HEALTH LAW, ETHICS, AND HUMAN RIGHTS

Mary Beth Hamel, M.D., M.P.H., *Editor*

Money, Sex, and Religion — The Supreme Court's ACA Sequel

George J. Annas, J.D., M.P.H., Theodore W. Ruger, J.D., and Jennifer Prah Ruger, Ph.D., M.S.L.

The Supreme Court decision in the Hobby Lobby case is in many ways a sequel to the Court's 2012 decision on the constitutionality of the Affordable Care Act (ACA).[1,2] Like the 2012 case, the decision was decided by a 5-to-4 vote, but in the initial ACA decision, Chief Justice John Roberts acted to "save" the ACA.[3] Not this time. Then the watchword was "broccoli," as in forcing people to eat it; this time it is abortion, as in forcing employers to pay for it. To simplify, the choice facing the Court in the Hobby Lobby case was whether to favor the exercise of religion by for-profit corporations (whose owners believe contraceptives that may prevent fertilized eggs from implanting violate their religious beliefs) over the federal government's attempt to create a uniform set of health care insurance benefits. As recommended by the Institute of Medicine (IOM),[4] such benefits include all contraceptives approved by the Food and Drug Administration (FDA) as preventive health care for women.

Two editorials neatly summarize the conflicting politics of the decision. According to the *New York Times*, the "deeply dismaying decision . . . swept aside accepted principles of corporate law and religious liberty to grant owners of closely held, for-profit companies an unprecedented right to impose their religious views on employees . . . [by denying] thousands of women contraceptive coverage vital to their well-being and reproductive freedom."[5] The *Wall Street Journal*, on the other hand, saw the decision as "narrow [and] an important vindication of religious liberty in this (still blessedly) pluralistic constitutional republic," noting that "women who work for the small number of religiously oriented businesses will still be able to buy birth control for as little as $9 a month."[6]

The majority decision, written by Justice Samuel Alito, is a setback for both the ACA's foundational goal of access to universal health care and for women's health care specifically. It is also especially worrisome that abortion is again at the center of the continuing debate over the implementation of the ACA and that the challenge of abortion has been expanded to include birth control.[7] This has happened even though, in the opinion of medical experts, the four methods of contraception under scrutiny do not induce abortion; rather, they prevent abortion by preventing pregnancy.[4,8] This controversy could occur only because in assessing the competing claims about abortion and birth control, the Court's majority focused on the religious claims of the corporations without discussing scientific or medical opinions. As Judge Mary Beck Briscoe observed in her dissent in the 10th Circuit, the belief of Hobby Lobby's owners "is not one of religious belief but rather of purported scientific fact."[9,10]

THE ACA AND THE RELIGIOUS FREEDOM RESTORATION ACT

The ACA does not itself require insurance plans to cover contraception but does require coverage of four categories of preventive care without cost sharing by patients. The fourth category covers women's health and requires new insurance plans to cover "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA)" of the Department of Health and Human Services (HHS).[11] HRSA asked the IOM to help the agency develop this list,[4] and the IOM applied neutral scientific and medical criteria to conclude that coverage should include the "full range" of FDA-approved contraceptive methods. HRSA adopted this recommendation, and HHS promulgated the contraceptive-coverage regulations, which include 20 specific contraceptives, accordingly.[12]

The owners of Hobby Lobby and Conestoga Wood Specialties objected to the inclusion of four

of the FDA-approved contraceptives (two types of intrauterine devices [IUDs] and the emergency contraceptives Plan B and Ella) because they believed that these devices or drugs could induce abortion. The Conestoga board of directors believes that "human life begins at conception," that it is a "sin against God" to be involved in the "termination of a human life," and that the four FDA-approved contraceptives might operate as "abortifacients."[2] Hobby Lobby's owners similarly believe that life begins at conception and that it would be a violation of their religion "to facilitate access to contraceptive drugs or devices that operate after that point."[2]

The case centered not on a constitutional analysis of the First Amendment but on interpreting a federal statute, the 1993 Religious Freedom Restoration Act (RFRA), which states that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless it] is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."

For RFRA to be relevant, the term "person" must include for-profit corporations. Despite the statute's silence on this point, and strong historical and conceptual arguments for excluding corporations (which are artificial persons created by law and are separate and distinct from their shareholders)[13] from RFRA's protection of religious freedom, the majority concluded that corporations are persons under RFRA. The majority understood that corporations are legal fictions, artificial entities created entirely by law, but nonetheless observed that the corporation is created to protect the rights of real people, including "shareholders, officers, and employees." The fact that corporations themselves cannot exercise religion is, in the words of the majority, "quite beside the point. Corporations 'separate and apart from' the human beings who own, run, and are employed by them cannot do anything at all."[2] This is true, but it does not explain why corporations have always been treated in law as entities separate from their human owners. Nonetheless, once the majority concluded that a nonprofit corporation can exercise religion, the justices could find no reason, and no congressional intent, to exclude for-profit corporations from RFRA's protections.

The majority also found that the contraceptive-coverage regulations "substantially burden" the corporations' exercise of religion. This is because in order to follow their religion, the owners believed they could not offer insurance that covered any contraceptive that "may result in the destruction of an embryo."[2] And if they excluded these contraceptives, the "economic consequences will be severe" under the ACA.[2] They could, for example, be taxed $100 a day for each affected individual. The corporations could also drop insurance coverage entirely and pay less under the ACA than the cost of coverage. The majority rejected this option because the corporations believed that providing health insurance was also a religious obligation.

RELIGION AND BIRTH CONTROL

The majority's finding left only two legal issues to be decided. Does the state have a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing? And if so, is the regulation the "least-restrictive means" to ensure this? The majority assumed, without deciding, that the government's interest was compelling and quickly moved to the then decisive question of whether the contraceptive mandate was the least restrictive means. The majority's answer was no.

The majority of the Court suggested two less restrictive means. The first was for the federal government to pay the cost of covering the four contraceptives at issue. This suggestion does not seem to be politically realistic. The second less restrictive alternative was more serious and more interesting. HHS regulations had already established an accommodation for nonprofit religious corporations — namely, they can self-certify that they have a religious objection to particular contraceptives, and an alternative plan will be put in place to ensure coverage to their employees without payment or other action by the objecting corporation. The majority first suggested that this is a reasonable accommodation but then almost immediately said it might not be legal, thereby saving for a future date the issue raised by the Little Sisters of the Poor who objected even to filing a certificate.[14]

Nonetheless, in light of the importance of the HHS accommodation to the Court's opinion, the three women justices were surprised when, only 3 days after issuing the Hobby Lob-

by decision, a majority of the Court issued an order provisionally exempting Wheaton College from the self-certifying accommodation. To do this, the majority had to take seriously Wheaton's argument that the HHS accommodation itself violates an institution's religious freedom on the basis of an even more attenuated theory of cause and effect than that at issue in the Hobby Lobby case. Justice Sonia Sotomayor dissented, joined by Justices Ruth Bader Ginsburg and Elena Kagan, and rightly juxtaposed the two seemingly incongruous rulings, writing that "[t]hose who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation" to hold in Hobby Lobby's favor, "the Court now, as the dissent in *Hobby Lobby* feared it might . . . retreats from that position." For the dissenting justices, such action "evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution."[15]

Near the end of their opinion in *Hobby Lobby*, the majority stated that HHS apparently believes that "no insurance coverage mandate would violate RFRA . . . [even requiring, where legal] all employers to provide coverage for . . . third-trimester abortions or assisted suicide." Since religious people could not do this, "HHS would effectively exclude these people from full participation in the economic life of the Nation," by effectively precluding them from using the corporate form to do business.[2] The majority added that not all religious objections to specific mandates, such as immunizations, would necessarily succeed but did not explain why not or provide doctrinal principles that would ensure that immunizations remain mandatory. The majority noted that religious objections to taxes would not succeed because this would "lead to chaos"[2,16] but did not explain why this government-required payment for taxes does not apply to government-required payments for not providing adequate health insurance to your workers.

RELIGION AND WOMEN'S HEALTH

Justice Ginsburg wrote the dissent for herself and Justices Stephen Breyer, Kagan, and Sotomayor. The gender lineup is instructive: all three female justices supported the lawfulness of the contraceptive mandate, whereas five of the six male justices did not. Justice Ginsburg began her dissent by noting that the majority opinion was "of startling breadth," holding as it did that "commercial enterprises . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs . . . [without regard to the] disadvantages that religion-based opt-outs impose on others."[2]

Echoing the majority's view that the ability to form a corporation gives a person the ability to participate in the economic "life of the Nation," she quoted a prior decision in which the Court acknowledged that "the 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." Gender equality in health care is what the contraceptive regulation sought to promote by putting "health care decisions — including the choice among contraceptive methods — in the hands of women, with the aid of their health care providers."[2]

Justice Ginsburg was not persuaded that RFRA even applies to for-profit corporations, making the point that prior to this opinion, the Court had never recognized that a for-profit corporation could qualify for a religious objection to a generally applicable law. In her view, nonprofit religious corporations can be distinguished from for-profit corporations because the former exist not to make money, but to serve "a community made up of believers in the same religion." As persuasive as her argument is about for-profit corporations, it should be noted that it was explicitly shared by only one other justice, with two justices deciding not to give their opinion. She also argued that although the majority sought to confine its opinion to "closely held corporations, its logic extends to corporations of any size, public or private."[2]

Likewise, Justice Ginsburg noted that although the Court tried to confine its reasoning to 4 of the 20 FDA-approved contraceptives, "the Court's reasoning appears to permit commercial enterprises . . . to exclude from their group health plans all forms of contraceptives." This is a substantial burden on women, especially those earning low wages. As Ginsburg noted, but the majority ignored, an IUD generally costs more than $1,000 when the office visit and insertion procedure are added, an expenditure that is "nearly equivalent to a month's full-time pay for workers earning the minimum wage." Nor are

contraceptives all that the opinion addressed. Its logic could apply, Justice Ginsburg suggested, to employers with religious objections "to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs . . . (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)."[2]

Justice Ginsburg also got the best of a core question: Is the "burden" on the religious beliefs of a corporation's owners "substantial" if a female employee uses one of the four religiously objectionable contraceptives? Ginsburg argued that there are too many breaks in the link between the corporation owners and the possible results of the use of contraception by an employee, including actions by the employee, her physician, and perhaps the pharmacist, to substantially burden the company's religious beliefs. For example, it is unlikely that the corporation's owners would feel morally responsible if an employee died in childbirth as a result of an unintended pregnancy. Nor was it likely that this group of owners would feel morally responsible for any pregnancy-related conditions or deaths that could have been prevented by use of the four religiously objectionable birth-control methods. And why is it a violation of one's religion to provide health insurance (which everyone concedes is part of employee compensation) that covers all 20 contraceptives but not a violation of religion for employees to use their wages to purchase the four contraceptives to which the company has a religious objection?

In the context of making money, rather than spending it, Hobby Lobby itself apparently has no religious objection to an intervening agent making choices that funnel its money to the makers of contraceptives, including Plan B. Hobby Lobby's public filings regarding the 401(k) retirement plan it funds and operates for its employees reveal that a portion of this plan is invested, by fund managers such as Vanguard, in companies like Teva Pharmaceuticals, the maker of Plan B.[17]

MEDICAL CARE AND THE ACA

In terms of health care, the reaction of the American College of Obstetricians and Gynecologists (ACOG) to the Court's opinion seems just about right to us: "This decision inappropriately allows employers to interfere in women's health care decisions . . . [which] should be made by a woman and her doctor, based on the patient's needs and her current health." ACOG went on to underline that contraceptives and family planning are mainstream medical care and should be treated as such. In their words, "access to contraception is essential women's health care."[18]

The Court's ruling can also be viewed as a direct consequence of our fragmented health care system, in which fundamental duties are incrementally delegated and imposed on a range of public and private actors. The Court is correct on one dimension of its opinion: if universal access to contraceptives is a compelling societal interest, then the provision of such access ought to fall first and foremost on the national government and only secondarily be transferred to private parties.[19] Our systemic reliance on health insurance that is based on private employment provokes just this sort of clash between public and private values.[20]

Our incremental, fragmented, and incomplete health insurance system means that different Americans have different access to health care on the basis of their income, employment status, age, and sex. The decision in *Hobby Lobby* unravels only one more thread, perhaps, but it tugs on a quilt that is already inequitable and uneven.[21] A central goal of the ACA was to repair some of this incremental fragmentation by universalizing certain basic health care entitlements. In ruling in favor of idiosyncratic religious claims over such universality, the Court has once again expressed its disagreement with this foundational health-policy goal.

An interview with Professor Annas is available at NEJM.org

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

From the Department of Health Law, Bioethics, and Human Rights, Boston University School of Public Health, Boston (G.J.A.); and the University of Pennsylvania School of Law (T.W.R.) and Perelman School of Medicine and the Leonard Davis Institute of Health Economics (J.P.R.) — all in Philadelphia.

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