a doubt. The government surely has a compelling interest in the reproductive health of the millions of American women. Moreover, failure to consider the impact on others turns RFRA into a *per se* preference for believers, which violates the Establishment Clause.

spectives of for-profit corporations were in the hearing.

If the court were to hold that RFRA eschews any concerns about third-party harm, we will have landed on the RFRA of the religious lobbyists' dreams, and every vulnerable person's nightmares: pure religious narcissism. In a nutshell, "My actions trump your needs and secular freedoms, because my actions are based on religious beliefs. Period." If that is the test adopted by the court, the floodgates will open, as Justices Elena Kagan and Sonia Sotomayor strongly emphasized. Ironically, that might well be a gift, because it would likely trigger a movement to repeal RFRA.

WHAT IS THE LIMITING PRINCIPLE?

The most important element of any Supreme Court argument is a limiting principle, which would prevent absurd results in future cases. Open-ended and unworkable constitutional rules are unattractive to the court. This is where the

plaintiffs' lawyer Clement fell down. He was forced to concede time after time that there is no limit to his theory—that his clients' "rights" were simply trump cards that overcome women's rights, employee rights and science. His theory pushes all preventive medical care to the top of a very slippery slope.

Clement was challenged to explain how the court could hold that these companies could pick and choose among required medical treatments, but other employers would not be able to object to vaccinations, blood transfusions, colon screenings or indeed, all medical treatment. (He had no answer for that, other than the specter of an endless stream of RFRA cases.) In truth, under Clement's theory, Hobby Lobby's attack on four out of 20 types of contraception is no different from an attack on all contraception, all preventive care, or any other medical treatment, as Justice Kagan pointed out.

This is a court that is very committed to providing guidance to the lower courts. Clement gave none, and he guaranteed a constant stream of cases from every individual and corporation seeking a religious exemption, which would result in a wide variety of likely irreconcilable outcomes across the country. A decision that only creates more confusion is a failure. More worrisome, though, is that Clement's theory is a recipe for religious divisiveness like we have not seen for centuries.

These are frustrating cases for those of us who believe in a woman's fundamental equality as an individual, not to mention her right to choose, and a couple's right to control their own family planning, particularly for those of us who hold these views as part of our religious faith. Until recently, many of us assumed that no religious entity would have the temerity to attack contraception, despite the constant battering of abortion rights, because overwhelming majorities of Americans use it. We were wrong. These cases and the oral arguments did not reduce my frustration level, I have to say. ■

On March 25, Catholics for Choice ran this ad in the *Washington Post* exposing who supported the cases before the Supreme Court that opposed the contraceptive coverage benefit in the Affordable Care Act, and asking whose religious freedom is really at stake.