The Convergence of Law, Medicine and Religion: Jefferson College of Population Health Forum

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NOVEMBER 13, 2019
Overview of Lecture

1) Basic Features of Law and Legal System as it Applies to Health Care
2) Text, Law and Institutions
3) The Supreme Court as Supreme Interpreter
4) Congress Interpreting the Constitution (RFRA)
5) The Hobby Lobby Decision
6) When the Supreme Court is Not Supreme: HHS and State Activity on Conscience and Abortion
Start at the Beginning
Home of Penn Law School, 1895-1900
What’s Distinctive about the US Constitution?

• Writtenness
• Length
• Difficult to change
• Age
• Unspecified nature of many of the key terms
Where do we find the Constitution, and American Law In General?

- Text
- Time
- Institutions
- “We the People”
The Language of the Constitution

- “Neither shall any Person be eligible to [be President] who shall not have attained to the Age of thirty five Years.” Art. II, sec. 1
- “The executive Power shall be vested in a President.” Art. II, sec. 1
- “Excessive bail shall not be imposed . . . nor cruel or unusual punishments inflicted.” Amend. VIII
Four Questions

- Is freedom of religion important?
- Is equal treatment of men and women important?
- Is a right to health care important?
- How do we as a society reconcile these values?
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Inadequacy of Textual Guarantees Alone

“Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association.”
John Marshall, Chief Justice 1801-1835
“[W]e must never forget that it is a Constitution we are expounding.”

“To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”
Who Does the Interpreting?

- Multiple institutions, and the public
- But increasingly through time in the U.S., and distinctively, it has been the Supreme Court
- Rise of judicial review of other branches

  “It is emphatically the province and duty of the judicial department to say what the law is.”
The Supreme Court of the United States
The United States Supreme Court

- Top of the US judicial pyramid
- Hears cases involving federal law claims from US courts of appeals (“circuit courts”) and also state supreme courts
- Only a tiny fraction of cases are heard by Court
- Decisions on constitutional matters can be overturned only by constitutional amendment, or by the Court itself
- Decisions regarding statutes can be overturned or modified by another statute
Supreme Court Justices

- Appointed for life
- Nominated by President, confirmed by Senate
- Decide cases by majority vote after oral argument
- Each Justice can write, or join, different kinds of opinions: majority, concurrence, dissent
The Affordable Care Act and Hobby Lobby

- Patient Protection and Affordable Care Act enacted in 2010, and upheld as constitutional by the Supreme Court in June 2012

- ACA builds on existing health insurance system, does not replace it with something else – fills in gaps

- Most Americans before, and after ACA, get their health insurance through employment. We delegate public function (universal health coverage) to private companies.
The ACA’s Contraceptive Mandate

- ACA says employers with more than 50 employees must offer health insurance that provides “minimum essential coverage” or face fines
- Statute also requires employer to provide “preventative care and screenings” to women
- Congress delegated job of defining those terms to agency (HHS), which in turn looked to opinion of prestigious medical board (Institute of Medicine)
2011: HHS adopts Institute of Medicine’s recommendation that employers be required to cover “all FDA approved contraceptive methods.” This includes products like Plan B and Ella that operate after sex. Some religious groups believe that these forms of contraception produce an abortion, and thus violate their religious beliefs.

HHS originally exempted “religious employers” – defined as churches and religious orders from contraceptive mandate
In 2013, under pressure from Catholic hospitals and universities and other religious organizations that performed secular functions, the Obama administration issued a new exception to the mandate.

Objecting non-profit religious organizations could opt out of mandate, and mandate would then shift to insurance company to provide contraceptive coverage free of charge to women.

Discuss health insurance basics and operation.
The Hobby Lobby Litigation

• Various for-profit companies owned by religious individuals or families filed suit, claiming exemption on First Amendment and RFRA grounds.

• Mixed record of success in lower courts

• Came to Supreme Court for resolution in 2013-2014 Term

• Decision issued last week
The Law at Issue in Hobby Lobby: How Must Government Accommodate Religion?

Two different standards at work for federal laws like ACA:

1) First amendment “free exercise” clause;

2) Religious Freedom Restoration Act of 1993

RFRA is more protective of religious objectors, and that is the rule the Court majority applied
Problem in religious freedom cases is not belief, it is conduct or action associated with belief. Imagine religion that believed in human sacrifice.

1990: *Employment Division v. Smith* case ruled that as long as a law was “neutral” and “generally applicable”, it could absolutely prohibit practices that were central to religions.

*Smith* was hugely unpopular on both left and right.
In 1993, Congress enacted the Religious Freedom Restoration Act in response to *Smith*.

RFRA says government cannot “burden a person’s exercise of religion” unless it demonstrates “a compelling governmental interest” and uses the “least restrictive means of furthering that interest.”

RFRA enjoyed huge bipartisan success, passing unanimously in the House of Representatives and by 97 to 3 in the Senate.
In a 1997 case, the Supreme Court said that RFRA was invalid as a rule to constrain state or local government action. Current law is that states and cities do not have to give extra leeway to religious entities.

BUT . . . RFRA’s higher standard on government action is still good law as applied to federal government laws and regulations, like the ACA contraceptive mandate.
Does ACA Mandate Violate RFRA as Applied to Hobby Lobby?

Five Justices of Supreme Court say “yes”:
Alito, Roberts, Kennedy, Thomas, Scalia

Four Justices say “no”:
Ginsburg, Breyer, Kagan, Sotomayor
Key Elements of Majority Reasoning

1) Higher standard of RFRA applies, not first amend.
2) A corporation is “a person” for RFRA purposes
3) For-profit business motive does not impact RFRA rights
4) Courts may not ever inquire into the sincerity of, or the substantial burden on, a claimed religious belief
5) Access to contraception for women is “compelling”
6) But mandate is not “least restrictive means” – government should offer similar compromise
Justice Ginsburg in dissent

“Would the exemption the Court holds RFRA demands for employers . . . extend to those who object to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia (certain Muslims, Jews and Hindus); and vaccinations (Christian Scientists, among others).”
Generally, it is a person with some legal duty who refuses to fulfill that duty because of moral, religious or personal beliefs.

In health care, we see this when doctors refuse to provide a certain kind of treatment to patients, typically for religious reasons.

This is primarily governed by state laws through what are known as “conscience clauses” and usually cover abortion or contraceptive services.

- These statutory exceptions can sometimes cover pharmacists and their obligations to provide birth control and / or Plan B.
- Almost every state has some version of these
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