Whose Freedom? Teaching The Contraceptive Coverage Cases As A Bridge From Policy To Bioethics

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One of the pleasures (yet one of the challenges) of teaching health law is the way that various topics within it comprise their own microcosm of the law’s bramble bush.¹ It is inevitable that a professor teaching a survey course will encounter subjects that do not obviously relate to each other, yet all clearly come within the ambit of health law. Teasing out the threads that connect those subjects is a matter not only for good casebook authors but also for each professor to do in her own way. In this essay, I share a method I have used to link two portions of a single course: one addressing the Affordable Care Act (“ACA”) and one addressing bioethics. Even in a post-ACA world, this method would work to link a discussion of health care coverage with one addressing bioethics.

I. THE ACADEMIC SETTING

Nova Southeastern University’s Shepard Broad College of Law offers two survey courses that together comprise the foundation of health law.² One—named Health Care Organizations, Regulation and Access (“HCORA”)—

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* Professor of Law, Nova Southeastern Shepard Broad College of Law (NSU Law). Thank you to Professors Rob Gatter, Elizabeth Pendo, and Sidney Watson for this opportunity; and to several current students and alumni who have enriched this class session with their feedback.

1. KARL N. LLEWELLYN, THE BRAMBLE BUSH (1951). Reviewing this book, Professor Grant Gilmore explained:

_The Bramble Bush_, as manifesto, tells us that the law is not a self-contained set of logical propositions; that rules of law do not explain results at law; that the stated reasons for decision regularly mask the inarticulate major premise; that facts are slippery things with a nasty habit of changing shape and color, depending on who is looking at them; that judges are not automatons who announce the law but human beings, possibly neurotic; that juries are barely human; that the truth is not in the law books, which should nevertheless still be studied; that we don't quite know yet where the truth is, but it is somewhere—in economics, or sociology, or anthropology, or psychology, or in the murky reaches of Freudian theory.


2. Although not named Health Law I and Health Law II, they are the equivalent of those courses at many schools.

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covers health care financing and business matters. The other, which I teach, addresses—well, it addresses what it is called: Health Policy, Bioethics, and Quality of Care (“HPBQ”). Each is a three-credit course taught once a week. To deal with the length of the class period yet achieve active learning, both professors incorporate many in-class exercises to engage the students in the learning process.

Both of the foundational courses address ACA (and likely still will to some extent even in a post-ACA setting), but the professors teaching them take care to approach it from different perspectives. In HPBQ, the first few weeks utilize legal history and empirical data to prepare students for in-depth examination of National Federation of Independent Business v. Sebelius and its impact on expansion of coverage within each segment of America’s fractured health care “non-system.” The course examines these developments through the eyes of a patient/individual requiring health care services, whereas HCORA examines subject matter from a business/health care provider perspective.

Thus, in the section about health care policy, HPBQ first covers Medicaid expansion and then the individual mandate, using National Federation of Independent Business v. Sebelius exercises requiring students to shop for health insurance and determine coverage eligibility. In the fourth week of class, students have absorbed the messages that insurance is expensive and the Medicaid population may not look like the population they envision when they hear the words “Medicaid coverage.” These lessons will remain useful regardless of what, if anything, happens to the individual mandate and the Medicaid expansion.

Next, it is time to transition to the bioethics portion of the course, to a class titled “Intersection of Policy & Bioethics Issues Part I: Coverage of Certain Treatments, Drugs, or Procedures.” In other words, it is time to re-examine ACA contraceptive coverage cases: Burwell v. Hobby Lobby Stores, Inc. and the Court of Appeals’ opinions the Supreme Court reviewed in Zubik v. Burwell.

II. THE TRANSITION CLASS

The goal of the transitional class session is to analyze coverage of controversial contraceptive prescriptions or devices as being of importance in both policy and bioethics. Contraceptive coverage allows for consideration of the reasons why access to contraception is important.

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3. The course description reads:
Course surveys the statutes, regulations, cases, legal issues, and policy considerations facing health care professionals, providers, and consumers in a rapidly changing field. Topics include an overview of the American health care enterprise and health care delivery models; the impact of federal health care reform legislation; the regulation of health care institutions for quality and safety; liability of health care institutions; issues relating to access to health care services and health care cost and payment including the duty to provide care, health care insurance and managed care; ERISA; Medicare and Medicaid; professional relationships and structures; and operational and business aspects including fraud and abuse, competition and antitrust, human subjects research, and technology and the globalization of health care services.


4. This course description reads:
Course surveys the health law policy considerations, bioethics issues and mechanisms for assuring quality of health care that challenge health care professionals, providers, and consumers in a rapidly changing field. Bioethics topics include death and dying; modern reproductive issues including fetal and maternal decision making, assisted reproduction, cloning, and human genetics; justice in health care access and coverage; and organ donation and transplantation. The course also surveys the major mechanism assuring the quality of health care including regulation of health professionals and related discipline or quality matters; the professional-patient relationship including informed consent, privacy, confidentiality and human subject research; and liability of health professionals and organizations.

Id.


8. Thank you to Professors Seth Chandler and Sidney Watson for the exercise adapted to use in these classes. They are available in the Health Law Professors Syllabus maintained by Saint Louis University School of Law.

9. See John V. Jacono, Medicaid, Managed Care, and the Mission for the Poor, 9 S. U. J. Health L. & Pol'y 187, 188 (2016) (“Medicaid was created fifty years ago as a way of providing for the health care needs of the ‘ needy poor.’ In the years since, up to and including amendments to Medicaid in the Affordable Care Act (ACA), the program has expanded services and benefits to covered, but it remains a medical insurance program for low-income Americans.”). That much students recognize, but they do not recognize before these exercises their neighbors in a middle-class neighborhood may require the Medicaid expansion because of the high cost of health insurance premiums, deductibles, and co-pays and the very low income identified as Federal Poverty Level, on which Medicaid eligibility is based. See U.S. Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs, DEPT. OF HEALTH & HUMAN SERV. (Jan. 25, 2016), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/SNZ9-KHYL].

10. Later in the course, there is another “intersection” class, considering the legal implications of medical marijuana from both a policy and a bioethics viewpoint. The first transition must occur around week four at the latest if the course is going to devote one-third of its coverage of its three portions; NSU Law has 13-week-long semesters.


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women and the country in both financial and sociological ways. It also provides a vehicle to begin discussing conscientious objection, which will arise again later in the course in the end-of-semester decision-making contest. The assigned readings (the contraceptive coverage cases and casebook notes about them) address primarily the coverage issues, but I press the students to articulate why contraceptives are important to the women who receive them, through the coverage mandate. This forces the students to synthesize the lessons from the past few weeks about access to health care through coverage with material they should recall from Constitutional Law. I guide them toward consideration of constitutional and bioethical concepts of autonomy and medical decision-making during this discussion because those concepts underline the reason access to contraceptive medicine is so important.13 Thereafter, the in-class exercise, which appears in Appendix A, requires students to extrapolate their knowledge out to analyze religiously based objections to covering another controversial treatment.

The students receive the in-class exercise as part of their reading assignment. It forces them to discuss matters with which they may not be comfortable by asking them to consider religiously based objections to covering gender reassignment surgery.14 In addition to the two exercises discussed earlier, which address other populations,15 this one develops the students’ cultural competence. Specifically, it seeks to cultivate tolerance for and empathy with transgender individuals. This is important for an institutional reason; NSU Law has established a set of learning outcomes for the health law concentration that includes demonstrating cultural competency and cultural empathy. Moreover, on a class-wide and individual level, properly understanding the medical rationales underlying gender reassignment surgery, which is essential to considering whether it should be a covered benefit, requires breaking through barriers some students may bring to class with them.

One way to use this exercise is to discuss it immediately at the beginning of class, trusting that students have understood the reading assignment, including the exercise. As this is one of the two foundational health law courses, however, and given ACA’s complexity, its health-law-specific concepts such as third-party insurance, I have found that the vast majority of students need a more structured introduction to the case-based material in the exercise in class. This is especially true in the final quarter, where the Zubik Court left in place interpretations of the Religious Freedom Restoration Act that exempt for-profit religious organizations.16 To properly under the law as it stands requires the students to consider the source of a gender reassignment coverage mandate and to take briefly touch upon arguments about insurance coverage to medically necessary treatments.17 (4) (a) imagine that religious employers who might object to insurance coverage to medically necessary treatments.


15. The first asks them to put themselves into the shoes of working-class and middle-class families seeking care coverage on an exchange, and the second requires each of them to assist an undocumented immigrant requiring access to medical care.


18. I call this a coverage “mandate” to simplify discussion. However, of course, the two contraceptive coverage mandates, but in a very important way. The contraceptive coverage mandate is a particular benefit that must be provided. This coverage requirement, however, requires cover gender reassignment surgery to the abstract.

19. In the near future, both the Chief Justice and the justices of the other two judges on the court will likely publish cases in the inpatient-care and primary-care areas. As these court precedents start to be applied to other cases, it becomes clear that the Zubik Court is not likely to interpret the Religious Freedom Restoration Act as written.

20. See, e.g., Stone v. BMW of North America, Inc., 564 U.S. 149 (2011) (holding that BMW’s choice of retirement plan was not qualified under ERISA).

21. See, e.g., States v. Provider (Chamber of Commerce of the U.S.), 564 U.S. 248 (2014) (holding that the Affordable Care Act’s provisions regarding the health system, as “compliance[ing] with the regulations set by the Department of Responsibility centers and preemptions for providers”); and early for a better understanding of the issue.


23. See, e.g., States v. Provider (Chamber of Commerce of the U.S.), 564 U.S. 248 (2014) (holding that the Affordable Care Act’s provisions regarding the health system, as “compliance[ing] with the regulations set by the Department of Responsibility centers and preemptions for providers”); and early for a better understanding of the issue.
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conceiving another controversial treatment.

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assignment. It forces them to discuss matters with which they may not be
comfortable by asking them to consider religiously based objections to
performing gender reassignment surgery. In addition to the two exercises
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courses, however, and given ACA's complexity, its regulatory structure, and
health-law-specific concepts such as third-party administrators and self-
insurance, I have found that the vast majority of students benefit from a gently
Socratic doctrinal session about the case-related material before engaging with the
exercise in class. This is especially true in the immediate aftermath of
Zubik, given that the Zubik Court left in place conflicting circuit court interpretations of the Religious Freedom Restoration Act (RFRA) as applied
to not-for-profit religious organizations. To properly respond to the exercise under the law as it stands requires the students to (1) identify
the statutory source of a gender reassignment coverage mandate; (2) consider how that
statutory source differs from the source of the contraceptive coverage mandate;
briefly touch upon arguments about insurance contract provisions limiting
coverage to medically necessary treatments; (4) categorize the varying types of
religious employers who might object to providing or facilitating coverage;
(5) identify the employers' potential religious objections.

17. Zubick, 136 S. Ct. at 1560.
18. I call this a coverage “mandate” to simplify discussion of it on the same day as the contraceptive coverage mandate, but, of course, the two coverage requirements differ in an important way. The contraceptive coverage mandate is a part of the definition of essential health benefits that must be provided. This coverage requirement, in contrast, does not mandate that insurers cover gender reassignment surgery in the abstract; the surgery must be covered if it is medically necessary and analogous to other surgeries covered by the plan. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,435, 31,427–31,428 (May 18, 2016) (codified at 45 C.F.R. pt. 92); 45 C.F.R. § 92.207(b)(3) (2016); 42 U.S.C. § 18116; see also Sharon Coolidge, Transgender Library Insurance Dispute Goes to Court, CINCINNATI.COM (Sept. 26, 2011, 11:50 AM), www.cincinnati.com/story/news/politics/2016/09/26/transgender-library-insurance-dispute-goes-court/9110732/ [https://perma.cc/5XY-KB5G] (describing case);

19. The medical necessity analysis is necessitated by the differences highlighted above in footnote 18. Some courts have begun to trace through the medical necessity analysis, as well as related ones such as interpretation of exclusions of coverage for cosmetic procedures. See, e.g., Cruz v. Zucker, 195 F. Supp. 3d 554, 559 (S.D.N.Y. 2016), on reconsideration, No. 14-CV-4456 (JSR), 2016 WL 6882992 (S.D.N.Y. Nov. 14, 2016), and appeal withdrawn, (Dec. 30, 2016).

20. Three that come immediately to mind are churches; family-owned, closely held forprofit corporations; and not-for-profit organizations of the type at issue in Zubik.

21. See, e.g., States, Providers Challenge ACA Antidiscrimination Rule, Health Care Daily Rep. (BNA) No. 164, at 2–4 (Aug. 24, 2016) (describing plaintiffs, four states, and a Catholic health system, as "complain[ing] that the regulations should have included religious or conscience-based exceptions for providers"). After Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, one author predicted that that case "represents a wake-up call for civil rights groups, especially those in the LGBT community, to not be caught off-guard when planning future cases or agreeing to the inclusion of overly broad religious exemptions in future civil rights
which junction they must analyze the two lines of authority at issue in Zaloli; (6) determine which line of authority they favor and why; and (7) apply the facts to their chosen legal principles. Creating organization out of that chaos before asking the students to analyze the facts of the problem helps tremendously. Generally, students benefit from professor-level interaction in thinking through numbers one through three on this list, thus being guided through the statutory and regulatory analysis a person seeking coverage would make. Therefore, they may pick up with the analysis themselves in small groups beginning at member four, articulating employers’ objections and analyzing potential defenses based on the assigned class reading.

Initially, the exercise was self-contained within the class session, requiring students to read and analyze the materials relating to gender reassignment surgery on the spot, in the context of the contraceptive coverage law they had read before class. Very shortly, however, it became apparent that the students would produce more thoughtful work if they were able to review the exercise before class, along with their reading. Part of their course grades depend on preparation for and participation in class discussion, and having the exercise ahead of time permits them to do a thorough job. After the doctrinal portion of the class, as they break into small groups for discussion, they all begin with the thoughts they formulated on their own ahead of time, now informed by what they learned during the first part of the class session. Discussion is usually lively, and when students report back from each small group, conclusions often differ.

One of the reasons this exercise serves as a good transitional exercise between policy and bioethics is the connection one may draw between contraceptive coverage and the liberty interest in medical decision making autonomy. As noted above, I steer students to consideration of those Fourteenth Amendment, bioethic concepts during in-class discussion of the contraceptive coverage cases. During debriefing after they work on the exercise in small groups, I again steer them in that direction. I ask of transgender individuals may make any constitutional argument, assuming that start action exist, as it would in cases involving Medicaid coverage. One, of course, is Equal Protection. If coverage for, and thus access to, a hysterectomy is available to a woman for fibroid tumors, then (assuming medical necessity) it also should be available to a woman undergoing the physical transition to a man’s body for gender dysphoria. It has become even more important if ACA section 1557 is in effect.

Second, once students have not only reflected on the reasons transgender individuals desire (even need) sex reassignment surgery, I ask if they can argue that other constitutional rights respect to a transgender individual’s ability to transition, and thus that displaying the physical characteristics accurately depicts their identity, as they define the attributes of personhood as they define them in the State. Eventually, someone will come up with Casey’s statement. Constitution protects personal decision making in medical decision-making areas:

These matters, involving the most intimate and personal decisions, may make a difference central to personal dignity and independence to the liberty protected by the Fourteenth Amendment. The liberty interest includes the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Rights about personal attributes of personhood were not made by the State.

At this stage of discussion, I find it necessary to steer students narrowly on the choice of undergoing the sex reassignment surgery, if they are making choices about their genders. That is sometimes difficult, but there is much to be gained in terms of development of students by tackling the issue.

III. LESSONS FOR THE FUTURE

In the past, I have assigned only the contraceptive casebook notes about them as substantive background for the in-class exercise. Thus, I have relied on the Constitutional Law identity so that they understand habeas corpus and Roe v. Wade and Casey v. Planned Parenthood of Southeastern Pennsylvania. In my own class, I urge students who may not have encountered Roe v. Wade itself, I urge students who may not have encountered Roe v. Wade because they have not encountered Roe v. Wade itself. I urge students who may not have encountered Roe v. Wade because they have not encountered Roe v. Wade itself. I urge students who may not have encountered Roe v. Wade because they have not encountered Roe v. Wade itself. I urge students who may not have encountered Roe v. Wade because they have not encountered Roe v. Wade itself.

23. Cf. Nonstatutory Interpretation of “Informed Consent” and “Gender Dysphoria.” The nonstatutory interpretation of “informed consent’’ is not as straightforward. See U.S. v. Hughes, 535 F.3d 1290 (10th Cir. 2008) (requiring evidence showing that the defendant had the right to refuse treatment and that the defendant was capable of making an informed decision). In this case, the defendant was not capable of making an informed decision, and the court held that the defendant had not given informed consent to the treatment. This decision is not as straightforward as the Roe v. Wade case because it is not as clear whether the defendant had the right to refuse treatment. The court held that the defendant had the right to refuse treatment because the defendant was capable of making an informed decision. However, if the defendant had not been capable of making an informed decision, the court would have held that the defendant had not given informed consent to the treatment.
In each juncture they must analyze the two lines of authority at issue in Zubik; determine which line of authority they favor and why; and (7) apply the same to their chosen legal principles. Creating organization out of that chaos through numbers one through three on this list, thus being guided through the statutory and regulatory argument a person seeking coverage may make. Thereafter, they may pick up with the analysis themselves in groups beginning at number four, articulating employers’ objections and formulating potential defenses based on the assigned class reading.

Initially, the exercise was self-contained within the class session, requiring two or three students to read and analyze the materials relating to gender assignment and to write up their arguments on the spot, in the context of the contraceptive coverage law they had prepared before class. Very shortly, however, it became apparent that the students would need more thorough work if they were to exercise the class, along with their reading. Part of their course grades depend on participation in class discussion, and having the exercise of time permits them to do a thorough job. After the doctrinal portion of the exercise, as they break into small groups for discussion, they all begin with the same material, formulated on their own ahead of time, now informed by what they learned during the first part of the class session. Discussion is usually round-robin until students report back from each small group, conclusions often stating the reasons this exercise serves as a good transitional exercise for policy and bioethics is the connection one may draw between reproductive freedom and the liberty interest in medical decision making.

As noted above, I steer students to consideration of those liberties, many of which Amendment, bioethical and political concepts during in-class discussion of the contraceptive coverage cases. During debriefing after they work on the cases in small groups, I again steer them in that direction. I ask if individuals may make any constitutional argument, assuming that exists, as it would in cases involving Medicaid coverage. One, of course, could argue for, and thus access to, a procedure is available to a woman for fibroid tumors, then (assuming necessity) it also should be available to a woman undergoing the

physical transition to a man’s body for gender dysphoria. This argument may become even more important if ACA section 155724 is repealed.

Second, once students have not only reflected on but also debated the reasons transgender individuals desire (even need) gender reassignment surgery, I ask if they can argue that other constitutional rights are at stake with respect to a transgender individual’s ability to transition fully to a body displaying the physical characteristics accurately depicting his or her gender. Eventually, someone will come up with Casey’s statement explaining why the Constitution protects personal decision making in procreation and other medical decision-making areas:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood they were formed under compulsion of the State.25

At this stage of discussion, I find it necessary to take care to focus the students narrowly on the choice of undergoing the surgery, at the risk of the conversation devolving into a debate over whether transgender individuals are making choices about their genders. That is sometimes a difficult line to draw, but there is much to be gained in terms of development of empathy among the students by tackling the issue.

III. LESSONS FOR THE FUTURE

In the past, I have assigned only the contraceptive coverage cases and casebook notes about them as substantive background for class discussion and the in-class exercise. Thus, I have relied on the students’ having taken Constitutional Law already so that they understand Equal Protection law and have encountered Roe v. Wade and Casey26 and Casey27 previously. In the assignment itself, I urge students who may not have encountered them or who cannot

25. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). See also Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (discussing such rights, plus others such as the right to marry, as “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).
27. Casey, 505 U.S. 833.
recall them to at least review their reasoning. In the future, I likely will add those cases, or at least Casey, to the assignment. Doing so will permit me to press the students more on those cases and the boundaries of the rights those cases recognized when teasing out constitutional arguments for entitlement to coverage for gender reassignment surgery.

The desire to urge students to creatively craft such arguments also has prompted me to assign this same problem in a Bioethics and Law course. There, the lesson follows immediately after coverage of Roe, Casey, and Gonzales v. Carhart. Although not directly at issue in Bioethics and Law, I also introduce the Supreme Court's 2015 opinion in Obergefell v. Hodges at this point, for its description of marriage as one of several "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." Adding Obergefell as recent authority permits me to raise questions later in the bioethics course about whether Washington v. Glucksberg, the Supreme Court's 1997 decision upholding a state law prohibiting aid in dying, should be reconsidered due to its unduly narrow view of autonomous medical decision making near the end of life.

Other readings I have contemplated adding to the problem are the anti-discrimination provision of ACA itself, cases challenging refusals to cover gender reassignment that have appeared since I created the problem in 2013, and one or more academic medical or psychological article(s) about gender dysphoria. Such materials lead to deeper understanding of the issues. They even may prompt a more far-ranging discussion of discriminatory motives; without disparaging the religious objections some employers assert, illegal and discriminatory attitudes unrelated to religion could underlie refusals to cover gender reassignment surgery. Yet, as illustrated in Appendix A, thus far I have chosen to draw the line in my assignment after the contraceptive coverage cases and a few popular press articles describing religious objections and insurance company reasoning regarding coverage of that surgery. The course is not focused on transgender issues or even on discrimination. I have chosen to analyze these issues as a consciousness-raising exercise of statutory construction potentially raising constitutional issues. My goals include inspiring creative lawyering, exposing connections between areas of health law that do not seem to be connected, and developing empathy and cultural competency among the students. These materials have sufficed so far.

28. See APPENDIX A.
30. Obergefell, 135 S. Ct. at 2585.
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28. See APPENDIX A.
30. Obergefell, 135 S. Ct. at 2585.
APPENDIX A

HPBQ Activity 3

This reading relates to religiously-based objections to mandates that certain medications or treatments be covered by employer-provided health care coverage. In this activity, we’re going to go a little further than the obvious (the abortion objection) and consider other treatments that might meet religious objections but also might differ in important ways.

GOALS OF THIS ASSIGNMENT:

1. Think beyond the obvious about the employers’ objections in Hobby Lobby and Notre Dame. 32

2. Consider whether and to what extent any proposed coverage mandate of certain other treatments might meet the same objections as a religious matter.

3. Consider whether those other sorts of treatments would have the same level of legal protection as abortion-related treatments have.

4. Consider more broadly the societal implications of the general acceptance of coverage for certain treatments as opposed to others.

As preparation for this in-class activity, please read the articles at the following links and come to class with some notes about your thoughts on the above four matters. I will not be collecting those notes, so you can scribble them in handwriting if you wish. I will, however, be watching to see that you have actual notes with you, as part of my evaluation of your class participation in this in-class activity. (I also will be watching to see that you are basing your comments on something beyond emotion and general beliefs.) For example, related to number three above, think about the similarities and differences between the subject discussed below and abortion in the sense of the United States Supreme Court’s rulings in Roe v. Wade, Planned Parenthood v. Casey, Gonzales v. Carhart, etc. If you did not read any of those opinions in a previous class (Con Law?), 33 make sure you do a little reading about them (or that you read those opinions) as part of your preparation for this in-class activity.

For your reading/preparation pleasure:

http://www.forbes.com/sites/peterubel/2012/10/04/is-sex-reassignment-surgery-a-basic-human-right/#2715ce4857a0b29ebc536866 [https://perma.cc/H8XZ-C9G8]

32. This is the in-class exercise I used in the spring semester of 2016. My essay, which discusses assigning Zuhik instead of Notre Dame, reflects plans for the next time I teach the course. As in almost every other health law course, rapidly changing law confounds attempts to use handouts and even some lesson plans from year to year. I have used a variation of this exercise every year between 2013 and 2016.

33. This caution is intended to capture students whose professors may not have covered individual rights, preferring to confine their Constitutional Law courses to structural considerations. Other students who may need to read these cases include those who are foreign lawyers seeking LLM degrees or others who may not have taken Constitutional Law for some reason, such as master’s-degree-level students in a school in which master’s-degree-level students take the same classes as J.D. students.
APPENDIX A

HPBQ Activity 3

This reading relates to religiously-based objections to mandates that certain medications or treatments be covered by employer-provided health care coverage. In this activity, we’re going to go a little further than the obvious (the abortion objection) and consider other treatments that might meet religious objections but also might differ in important ways.

GOALS OF THIS ASSIGNMENT:

1. Think beyond the obvious about the employers’ objections in *Hobby Lobby* and *Notre Dame.*

2. Consider whether and to what extent any proposed coverage mandate of certain other treatments might meet the same objections as a religious matter.

3. Consider whether those other sorts of treatments would have the same level of legal protection as abortion-related treatments have.

4. Consider more broadly the societal implications of the general acceptance of coverage for certain treatments as opposed to others.

As preparation for this in-class activity, please read the articles at the following links and come to class with some notes about your thoughts on the above four matters. I will not be collecting those notes, so you can scribble them in handwriting if you wish. I will, however, be watching to see that you have actual notes with you, as part of my evaluation of your class participation in this in-class activity. (I also will be watching to see that you are basing your comments on something beyond emotion and general beliefs.) For example, related to number three above, think about the similarities and differences between the subject discussed below and abortion in the sense of the United States Supreme Court’s rulings in *Roe v. Wade*, *Planned Parenthood v. Casey*, *Gonzales v. Carhart*, etc. If you did not read any of those opinions in a previous class (Con Law?), make sure you do a little reading about them (or that you read those opinions) as part of your preparation for this in-class activity.

For your reading/preparation pleasure:

http://www.aetna.com/medical/coverage-options/
[https://perma.cc/5XUP-XWAY]


http://www.forbes.com/sites/peterubel/2012/10/04/is-sex-reassignment-surgery-a-basic-human-right/#2715e4857a0b29bc53d6866 [https://perma.cc/H8XZ-C9G8]


32. This is the in-class exercise I used in the spring semester of 2016. My essay, which discusses assigning *Zubik* instead of *Notre Dame*, reflects plans for the next time I teach the course. As in almost every other health law course, rapidly changing law confounds attempts to use handouts and even some lesson plans from year to year. I have used a variation of this exercise every year between 2013 and 2016.

33. This caution is intended to capture students whose professors may not have covered individual rights, preferring to confine their Constitutional Law courses to structural considerations. Other students who may need to read these cases include those who are foreign lawyers seeking LLM degrees or others who may not have taken Constitutional Law for some reason, such as master's-degree-level students in a school in which master's-degree-level students take the same classes as J.D. students.