

*The* **BOISI CENTER** *for*  

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**RELIGION *and* AMERICAN PUBLIC LIFE**

## **Symposium on Religion and Politics**

### **HHS Mandate Debate**



# BOSTON COLLEGE

BOISI CENTER  
FOR RELIGION AND AMERICAN PUBLIC LIFE

## Symposium on Religion and Politics

### The HHS Mandate Debate

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## **President Obama's Remarks on Shift in Contraception Policy**

**Barack Obama**

2 Feb. 2012

As part of the healthcare reform law that I signed last year, all insurance plans are required to cover preventative healthcare at no cost. That means free check-ups, free mammograms, immunizations and other basic services.

We fought for this because it saves lives and because it saves money for families, for businesses, for government, for everybody. And that's because it's a lot cheaper to prevent an illness than to treat one.

We also accepted a recommendation from the experts at the Institute of Medicine that when it comes to women, preventative care should include coverage of contraceptive services such as birth control.

In addition to family planning, doctors often prescribe contraception as a way to reduce the risk of ovarian and other cancers and treat a variety of different ailments. And we know that the overall cost of health care is lower when women have access to contraceptive services.

Nearly 99 percent of all women have relied on contraception at some point in their lives. Ninety-nine percent. And yet more than half of all women between the ages of 18-34 have struggled to afford it. So for all these reasons, we decided to follow the judgment of the nation's leading medical experts and make sure that free preventive care includes access to free contraceptive care.

Whether you're a teacher or a small business woman or a nurse or a janitor, no woman's health should depend on who she is or where she works or how much money she makes. Every woman should be in control of the decisions that affect her own health. Period.

This basic principle is already the law in 28 states across the country. Now as we move to implement this rule, however, we've been mindful that there is another principle at stake here. And that's the principle of religious liberty, an inalienable right that has been enshrined in our Constitution.

As a citizen and as a Christian, I cherish this right. In fact my first job in Chicago was working with Catholic Parishes in poor neighborhoods. And my salary was funded by a grant from an arm of the Catholic church. And I saw that local churches often did more good for a community than a government program ever could. So I know how important the work that faith based organizations do and how much impact they can have in their community.

I also know that some religious institutions, particularly those affiliated with the Catholic Church, have a religious objection to directly providing insurance that covers contraceptive services for their employees. And that's why we originally exempted all churches from this requirement. An exemption, by the way, that 8 states didn't already have.

And that's why from the very beginning of this process, I spoke directly to various Catholic officials. And I promised that before finalizing the rule as it applied to them, we would spend the next year working with institutions like Catholic hospitals and Catholic universities to find an equitable solution that protects religious liberty and ensures every woman has access to the care that she needs.

Now, after the many genuine concerns that have been raised over the last few weeks, as well as frankly the more cynical desire on the part of some to make this into a political football, it became clear that spending months hammering out a solution was not going to be an option. That we needed to move this faster.

So last week, I directed the Department of Health and Human Services to speed up the process that had already been envisioned. We weren't going to spend a year doing this. We're going to spend a week or two doing this.

Today, we reached a decision on how to move forward. Under the rule, women will still have access to free preventive care. That includes contraceptive services no matter where they work. So that core principle remains, but if a women's employer is charity or hospital that has a religious objection to providing contraceptive services in the health plan, the insurance company not the hospital, not the charity will be required to reach out and offer the woman contraceptive care free of charge without co pays and without hassles.

The results will be that religious organizations won't have to pay for these services, and no religious institution will have to provide these services directly. Let me repeat: these employers won't have to pay for or provide contraceptive services. But women who work at these institutions will have access to free contraceptive services just like other women and they'll no longer have to pay hundreds of dollars a year that could go towards paying the rent or buying groceries.

I've been confident from the start that we could work out a sensible approach here, just as I promised. I understand some folks in Washington might want to treat this as a political wedge issue. But it shouldn't be. I certainly never saw it that way. This is an issue where people of good will on both sides of the debate have been sorted through some very complicated questions to find a solution that works for everyone.

With today's announcement we've done that. Religious liberty will be protected, and a law that requires pre preventive care will not discriminate against women. We live in a pluralistic society where we're not going to agree on every issue or share every belief. That doesn't mean that we have to choose between individual liberty and basic fairness for all Americans.

We are unique among nations for having been founded upon both these principles and our obligation as citizens to carry them forward. I have complete faith that we can do that. Thank you very much everybody.

## Remarks at Conservative Political Action Conference (CPAC)

Mitt Romney

February 10, 2012

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This year, here at CPAC, we've got a great crowd. It's been a great conference. For that I suppose we should acknowledge President Obama, the conservative movement's top recruiter. Turns out, he really is a great community organizer. Although, I don't think we were the community he had in mind.

Today we are poised for a great victory in November. The pundits and the pollsters tell us we can win this election. But we must tell the nation why we should win. It is up to us to prove that we are truly ready to step forward and lead this country. This election is not just about getting more votes. Defeating Barack Obama is only one step toward our greater goal of saving America.

Of course we can defeat Barack Obama! That's the easy part! Believe me, November 6th will be the easiest day our next President will face.

This country we love is in jeopardy. It's more than the economic statistics we read, it's the pain we feel in our hearts. For three years we have suffered through the failures not only of a weak leader, but of a bankrupt ideology. I am convinced that if we do our job, if we lead with conviction and integrity, that history will record the Obama Presidency as the last gasp of liberalism's great failure and a turning point for a new conservative era.

But it's not enough to show how they have failed. We must prove we deserve to lead. I am here today to ask you to stand with me shoulder to shoulder as we go forward to fight for America.

As we step forward together, now is the time to reaffirm what it means to be a conservative and why this must be our greatest hour. America is like no other country in history. At the very heart of our American conservatism is the conviction that the principles embodied in the Constitution and the Declaration of Independence are uniquely powerful, foundational, and defining. Some see the hand of Providence in their authorship. Others credit the brilliance of the Founders. Many of us see both. But conservatives all agree that departing from these founding principles is a departure from the greatness of America-- from our mission, from our freedom, from our prosperity, and from our purpose.

I know this President will never get it, but we conservatives aren't just proud to cling to our guns and to our religion. We are also proud to cling to our Constitution!

The wisdom of our founding documents is that they see the nation's prosperity not as a product of government, but as the product of individual citizens, each pursuing happiness. This is key to the success of the American experiment. America does not just exist for the people, it has been made exceptional by the people.

A free people, pursuing their own dreams and achieving success in their own ways – that is what has propelled America and made us the most prosperous and powerful nation in the world.

Many politicians on both sides of the aisle have forgotten that – if they ever really understood it at all. They have fallen under the spell of Washington.

Politicians are routinely elected on promises to change Washington, but when they come here, they become creatures of Washington. They begin to see government as the answer to every challenge and the solution for every problem. At every turn, they try to substitute the heavy hand of the federal government for free citizens and free enterprise. They think government knows better – and can do better – than a free people exercising their free will. And this President is the worst offender. Barack Obama is the poster child for the arrogance of government.

This election really is a battle for the soul of America. And it's going to come down to a choice between whether we want to be a nation of and by Washington ... or a nation of and by a free people.

As conservatives, we are united by a set of core commitments. But not everyone has taken the same path to get here. There are college students at this conference who are reading Burke and Hayek. When I was your age, you could have told me they were infielders for the Detroit Tigers. Some of you work in think tanks or follow the writings of prominent leaders. Some of you have worked in government or labored on the front lines of conservative causes. I salute you all.

My path to conservatism came from my family, my faith, and my life's work.

I was raised in a home shaped by and rooted in conservative values. My mother's father – my grandfather – came to America from England. As a teenager, he was alone in a new country, but he risked it all for a chance at religious liberty and economic opportunity.

You've probably heard how proud I am of my father. He was born to American parents living in Mexico. When he was five, they moved back to the United States. His dad was a builder who went bust more than once. My Dad grew up poor and never had a chance to finish his college degree. But he believed in a country where the circumstances of one's birth were not a barrier to achievement. And with hard work, he became the head of a car company and the Governor of the great state of Michigan.

The values that allowed my parents to achieve their dreams are the same values they instilled in my siblings and me. Those aren't values I just talk about; they are values that I live every day. My 42-year marriage to my wife, Ann; the life we've built with our five sons; and the faith that sustains us – these conservative constants have shaped my life.

In business, if you're not fiscally conservative, you're bankrupt. I spent 25 years balancing budgets, eliminating waste, and keeping as far away from government as was humanly possible. I did things conservatism is designed for – I started new businesses and turned around broken ones. And I am not ashamed to say that I was very successful at it.

I know conservatism because I have lived conservatism.

As governor of Massachusetts, I had the unique experience of defending our conservative principles in the most liberal state in our union.

When I took office, I was facing a \$3 billion budget deficit and an economy in a tailspin.

Even with a legislature that was 85% Democrat, I cut taxes 19 times and balanced the budget all four years. I cast over 800 vetoes and cut entire programs. I erased a \$3 billion budget shortfall and left office with a \$2 billion rainy day fund. If there was a program, an agency, or a department that needed cutting, we cut it. In fact, a commentator once said that I didn't just go after the sacred cows, I went after the whole herd. And I can't wait to get my hands on Washington.

During my tenure, our conservative values also came under attack. Less than a year after I took office, the state's supreme court inexplicably found a right to same-sex marriage in our constitution. I pushed for a stay of the decision, fought for a marriage amendment to our constitution, and successfully prohibited out-of-state couples from coming to our state to get married and then go home. On my watch, we fought hard and prevented Massachusetts from becoming the Las Vegas of gay marriage. When I am President, I will preserve the Defense of Marriage Act and I will fight for a federal amendment defining marriage as a relationship between one man and one woman.

During my time in office, I stood up to those who wanted to call into question the very definition of life. I vetoed a bill that would have opened the door to cloning and embryo farming. I vetoed a bill that would have allowed young girls to gain access to abortion-inducing drugs. I fought for abstinence education in our public schools. And I defended the Catholic Church's right to serve their community in ways that were consistent with their conscience through adoption programs that placed children in a home with a mom and a dad.

I was a conservative governor. I fought against long odds in a deep blue state. I understand the battles that we, as conservatives, must fight because I have been on the front lines.

Here at CPAC, I know you understand this. This gathering has always welcomed me. And you have consistently supported me – not because of my rhetoric, but because of my record.

Over the course of this conference, several candidates either have been – or will come – before you seeking to lead our country out of these troubled times. What distinguishes us from one another is not our opposition to President Obama or even our support for conservative convictions. What distinguishes us is the nature of our experience, our perspective, and our judgment.

This election will ultimately be about two very different visions for America. But our more immediate choice will be between candidates from two very different backgrounds.

I spent 25 years in business, starting at the bottom and going on to help create a great American success story. I led an Olympics out of the shadows of scandal and turned around a state crying out for leadership.

In each of these endeavors, I worked with many talented people, but I was the Chief Executive. Success or failure lay on my shoulders. When tough decisions had to be made, I made them.

Leadership as a Chief Executive isn't about getting a bill out of subcommittee or giving a speech – it's about setting clear goals and overcoming constant adversity. It's about sharing credit when times are good and taking responsibility for failure.

I am the only candidate in this race, Republican or Democrat, who has never worked a day in Washington. I don't have old scores to settle or decades of cloakroom deals to defend.

As conservatives, you've learned to be skeptical of this city and its politicians and right you are.

My wife and I raised five boys and one of the lessons you learn is that when you hear an excuse that just doesn't make sense... it's because it doesn't make sense. And let me tell you, any politician who tries to convince you that they hated Washington so much that they just couldn't leave, well, that's the same politician who will try to sell you a Bridge to Nowhere.

This is a moment when our country needs serious change and real reform. So, let me tell you exactly what kind of President I will be.

To get America back on track and get Americans back to work, we need bold and sweeping reforms. These are not managerial issues of changing this department or that agency. To change Washington, we must change the relationship between government and citizen. These are moral choices that will define us for generations to come.

Today we borrow almost forty cents of every dollar we spend. That is unconscionable. It's unsustainable. It's reckless. It's immoral. And, if I am President, it will end.

I will approach every spending decision by asking a few important questions: Can we afford it? And, if not, is it worth borrowing money from China to pay for it?

As President, I will not just slow the growth of government, I will cut it. I will not just freeze government's share of the total economy, I will reduce it. And, without raising taxes or sacrificing America's military superiority, I will finally balance the budget.

And that will start with the easiest cut of all – I will eliminate Obamacare.

I will dramatically reduce the size of the federal workforce. And, for the first time ever, we will tie the compensation and benefits of federal workers to those in the private sector. The principle here is simple: public servants should not get a better deal than the citizens they serve.

But cutting spending and bureaucracy alone won't be enough. In their current form, Social Security and Medicare are unsustainable. And we cannot afford to avoid our entitlement challenges any longer.

I am the only candidate for President who has offered a sweeping, specific plan to save Social Security and reform Medicare. There are those who say you can't talk straight to the American people on these key issues and still win an election. I say we can, we must, and I will!

These are sensible and critical reforms. Under my plan, no one at or near the retirement age will see any changes. And tax hikes are off the table.

We will slowly and gradually raise the retirement age for Social Security – and, we will slow the growth in benefits for our nation's higher-income retirees.

When it comes to Medicare, tomorrow's seniors should have the freedom to choose between traditional Medicare and a range of private plans. If these future seniors choose a more expensive plan, they would bear the additional cost.

I know this President and his liberal allies will attack me for leading where he has failed. So be it. I will stand and fight – and we will win.

He will attack us with the usual fear tactics, but we will remind Americans that during this President's term we have seen record high job losses and record home foreclosures. We will not be lectured to on values by the man whose ineptitude and failure has created so much unnecessary pain for our fellow Americans.

Ours will not be the easy course. But it will be the right course. And I am confident that Americans are yearning for a President to do what is needed, not what is expedient.

And let me be clear: Mine will be a pro-life presidency.

On day one, I will reinstate the Mexico City policy.

I will cut off funding for the United Nations Population Fund, which supports China's barbaric One Child Policy.

I will ensure that organizations like Planned Parenthood get no federal support.

And I will reverse every single Obama regulation that attacks our religious liberty and threatens innocent life.

The Presidency is more than a public office; it is a sacred trust. As President, I will honor that trust by assuring that America remains the greatest military power on the face of the earth. This is very simple: If you do not want America to be the strongest nation on earth, I am not your President. You have that President today.

This election is a defining moment for our generation and for the conservative movement. Make no mistake – we have an opportunity for Greatness but with that opportunity comes defining responsibility. We cannot use this election to refight past battles or reward our friends. I know

that the fundamental change this moment demands will take fresh, bold conservative leadership with real world solutions based on real world experience.

I will come to Washington, and, with your help and guidance and prayers, I will change Washington. And then I will leave Washington and go back to the life and family I love.

I believe this is a moment that demands we return to our basic values and first principals. This is our moment. This is why we are conservatives. The task before us now is to reaffirm the convictions that unite us and go forward shoulder to shoulder to secure the victory America deserves.

Thank you and God bless.



# **United States Conference of Catholic Bishops**

## **Ad Hoc Committee for Religious Liberty**

### **Our First, Most Cherished Liberty**

#### *A Statement on Religious Liberty*

We are Catholics. We are Americans. We are proud to be both, grateful for the gift of faith which is ours as Christian disciples, and grateful for the gift of liberty which is ours as American citizens. To be Catholic and American should mean not having to choose one over the other. Our allegiances are distinct, but they need not be contradictory, and should instead be complementary. That is the teaching of our Catholic faith, which obliges us to work together with fellow citizens for the common good of all who live in this land. That is the vision of our founding and our Constitution, which guarantees citizens of all religious faiths the right to contribute to our common life together.

Freedom is not only for Americans, but we think of it as something of our special inheritance, fought for at a great price, and a heritage to be guarded now. We are stewards of this gift, not only for ourselves but for all nations and peoples who yearn to be free. Catholics in America have discharged this duty of guarding freedom admirably for many generations.

In 1887, when the archbishop of Baltimore, James Gibbons, was made the second American cardinal, he defended the American heritage of religious liberty during his visit to Rome to receive the red hat. Speaking of the great progress the Catholic Church had made in the United States, he attributed it to the “civil liberty we enjoy in our enlightened republic.” Indeed, he made a bolder claim, namely that “in the genial atmosphere of liberty [the Church] blossoms like a rose.”<sup>1</sup>

From well before Cardinal Gibbons, Catholics in America have been advocates for religious liberty, and the landmark teaching of the Second Vatican Council on religious liberty was influenced by the American experience. It is among the proudest boasts of the Church on

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<sup>1</sup> Cardinal James Gibbons, Address upon taking possession of Santa Maria in Trastevere, March 25, 1887.

these shores. We have been staunch defenders of religious liberty in the past. We have a solemn duty to discharge that duty today.

We need, therefore, to speak frankly with each other when our freedoms are threatened. Now is such a time. As Catholic bishops and American citizens, we address an urgent summons to our fellow Catholics and fellow Americans to be on guard, for religious liberty is under attack, both at home and abroad.

This has been noticed both near and far. Pope Benedict XVI recently spoke about his worry that religious liberty in the United States is being weakened. He called it the “most cherished of American freedoms”—and indeed it is. All the more reason to heed the warning of the Holy Father, a friend of America and an ally in the defense of freedom, in his recent address to American bishops:

Of particular concern are certain attempts being made to limit that most cherished of American freedoms, the freedom of religion. Many of you have pointed out that concerted efforts have been made to deny the right of conscientious objection on the part of Catholic individuals and institutions with regard to cooperation in intrinsically evil practices. Others have spoken to me of a worrying tendency to reduce religious freedom to mere freedom of worship without guarantees of respect for freedom of conscience.

Here once more we see the need for an engaged, articulate and well-formed Catholic laity endowed with a strong critical sense vis-à-vis the dominant culture and with the courage to counter a reductive secularism which would delegitimize the Church’s participation in public debate about the issues which are determining the future of American society.<sup>2</sup>

## **Religious Liberty Under Attack—Concrete Examples**

Is our most cherished freedom truly under threat? Sadly, it is. This is not a theological or legal dispute without real world consequences. Consider the following:

- *HHS mandate for contraception, sterilization, and abortion-inducing drugs.* The mandate of the Department of Health and Human Services has received wide attention and has been met with our vigorous and united opposition. In an unprecedented way, the federal government will both force religious institutions to facilitate and fund a product contrary to their own moral teaching and purport to define which religious institutions are “religious enough” to merit protection of their religious liberty. These features of the “preventive services” mandate amount to an unjust law. As Archbishop-designate

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<sup>2</sup> Benedict XVI, *Ad limina* address to bishops of the United States, January 19, 2012.

William Lori of Baltimore, Chairman of the Ad Hoc Committee for Religious Liberty, testified to Congress: “This is not a matter of whether contraception may be *prohibited* by the government. This is not even a matter of whether contraception may be *supported* by the government. Instead, it is a matter of whether religious people and institutions may be *forced* by the government to provide coverage for contraception or sterilization, even if that violates their religious beliefs.”<sup>3</sup>

- *State immigration laws.* Several states have recently passed laws that forbid what the government deems “harboring” of undocumented immigrants—and what the Church deems Christian charity and pastoral care to those immigrants. Perhaps the most egregious of these is in Alabama, where the Catholic bishops, in cooperation with the Episcopal and Methodist bishops of Alabama, filed suit against the law:

It is with sadness that we brought this legal action but with a deep sense that we, as people of faith, have no choice but to defend the right to the free exercise of religion granted to us as citizens of Alabama. . . . The law makes illegal the exercise of our Christian religion which we, as citizens of Alabama, have a right to follow. The law prohibits almost everything which would assist an undocumented immigrant or encourage an undocumented immigrant to live in Alabama. This new Alabama law makes it illegal for a Catholic priest to baptize, hear the confession of, celebrate the anointing of the sick with, or preach the word of God to, an undocumented immigrant. Nor can we encourage them to attend Mass or give them a ride to Mass. It is illegal to allow them to attend adult scripture study groups, or attend CCD or Sunday school classes. It is illegal for the clergy to counsel them in times of difficulty or in preparation for marriage. It is illegal for them to come to Alcoholic Anonymous meetings or other recovery groups at our churches.<sup>4</sup>

- *Altering Church structure and governance.* In 2009, the Judiciary Committee of the Connecticut Legislature proposed a bill that would have forced Catholic parishes to be restructured according to a congregational model, recalling the trusteeism controversy of the early nineteenth century, and prefiguring the federal government’s attempts to redefine for the Church “religious minister” and “religious employer” in the years since.
- *Christian students on campus.* In its over-100-year history, the University of California Hastings College of Law has denied student organization status to only one group, the

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<sup>3</sup> Most Rev. William E. Lori, Chairman, USCCB Ad Hoc Committee on Religious Liberty, Oral Testimony Before the Judiciary Committee of the United States House of Representatives, February 28, 2012.

<sup>4</sup> Most Rev. Thomas J. Rodi, Archbishop of Mobile, August 1, 2011.

Christian Legal Society, because it required its leaders to be Christian and to abstain from sexual activity outside of marriage.

- *Catholic foster care and adoption services.* Boston, San Francisco, the District of Columbia, and the state of Illinois have driven local Catholic Charities out of the business of providing adoption or foster care services—by revoking their licenses, by ending their government contracts, or both—because those Charities refused to place children with same-sex couples or unmarried opposite-sex couples who cohabit.
- *Discrimination against small church congregations.* New York City enacted a rule that barred the Bronx Household of Faith and sixty other churches from renting public schools on weekends for worship services even though non-religious groups could rent the same schools for scores of other uses. While this would not frequently affect Catholic parishes, which generally own their own buildings, it would be devastating to many smaller congregations. It is a simple case of discrimination against religious believers.
- *Discrimination against Catholic humanitarian services.* Notwithstanding years of excellent performance by the United States Conference of Catholic Bishops' Migration and Refugee Services in administering contract services for victims of human trafficking, the federal government changed its contract specifications to require us to provide or refer for contraceptive and abortion services in violation of Catholic teaching. Religious institutions should not be disqualified from a government contract based on religious belief, and they do not somehow lose their religious identity or liberty upon entering such contracts. And yet a federal court in Massachusetts, turning religious liberty on its head, has since declared that such a disqualification is *required* by the First Amendment—that the government somehow *violates* religious liberty by allowing Catholic organizations to participate in contracts in a manner consistent with their beliefs on contraception and abortion.

## **Religious Liberty Is More Than Freedom of Worship**

Religious liberty is not only about our ability to go to Mass on Sunday or pray the Rosary at home. It is about whether we can make our contribution to the common good of all Americans. Can we do the good works our faith calls us to do, without having to compromise that very same faith? Without religious liberty properly understood, all Americans suffer, deprived of the essential contribution in education, health care, feeding the hungry, civil rights, and social services that religious Americans make every day, both here at home and overseas.

What is at stake is whether America will continue to have a free, creative, and robust civil society—or whether the state alone will determine who gets to contribute to the common good,

and how they get to do it. Religious believers are part of American civil society, which includes neighbors helping each other, community associations, fraternal service clubs, sports leagues, and youth groups. All these Americans make their contribution to our common life, and they do not need the permission of the government to do so. Restrictions on religious liberty are an attack on civil society and the American genius for voluntary associations.

The Union of Orthodox Jewish Congregations of America issued a statement about the administration's contraception and sterilization mandate that captured exactly the danger that we face:

Most troubling, is the Administration's underlying rationale for its decision, which appears to be a view that if a religious entity is not insular, but engaged with broader society, it loses its "religious" character and liberties. Many faiths firmly believe in being open to and engaged with broader society and fellow citizens of other faiths. The Administration's ruling makes the price of such an outward approach the violation of an organization's religious principles. This is deeply disappointing.<sup>5</sup>

This is not a Catholic issue. This is not a Jewish issue. This is not an Orthodox, Mormon, or Muslim issue. It is an American issue.

## **The Most Cherished of American Freedoms**

In 1634, a mix of Catholic and Protestant settlers arrived at St. Clement's Island in Southern Maryland from England aboard the *Ark* and the *Dove*. They had come at the invitation of the Catholic Lord Baltimore, who had been granted Maryland by the Protestant King Charles I of England. While Catholics and Protestants were killing each other in Europe, Lord Baltimore imagined Maryland as a society where people of different faiths could live together peacefully. This vision was soon codified in Maryland's 1649 Act Concerning Religion (also called the "Toleration Act"), which was the first law in our nation's history to protect an individual's right to freedom of conscience.

Maryland's early history teaches us that, like any freedom, religious liberty requires constant vigilance and protection, or it will disappear. Maryland's experiment in religious toleration ended within a few decades. The colony was placed under royal control, and the Church of England became the established religion. Discriminatory laws, including the loss of political rights, were enacted against those who refused to conform. Catholic chapels were closed, and Catholics were restricted to practicing their faith in their homes. The Catholic community lived under these conditions until the American Revolution.

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<sup>5</sup> Union of Orthodox Jewish Congregations, Statement, January 24, 2012.

By the end of the 18th century, our nation’s founders embraced freedom of religion as an essential condition of a free and democratic society. James Madison, often called the Father of the Constitution, described conscience as “the most sacred of all property.”<sup>6</sup> He wrote that “the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”<sup>7</sup> George Washington wrote that “the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle.”<sup>8</sup> Thomas Jefferson assured the Ursuline Sisters—who had been serving a mostly non-Catholic population by running a hospital, an orphanage, and schools in Louisiana since 1727—that the principles of the Constitution were a “sure guarantee” that their ministry would be free “to govern itself according to its own voluntary rules, without interference from the civil authority.”<sup>9</sup>

It is therefore fitting that when the Bill of Rights was ratified, religious freedom had the distinction of being the First Amendment. Religious liberty is indeed the first liberty. The First Amendment guarantees that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

Recently, in a unanimous Supreme Court judgment affirming the importance of that first freedom, the Chief Justice of the United States explained that religious liberty is not just the first freedom for Americans; rather it is the first in the history of democratic freedom, tracing its origins back the first clauses of the Magna Carta of 1215 and beyond. In a telling example, Chief Justice Roberts illustrated our history of religious liberty in light of a Catholic issue decided upon by James Madison, who guided the Bill of Rights through Congress and is known as the architect of the First Amendment:

[In 1806] John Carroll, the first Catholic bishop in the United States, solicited the Executive’s opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State James Madison responded that the selection of church “functionaries” was an “entirely ecclesiastical” matter left to the Church’s own judgment. The “scrupulous policy of the Constitution in guarding against a political interference with religious affairs,” Madison explained, prevented the Government from rendering an opinion on the “selection of ecclesiastical individuals.”<sup>10</sup>

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<sup>6</sup> James Madison, “Property,” March 29, 1792, in *The Founding Fathers*, eds. Philip B. Kurland and Ralph Lerner (Chicago: The University of Chicago Press, 1987), accessed March 27, 2012. <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

<sup>7</sup> James Madison, “Memorial and Remonstrance Against Religious Assessment,” June 20, 1785, in *The Founding Fathers*, accessed March 27, 2012. [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html).

<sup>8</sup> Michael Novak and Jana Novak, *Washington’s God*, 2006.

<sup>9</sup> Anson Phelps Stokes, *Church and State in the United States* (Harper & Brothers Publishers, 1950), 678.

<sup>10</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. \_\_\_, 132 S. Ct. 694, 703 (2012).

That is our American heritage, our most cherished freedom. It is the first freedom because if we are not free in our conscience and our practice of religion, all other freedoms are fragile. If citizens are not free in their own consciences, how can they be free in relation to others, or to the state? If our obligations and duties to God are impeded, or even worse, contradicted by the government, then we can no longer claim to be a land of the free, and a beacon of hope for the world.

## **Our Christian Teaching**

During the civil rights movement of the 1950s and 1960s, Americans shone the light of the Gospel on a dark history of slavery, segregation, and racial bigotry. The civil rights movement was an essentially religious movement, a call to awaken consciences, not only an appeal to the Constitution for America to honor its heritage of liberty.

In his famous “Letter from Birmingham Jail” in 1963, Rev. Martin Luther King Jr. boldly said, “The goal of America is freedom.” As a Christian pastor, he argued that to call America to the full measure of that freedom was the specific contribution Christians are obliged to make. He rooted his legal and constitutional arguments about justice in the long Christian tradition:

I would agree with Saint Augustine that “An unjust law is no law at all.” Now what is the difference between the two? How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law.<sup>11</sup>

It is a sobering thing to contemplate our government enacting an unjust law. An unjust law cannot be obeyed. In the face of an unjust law, an accommodation is not to be sought, especially by resorting to equivocal words and deceptive practices. If we face today the prospect of unjust laws, then Catholics in America, in solidarity with our fellow citizens, must have the courage not to obey them. No American desires this. No Catholic welcomes it. But if it should fall upon us, we must discharge it as a duty of citizenship and an obligation of faith.

It is essential to understand the distinction between conscientious objection and an unjust law. Conscientious objection permits some relief to those who object to a just law for reasons of conscience—conscriptio being the most well-known example. An unjust law is “no law at all.” It cannot be obeyed, and therefore one does not seek relief from it, but rather its repeal.

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<sup>11</sup> Martin Luther King Jr., “Letter from Birmingham Jail,” April 16, 1963.

The Christian church does not ask for special treatment, simply the rights of religious freedom for all citizens. Rev. King also explained that the church is neither the master nor the servant of the state, but its conscience, guide, and critic.

As Catholics, we know that our history has shadows too in terms of religious liberty, when we did not extend to others the proper respect for this first freedom. But the teaching of the Church is absolutely clear about religious liberty:

The human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs . . . whether privately or publicly, whether alone or in association with others, within due limits. . . . This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. Thus it is to become a civil right.<sup>12</sup>

As Catholics, we are obliged to defend the right to religious liberty for ourselves and for others. We are happily joined in this by our fellow Christians and believers of other faiths.

A recent letter to President Obama from some sixty religious leaders, including Christians of many denominations and Jews, argued that “it is emphatically not only Catholics who deeply object to the requirement that health plans they purchase must provide coverage of contraceptives that include some that are abortifacients.”<sup>13</sup>

More comprehensively, a theologically rich and politically prudent declaration from Evangelicals and Catholics Together made a powerful case for greater vigilance in defense of religious freedom, precisely as a united witness animated by the Gospel of Jesus Christ.<sup>14</sup> Their declaration makes it clear that as Christians of various traditions we object to a “naked public square,” stripped of religious arguments and religious believers. We do not seek a “sacred public square” either, which gives special privileges and benefits to religious citizens. Rather, we seek a civil public square, where all citizens can make their contribution to the common good. At our best, we might call this an American public square.

The Lord Jesus came to liberate us from the dominion of sin. Political liberties are one part of that liberation, and religious liberty is the first of those liberties. Together with our fellow Christians, joined by our Jewish brethren, and in partnership with Americans of other religious

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<sup>12</sup> Second Vatican Council, *Declaration on Religious Liberty (Dignitatis Humanae)*, no. 2, in *The Documents of Vatican II*, ed. Walter M. Abbott (New York: Guild Press, 1966).

<sup>13</sup> Letter from Leith Anderson *et al.* to President Obama, December 21, 2011 (available at [www.becketfund.org/wp-content/uploads/2011/12/To-President-NonCatholics-RelExemptionSigned.pdf](http://www.becketfund.org/wp-content/uploads/2011/12/To-President-NonCatholics-RelExemptionSigned.pdf)).

<sup>14</sup> Evangelicals and Catholics Together, “In Defense of Religious Freedom,” *First Things*, March 2012.

traditions, we affirm that our faith requires us to defend the religious liberty granted us by God, and protected in our Constitution.

## **Martyrs Around the World**

In this statement, as bishops of the United States, we are addressing ourselves to the situation we find here at home. At the same time, we are sadly aware that religious liberty in many other parts of the world is in much greater peril. Our obligation at home is to defend religious liberty robustly, but we cannot overlook the much graver plight that religious believers, most of them Christian, face around the world. The age of martyrdom has not passed. Assassinations, bombings of churches, torching of orphanages—these are only the most violent attacks Christians have suffered because of their faith in Jesus Christ. More systematic denials of basic human rights are found in the laws of several countries, and also in acts of persecution by adherents of other faiths.

If religious liberty is eroded here at home, American defense of religious liberty abroad is less credible. And one common threat, spanning both the international and domestic arenas, is the tendency to reduce the freedom of religion to the mere freedom of worship. Therefore, it is our task to strengthen religious liberty at home, in this and other respects, so that we might defend it more vigorously abroad. To that end, American foreign policy, as well as the vast international network of Catholic agencies, should make the promotion of religious liberty an ongoing and urgent priority.

## **“All the Energies the Catholic Community Can Muster”**

What we ask is nothing more than that our God-given right to religious liberty be respected. We ask nothing less than that the Constitution and laws of the United States, which recognize that right, be respected.

In insisting that our liberties as Americans be respected, we know as bishops that what our Holy Father said is true. This work belongs to “an engaged, articulate and well-formed Catholic laity endowed with a strong critical sense vis-à-vis the dominant culture.”

As bishops we seek to bring the light of the Gospel to our public life, but the work of politics is properly that of committed and courageous lay Catholics. We exhort them to be both engaged and articulate in insisting that as Catholics and as Americans we do not have to choose between the two. There is an urgent need for the lay faithful, in cooperation with Christians, Jews, and others, to impress upon our elected representatives the importance of continued protection of religious liberty in a free society.

We address a particular word to those holding public office. It is your noble task to govern for the common good. It does not serve the common good to treat the good works of religious believers as a threat to our common life; to the contrary, they are essential to its proper functioning. It is also your task to protect and defend those fundamental liberties guaranteed by the Bill of Rights. This ought not to be a partisan issue. The Constitution is not for Democrats or Republicans or Independents. It is for all of us, and a great nonpartisan effort should be led by our elected representatives to ensure that it remains so.

We recognize that a special responsibility belongs to those Catholics who are responsible for our impressive array of hospitals, clinics, universities, colleges, schools, adoption agencies, overseas development projects, and social service agencies that provide assistance to the poor, the hungry, immigrants, and those faced with crisis pregnancies. You do the work that the Gospel mandates that we do. It is you who may be forced to choose between the good works we do by faith, and fidelity to that faith itself. We encourage you to hold firm, to stand fast, and to insist upon what belongs to you by right as Catholics and Americans. Our country deserves the best we have to offer, including our resistance to violations of our first freedom.

To our priests, especially those who have responsibility for parishes, university chaplaincies, and high schools, we ask for a catechesis on religious liberty suited to the souls in your care. As bishops we can provide guidance to assist you, but the courage and zeal for this task cannot be obtained from another—it must be rooted in your own concern for your flock and nourished by the graces you received at your ordination.

Catechesis on religious liberty is not the work of priests alone. The Catholic Church in America is blessed with an immense number of writers, producers, artists, publishers, filmmakers, and bloggers employing all the means of communications—both old and new media—to expound and teach the faith. They too have a critical role in this great struggle for religious liberty. We call upon them to use their skills and talents in defense of our first freedom.

Finally to our brother bishops, let us exhort each other with fraternal charity to be bold, clear, and insistent in warning against threats to the rights of our people. Let us attempt to be the “conscience of the state,” to use Rev. King’s words. In the aftermath of the decision on contraceptive and sterilization mandates, many spoke out forcefully. As one example, the words of one of our most senior brothers, Cardinal Roger Mahony, thirty-five years a bishop and recently retired after twenty-five years as archbishop of Los Angeles, provide a model for us here: “I cannot imagine a more direct and frontal attack on freedom of conscience than this ruling today. This decision must be fought against with all the energies the Catholic community can muster.”<sup>15</sup>

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<sup>15</sup> Cardinal Roger Mahony, “Federal Government Mandate for Contraceptive/Sterilization Coverage,” *Cardinal Roger Mahony Blogs L.A.* (blog), January 20, 2012, [cardinalrogermahonyblogspot.com/2012/01/federal-government-mandate-for.html](http://cardinalrogermahonyblogspot.com/2012/01/federal-government-mandate-for.html).

## **A Fortnight for Freedom**

In particular, we recommend to our brother bishops that we focus “all the energies the Catholic community can muster” in a special way this coming summer. As pastors of the flock, our privileged task is to lead the Christian faithful in prayer.

Both our civil year and liturgical year point us on various occasions to our heritage of freedom. This year, we propose a special “fortnight for freedom,” in which bishops in their own dioceses might arrange special events to highlight the importance of defending our first freedom. Our Catholic institutions also could be encouraged to do the same, especially in cooperation with other Christians, Jews, people of other faiths, and indeed, all who wish to defend our most cherished freedom.

We suggest that the fourteen days from June 21—the vigil of the Feasts of St. John Fisher and St. Thomas More—to July 4, Independence Day, be dedicated to this “fortnight for freedom”—a great hymn of prayer for our country. Our liturgical calendar celebrates a series of great martyrs who remained faithful in the face of persecution by political power—St. John Fisher and St. Thomas More, St. John the Baptist, SS. Peter and Paul, and the First Martyrs of the Church of Rome. Culminating on Independence Day, this special period of prayer, study, catechesis, and public action would emphasize both our Christian and American heritage of liberty. Dioceses and parishes around the country could choose a date in that period for special events that would constitute a great national campaign of teaching and witness for religious liberty.

In addition to this summer’s observance, we also urge that the Solemnity of Christ the King—a feast born out of resistance to totalitarian incursions against religious liberty—be a day specifically employed by bishops and priests to preach about religious liberty, both here and abroad.

To all our fellow Catholics, we urge an intensification of your prayers and fasting for a new birth of freedom in our beloved country. We invite you to join us in an urgent prayer for religious liberty.

*Almighty God, Father of all nations,*

*For freedom you have set us free in Christ Jesus (Gal 5:1).*

*We praise and bless you for the gift of religious liberty,*

*the foundation of human rights, justice, and the common good.*

*Grant to our leaders the wisdom to protect and promote our liberties;*

*By your grace may we have the courage to defend them, for ourselves and for all those who live  
in this blessed land.*

*We ask this through the intercession of Mary Immaculate, our patroness,*

*and in the name of your Son, our Lord Jesus Christ, in the unity of the Holy Spirit, with whom you live and reign, one God, for ever and ever. Amen.*

## Acknowledgments

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The document *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, was developed by the Ad Hoc Committee for Religious Liberty of the United States Conference of Catholic Bishops (USCCB). It was approved by the Administrative Committee of the USCCB at its March 2012 meeting as a statement of the Committee and has been authorized for publication by the undersigned.

Msgr. Ronny E. Jenkins, JCD  
General Secretary, USCCB

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## A B A L A N C I N G   A C T

[March 5, 2012](#) [1]

[David Hollenbach](#) [2], [Thomas A. Shannon](#) [3]

Catholic teaching on the church's rights and the rights of all

Although the presidential election is 10 months away, some rhetorical fires are already raging. Key issues, as identified by some candidates and by the U.S. Catholic bishops, include abortion, gay marriage and contraception. Rightly or wrongly, many people think no political compromise is possible on these matters. And in this year's electoral politics, religious freedom is being invoked in ways that have political implications.

Catholic teaching on religious freedom provides a carefully nuanced framework for considering these debates. One element of the tradition requires respect for the church's right to play an active role in public life. The Catholic understanding of religious freedom stands in sharp contrast to secularizing approaches to public life and privatistic interpretations of the place of religion. The contrast is particularly evident in the way the U.S. bishops have linked their opposition to same-sex relationships and gay marriage to their exercise of religious freedom. They state that the human rights of all persons must be protected, but that this "should be done without sacrificing the bedrock of society that is marriage and the family and without violating the religious liberty of persons and institutions." This linkage echoes controversies about whether Catholic institutions can be legally required to provide family health care benefits for the partners of employees in same-sex relationships, provide adoption services to gay couples or fund insurance plans that cover contraception.



### Civil Law and Moral Values

Argument about the role of the U.S. bishops in public life reached high intensity during the debate over the Affordable Health Care Act enacted in 2010. Though the bishops have been long-time supporters of affordable, universal health care insurance for all Americans, they opposed the health care bill because they concluded that the bill could allow tax dollars to fund abortions. Yet this position was not a matter of moral principle; it was a prudential judgment about consequences they thought might follow were the legislation passed. Whether the bishops were right in their judgment on this complex public policy has been questioned.

Unquestionably, the bishops' opposition to the Affordable Health Care bill was an exercise of their right to religious freedom. But how does their exercise of religious freedom relate to their other moral concerns, such as the right of all persons to adequate health care? When religious freedom is exercised to advocate legislative policy to enforce certain moral standards, like opposition to abortion or same-sex marriage, the role of civil law in the enforcement of moral norms comes to the fore. When and how is civil legislation an appropriate means for the promotion of the moral norms taught by the church's magisterium?



These questions, present in the current electoral debates, join two distinct but overlapping issues—moral pluralism among the U.S. population and an increasing politicization of religious issues. In Robert Putnam and David Campbell's book *American Grace: How Religion Divides and Unites Us*, two findings are significant. First, largely because post-baby-boomer generations are alienated from Catholic and evangelical leaders' positions on gay rights and abortion, younger Americans have become increasingly secularized. The percentage of young people who say they have "no religion" increased from 5 percent in the 1970s, '80s and '90s to 25 percent today.

Second, there is a notable correlation between being actively engaged in a religious community and supporting the Republican Party; there is a similar link between not being active in any religious community and supporting the Democratic Party. The so-called "God-gap" in American political alignment revolves primarily around the issues of abortion and homosexual relationships. Those who are pro-life and pro-traditional marriage are likely to be believers

and Republicans, while those who are pro-choice and pro-gay rights are increasingly secular and Democratic. Abortion and homosexuality overshadow a range of other public issues of moral importance: avoidance of war, discontinuation of the death penalty, promotion of economic justice through jobs and just wages, provision of affordable health care, overcoming racial and gender discrimination, alleviation of global poverty and the promotion of human rights.

Mary Jo Bane, of Harvard University's Kennedy School of Government, has argued that polarization in politics is making it increasingly difficult for Americans to agree on or to achieve common purposes in national life. Since the Catholic moral tradition sees the promotion of the common good as the principal purpose of law and politics, one can ask whether polarization ought not to be raising serious concerns among Catholics.

Neither the unity of society nor the concerns of those who are religiously active should override all other values as the church determines its pastoral agenda. But some moral questions may have such importance that pursuing them justifies pastoral actions that lead to social conflict and the departure of some people from active involvement in the church. Still, if religio-political polarization threatens efforts to work for the common good and occasions a sharp decline in active participation in the religious community by the younger generation, then careful consideration is called for about how church leaders approach public policies on abortion, contraception and same-sex relationships.

### **A Modest Approach**

Catholic moral tradition has long stressed that civil law should be founded on moral values. But it also stresses that civil law need not seek to abolish all immoral activities in society. For one thing, such a goal is impossible to attain. Since it is very unlikely that a majority of people in a particular society will be fully virtuous, civil law should not try to coerce people to move dramatically beyond the level of virtue they have already attained. Such efforts would likely produce resistance, bringing civil law into disrepute and leading to an outcome that may be worse than pursuing more modest moral goals.

Following this approach, John Courtney Murray, S.J., observed that efforts to promote virtue in sexual matters through civil coercion are particularly unlikely to succeed. In the mid-1960s Father Murray drew on Thomas Aquinas to argue that preventing the use of contraception by civil legislation would likely be unsuccessful. Similarly, Father Murray appealed to Aquinas to argue that the goal of civil law is to promote public morality, which is limited to achieving the common good of the population. Father Murray acknowledged that whether contraception was a matter of public or private morality could be disputed, but he argued that the case for holding it to be a matter of private morality was "sufficiently conclusive." He argued that the church should not try to keep laws on the books preventing the sale of contraceptives.

Father Murray further noted that using civil law to prohibit the sale of contraceptives was inappropriate, because many people rejected the argument that contraception was immoral, and others, including some religious leaders, held that it could be morally required as a means to responsible parenthood. Although Father Murray did not accept this argument, he argued against seeking to translate the Catholic moral objection to contraception into a civil ban because of the diversity of positions in society. Though the church could teach its members that birth control—among other issues—is morally unacceptable, the moral role of civil law is limited. The church should not ask the state to do what it has not been able to convince its own members to do.

This affirmation of both the reality of pluralism and the moral importance of the religious beliefs of others is directly relevant to our contemporary debates over how a society should frame civil laws on matters about which there is considerable moral and religious disagreement. Should the government use civil legislation and coercive regulation to prevent abortion and same-sex relationships? Or on these matters should the church and other moral educators, like the family, seek to develop the virtue in people that will lead them to do what is right without their being compelled by threat of police action?

### **Avoiding Confrontation**

Regarding the recent requirement from the U.S. Department of Health and Human Services that health insurance must now cover contraception, this policy is a lamentable failure by the administration to take the religious and moral concerns of Catholic leadership as seriously as they should. Still, this failure ought not lead to a church/state confrontation. We would suggest that since the H.H.S. policy mandates insurance coverage of contraception and not its use, Catholic institutions could rightly regard provision of health insurance in line with H.H.S. regulations as a form of "remote or indirect material cooperation" with the contraceptive action the church officially regards as immoral. The harm to the common good of not providing full health insurance to employees at Catholic institutions or of separating these institutions from formal connection with the church could be disproportionate. One need not see the recent H.H.S. ruling as drawing "a line in the sand" or as a direct threat to Catholic religious freedom, as Cardinal Timothy Dolan, president of the U.S. Conference of Catholic Bishops, has argued. Following standard principles of the Catholic moral tradition, some compromise between church and state on this matter can be sought.

The Second Vatican Council's "Declaration on Religious Freedom" stated that the way government should respond to matters on which there is moral or religious disagreement should be based on a presupposition in favor of freedom. Freedom "is to be respected as far as possible, and curtailed only when and in so far as necessary." Father Murray added that this means freedom should be limited only so far as necessary to preserve society's very existence.

Both Father Murray and the council specify when such threats exist and thus when religious freedom can be limited and when it cannot. The criteria are the standards of "public order." Public order includes three elements: justice, which secures the rights of all citizens; public peace, which itself is grounded in justice; and those standards of public morality on which consensus exists in society. Public order is a moral concept—the minimal level of morality that protects the most basic prerequisites of social life. These prerequisites include protection of the levels of justice and peace required for a civil society to exist at all. When such requirements of public order are endangered, the use of the coercive power of the state is justified, even to limit religious freedom.

Drawing on Father Murray's analysis, we can conclude that the question to be addressed regarding same-sex relationships, abortion and contraception in the United States today is whether permissive stances toward each threaten social life, and whether the justice and public peace that sustain social life require that each be prohibited by law. Clearly, some religious leaders (including bishops) believe that abortion and same-sex relationships do threaten social life. They hold that civil recognition of same-sex partnerships threatens the family bonds that hold society together, and that abortion is the unjustified taking of innocent human life. The bishops argue that the standards of justice and public morality can be invoked to support the use of coercive governmental power to limit same-sex partnerships and prevent abortion.

A significant number of U.S. citizens do not agree with the bishops; some who disagree do so on religious grounds. One could argue that those who disagree with the bishops are simply in error when they hold that homosexual partnerships based on mutual love and commitment can be morally justifiable, or when they conclude that in some tragic circumstances abortion might, with regrets, be justified. It is appropriate here to recall Vatican II's rejection of the earlier Catholic position that error has no rights.

To suggest that the government is not the appropriate agent for pursuing the advancement of moral values on homosexuality, abortion or contraception is not an argument that these actions are either morally insignificant or acceptable. It is simply not the role of the government to compel people to hold right

beliefs on all moral matters. Similarly, with the moral disagreement and pluralism in the United States today on committed same-sex relationships and on abortions in situations of grave distress, it is not the role of government to resolve these disagreements through legislation. The use of coercive law in these areas is likely to be ineffective and to impede the attainment of the common good. Since the common good is the overriding standard of both social morality and civil law in the Catholic tradition, action that threatens the common good should be taken only when the justification for the action is entirely clear.

The approach to religious freedom presented here will enable the church to contribute to the common good, remain faithful to its own true identity and respect all its fellow citizens.

*David Hollenbach, S.J.*, holds the University Chair in Human Rights and International Justice at Boston College. *Thomas A. Shannon* is professor emeritus of religion and social ethics in the department of humanities and

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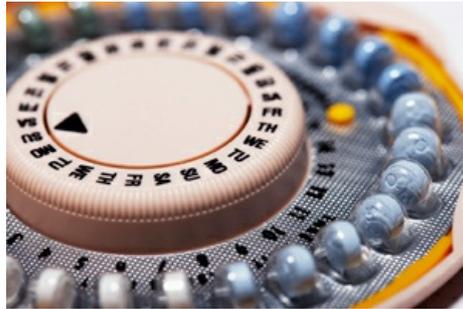
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# The Contraception Mandate and Religious Liberty

INTERVIEW \* February 1, 2013

On Feb. 1, 2013, the Department of Health and Human Services (HHS) proposed [new rules that would exempt certain religious organizations](#), including houses of worship, schools and hospitals, from a new mandate to offer free contraception services to women employees. The new regulations would instead require the nonprofits' health-insurance providers to offer and pay for contraceptive services. The new proposal is the latest step in a controversy that first arose in 2010, with the enactment of the Patient Protection and Affordable Care Act. The contraception mandate has been the subject of much debate and the object of many lawsuits (read more about [public opinion on the birth control insurance mandate](#)).



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To help explain what today's announcement might mean for the debate, the Pew Forum asked Professors Ira C. Lupu and Robert Tuttle of The George Washington University Law School to discuss the new rules and the possible outcome of the legal challenges to them.

## 1. Briefly explain the roots of controversy. How did we get where we are today?

The Patient Protection and Affordable Care Act of 2010 requires employers to offer employees health insurance that provides some preventative medical services free of charge. Part of this mandate includes reproductive health services, such as birth control, sterilization and emergency contraception.

Under regulations drafted by the Department of Health and Human Services (HHS) and other federal agencies in 2011, the contraception mandate would not apply to churches or other religious organizations – if their primary purpose is to inculcate religious values and if they primarily serve and primarily employ people of their faith tradition. Under the 2011 rules, houses of worship were clearly exempt, but other religiously affiliated organizations were not exempt because they have purposes other than promoting religion (such as providing education or health care) and they usually serve and employ people of many faiths. HHS gave these groups an extra year to comply with the mandate – meaning that they would have to offer their employees insurance providing the pregnancy prevention services by August 2013.

Many religiously affiliated organizations criticized the new mandate, and some sued the government in federal court. The opponents argued that the requirement violates the guarantees of religious freedom contained in the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act ("RFRA") of 1993, which bars the government from substantially burdening religious exercise without having a compelling interest for doing so.

Leading the opposition have been Roman Catholic organizations that oppose abortion and the use of artificial birth control. Some Protestant and Jewish groups that oppose abortion and the use of emergency contraceptives also have sued the government to stop the mandate. Some businesses owned and operated by religious people also have sued, arguing that their religious rights are being abridged. All of the opponents of the mandate contend that they should not be forced to pay for health insurance that provides services that conflict with their religious beliefs. Supporters of the mandate counter that a woman's access to pregnancy prevention services should not depend on which employer they work for. Supporters also argue that hospitals, schools and other nonprofits, as well as businesses, have no right to impose their religious beliefs on their employees.

In February 2012, President Obama sought to resolve the controversy by proposing a compromise. With respect to religiously affiliated nonprofits that did not qualify for the full exemption, the president proposed that the groups would still need to provide insurance that covered women's reproductive health, but they would not have to bear any of the financial cost of these services. Instead, in cases where a religious employer objected, the insurance companies that covered the relevant employees would have to bear all of these costs. The compromise did not change the obligations of for-profit businesses.

Many groups that had objected to the original regulations argued that the compromise did not change the situation. Religious organizations would still have to offer their employees insurance that included coverage of reproductive services, they said, and the insurance companies required to pay for these services would find another way to pass along the cost to employers. Furthermore, the details of the president's proposal were still somewhat uncertain because they had not been fleshed out into regulatory language – until now.

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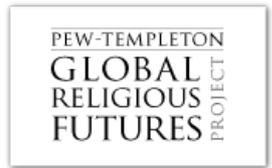
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## 2. Please explain the newly promulgated rules released today by the Department of Health and Human Services.

The newly proposed rules apply to those religious nonprofits, such as schools, hospitals and social service providers, that HHS did not intend to exempt under the original regulations. Under the new regulations, these religious nonprofits may purchase insurance plans for their workforce that do not offer contraception services. If they do so, their insurance provider will be required to enroll the nonprofit's female employees in a separate policy that only provides contraceptive services. The insurer will be required to provide these services to employees at no cost. In addition, the insurer, rather than the nonprofit, will have to administer the policy and cover its entire cost. For religious nonprofits that self-insure, the proposed rules require that such organizations must select a third-party administrator that would provide contraceptive coverage to female employees.

## 3. Are the new rules likely to satisfy the nonprofit organizations that have filed suits in federal courts?

From the beginning of this controversy, religiously affiliated nonprofits have objected to being involved in any way in the provision of one or more of these kinds of services to their employees, whether or not the employer directly paid for the services. Some object to all medical forms of contraception; others object only to emergency contraception, which they view as abortion-inducing. But all object to being put in a role where they are helping their employees gain access to such services. In light of these objections, the new rules may not sufficiently relieve these organizations of what they see as "sinful complicity" in the provision of pregnancy prevention services.

## 4. What is the status of the lawsuits brought by business or for-profit entities against the original Affordable Care Act rules? Could the outcome of these cases affect the lawsuits brought by nonprofit entities?

As of this date, there have been at least a dozen lower court decisions in cases brought by for-profit businesses objecting to the mandate. Other such cases have recently been filed. In a few cases, lower courts have upheld the position of the United States that corporations and other business entities cannot "exercise religion," the way individuals can. In addition, some courts have ruled that the contraception mandate does not substantially burden religious exercise, and violates neither RFRA nor the Free Exercise Clause.

However, in a larger number of cases, the lower courts have decided that businesses do have the right to bring such challenges and that the mandate does violate the Religious Freedom Restoration Act. Courts in these cases have concluded that requiring businesses to cooperate in the provision of services that the employer views as sinful is a substantial burden, and that the government's interest in imposing the mandate to provide services is not "compelling."

The outcome of these cases could affect the cases brought by religious nonprofits. Of course, religiously affiliated nonprofits, organized in part for religious purposes, will not have to overcome any hurdles about whether they can challenge the regulations. But the nonprofits will have claims similar to those of for-profit businesses, even though, under the new rules, the nonprofits will not be bearing the cost of coverage of pregnancy prevention services in the way that for-profit businesses do. But both make the same basic claim: that they are being forced to facilitate what they believe to be sinful activity in direct violation of their religious rights under RFRA and the Constitution.

## 5. Do you think it is likely that this issue will be taken up by the Supreme Court?

Because the lower courts will inevitably disagree on a number of questions presented by these cases, the Supreme Court is likely to eventually accept one or more of them to resolve those conflicts. In particular, the high court will have to resolve whether for-profit businesses may assert the same claims of religious freedom as individuals and religious nonprofits. It also will need to determine whether the mandate is a substantial burden on the religious exercise of employers of any kind – whether for profit or nonprofit. Finally, if the justices determine that the mandate does constitute such a burden, the court still must decide whether it violates RFRA or the Constitution.

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The Pew Forum on Religion & Public Life

1615 L Street, NW Suite 700 Washington, DC 20036-5610 T: 202.419.4550 F: 202.419.4559

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