

Religious Liberty, Health Care, and the Culture Wars

in Law, Religion, and Health in the United States 21 (Holly Fernandez Lynch et al. eds., Cambridge 2017)

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1. Contraception

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Second, there was ample precedent for exempting businesses.² Statutory exemptions from performing or assisting with abortions, or with assisted suicides, protect incorporated for-profit hospitals, hospices, and medical practices. Exemptions for kosher slaughter protect incorporated for-profit slaughterhouses. Both sides in the House of Representatives understood the language of the Religious Freedom Restoration Act to protect incorporated for-profit businesses; this was common ground in a 1999 debate on whether to exclude most civil-rights claims from a bill with language substantially identical to that of RFRA.

Third, the decision in *Hobby Lobby* is narrow.³ The case was decided on the ground that the government could provide free emergency contraception without making the employer pay for it, contract for it, or arrange for it. The employer's health insurer, or its third-party administrator in self-insured plans, must provide free contraception with segregated funds and segregated communications to insured employees. The insurers are expected to recoup their costs

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through the savings from fewer pregnancies; the third-party administrators are passing the costs on to the government.⁴

This solution, which the government had developed for religious nonprofits, could also be made available to for-profits. The Court said that if this were done, the impact on employees would be “precisely zero.”⁵ The government has now extended this solution to closely held for-profit businesses. Numbers for insured plans are not available, but the government represented in 2016 that it was paying for free contraception for 624,000 employees of conscientious objectors with self-insured plans, that the fraction of these employees receiving free contraception matched what would be actuarially expected in the general population, and that this less restrictive solution was working smoothly.⁶

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But in *Zubik*, the Supreme Court appears to have been deadlocked. It issued a remand order urging the parties to settle.⁷ The Court claimed that “[b]oth petitioners and the Government now assert,” in supplemental briefing, that it is “feasible” to provide free contraception through petitioners’ insurance companies without requiring any notice from petitioners. The Court acknowledged that “there may still be areas of disagreement between the parties on issues of implementation,” but claimed that the importance of these disagreements was unclear. The parties “should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the

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The Court's order appeared to be an attempt to buy time, pending the confirmation of a ninth Justice. The disagreements "on issues of implementation" were deal breakers—demands from the religious organizations that the government said were entirely unworkable and in some ways illegal.⁹ Unless one or both sides cave in negotiations, these cases will come back to the Court unchanged. Both sides held firm during the Obama Administration, but the Trump Administration's position remains to be seen. It threatens to repeal the Affordable Care Act, which would end this dispute; it might also repeal the contraceptive mandate or settle the *Zubik* cases on the religious organizations' terms.

The rather desperate order in *Zubik* may imply that the Court was divided four-four on the merits; it at least implies that one or more Justices hoped to avoid deciding. This apparent deadlock surprised me. A decision for the religious non-profits here would cause the decision in *Hobby Lobby* to come unglued. And the religious organizations' claim of burden is much weaker than other claims of burden that the Court has rejected.¹⁰

The employers in *Hobby Lobby* were required to pay, contract, and arrange for drugs and devices they believed to be abortifacients. The employers in *Zubik* do not have to pay, contract, or arrange for anything that they object to. That seems to be a fundamental difference. But it is not a difference that changed the bottom line for the interest groups lined up on each side in both cases, and perhaps it did not matter to any Justice.

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If President Trump gets a second appointment to the Supreme Court, then in all likelihood Kennedy would no longer be the swing vote, and decisions depriving employees of benefits would become much more likely. Or Trump and his allies could repeal the right to free contraception by legislation or regulation, for reasons that may have nothing to do with religious liberty, and the issue would never come back to the Court. Religious liberty subject to the compelling-interest test is not a threat to American health care. Donald Trump may be.

2. Other Health Care Issues, Real and Imagined

A. Real Issues

Another health care issue that has actually been litigated is emergency contraception at pharmacies. But as of 2012, forty-two states had imposed no requirements with respect to this issue, and six had imposed rules short of requiring that all pharmacies stock and supply emergency contraception.¹¹

When forty-eight states have, at most, a less restrictive rule, and forty-two states impose no requirement at all, it is hard to imagine a compelling government interest for the two outliers.¹² The problem is not that none of the other states care about providing the full range of pharmaceuticals to their citizens; it is that none of them find it necessary to burden constitutional rights to achieve that goal. What is it that makes such means necessary in the outlier states?

Religious pharmacists in Illinois won an exemption under the Illinois Conscience Act.¹³ But the Washington rule was upheld against a constitutional challenge in the Ninth Circuit, and the Supreme Court denied certiorari.¹⁴ The

11. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 935 (W.D. Wash. 2012), *rev'd on other grounds sub nom. Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). [My brief in *Stormans* came out too late for volume 2; maybe someday in a volume 6.]

12. See *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) [in this volume at 363-452] (relying on practice of “vast majority of States and the Federal Government” permitting prisoners to grow beards, and holding that defendant prison system had failed to show why it could not do the same).

13. *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2012), *appeal dis'd*, 982 N.E.2d 770 (Ill. 2013).

14. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). This case and the broader issues it raises are discussed at greater length in Douglas Laycock and Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016) [too late for volume 2; maybe someday in a volume 6].

underlying issue is of obvious importance, but the state claimed that it was not squarely presented, and the Court may not have wanted to decide a fundamental issue about the meaning of the Free Exercise Clause with only eight Justices.

The trial court in the Washington case found that pharmacies are generally not required to stock any particular drug and that no pharmacy could possibly stock all available drugs.¹⁵ Despite much effort and many test shoppers, plaintiffs failed to show that anyone had been unable to get timely emergency contraception.¹⁶ Of those pharmacies that did not stock emergency contraception, fewer than 10 percent offered religious reasons; the rest offered business reasons.¹⁷ Conscientiously objecting pharmacies who refuse to stock emergency contraception are no threat to the timely availability of emergency contraception.

Washington law had long protected business discretion about what drugs to stock, and newly amended rules were said not to change that, except for religious objections to emergency contraception.¹⁸ Religious reasons would be singled out for prohibition. This was more a matter of regulatory intent and enforcement policy than of the text of the rules. The “Stocking Rule” says that a pharmacy “must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.”¹⁹ The “Delivery Rule,” adopted in 2007, says that pharmacies must deliver prescribed drugs, subject to several exceptions, one of which is “[u]navailability of the drug or device despite good faith compliance with” the Stocking Rule.²⁰

In the forty-year history of the Stocking Rule, no pharmacy has ever been cited for violating it.²¹ The Stocking Rule does not require pharmacies to stock all drugs—such a requirement would be impossible. So it is not clear from the text of the regulations that the Delivery Rule changed anything. But the history of the Delivery Rule’s creation is clear; it is understood and intended to provide a basis for penalizing conscientious refusals to deliver emergency contraception.²²

The state said that it prohibited pharmacies from acting on the basis of secular conscience as well as religious conscience. But that added nothing; despite substantial effort, it could not find even one pharmacy with secular

15. *Stormans*, 854 F. Supp. 2d at 933-34.

16. *Id.* at 946-51.

17. *Id.* at 949.

18. *Id.* at 940-46, 952-61.

19. WASH. ADMIN. CODE § 246-869-150(1).

20. WASH. ADMIN. CODE § 246-869-010.

21. *Stormans*, 854 F. Supp. 2d at 934.

22. *Id.* at 956-59.

conscientious objections to emergency contraception.²³ And assuming it found one somewhere, a law that applies only to religion and to one rare and closely analogous case is still very far from generally applicable.

Yet the Ninth Circuit held that this targeted regulation is a neutral and generally applicable law,²⁴ subject only to rational-basis review under the Free Exercise Clause as interpreted in *Employment Division v. Smith*.²⁵ There are at least three major problems with the court's analysis. First, when considering whether the regulations prohibit any secular reasons for failing to stock and deliver drugs, the court myopically focused on the bare text of the regulations, largely ignoring the interpretation revealed by the enforcement history and refusing to consider the drafting history. If the court had considered reality instead of the bare text, as it had already done in deciding that the regulations prohibit conscience-based refusals to stock and deliver, it would have concluded that the regulations prohibit these conscience-based refusals—and almost nothing else.

Second, and more fundamentally, the court said that business reasons for not stocking or delivering drugs make sense and, therefore, do not detract from the general applicability of the rules.²⁶ That is, business reasons for not stocking a drug are good reasons, sufficient to justify a decision not to stock, but religious reasons are bad reasons, insufficient to justify a decision not to stock. This is precisely the negative “value judgment” about religion that the Free Exercise Clause prohibits.²⁷

In *Sherbert v. Verner*,²⁸ South Carolina occasionally found acceptable secular reasons for an employee to refuse work and seek unemployment compensation instead. Explaining *Sherbert* in *Smith*, the Court said that because there were “at least some” secular exceptions to the eligibility rules, there had to be a religious exception as well.²⁹ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the city and state recognized a long list of permitted secular reasons for killing animals.³⁰ In both *Sherbert* and *Lukumi*, the permitted secular reasons were perfectly

23. *Id.* at 982-83.

24. *Stormans*, 794 F.3d at 1075-84.

25. 494 U.S. 872 (1990).

26. *Stormans*, 794 F.3d at 1080.

27. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) [in volume 2 at 137-230] (holding that city “devalues religious reasons for killing [animals] by judging them to be of lesser import than nonreligious reasons”).

28. 374 U.S. 398 (1963).

29. *Smith*, 494 U.S. at 884.

30. *Lukumi*, 508 U.S. at 543-44 (noting that fishing, hunting, extermination, euthanasia, and medical research were all permitted reasons for killing animals).

sensible; they were not bad reasons. But exceptions for those reasons required a similar exception for religious reasons for refusing jobs or killing animals.

A rule that permits an act when done for secular reasons but prohibits the same or analogous acts when done for religious reasons discriminates against religious reasons. Such a rule may conceivably be justified by a compelling government interest, but it is not neutral and generally applicable as the Court applied that concept in *Smith* and *Lukumi*. By treating the legitimacy of business reasons for not filling prescriptions as going to general applicability instead of to justification, the Ninth Circuit substituted rational-basis review for compelling-interest review.

Third, the Ninth Circuit approved a formula for discriminatory enforcement. The court said it was irrelevant that the rules had never been enforced against anyone but the plaintiff, because the Pharmacy Commission followed a policy of “complaint-driven enforcement.”³¹ There had been “many complaints” against the plaintiff, and hardly any complaints against anyone else. So the court validated a multi-year campaign by ideologically motivated activists to drive one small pharmacy out of business because the activists found its religious practices unacceptable.

In vitro fertilization is another morally contested treatment, because unused embryos are often discarded in the process.³² I am not aware of any litigation about insurance plans. Only nine or ten states require insurance plans to cover *in vitro* fertilization, and four of those specifically exempt employers with religious objections.³³ This is one context where protecting the very serious religious-liberty claim may bar access to a particular treatment for employees.

There has been employment litigation about teachers in Catholic schools who undergo *in vitro* fertilization in violation of morals clauses in their employment contracts. That litigation has not gone well for the schools.³⁴ But both schools appear to have relied only on employment-law defenses, and failed to offer a RFRA defense.

31. *Stormans*, 794 F.3d at 1083-84.

32. For the question whether conscientiously objecting physicians may be required to provide this treatment, and other related issues, see I. Glenn Cohen, *Religion and Reproductive Technology*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 360 (Holly Fernandez Lynch et al. eds., Cambridge 2017).

33. National Conference of State Legislatures, *State Laws Related to Insurance Coverage for Infertility Treatment*, available at www.ncsl.org/research/health/insurance-coverage-for-infertility-laws [<https://perma.cc/36J9-3E3C>] (current through June 2014).

34. *Herx v. Diocese of Fort Wayne–South Bend*, 2015 WL 1013783 (N.D. Ind. Mar. 9, 2015) (upholding jury verdict for employee); *Dias v. Archdiocese of Cincinnati*, 2013 WL 360355 (S.D. Ohio January 30, 2013) (denying cross motions for summary judgment).

The widespread exemptions from vaccination laws are never based on general guarantees of religious liberty. Rather, forty-seven state legislatures have enacted specific exemptions from vaccination requirements. All of these exemptions include religious beliefs,³⁵ and sixteen include personal or philosophical beliefs.³⁶

A claim for exemption from vaccination laws under a state RFRA would present an easy case under the compelling-interest test. Most obviously, unvaccinated children, who are far too young to decide for themselves, are exposed to risks of serious diseases. Moreover, there is a large pseudo-scientific movement seeking exemption. When large numbers of people claim exemption, a virus can spread in the population and put everyone at risk. Even those who are vaccinated are no longer safe, because no vaccine is 100-percent effective. And some people cannot be vaccinated because of compromised immune systems or for other medical reasons. So those who refuse vaccination endanger those around them. These are the reasons most often cited in opposition to exemptions.³⁷

Beyond these familiar and sufficient reasons is a serious collective-action problem. It is in the interest of anyone with the slightest qualms about vaccination to have everyone else vaccinated and to be exempt himself; he would be protected without incurring whatever risk he perceives. But that outcome is unachievable; allowing these would-be free riders to claim exemption soon results in many people unvaccinated, not just one. The anti-vaccination movement has many adherents, all with strong incentives to claim any religious exemption that is available either honestly, or more often, falsely.³⁸ The existence of widespread secular incentives to false claims is a reason to refuse exemptions that has visibly influenced judicial decisions under the compelling-interest test.³⁹

35. Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 *CASE W. RES. L. REV.* 869, 886 nn.119-120, 914 (2013) (collecting these statutes).

36. *Id.* at 886 n.121. California repealed its exemption after Lu compiled her list. 2015 *CAL. LEGIS. SERV.* ch. 35, § 4.

37. See, e.g., Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccination Refusal*, 63 *BUFF. L. REV.* 881 (2015) (summarizing medical evidence and reviewing legal arguments).

38. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 *HASTINGS L.J.* 1551, 1570-88 (2014) (collecting anecdotal and survey evidence suggesting that most claims to religious motivations for refusing vaccination are false).

39. See Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 *IND. J. GLOBAL LEGAL STUD.* 503, 534 (2006) [in volume 1 at 429-]

The larger point illustrated by the vaccination example is that legislatures are *not* better than courts at assessing the public interest with respect to religious exemptions.⁴⁰ It is hard to imagine a court getting this so wrong.⁴¹ But nearly every state legislature has gotten it wrong, and many of them have protected not just religious conscience, but anyone who wants to free-ride, reads crackpot science, or objects for any other reason.

B. Hypothetical Issues

The other claims that people have imagined have never happened, and are not likely to happen. Justice Ginsburg envisioned employers refusing to insure blood transfusions, antidepressants, vaccinations, or medicines derived from pigs.⁴² Or maybe Christian Science employers would refuse to provide any medical insurance at all. But all of these are medical treatments that various religious groups refuse to accept for themselves. Few of these religious groups believe that these treatments harm innocent third parties, let alone that they kill babies. These religious teachings are quite unlike the teaching at issue in *Hobby Lobby*.

Christian Scientists have long lobbied for the exemptions they need. They are seeking a legislative exemption from the Affordable Care Act's individual mandate;⁴³ they do not want to buy health insurance for themselves, which would go unused. They have such an exemption in Massachusetts,⁴⁴ which enacted the original state plan on which the Affordable Care Act was modeled.

They have not sought exemption from the employers' obligation to provide insurance for their employees. Their bill does not address that issue, and the Church's website expresses no opposition to the employer mandate.⁴⁵ Gary

30] (applying this analysis to cases refusing exemptions to military draft, tax collection, and school desegregation).

40. See Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1172-77 (2007) [in this volume at 645-51] (responding to this claim at greater length).

41. See *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 352-54 (4th Cir. 2011) (upholding vaccination requirement under compelling-interest standard; collecting cases); cf. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include the right to expose the community or the child to communicable disease").

42. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

43. The bill is H.R. 1201 in the 115th Congress, available at www.congress.gov/bill/115th-congress/house-bill/1201/text?r=1 [<https://perma.cc/F5BE-YLVP>].

44. MASS. GEN. L. ch. 111M, § 3 (2014).

45. *Healthcare and the Affordable Care Act*, available at www.christianscience.com/mem

Jones, Manager of the Church's Federal Office, confirmed in a conversation that the Church does not object to providing health insurance for employees who want it.⁴⁶ He said that the Church's headquarters has long provided coverage for either Christian Science treatment or standard medical treatment, as each employee chooses, and he is not aware of any Christian Science business person resisting employee health insurance on religious grounds.

Similar reasoning applies to Jehovah's Witnesses and blood transfusions. It is extremely important to Jehovah's Witnesses not to have a blood transfusion themselves; so far as I understand their teaching, they have no reason to refuse to provide blood transfusions for others.⁴⁷ As a general matter, "they do not believe that they have a right to impose their values on persons outside their community."⁴⁸ Whatever the explanation, I know of no litigation about excluding blood transfusions from health insurance plans.

And so it is with all the other hypothetical claims. They have not happened. They are not likely to happen. And if they ever do, the claim to exemption will look rather different. The Obama Administration believed that contraception pays for itself in avoided pregnancies, and this belief enabled it to find a solution that may not be available with respect to anything else. Making the insurers pay on the side either would not work, because few or none of these other medical treatments will pay for themselves, or it would work, in which case employees can be protected without burdening employers. And if employees have to actually do without these other forms of medical care, that would be a very different case from *Hobby Lobby*.

ber-resources/committee-on-publication/u.s.-federal-office/healthcare-and-the-affordable-care-act-aca [https://perma.cc/9WA7-VZVQ].

46. Conversation with Gary Jones (Nov. 7, 2015). The Federal Office works to protect Christian Science from adverse effects of federal law. See U.S. Federal Office, available at <http://christianscience.com/member-resources/committee-on-publication/u.s.-federal-office> [https://perma.cc/63EL-FMU2].

47. See M. JAMES PENTON, APOCALYPSE DELAYED: THE STORY OF JEHOVAH'S WITNESSES 153-54, 202-06 (1985) (explaining the teachings on blood); Charles H. Barron, *Blood Transfusions, Jehovah's Witnesses, and the American Patients' Rights Movement*, in ALTERNATIVES TO BLOOD TRANSFUSION IN TRANSFUSION MEDICINE (Alice Maniatis *et al.* eds., 2011) (explaining the teaching and reviewing the evolution of U.S. law and medical practice protecting the right to refuse blood transfusions).

48. PENTON, *supra* note 47, at 152.