Spring 2014

Health Coverage Versus Religious Liberty: The Affordable Care Act's Contraception Mandate

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HEALTH COVERAGE VERSUS RELIGIOUS LIBERTY:

THE AFFORDABLE CARE ACT'S CONTRACEPTION MANDATE

A thesis presented

by

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to

The Public Policy and Law Program

in partial fulfillment of the requirements
for Honors in Public Policy and Law

Trinity College
Hartford, CT
April, 25, 2014

Thesis Advisor

Second Reader

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Public Policy & Law Thesis
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Introduction

The Patient Protection and Affordable Care Act of 2010 ("ACA") is a huge and complex law with the laudable but ambitious goal of providing quality health care for all Americans, regardless of income, health, or prior coverage.[1] It has been described as the most sweeping overhaul of the United States healthcare system since Medicare and Medicaid were enacted in 1965, affecting about one-sixth of the U.S. economy. However, the ACA was controversial from its inception and four years after its passage it remains unpopular with a majority of Americans. It survived a constitutional challenge in 2012 when the Supreme Court upheld an important part of the law known as the "individual mandate" as a proper exercise of Congress' taxing power, but this did little to quell the opposition.

This thesis will trace the origins and political history of one of the most controversial aspects of the ACA - the provision that provides free contraception, sterilization and counseling services to all women of childbearing age, known as the "contraception mandate." By itself, as an idea, it seems unobjectionable, but its implementation has required the forced entanglement and cooperation of those who believe it is a sin and this has alienated many in the faith community. The mandate has run into strong and widespread opposition from both mainstream religions and smaller, less well-known religious groups, as well as those who sympathize with their plight, creating its own separate national debate. The concerns are whether this mandate should be viewed as promoting the state goals of women's health and gender equity or as undermining the constitutional rights of religious organizations to freely practice their

[1] The Patient Protection and Affordable Care Act of 2010 ("ACA" throughout this paper), cited as Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. § 18001 (2010). The ACA was effective on March 23, 2010.

religion and govern their internal affairs according to their religious beliefs. The debate will continue until an acceptable accommodation for religious practice can be found.

Although most services under the ACA are subject to cost-sharing, the ACA requires a core group of "preventive services," such as cancer screenings, to be provided for free because of the policy decision to eliminate any barrier, no matter how small, to accessing services that could prevent illness. The contraception mandate, which ironically is not even contained in the ACA, was created by a Health and Human Services regulation, which determined that contraceptive services for women should be part of free preventive services.

Access to contraception is not a new idea, but neither are religious objections to contraception. But while religious objections have remained clear and unchanged, attitudes towards contraception and contraception coverage have evolved. Contraception has followed a particular course from prohibited practice to privacy right to gender equity goal to family health care issue, all in under 50 years. Particularly influential in this evolution were science-based studies by the medical community and entities such as the Institute of Medicine, which documented the health benefits of family planning, creating the new recognition of contraception as a public health issue, not solely an individual's private choice, or merely a lifestyle issue. When the mandate became part of national and state health care policy, activists urged legislation to provide access to contraception to as many women as possible, which went beyond government-assisted programs for the poor and unemployed.

Legislation then began to focus on the regulation of private employer-sponsored benefit plans, which is how most employed Americans access and pay for their health

care. To the extent that religious organizations were also private employers who sponsored benefit plans, they were also swept up in this new government regulation.

The right to use birth control by married couples was first recognized by the Supreme Court as a constitutionally protected privacy right in the United States in 1965, and this right was extended to unmarried couples in the early 1970s.[2] In 1973, abortion was also recognized as a constitutionally protected privacy right in the landmark Supreme Court case of *Roe v. Wade*.[3] Given that these constitutional protections have been in place for such a long time, that the use of contraception is widespread, and that the contraceptive mandate itself is not a new idea, what exactly has sparked this outrage?

The story of the mandate as an idea about "fairness" that developed over time in our culture and society, as outlined in this thesis, will provide an insight into the current impasse of the parties. It will describe how the administration in its single-minded reformist focus on gender equity missed an opportunity to build a consensus with the faith community, and how further negotiations were caught up in a lengthy, adversarial administrative rule making process that was unsuccessful. The strong reactions of the faith community may have surprised a secular world that bases its beliefs in science and reason alone, and shows how little the two sides understood each other. This thesis will

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[2] *Griswold v. Connecticut,* 381 U.S. 479 (1965) (Connecticut law prohibiting use of contraceptives for married couples held to violate the constitutional right to privacy found in the Bill of Rights) and *Eisenstadt v. Baird* 405 U.S. 438 (1972) (Massachusetts law prohibiting distribution of contraceptives to unmarried couples held to violate Equal Protection Clause and right to privacy). It is therefore unconstitutional for the government to prohibit Americans from using birth control. It is ironic that these original cases struck down laws that prohibited the use and distribution of contraceptives and today the HHS Regulations are challenged for mandating access to contraceptives.

[3] *Roe v. Wade*, 410 U.S. 113 (1973) (abortion is part of the right to privacy under the Due Process Clause of the Fourteenth Amendment. A woman has a right to an abortion during the first trimester of pregnancy.) http://en.wikipedia.org/wiki/Birth_control_movement_in_the_United_States

try to clarify the real points of disagreement between church and state beyond the rhetoric on both sides, which will hopefully point to a solution.

The mandate was first announced on August 1, 2011, over a full year after the ACA went into effect. It was greeted by a firestorm of protest by diverse religious groups denouncing it as an assault on religious freedom. Many of these same religious groups, and particularly the Catholic Church, had supported the same type of universal health care goals which the administration was promoting and would appear to be natural allies. The Catholic Church in particular is committed to vigorously combating poverty, and maintained not only an extensive community outreach network for social services, but also an extensive healthcare network of hospitals and nursing homes in the United States. What prevented a coalition for improving healthcare and services?

The short answer is that the contraceptive mandate provided only limited exemptions for churches and their integrated auxiliaries and excluded all other religious institutions. The excluded institutions protested that they should be exempted like churches, because they were exercising their religion through the good works they engaged in. The government refused to broaden the exemption, but, instead, later on, offered an accommodation to these religious non-profits, which purportedly would shift costs and responsibility onto third parties. However, since the accommodation still required employer plans to cover contraceptives, it was universally rejected as failing to shift moral complicity. Religious non-profits did not want to be involved in providing contraceptives to their employees in any way. Litigation ensued.

In its zeal to provide contraception coverage to as many women as possible, the administration seemed to not understand or appreciate the real burdens it placed on the

faith community and the consequences that would ensue. The faith community, particularly the U.S. Conference of Catholic Bishops, upped the ante with strong rhetoric, which was not helpful to its cause. Unlike abortion, contraception may have seemed to like a settled issue among voters to the administration. After all, before the ACA was passed, half the states had already enacted their own laws requiring contraception coverage and such coverage had also found its way into federal law. State governments had been coexisting fairly peacefully with the faith community for years.

The administration did not, or could not, build consensus before it went ahead and announced the mandate. In so doing, the mandate began its escalation into a big national issue. The lack of consensus before the mandate was announced offended potential allies and at the same time handed the opponents of the ACA itself a potent weapon to galvanize opposition. The image of religious objectors coerced against their true conscience to become part of the distribution network for contraceptives was very compelling.

The mandate broadly required all contraceptive services approved by the FDA to be provided by employer plans, which included not only contraceptives but also those drugs and devices that, in the view of some religious communities, functioned as abortifacients. Abortion remains a polarizing issue more than 40 years after it was held to be a constitutionally protected right, with many Americans still strongly opposing it on religious and moral grounds. Contraception, on the other hand, enjoys widespread acceptance, but to the extent that certain contraceptive methods are considered abortifacients, the contraception mandate became an abortion mandate, with great potential to escalate the controversy beyond its original boundaries.

The mandate became a powerful symbol and a lightning rod for many viewpoints. In the eyes of some, the mandate was part of an attempt to keep the public sphere "neutral," to confine religion to something private and unseen, and to limit the influence of religiously-informed opinions on public topics. According to this viewpoint, religious institutions should be allowed a public voice to challenge the power of an overreaching state.[4] Some saw the controversy to be as much about the impermissible reach of government as about religious liberty. The government's view is that the mandate is a fundamental right that should not be extinguished by religious objections.

Framing the controversy as enlightened reformers versus conservatives who want us to return to the "dark ages" is not helpful, because that view, taken by many advocates, trivializes sincerely held religious beliefs and obscures the real constitutional issue. I see the controversy as two sides with strong and worthy beliefs, grounded in our traditions of liberty and equality, both of which benefit and inform American public policy. A decision of which is more "important" should be avoided. The challenge is that an accommodation acceptable to both sides must be found.

The administrations of Democratic Presidents Clinton and Obama, given their legislative programs to distribute contraceptives as widely as possible, appear to have sided with the view of contraception advocates that public health and gender equity are the paramount issues. They certainly are politically popular ones, yielding more tangible benefits than generalized and ethereal notions of individual liberty.

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[4] See dissent in *Catholic Charities v. Superior Court*, 10 Cal Rptr.3d 283, 321. "Religious institutions enhance individual autonomy 'by challenging the sovereign power of the liberal state' and by articulating alternative visions - 'counter cultural' visions that challenge and push the larger community in…directions unimagined by prevailing beliefs.'"

This thesis will also tell the legal story of the mandate from its first introduction in federal law, to its acceptance and definition by the states, to its present form in the HHS regulation under the ACA. A number of significant state, federal and Supreme Court cases influenced its development with their constitutional rulings. The current legal points of the debate have focused on what type of exemption is appropriate, what employers are truly "religious," and whether "opt outs" or any type of accommodation are realistic alternatives.

The legal and cultural stories of the mandate have culminated before the Supreme Court of the United States in the consolidated cases of *Sebelius v. Hobby Lobby Stores* and *Sebelius v. Conestoga Wood Specialties ("Hobby Lobby Stores")*. and the issues the Supreme Court must decide. *Hobby Lobby Stores*, argued before the Court on March 25, 2014, was the focus of national attention, raising a case of first impression, of whether a for-profit religious employer is a person capable of exercising religion under the Religious Freedom Restoration Act (RFRA).[5] The case will have far reaching consequences and is the latest development in an ongoing process to define the meaning of religious freedom in our pluralistic society.

[5] The Religious Freedom Restoration Act ("RFRA" throughout this paper) is cited as 42 U.S.C. sec. 2000bb et seq. RFRA was effective on Nov. 16, 1993. Each case also raised a constitutional claim under the First Amendment.

Hobby Lobby Stores, Inc., et al., v. Sebelius Sec of H&HS Case No. 13-354 consolidated with *Conestoga Wood Specialties Corp., et al., v. Sebelius, Sec. of H&HS* Case No. 13-356.

Chapter 1
The Rise of the Mandate in Federal Law

The ACA's current mandate that employers provide prescription contraception coverage reflects a public policy goal that has its origin in the early 1990s when President Clinton first proposed universal health care coverage.[6] This is when mandates for health coverage began to be introduced. The Health Security Act, as it was officially called, was a controversial bill introduced in October 1993, which had the ambitious aim to provide universal health care coverage for all Americans.[7] Its mandate was to require that every insurance plan offer a "comprehensive benefits package" based on the generous employer-sponsored plans offered by the nation's largest employers at that time. The mandate also required coverage for "family planning services," which was limited only to voluntary family planning services and contraceptive "devices." It did not cover contraceptive drugs, although it covered prescription drugs generally. This omission was noted by advocacy groups, in particular The Guttmacher Institute, which presented findings to the Senate in March 1994 from its survey which concluded that private health insurers failed to cover contraceptive prescription drugs in the same way other prescription drugs were covered. The Guttmacher Institute's efforts raised consciousness of this gender inequity and creating a model for future legislation.[8] Critics raised claims of bias in the health insurance industry because it preferred expensive treatment over prevention and ignored or trivialized women's health needs.

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[6] Dailard, C., *Contraceptive Coverage: A 10-year Retrospective* (June 2004). The Guttmacher Report on Public Policy. Garrett, L. *Religious Firms Support Obamacare Challenge* (2/7/14), retrieved on 2/9/14 from Publishers Weekly: http://www.publishersweekly.com

[7] *Clinton Health Care Plan of 1993*, http://en.wikipedia.org/wiki/Clinton_health_care_plan_of_1993 accessed on 2/10/14. Opponents called it "HillaryCare" because the First Lady chaired the Task Force on National Health Care Reform.

[8] Dailard, *Ibid.*

The Health Security Act was strongly opposed and failed by September of 1994, yet it led the way to incremental, single-service mandates at the federal level.[9] Although the Health Security Act was widely considered a debacle, it was the beginning of federal health insurance reform, which then proceeded incrementally.

The next federal legislation proposed to address health care was the Health Insurance Portability and Accountability Act of 1996. "HIPPA" helped workers who lose or change their jobs (and consequently lose their health insurance) to continue their insurance with their next employer by preventing the new plan from denying coverage to workers based on pre-existing conditions.[10] In so doing, it increased the federal government's regulatory control of health insurance, which traditionally had been left to the states. It regulated all employment-based health plans, both insured and self-insured. The states do not have the power to regulate employment-based plans which are self-insured under the Employee Retirement Income Security Act of 1974 ("ERISA").[11] This represents a significant group of people, because these plans cover about half of all Americans with coverage through their employers.[12] HIPPA created a precedent for federal mandates to include specific types of benefits in health plans.

This precedent was followed by the Equity in Prescription Insurance and Coverage Act of 1997 ("EPICC"), a bill that sought to require private insurers that cover prescription drugs and outpatient services to cover contraceptive drugs and services as

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[9] Dailard, *Ibid.*

[10] Dailard, *Ibid.,* Health Insurance Portability and Accountability Act of 1996. HIPPA Fact Sheet Dec. 2004 Dept of Labor http://www.dol.gov/ebsa/newsroom/fsjobloss.html; FAQ's About Portability of Health Coverage and HIPAA http://www.dol.gov/ebsa/faqs/faq_consumer_hipaa.html

[11] ERISA and the way it affects state insurance laws will be discussed in a succeeding section.

[12] Dailard, *Ibid*.

well. It would have extended the mandate to include any contraceptive that is FDA approved.[13] It was offered as an amendment to ERISA, as only the federal government has the power to regulate employee benefit plans of private employers under this law. There was no exemption from EPICC for religious employers. Proponents pointed out that contraceptives help reduce the need for abortion as well as addressing gender inequities.

The bipartisan bill, which never became law, although it was introduced again and again for years in Congress, would have reached all employer-sponsored plans, both those which were insured and those which were self-insured by the employer. It would have extended the mandate to the individual health policy market as well because it also amended the Public Health Service Act.[14] At that time, Congress was hesitant to enact a federal contraceptive coverage mandate for private plans.[15] However, it was willing to do so for its own employees in government sponsored plans.

In 1998, Congress mandated prescription contraceptive coverage in all insurance plans covering prescription drugs, which participate in the Federal Employees Health Benefits Program (FEHBP).[16] At that time, the FEHBP covered 1.2 million women and

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[13] Zolman, R. (2002). *Insurance Coverage of Prescription Contraceptives*, p.18 LEDA (Legal Electronic Document Archive) at Havard Law School; http://dash.havard.edu/bitstream/handle/1/8889475/Zolman.html.

[14] Zolman, *Ibid* p. 18. The EPICC was introduced for years on and after 1997 without success. As recently as 2007 it was reintroduced by Rep. Nita Lowey as H.R. 2412 but died in committee in 2008 EPICC Act of 2007 https://www.govtrack.us/congress/bills/110/hr2412#summary

[15] Zolman, *Ibid* p. 19

[16] The mandate was an amendment to the FY 1999 Treasury/Postal Appropriations Bill (HR 4104). It was a resolution between amendments in the House introduced by Rep. Lowey and in the Senate by Sen. Snowe and Sen. Reid. The amendment became law as the Lowey Amendment. It was signed into law by President Clinton in September 1999 as a part of the FY 1999 Omnibus Supplemental Appropriations Act, H.R. 4328, PL 105-277.

was the largest employer sponsored health plan in the world.[17] This action by Congress was encouraging news for contraception coverage activists, particularly as the new law was intended to serve as a role model for state legislatures and insurers.[18] The mandate includes a "conscience clause" exemption for plan sponsors on religious, but not moral, grounds.[19] In addition, individual doctors, but not nurses or other health care providers, could object to prescribing contraceptives and abortifacients on both religious and moral grounds[20]. At the same time, the ban on funding abortions through the FEHB program became law.

In December 2000, a federal agency, the U.S. Equal Opportunity Commission ("EEOC"), made the very significant determination that the failure of employers to include contraceptives in prescription drug coverage constituted sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII").[21] Title VII is a federal antidiscrimination law prohibiting sex discrimination in the workplace.[22] It is directed to an employer's treatment of its employees and the benefits of employment. The EEOC is charged with enforcing Title VII, so its rulings are persuasive. The ruling was consistent

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[17] Dailard, *Ibid.* FEHB is still the largest such plan in the world today, covering almost 9 million people. FEHB Facts, http://www.opm.gov/retirement-services/publications-forms/pamphlets/ri75-13.pdf

[18] Zolman, *Ibid* p. 17

[19] Five religious plans are exempt by name: Providence Health Plan, Personal Care's HMO, Care Choices, OSF Health Plans, Yellowstone Community Health Plan, as well as any "existing or future plan, if the plan objects to such coverage on the basis of religious beliefs." *Contraceptive Coverage Mandate in FY 2000 Treasury Postal Appropriations* Nat'l conference of Catholic Bishops, http://lobby.la.psu.edu/013_Contraceptive_Coverage/organizational_statements/NCCB_USCC/NCCB-USCC_Contraceptive_Coverage_Mandate.htm

[20] Legislative Report: 1998 FY 1999 Treasury/Postal Appropriations Bill, Retrieved from National Committee for a Human Life Amendment: http://www.nchla.org/legissectiondisplay.

[21] EEOC Decision of Coverage on Contraception, EEOC (Dec. 14, 2000) http://www.eeoc.gov/policy/docs/decision-contraception.html

[22] Dailard, *Ibid*

with the federal government's public health goals for the nation in 2000, included in the Department of Health and Human Services publication "Healthy People 2010," one of which was to increase private sector insurance coverage of contraceptives. The EEOC ruling and federal public policy contributed momentum as the debate shifted to the federal courts.

Activists turned to the federal courts and were successful in suing an individual employer using Title VII to obtain a judicial mandate for contraception coverage in the landmark case of *Erickson v. Bartell Drug Co.* (2001).[23] In *Erickson*, a federal district court in Seattle in a case of first impression found that Title VII prohibits private employers from excluding prescription contraceptive coverage from plans that provide comprehensive drug coverage as an "unlawful employment practice." It confirmed the December 2000 decision of the EEOC.[24] Title VII provides no exemption to religious employers from providing contraception coverage.

The *Erickson* case involved a self-insured prescription benefit plan for non-union employees at the Bartell Drug Company in Seattle, Washington. A female employee, Jennifer Erickson, filed a suit as a class action representing herself and all affected female employees of Bartell. Planned Parenthood of America and other named individual female employees joined as plaintiffs. The court ruled that Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses. The court found that the prescription drug plan discriminates against female employees

[23] *Erickson v. Bartell Drug Co.* 141 F. Supp2d 1266 (W.D. Wash 2001). The decision was not appealed. Employees may sue their employer privately under Title VII but must first file a complaint with the EEOC, giving it a chance to resolve the matter. Zolman, *Ibid*.

[24] Dailard, *Ibid*.

by providing less complete coverage than that offered to male employees. The decision noted that, "Although the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered."[25] Title VII did not mandate prescription drug coverage, it focused on gender inequity. It did not require that the health plan cover all FDA-approved contraceptives if there were no prescription drug plan offered to employees.

The *Erickson* court was persuaded by the dissent in the Supreme Court case of *General Electric Co. v. Gilbert* in finding that Title VII required prescription contraceptives to be included in comprehensive health plan drug coverage.[26] In *Gilbert*, an employer provided a short-term disability policy to all employees, which excluded coverage for pregnancy-related disabilities. The majority found that, because the policy covered the same illnesses and conditions for both men and women, it provided equal coverage, even though pregnancy-related disabilities were left out. The majority reasoned that pregnancy discrimination is not the same as gender discrimination. The dissent argued that exclusion of this type of coverage for women was unlawful discrimination because women are the only sex at risk for pregnancy and so the comprehensiveness of the coverage for women was lacking. The effect of this decision was harmful and potentially very expensive for women.

Two years later, in 1978, Congress agreed that this was overt discrimination against female employees and amended Title VII with the Pregnancy Discrimination Act

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[25] *Erickson*, 141 F. Supp2d 1266, 1277.

[26] *General Elec. Co. v. Gilbert*, 429 U.S.125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976)

("PDA").[27] Congress intended to correct the narrow interpretation of Title VII excluding contraception by *General Electric Co*., and to embrace the dissent's broader interpretation of Title VII. That interpretation recognized there are sex-based differences between men and women, which require employers to provide women-only benefits such as contraception in order to treat the sexes the same.[28]

Judge Robert Lasnik, in applying the new interpretation of Title VII to employee benefit plans, said, "The goal of Title VII is to end years of discrimination in employment and to place all men and women, regardless of race, color, religion or national origin on equal footing in how they were treated in the workplace" and that this now "includes the benefits that an employer provides to its employees."[29] Judge Lasnik went on to order the employer to amend its benefit plan to include prescription contraception coverage as well as contraception services on the same terms that other drugs and other outpatient services are covered under the plan.

The *Erickson* decision had a profound influence on the movement to cover prescription contraceptives by providing a legal and philosophical basis for state law mandates to prohibit employers from excluding contraceptive drug coverage in their comprehensive drug benefits plans.[30] This was true even though, technically, a judicial decision of the District Court only applies to the parties named in the complaints. Nevertheless, *Erickson* provided a legal precedent for the first time, for employees, as individuals and as a class, to bring a lawsuit under Title VII and ask the federal court

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[27] Pregnancy Discrimination Act, 42 U.S.C. sec 2000e(k) et seq.

[28] *Erickson*, 141 F. Supp2d 1266, 1270

[29] *Erickson*, *Ibid*, 1269, 1271.

[30] Zolman, *Ibid* p.23,24

directly to order the employer to include contraceptive coverage in the prescription drug plan. A number of large employers and major universities voluntarily added contraceptive coverage to their plans as a result of this decision.[31]

[31] Dailard, *Ibid*

Chapter 2
The Mandate and Antidiscrimination Laws

After *Erickson*, many states created their own contraception mandates to be included in insured benefit plans under their authority to regulate insurance. By 2006, more than half the states had enacted laws containing state contraception mandates, most amending their state insurance codes, which provided more effective enforcement than individual lawsuits. However, these state mandates did not extend to self-insured plans because of "ERISA preemption," which gives federal law the sole authority to regulate these plans.

Since ERISA did not impose any contraception requirements on self-insured plans, and since the states were preempted from doing so, then the plans would not be subject to any contraception mandates at all, creating a "loophole" in the eyes of advocates who wanted these plans to include them. However, after *Erickson*, employees now had a remedy, which was to ask a federal court directly to grant relief under Title VII. But there was a feeling among advocates that this was not enough, as they believed that many employers would not change their plans voluntarily and would wait for enforcement.[32]

After *Erickson* there was another avenue to pursue, which was to enable state fair employment laws to stop discrimination in these plans and therefore creating an "indirect mandate" linked to discriminatory practices. Allowing existing state fair employment laws to enforce Title VII would create a more powerful and effective means of enforcement than case-by-case litigation, but the ERISA loophole had to be overcome.[33]

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[32] Zolman, *Ibid*.

[33] Zolman, *Ibid*. p. 24, fn 284, p.53 citing Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rv. 363 (1998) at 397-399.

ERISA is a federal law that regulates all employee benefit plans with the goal of protecting the interests of participants and their beneficiaries.[34] It does not require, by its very nature, that employee benefit plans include specific benefits of any kind, including contraception coverage, as it is neutral with regard to benefit provisions.[35]

ERISA preemption was intended to be very broad and to prevent any state regulation of employee benefit plans, creating only very limited exceptions to preemption.[36] The reason for preemption was simply to eliminate the threat of conflicting or inconsistent state regulation of employee benefit plans, which are important to the well being of Americans. So for the sake of uniformity, ERISA regulates benefit plans but carves out a niche for the states to exercise their regulatory power in the traditional areas of insurance, banking and securities.[37] States have full authority under this ERISA exception, to regulate an insurance company's health plans and may mandate what provisions those plans will include.

Title VII originated as a civil rights law coming in the midst of the Civil Rights movement in the South, and was primarily about racial fairness for blacks, not gender equity for women.[38] It is directed at discrimination in the "compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." For the *Erickson* decision to apply Title VII to benefit plans to

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[34] US Dept of Labor http://www.dol.gov/ebsa/aboutebsa/history.html (accessed 3/4/14)

[35] *Shaw v. Delta Airlines* 463 U.S. 85,90; Zolman *Ibid*, p. 25 fn 289; This all changed, of course, with the enactment of the ACA in March 2012.

[36] *Shaw v. Delta Airlines*, Inc, 463 U.S. 85, 102, 99 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)

[37] 29 U.S.C. sec. 1144 (b): "Except as provided in subparagraph (B) nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities."

[38] *Erickson*, 141 F. Supp2d 1266, 1268-1269

require women-only prescription contraceptives was something new, but not completely new, as the PDA in 1978 had already broadened interpretation of Title VII to include women-only disability coverage for pregnancy.

ERISA cannot, by its terms, preempt another federal law. This became an issue when the federal district court in *Erickson* interpreted Title VII to apply to these benefit plans as well, creating an overlap in jurisdiction between two federal laws.[39] This was made more complex by the nature of Title VII, which works together with the states as part of its overall regulatory scheme. Historically, states have played an important role in enforcing Title VII through their enactment and enforcement of state fair employment laws. If state employment laws, channeling Title VII, are to enforce and regulate self-insured benefit plans, an argument must be found to overcome the ERISA preemption of these laws. A Supreme Court case from 1983, decided before *Erickson*, considered this same preemption issue under the PDA.[40]

The Supreme Court in *Shaw v. Delta Air Lines*[41] (1983) looked at the issue of whether ERISA preempts state fair employment laws seeking to enforce the PDA by preventing sex discrimination in self-funded benefit plans.[42] Delta Airlines provided a disability benefits plan for employees, which excluded disabilities related to pregnancy. State fair employment laws required that the plan be changed to include insurance

[39] ERISA provides in sec. 514(d) that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.." Title VII itself also does not preempt state antidiscrimination laws that do not conflict with it and actually encourages state antidiscrimination laws to aid in its enforcement.

[40] Zolman, *Ibid*, p. 24.

[41] *Shaw v. Delta Airlines*, Inc, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). This case was not cited in the *Erikson* decision which did not consider state employment laws enforcing Title VII but individual plaintiffs enforcing Title VII.

[42] The New York Human Rights Law and Disability Benefits Law

coverage for these disabilities. The Court in *Shaw* found that pregnancy disability under Title VII (the PDA amendment) must be treated like any other disability and given the same benefits and allowed enforcement of Title VII through the New York Human Rights law.

In so doing the court found that ERISA preemption would not apply to those state laws that are consistent with and promote the goals of Title VII and therefore are properly enforcing it. On the other hand, it would apply to (and therefore would preempt) those state laws that go beyond what Title VII requires or are inconsistent with it. They would not be considered a proper enforcement of Title VII. It was a practical solution, which found "partial preemption" and was aimed at keeping the state and federal regulation of the same subject in harmony.

A concern of the court in *Shaw* was that, if the state laws were not preempted, then Title VII could not be enforced at all, and if not enforced, there would be no other remedy to correct the discrimination in the plan. The net result would be a less effective enforcement of Title VII.[43] The Court concluded that, "[given] the importance of state fair employment laws to the federal enforcement scheme, [ERISA] preemption of the [state] human rights law would impair Title VII to the extent that the Human Rights law provides a means of enforcing Title VII's commands."[44]

Whether the "partial preemption" standard of *Shaw* may be followed to overcome the ERISA loophole depends on whether the direct Title VII remedy in *Erickson* is now considered sufficient because it was not available in *Shaw*, and if so, whether there is still

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[43] *Shaw*, 463 U.S. 85, fn 23

[44] Shaw, 43 US at 102

a need for state unfair employment laws to play a part.[45] It may also depend on the influence of the *Erickson* decision as precedent. Between 2000 and 2007 the *Erickson* decision was considered by a small group of federal district courts, and some adopted its reasoning while others did not.[46] *Erickson* was not appealed so there is no ruling from the Ninth Circuit.

In 2007, the 8th Circuit Court of Appeals in *In re Union Pacific Railroad Employment Practices Litigation*, declined to follow the *Erickson* holding and the December 2000 EEOC ruling and held that there was no violation of Title VII (amended by the PDA) because the sexes were treated the same with respect to contraception benefits.[47] It noted that neither the Circuit courts nor the Supreme Court had considered whether the PDA applies to contraception, in addition to pregnancy, and then found that it did not. The court stated that the coverage provided to women was not less favorable than the coverage provided to men, so there was no discrimination. The dissent argued that there was discrimination because a benefit exclusion which appeared to be gender neutral actually had a negative impact on women.

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[45] Zolman, *Ibid*, p.24 under the Supreme Court case *of Shaw v. Delta Airlines*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 490 (1983). In addition, the EEOC is the primary enforcement authority for Title VII. See *Erickson*, 141 F.Supp.2d 1276.

[46] The 8th Circuit Court of Appeals in *In re Union Pac. R .R. Empt't Practics Litig*. 479 Fed.3d 936, 944 (8th Cir. 2007) summarized the cases in fn. 1.

[47] 479 F.3d 936 (8th Cir. 2007). The court held that the PDA does not encompass contraception. The opinion contained a strong dissent. Rudary, *Ibid* p.10, 25 fn. 146.

The case was considered so important nationally that Senate majority leader Harry Reid (D-NV) and 29 other federal lawmakers signed an amicus curiae brief urging the Eighth Circuit to make contraceptive coverage mandatory under Title VII.[48]

In any event, outside of the Eighth Circuit, self-insured plans which avoid contraception coverage under the state mandates may still subject to Title VII as of the *Erickson* decision in 2001 and they may also be subject to state unfair employment laws if not preempted. If these plans want to avoid Title VII they must discontinue comprehensive prescription drug plans altogether, even though that may not be in the best interest of employers and their employees. In 2006, two states created state contraception coverage mandates by administrative ruling under their antidiscrimination laws, which were worded similar to Title VII, citing *Erickson.*[49] But both states are outside the Eighth Circuit and not subject to its precedent.

In July 2009 the EEOC in Charlotte, NC sent a letter to Belmont Abbey College, a small private Catholic college founded by Benedictine monks, advising it that it violated Title VII (amended by the PDA) because its employee benefits plan did not provide contraceptive coverage. The EEOC had not issued a final determination in the case by February 2012 when the president of the College gave testimony, along with other religious leaders, before the House Oversight Committee against the HHS

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[48] Allen, C. The Weekly Standard *The Persecution of Belmont Abbey*, (10/26/09), http://www.weeklystandard.com/print/Content/Public/Articles/000/000/017/093aasuz.asp?page=3

[49] Michigan and Montana. See State Insurance Mandates, p. 24 fn 56.

contraception mandate.[50] Belmont Abbey is currently a litigant seeking a religious exemption from the mandate.[51]

There is some debate about whether a religious employer could raise RFRA as a defense to a Title VII claim by an employee that it must provide contraceptive coverage in its plan.[52] At the oral argument of *Hobby Lobby*, the Solicitor General Mr. Verilli said that he believed that a RFRA exemption could be sought from Title VII.[53]

Once a direct contraception coverage mandate applicable to employer-sponsored plans was created in 2011 by HHS regulation, employees whose plan failed to include coverage for contraception did not have to resort to Title VII and state antidiscrimination laws, as long as the mandate applied to their particular plans. The ACA provided means for enforcement against plans that were not in compliance.

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[50] In testimony before the House Oversight Committee on 2/16/12 the president of Belmont Abbey College stated that the College was the first religious institution targeted by the EEOC for not covering contraceptives in its health plan and that the EEOC had yet to issue a final determination in the case. The Testimony of Dr. William K. Thierfelder before the Committee on Oversight and Government Reform of the U.S. House of Representatives, http://oversight.house.gov/hearing/lines-crossed-separation-of-church-and-state-has-the-obama-administration-trampled-on-freedom-of-religion-and-freedom-of-conscience/

[51] Reilly, P., Look Who's Discriminating Now, WSJ Houses of Worship, (8/13/09), http://online.wsj.com/news/articles/SB10001424052970203863204574346833989489154 Mr. Reilly is president of the cardinal Newman Society.

[52] J. Blackman, *Religious Exemptions to Anti-Discrimination Laws under RFRA* Liberty Law Blog, http://www.libertylawsite.org/2014/03/03/religious-exemptions-to-anti-discrimination-laws-under-rfra/ Some courts have held that the government must be a party for RFRA to be raised as a defense. Other courts have held differently. To the extent that state laws enforce Title VII the question is whether RFRA would apply.

[53] Tr. p. 73

Chapter 3
The State Insurance Law Mandates

Starting in 1998, the states began to experiment with both incremental and comprehensive approaches to address the issue of contraceptive equity through their power to regulate insurance, in particular, employer-sponsored group insurance. California introduced such legislation as early as 1994, but the first state to enact a law mandating contraceptive coverage was Maryland in 1998.[54] Within six years (by 2003), twenty states had enacted a mandate. By 2006, eight more states had enacted a mandate, but there has been no additional state legislation since then.[55]

Today, a total of 28 states require insurers that cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices.[56] There is no state stand-alone direct mandate requiring employers to provide employees with contraceptive coverage, only that if prescription drugs are covered as a benefit, contraception must be included. This is similar to the "indirect" mandate under Title VII.

The federal government has the power to regulate employee benefit plans of private employers under ERISA, but the states are permitted to regulate plans covered by insurance as an exception to ERISA preemption. The states are not uniform in their approach; they have all taken their own path to mandating contraception coverage. However, a few conclusions can be drawn about their various approaches to the mandate.

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[54] Dailard, *Ibid*

[55] M. Oxman*, (2013, October). State Mandates for Insurance Coverage of Contraception Before and After Health Reform*. p.1, 3. Retrieved from http://www.dailyreportingsuite.com/health/news/state_mandates

[56] State Policies in Brief (1/1/14)*, Insurance Coverage of Contraceptives*. The Guttmacher Institute http://www.guttmacher.org. Michigan created its mandate by administrative ruling of the state civil rights commission. Montana created its mandate by an opinion of the state attorney general interpreting state civil rights laws. Both states have civil rights laws similar in wording to Title VII. Oxman, *Ibid*, p.fn. 22 & 23.

Of the 28 states, 20 states allow exemptions for qualifying employers and insurers in order to accommodate their religious objections to contraception. The other 8 states do not permit any refusal by insurers or employers and thus provide no exemption whatsoever. That leaves 22 states that have chosen not to impose a mandate, but health plans in those states may still include such coverage voluntarily. The lack of a mandate in these states has been a matter of concern for contraception coverage advocates.

Based on the results of the 2012 presidential election, the states broke down along political lines with respect to the mandate. Since there was so activism on either side of the issue, the political influence on legislative decision-making could not be avoided. The greatest number of states with mandates (21) were Democrat-voting (blue) states and only 7 were Republican-voting (red) states.[57] Of these conservative states, almost all adopted the most expansive exemptions for religious employers. The top 10 liberal states according to Gallup were all included in the mandate, whereas the top conservative states were not, except for two, Arkansas and Montana. Of the 8 states that allowed no refusal, 6 were blue and only 2 were red.[58]

Eight states directly address the issue of contraceptives versus abortifacients, which has become an important issue in this debate, and is at the center of the *Hobby Lobby* religious objection.[59] Among the FDA-approved contraceptives are several that religious objectors consider abortifacients operating post-conception to prevent

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[57] *Wyoming Residents Most Conservative, D.C. Most Liberal,* http://www.gallup.com/poll/167144 accessed 1/31/14; *Barack Obama Wins Reelection against Mitt Romney* http://politicalmaps.org

[58] Red states are Georgia and Montana, although Montana has no legislation, it has an Attorney General Opinion. The 6 blue states are Colorado, Iowa, New Hampshire, Washington, Vermont and Wisconsin. State Policies in Brief (1/1/14), *Ibid*.

[59] Oxman, *Ibid*., p. 8. The 8 states are Arkansas, Colorado, Illinois, Maine, Missouri, North Carolina, Rhode Island, and Texas.

implantation of the embryo. This has given rise to claims that the line is being blurred between birth control and abortion. [60] These eight states accommodate religious objections by specifically not including prescription abortifacient drugs or devices as contraceptives, and a few in this group exclude well-known abortifacients by name.[61]

None of the states require that contraceptive coverage be provided for free. The most common provision is that copayments or cost sharing for contraceptives not exceed the same types of charges for comparable services.[62]

The 20 states which allow exemptions to the mandate fall into three categories of "limited," "broader," and "expansive" based on how much flexibility they give to religious organizations to be exempt from the mandate.[63] Of the states that grant exemptions, half (10) have adopted expansive exemptions, and seven have adopted broader exemptions. Only three have adopted the most limited exemptions, but these include the key states of New York and California upon which the ACA exemption is based.[64]

An example of the narrowest exemption is California[65], where employers must meet several very specific requirements to be exempt. The definition of who is a "religious employer" is an entity for which each of the following is true:[66]

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[60] S. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*. 28 Harvard JL & Pub Pol'y 741 (2005) p.3.

[61] Oxman, *Ibid* p. 8, Colorado, North Carolina, and Rhode Island

[62] Oxman, *Ibid* p. 8

[63] State Policies in Brief (1/1/14) *Ibid.*

[64] State Policies in Brief (1/1/14) Ibid. See attached chart for Insurance Coverage of Contraceptives

[65] The Women's Contraception Equity Act (1999); The exemption under the New York Women's Health and Wellness Act (2002) is the same as California

(a) The purpose of the organization is the inculcation of religious values
(b) The organization primarily employs individuals who subscribe to the faith
(c) The entity primarily serves individuals who subscribe to the faith
(d) The organization is a tax-exempt nonprofit organization under the Internal Revenue Code. 26 USC 6033[67]

Under this type of exemption, a church-controlled employer must have tax-exempt status as a religious entity, making it very difficult to fit within the exemption. Essentially, the organization has to be a church employing and serving only its own members. This narrow definition has been challenged and upheld as constitutional in New York and California, as will be further discussed. Religious advocates maintain that this definition ignores the reality of the mission of the Catholic Church and other churches to serve all faiths and is instead built upon a Congregational model, which is based on a private relationship with God does not have the same community outreach as other faiths.[68] Examples of "church-controlled employers" which would not qualify are those social service organizations providing public services such as affordable housing programs, job development services, domestic violence shelters, homeless shelters, hospice centers, soup kitchens, and nursing homes.

The "broader" category of states exempts "religious employers" which are either a "church" as defined in the Internal Revenue Code Sec 3121(w)(3) or a "church-

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[66] M. Oxman, *Ibid*, p. 4; *Catholic Charities of Sacramento, Inc. v. Superior Court* 32 Cal.4th 527, 85 P.3d 67 (2004) (cert. den. 2004)

[67] This section 28 USC 6033 (a)(3)(A)(i)(33) grants tax exempt status only to churches, their integrated auxiliaries, conventions or associations of churches and the exclusively religious activities of any religious order. Oxman, Ibid, p.4

[68] Stabile, *Ibid*, p.5, The congregational model is one that sees religious activity as confined to the worship hall and religion as a private relationship between the individual and God.

controlled organization" as defined in the Internal Revenue Code Sec. 501(c)(3).[69] Massachusetts is an example.[70] In these "broader" exemption states, under the IRS definition, church-controlled charitable organizations are exempt from the mandate unless they receive significant government funding or unless they charge significant fees for the goods and services they provide to the public.[71] Examples of church-controlled entities that charge fees and therefore would not qualify are adoption agencies and universities. This exemption allows a religious employer to engage in the worthy social outreach programs that the strictest exemption does not, so long as the employer is not making money at it.

The "expansive" category of states goes even further to allow religious employers or church affiliated organizations (as opposed to "churches" and "church controlled organizations") the flexibility to object to the mandate. Delaware is an example. In that state, a "religious employer", which is not defined in the law, may be excluded if the required coverage conflicts with the organization's "bona fide religious beliefs and practices."[72] In this category too are the states of Illinois, Missouri and Washington, which excuse entities with religious or moral objections to contraception or certain methods of contraception from paying for or covering those services.[73]

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[69] Oxman, *Ibid*, p. 13.

[70] M.G.L.A. Ch 175 sec 47W(c) "An Act Providing Equitable Coverage of Services Under Health Plans" (2002)

[71] More than 25% of revenues

[72] 72 Del. Laws, c. 311 sec. 3559(d)

[73] Oxman, *Ibid* p. 5

Interestingly, Illinois alone allows secular for-profit business entities to be excused on religious grounds, the very point being argued in the *Hobby Lobby Stores* case.[74]

The experience of Missouri, a red state with an expansive exemption, is instructive because it went too far in 2012 when it tried to change its existing mandate after the ACA went into effect. The amendment would have changed the mandate to require health insurers to offer employers policies that excluded contraceptives whether or not those employers qualified as "religious employers." The insurance industry argued that the Missouri law was brought into direct conflict with the ACA mandate and that the insurers could not comply with two conflicting laws. A federal court in Missouri found that the amendment was invalid because it was preempted by the ACA[75]

On the whole, the states with their variety of contraception mandates and exemptions have been more philosophically willing to accommodate religious beliefs with health care policy goals than the federal government has. This willingness has resulted in a lack of controversy and litigation.

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[74] State Policies in Brief (1/1/14) *Ibid*

[75] Oxman, *Ibid*.

Chapter 4
First Amendment Legal Challenges to State Mandates

The California and New York contraception coverage statutes with the narrowest exemptions were challenged by Catholic Charities and other religious groups under the Free Exercise and Establishment clauses of the First Amendment in 2004 and 2006. In each state, the highest court ruled against the challengers, upholding the mandate and the exemption. The opinions of these state courts contain arguments and discuss cases that anticipate the issues that are central to today's contraception mandate legal debate. They have proven to be influential and are often cited. The California opinion includes a strong dissent, which is instructive for the arguments against the mandate. The New York opinion had no dissent but the court below it (Appellate Division of the Supreme Court) contained a strong dissent, written by the presiding justice.

In *Catholic Charities of Sacramento, Inc. v. Superior Court*[76] the California Supreme Court in 2004, in the first constitutional challenge to any state contraceptive statute,[77] held, Judge Werdegar writing for the majority, that the narrow religious exemption in the Women's Contraception Equity Act (1999) does not violate the Free Exercise or the Establishment Clauses of the First Amendment to the United States Constitution.[78] Catholic Charities is a nonprofit organization operated by the Catholic Church, which provides social services to the general public such as elder care and

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[76] *Catholic Charities of Sacramento, Inc. v. Superior Court,* 10 Cal.Rptr.3d 283, 32 Cal.4th 527, 85 P.3d 67 (2004) (cert. den. 2004)

[77] Zolman, *Ibid* p. 14

[78] The First Amendment of the U.S. Constitution, part of the first 10 Amendments to the Constitution known as the "Bill of Rights," contains clauses on religion as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This provision applies to the states through the Fourteenth Amendment, so state governments are also prohibited from making such laws. There were also claims made under the California state constitution, which will not be discussed here.

counseling, and ministers to the poor and needy by providing food, clothing and affordable housing. It is obliged to follow Church teachings, which say that contraception is a sin and that as an affiliated entity of the Church it cannot be forced to endorse or facilitate a sin by providing contraceptive coverage to its employees.

Catholic Charities argued that it could not meet, nor could it ever meet, the four criteria in the exemption, which was drafted so narrowly so as to exclude parts of the Church organization, which are integral to its mission, such as the work of Catholic Charities. Therefore this exclusion was unfair and contrary to the First Amendment. First, its corporate purpose was not to inculcate religious values, it was to offer social services to promote a just and compassionate society. Second, it does not employ primarily persons who share its Catholic beliefs, but rather employs a diverse group of people who share its stated purpose. Third, it does not serve primarily people who share its Catholic beliefs, but rather serves a diverse group of people of many faiths or no faith. Fourth, it does not qualify under the nonprofit "religious" organization exemption under IRC sec. 6033, but does qualify as a "charitable" tax-exempt organization under Sec. 501(c)(3). [79]

Catholic Charities made arguments under the Establishment Clause, including the argument that the statute impermissibly interferes with the autonomy of religious organizations because it affects religious doctrine and internal church governance, and courts are incompetent to decide matters of faith. However, its principal arguments were

[79] The role of the Internal Revenue Code in making decisions which may burden religion has been challenged. The Respondent's Brief in *Hobby Lobby Stores* argues that the "federal tax code does not decide the scope of constitutional rights" in response to the government's distinction between for-profit and non-profit entities for religious freedoms. Resp. Brief p. 23.

that the statute unduly burdens its right of free exercise of its religion.[80] The court disagreed with the arguments, citing the prevailing standard in the Supreme Court case of *Employment Div., Ore. Dept of Human Res. v. Smith.*[81]

The *Smith* case held that religious beliefs do not excuse compliance with neutral, generally applicable laws, as opposed to laws that expressly single out religious practices. The right of free exercise does not relieve an individual from complying with a "valid and neutral" law of general applicability even if the law has the "incidental effect" of burdening a particular religious practice. To permit religious beliefs to excuse acts contrary to law "would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself."[82] In creating this standard of review for laws of this type, the *Smith* court found inapplicable the standard of "strict scrutiny" used in prior United States Supreme Court decisions.

The standard of "strict scrutiny" requires the state to show that a law substantially burdening a religious practice must be "narrowly tailored" to serve a "compelling state interest."[83] Strict scrutiny puts the burden on the state to justify its law so as to minimize any impact on religious practice. What exactly is a "compelling state interest" and what are the "least restrictive means" to achieve that interest are matters that must be examined. What exactly is a "neutral" law is also a matter of debate. But where a law is neutral and of general applicability, the rule of *Smith* does not require the state to make this showing.

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[80] *Catholic Charities* 10 Cal. Rptr.3d 283, 293-294.

[81] 494 U.S. 872,110 S. Ct. 1595, 108 L.Ed2d 876 (1990).

[82] *Catholic Charities* 10 Cal. Rptr.3d 283, 299-300.

[83] This was the standard of review enunciated in the Supreme Court case of *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963)

The *Smith* case uses a "rational basis" standard instead which has been described as a "standard that places an almost insurmountable burden" on the religious claimant.[84]

The *Smith* case involved a 66-year old Klamath Indian who was fired as a counselor at a private drug abuse and treatment center because he admitted to the program director that he had ingested peyote at a religious ceremony at a Native American Church where he is a member. He was fired and then was denied state unemployment benefits on the basis that he had been discharged for work-related "misconduct." There was no evidence that he had showed up for work high, but he defied the rules of his workplace. All counselors were considered to be role models for the recovering addicts and were advised that in keeping with the drug-free philosophy of the treatment center, use of an illegal drug by counselors was grounds for immediate termination. Possession of peyote, being a hallucinogenic drug, was a felony under the Oregon criminal code and there was no exemption for religious purposes.

The *Smith* decision, Justice Scalia writing for the majority, found that it could not make exemptions to a neutral, generally applicable criminal law and that the government's ability to prohibit socially harmful conduct could not be subject to a "strict scrutiny" analysis. The Court noted an exception to this rule where "hybrid rights" are present, that is, where there is a combination of a free exercise claim with other constitutional protections such as freedom of speech and of the press. In that case, but not on the *Smith* facts, strict scrutiny would be applied.[85] The Court's concern was that, given the diversity of religious beliefs in our society, the Court could not be put in the

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[84] *Catholic Charities* 10 Cal. Rptr.3d 283, 300 citing Justice Stevens in *United States v. Lee*, 455 U.S. 252, 263.

[85] The court stated that the present case does not present such a hybrid situation but a free exercise claim alone. *Smith*, 494 U.S. 872, 881-882

position of determining religious objections to key civic obligations of every conceivable kind because many laws would not meet the compelling state interest test. Then there would be anarchy.[86] The First Amendment's protection of religious liberty does not require the fielding of constant challenges to an individual's "civic obligations" such as compliance with the criminal law. The Court gave other examples of these types of laws containing civic obligations, such as compulsory military service, payment of income taxes, traffic laws, child neglect and child labor laws, compulsory vaccinations, minimum wage laws, and animal cruelty laws.

The Court was concerned with unity and the preservation of the democratic process. It may also been concerned with the severe damage that drug addiction inflicts on society, although there was no evidence that peyote was abused by these Native Americans as a recreational drug. It concluded that leaving accommodation of religious practices to the political process is preferable to a system in which each conscience is a law unto itself or a system where judges must constantly weigh the social importance of laws against religious beliefs.[87]

The dissent, written by Justice Blackmun and joined by Justices Brennan and Marshall, argued that is exactly what judges are supposed to do – weigh the goals of laws against religious beliefs. The dissent, applying the strict scrutiny test of *Sherbert v. Verner*, which the majority rejected, would have found the mandate lacking. In doing so, it found that it is not the state's broad general interest in fighting the "war on drugs" but the state's narrow interest in refusing to make an exception for the religious use of peyote

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[86] *Smith*, 494 U.S. 872, 887-888.

[87] *Smith*, 494 U.S. 872, 890. The Court stated that the Oregon legislature should enact an exemption for sacrificial peyote like other states have done.

that is important. When competing interests are weighed, they must be reduced to the same "plane of generality" or else the weighing would be distorted in the state's favor.[88] It noted that the purpose of any law may be traced back to one of the fundamental concerns of government - public health and safety, peace and order, defense and revenue, and the general welfare. An abstract or symbolic interest is not sufficient to justify enforcing a law burdening religion. Therefore the state's interest in enforcing its drug laws against the religious use of peyote is not sufficiently compelling to outweigh the individual's right to the free exercise of his religion.

The dissent represented a very strong division on the Court regarding the value of the strict scrutiny test in *Sherbert v. Verner*, which it believed should be applicable outside the unemployment compensation field. The dissenting justices, including Justice Brennan who wrote the *Sherbert* majority opinion in 1963, were clearly upset to see years of precedent rejected by the Court, leading to the dissenting opinion's remark: "In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated."[89]

Interestingly, the three dissenting justices joined a concurring opinion by Justice O'Connor, which urged that that strict scrutiny must always be applied if any laws, even facially neutral laws, burden religion because "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible

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[88] *Smith*, 494 U.S. 872,910

[89] *Smith*, 494 U.S. 872, 908

in a pluralistic society."[90] The majority's view of the First Amendment was too narrow and did not allow the religious claimants to even make the argument that they were burdened so as to qualify for an exemption from the rule. The opinion was actually closer than it appears, with 4 justices favoring the application of strict scrutiny. But like a squash match, a close score of 5 to 4 can still be a decisive win. However, the dissenting justices did not share in Justice O'Connor's holding to uphold the law because it was the kind of a law that required uniform application and could not admit any exceptions.

The California Supreme Court, following *Smith*, declined to examine the statute based on "strict scrutiny." Regarding Catholic Charities, the court reasoned that the statute applies neutrally and generally to all employers, regardless of religion and thus is neutral, not being targeted at any one religion. The law also has a valid objective and concerns a matter that the state may regulate, because the state may regulate insurance policies to prevent gender discrimination.

The court, in a very insensitive statement, found that the statute was valid because it conflicted with Catholic religious beliefs not directly, but "only incidentally, because those beliefs happen to make prescription contraceptives sinful."[91] If the *Smith* standard allows a court to trivialize religious concerns about matters that are sinful, then it may not be the best standard to apply in religious accommodation cases because results can be harsh.

Catholic Charities argued that the statute's exemption discriminates against any religious organizations that engage in charitable work, as opposed to work that is purely spiritual, and so it prefers one kind of religion over another in violation of the

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[90] *Smith*, 494 U.S. 872, 903

[91] *Catholic Charities* 10 Cal, Rptr.3d 283, 284

Establishment Clause, picking and choosing using a form of religious gerrymandering. The court rejected this argument stating that most religious employers are not against contraception and the fact that the exemption excludes Catholic Charities does not mean it is discriminates against them. Since the statute applies to religious and non-religious organizations equally, there is no preference given to non-Catholic institutions.

The court's view of Catholic Charities was that it was not really part of a church, but it was simply a nonprofit public benefit corporation with employees, most of which do not belong to the Catholic Church. Catholic Charities was not being forced to do something it considered to be sinful because the harm it was experiencing could be alleviated by an "opt out." It could drop prescription drug coverage altogether, which was not required by the mandate, and this should eliminate concern about religious burdening. Furthermore, it was free to express its disapproval of prescription contraceptives and encourage its employees not to use them, so its speech was not suppressed. This opt out seems very inadequate as it hurts the employees which the church believes that it has a moral duty to provide for.

Finally Catholic Charities argued that the statute violated the "rational basis" test because the exemption criteria are arbitrary and wholly unrelated to any legitimate state interest. The court disagreed, saying that the exemption has the legitimate rational purpose of accommodating a state-imposed burden on religion. The court did agree that the exemption criteria of only feeding hungry fellow co-religionists and no one else was a "problem" which did not appear to support a legitimate state purpose. But that made no difference since Catholic Charities had conceded it did not meet any of the criteria anyway. The court essentially told them to "get over it." The majority was indifferent to

a harsh result for the religious claimant, as long as the law was neutral and there was some kind of an opt-out, however inadequate it may seem.

Judge Brown in his dissent noticed the majority's indifference to putting a religious claimant in a position where it is being ordered to do something sinful. He stated, "instead of being dismissive of the very serious claims presented here, we should treat them with the highest respect."[92] It pointed out the injustice of applying the *Smith* rule under these circumstances. If neutral, generally applicable laws do not have to survive compelling state interest review, such laws require no justification no matter how heavy the burden on the religious claimant and how inconsequential the state interest. In the dissent's view, the government should not be making distinctions between what parts of a bona fide religious organization are "religious" and which are "secular" and thus vulnerable to infringement of religious freedom under the Establishment Clause. The fact that Catholic Charities can opt out of providing prescription drug coverage altogether and thereby not be forced to facilitate a sinful practice is not helpful at all, as it forces it to give up benefits needed by its employees in order to object to contraceptives.

The dissent looked at the big picture and philosophically discussed the value of protecting religious institutions from gratuitous state interference and emphasized that they are important to the foundation of our liberal democracy. It theorized that the right of religious liberty is at least on the same level as antidiscrimination in the constitutional hierarchy. A desire to prevent discrimination is not the only core value at stake. The dissent acknowledged that the religiously dictated conduct of churches operating in the secular world may come into conflict with public policy. That is no surprise. The

[92] *Catholic Charities* 10 Cal. Rptr.3d 283, 319.

question becomes whether the "coercive force of the law may be brought to bear to compel a religious organization that holds an alternative view, based on religious scruples, to support a hostile and competing vision of the good."[93]

The dissent stated that to demand that contraception be funded, despite the church's well-known objections and to draft a "grudging" narrow religious exception to accomplish this end indicates that the state is not neutral but has taken sides. Such a narrow exemption presents such a "crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity."[94] The law may not be neutral because of the unusually harsh result, and if not neutral, it must be subject to strict scrutiny and would not pass that test.

The dissent also maintained that the *Smith* decision was not applicable to a case of this type at all. *Smith* involved the denial of a benefit to an individual based on a violation of a criminal drug law. In this case, a religious entity, a church, is being forced to provide a benefit in violation of its theological objections. Just because the right of free exercise does not excuse an individual from following a valid and neutral law of general applicability does not mean that a church would never be relieved of the obligation to follow such a law. This is an obvious distinction ignored by the majority, according to the dissent.

The harm to an individual of losing benefits in *Smith* appears to be much less than the harm to Catholic Charities in being forced to provide contraception coverage that it considers sinful. The criminal law prohibiting socially harmful conduct of drug use in

[93] Catholic Charities, 10 Cal. Rptr.3d 283, 326

[94] Catholic Charities, 10 Cal. Rptr.3d 283, 329

Smith imposed a key civic obligation and is a different kind of law than the contraception mandate, which creates a new government entitlement program. In *Smith*, the Native Americans were not forced to commit anything they considered a sin, or to discontinue use of peyote, which was central to their religious ceremonies. They were not even prosecuted for possessing the drug, a crime that the state of Oregon routinely did not prosecute. It seems convincing that the *Smith* case should not have been applied to Catholic Charities. The case was appealed to the Supreme Court, which did not grant *certiorari*.

In 2006, the New York Court of Appeals in *Catholic Charities of the Diocese of Albany v. Serio,*[95] followed the California decision and held, Judge Smith writing for the majority, in a terse opinion with little analysis and no dissent that the *Smith* case is an "insuperable obstacle" to any Free Exercise claim against the contraception mandate in the New York Women's Health and Wellness Act (2002).[96] The claimants were ten faith-based social service organizations, eight affiliated with the Catholic Church and two affiliated with the Baptist Bible Fellowship International. They all provided a variety of social services to the public and operated hospice centers, nursing homes, and schools.

The court recognized that the heart of the case was the statute's exemption for "religious employers," which was the same for both New York and California. The claimants, as in the California decision, argued that the definition of "religious employer" for the exemption to the mandate is unconstitutionally narrow in violation of the

[95] *Catholic Charities v. Serio,* 7 N.Y. 3d 510, 859 N.E. 2d 459 (2006)

[96] *Catholic Charities v. Serio,* 859 N.E. 2d 459, 465

Establishment Clause, as none of the claimants fit within the narrow definition of "religious" employer to qualify for the exemption.

The court noted that before the statute became law, the issue of how broad the exemption should be was debated in the legislature, with supporters of one view contending that religious organizations should not be forced to violate the commands of their faith and supporters of the other view saying that that a broader exemption would deprive "tens of thousands" of women employed by church-affiliated organizations of contraception coverage. The court noted that this latter view prevailed and that the legislature had spoken. The court held that under the *Smith* test the First Amendment has not been offended because the burden on the claimants' freedom of religious exercise is the incidental result of a neutral law of general applicability.[97] There would be no "strict scrutiny" analysis. The court found that any burden on the claimant's religious exercise was the "incidental result" of a "neutral law of general applicability." The law was neutral because it did not "target religious beliefs" and it was not the law's "object" to interfere with anyone's exercise of religion. Its rather general object was to make broader health insurance coverage available to women."[98]

The court noted that the burden of showing that an interference with religious practice is unreasonable, requiring an exemption from the statute, is on the person claiming the exemption. Although the burden is heavy, it should not be impossible to overcome. Exemptions from the *Smith* rule should be allowed if the "results are plainly

[97] The Free Exercise claim under the New York constitution will not be discussed here

[98] *Catholic Charities v. Serio* 859 N.E. 2d 459, 464

inconsistent with the basic ideas of religious freedom," citing some extreme examples.[99] This seems to be quite a heavy burden for the claimant.

The court acknowledged that the burden that the mandate places on religious practices is serious, but since the mandate does not literally *compel* the claimants to provide contraception coverage they can always "opt out." They do not have to purchase any prescription drug coverage at all for their employees. As in the California decision, the religious institutions maintained that this "opt out" still poses a problem because they feel morally obligated to provide their employees with just wages and benefits. The court noted that although it may be "expensive or difficult" for employees not to have a drug plan, the employer could make it up with higher compensation.

It was important to the New York court, as it was to the California court, that many of the claimants' employees did not share their religious beliefs. The court made the following revealing statement of its philosophy:

> "The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect these employees' legitimate interests in doing what their own beliefs permit."

This sounds like a lecture to the claimants who, having failed at the very difficult task of proving an exception to the mandate, must now accept the burden of a direct contravention to their core religious beliefs because other people have "legitimate interests," too.[100] They must be made to see the reasonableness of the court's decision, even if they do not agree with it. Yet to the extent that a religious entity is an employer,

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[99] *Catholic Charities v. Serio*, 859 N.E. 2d 459, 467 The court cited as examples laws violating the confidentiality of the confessional, an alcohol prohibition for religious services preventing communion, uniform meat regulation of Kosher slaughterhouses which would put them out of business, and antidiscrimination laws that could end the male celibate priesthood.

[100] One could just as easily make the argument that nonbelievers should be prepared to accept some restrictions when they accept work at a religious institution with well-known religious beliefs.

and an offensive federal mandate is placed on the employment relationship, a natural conflict is created. Where do the organization's duties lie? These two roles create a conflict. When viewed purely as an employer, a religious entity is expected to abide by the secular culture, but it cannot do so at the expense of its core values, because it is also a religious entity.

An effect of the mandate, whether intended or unintended, is to intrude into the employment relationship and pit the employee against the employer. This obscures the real issue, which is the state burdening the religious freedom which is the right of every citizen. The undercurrent is that a religious entity sincerely opposed to contraception is a heartless employer denying government-defined basic health care to its employees because of its strange and outmoded religious beliefs and practices that have no place in today's secular world. This cultural belief pits citizens against each other. The problem with the *Smith* test is that the government is not challenged to find the least restrictive means, so religious freedom is never accommodated.

Presiding Judge Cardona, in his dissent in the Appellate Division of the Supreme Court below made several arguments against the mandate and opt outs that presage later objections to come. Several are similar to the dissent in the California decision, which was cited in the New York Appellate Division dissent. The dissent noted the adverse social effects of the decision. The exemption is overly strict in defining a religious employer, which can result in a smaller, rather than larger, number of women receiving coverage. Non-exempt religious employers will be forced to take the opt outs. This will make the situation worse for employees of non-exempt religious employers who do not qualify for the exemption because they could lose their drug coverage altogether. This

undermines the state interest in promoting preventive health care for women. In contrast, employees of exempt religious employers may obtain contraception coverage at low cost by alternate means.[101] The dissent noted that an earlier version of the law contained a broader exemption, but the added cost, even a small one, was rejected as a too much of a barrier to contraception coverage. The drug opt out has other problems for the religious employers as not only violates the moral duty to care for employees, but also penalizes the employer financially since competitive employers must provide benefits packages.

The dissent maintained that the exemption violated the Establishment Clause, following the dissent in the California decision. The activities set out in the exemption reflect the legislature's determination of what is "religious," with all the rest of the entity's activities being "secular." An organization is not automatically secular if it engages in these activities and a decision of what is secular or religious is not is not an appropriate matter of inquiry for the legislature. The dissent noted that the government should not discriminate "between those religious institutions that create separate legal entities for their ecclesiastical and ministerial activities and those religious institutions that do not."[102]

The dissent noted, anticipating a future course of events, that religious employers may choose to self-insure and be free of state insurance regulation altogether.

The dissent also found that the statute fell within the "hybrid" exception to *Smith* because in addition to the free exercise claims the claimants presented another viable First Amendment claim of free speech and therefore would apply a review of "strict

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[101] They can obtain coverage by directly purchasing a rider at the small group community rate, which was acknowledged by the state to be low. *Catholic Charities v. Serio*, 28 A.D.3d 115, 141

[102] *Catholic Charities v. Serio*, 28 A.D.3d 115, 149

scrutiny" to the law. It found no compelling state interest because the statute encourages the non-exempt religious employers to opt out of prescription coverage as "the principal way to avoid compromising their religious beliefs."[103] Therefore the state's interest in contraceptive coverage for women bears little relation to the statute which is not narrowly tailored to expand benefit coverage for women and instead is drafted in an "all or nothing" manner.

Constitutional challenges by groups with strong religious objections to the state mandates have been limited only to the California and New York narrow conscience clauses, and as of April 2014 there has been no such political upheaval in the states with broader, more accommodating conscience clause within their mandates.[104]

RFRA, enacted in 1993, and not mentioned in the state decisions because it does not apply to the states, rejected the *Smith* case with its harsh results burdening religious exercise and reinstituted the strict scrutiny test of *Sherbert v. Verner*. The California and New York courts were well aware that Congress had rejected the *Smith* standard at the time these decisions were handed down in 2004 and 2006. Most certainly, the results would have been different if a strict scrutiny test had been applied.

The effect of the decisions was to drive more large religious employers to self-insure or drop prescription drug coverage altogether, which would result in less, rather than more, access to contraception coverage. Catholic organizations in New York, as the dissent in the New York decision predicted, chose either to self-insure or to opt out of all

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[103] *Catholic Charities v. Serio*, 28 A.D.3d 115, 148

[104] Rudary, D. *Drafting a Sensible Conscience Clause* Health Matrix 23.1 (Spring 2013) p. 15; There has been one state RFRA challenge in Illinois by a secular entity. Illinois has a broad conscience clause within its mandate.

prescription drug coverage for its employees.[105] These included the Archdiocese of New York, the Archdiocese of Brooklyn and all the Catholic Charities organizations within their territories. Many large Catholic institutions in California, such as hospitals, decided to self-insure as well. This still presented a problem for smaller employers who could not afford to self-insure, and some dropped prescription coverage entirely.

Based on the EEOC complaint against Belmont Abbey, these religious non-profits must have been aware, at least as of July 2009, that they could still be subject to a Title VII lawsuit or state antidiscrimination enforcement action if their plans offered comprehensive drug coverage that did not include contraceptive coverage. The present official position of the EEOC, according to its website, is that the PDA prevents discrimination by requiring that a benefit plan provide the same insurance coverage for contraceptives as it does for other drugs.[106]

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[105] J. Berger and T. Kaplan, *N.Y. Law on Contraceptives Already in Place and Catholic Institutions Comply* (Feb. 10, 2012) http://www.nytimes.com/2012/02/11/nyregion/catholic-institutions-reluctantly-comply-with-ny-contraceptives-law.html?_r=0 (2/10/12) A spokesperson, Carol Hogan, said that the bishops of the California Catholic Conference "knew going forward that [self insurance] was their backup plan."

[106] *Questions and Answers: Commission Decision on Coverage of Contraception* (2000),http://www.eeoc.gov/policy/docs/qanda-decision-contraception.html. However, the guidance in this area on the EEOC website has not been updated since 2000. Enforcement and Litigation statistics for EEOC enforcement actions from 2000 to 2013 show that the EEOC does not track benefits issues under the PDA separately from Title VII generally. See EEOC Litigation Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm

Chapter 5
The ACA and HHS Mandates

The New Broad Mandate for Contraception Coverage

With the enactment of the ACA, contraceptive coverage advocates finally achieved the overall general legislative mandate applicable to all employers that they had been working toward for so many years. This is what the EPICC had tried to do but did not succeed. The ACA changed the landscape of the health insurance market by directly regulating both group health plans and group health insurers.[107] It amended ERISA, the Public Health Service Act, and the Internal Revenue Code to accomplish its goals.[108]

Health care reform was a major topic as early as the 2008 Democratic presidential primaries. Each of the candidates, Senator Hillary Clinton (D-NY) and Senator Barack Obama (D-IL), each proposed their own plan to cover the millions of uninsured Americans. In the general election, candidate Obama campaigned, among other things, on the promise of universal health care.[109] In February 2009, immediately after his inauguration, President Obama announced in a joint session of the Democratic-controlled Congress his plans to work for health care reform. By March 2010 the passage of the ACA made that reform a reality.[110]

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[107] Rudary, *Ibid*.

[108] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39875-90 (July 2, 2013); 29 C.F.R. sec 2590.715-2713A(a); 45 C.F.R. sec 147.131(b)

[109] http://en.wikipedia.org/wiki/Patient_Protection_and_Affordable_Care_Act. Barack Obama was elected president of the United States on November 4, 2008 defeating the Republican candidate John McCain and was inaugurated on January 20, 2009.

[110] *Id.*

On March 23, 2010 President Obama signed the ACA into law as the centerpiece of his domestic agenda.[111] The ACA established a minimum standard of quality health care for all Americans by requiring "minimum essential coverage" to be included in all plans, including "preventive services." The HHS Secretary was directed to promulgate rules defining which "preventive services" would become part of this mandate. Contraception coverage was determined by HHS regulation to be part of the mandated list of preventive services especially for women, with the result that a mandate for contraception coverage was included in all plans. This mandate came to be known as the "HHS contraception mandate."

The HHS Secretary modeled its contraception mandate and conscience clause on the narrow exemptions in the California and New York state mandates and, not surprisingly, was met with similar strong opposition from religious groups.

The HHS contraception mandate and the state mandates differ in several important respects. Unlike the state mandates, the ACA does not specifically require by its terms that contraception coverage be included in all group health policies. Instead, as noted, it contains a much broader and far-reaching mandate for "minimum essential coverage" to be included in those policies. Unlike the state mandates, the ACA prohibits any cost sharing for preventive services, based on the belief that cost is a barrier. Another major difference is that the opt-outs available to religious objectors under the state mandates of dropping prescription drug coverage from the plan or self-insuring are no longer available, as all plans must comply with the mandate. Employers have only the choice of dropping their health plan altogether, and paying a heavy fine, making that

[111] http://en.wikipedia.org/wiki/Patient_Protection_and_Affordable_Care_Act

choice painful both for themselves and their employees, who will be driven to the state exchanges. The limited choice to objecting religious employers is that to either pay for (or enable) contraception or pay a fine. If they keep their plan but do not comply with the mandate, the fines go up even higher for non-compliance. In the eight states that allow no exemption at all, it has been suggested that religious employers have always relied on self-insurance to obtain relief from the mandate. This opt out will no longer be available, and even the HHS exemptions may not help them.[112]

Finally, unlike the state mandates, the HHS contraception mandate is not an antidiscrimination mandate. It is a direct mandate for coverage, and does not depend on whether an employer is providing a comprehensive prescription drug benefit that excludes prescription contraceptives.

State mandates may continue to apply to plans which are exempted from the HHS mandate, for example, plans which are grandfathered and small employers..[113]

The net result is that under the ACA, the contraception mandate became broader and more far-reaching than ever before, with the same narrow exemptions and very limited options available to religious employers whose beliefs do not permit them to comply.

The ACA's goal was to fundamentally reform the American health care system to provide access to quality insurance for all, but from the start it was met with significant political and legal objections and long after passage remained the subject of contentious

[112] It is questionable whether the HHS mandate exemption would be available to religious employers in these 8 states. If there is a direct conflict between state law and federal law with respect to the ACA, federal law prevails. See p.30. On the other hand if states are more restrictive than federal law requires and "provide greater access to contraception coverage than federal standards" their laws will not be preempted. Coverage of Certain Preventive Services Under the Affordable Care Act 78 Federal Register 39888 (July 2, 2013)

[113] Oxman, *Ibid*. p. 9, 3.

debate. Such a large, complex and far-reaching piece of legislation passed without a single Republican vote, and many lawsuits were filed. The litigation eventually led to a constitutional challenge in the Supreme Court to two key provisions of the law - the "individual mandate" and Medicaid expansion.[114]

The "individual mandate" required most Americans to maintain "minimum essential" health insurance coverage or else to pay a penalty under the Internal Revenue Code. It commenced as of March 31, 2014. In March of 2014, HHS quietly issued a "technical bulletin" containing a broad opt-out exemption to October 2016 for individuals whose coverage was cancelled for non-compliance with the ACA if they find "other options" to be more expensive.[115] Many individuals would receive the required coverage through their employer.[116] According to the Kaiser Family Foundation, 78 percent of covered workers in 2013 were enrolled in a group health plan.[117]

The Supreme Court upheld the federal government's authority to impose the individual mandate as a constitutional exercise of Congress' taxing power.[118] The Court

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[114] Medicaid expansion was found unconstitutional. It will not be discussed here.

[115] *ObamaCare's Secret Mandate Exemption*, (March 12, 2014), WSJ http://online.wsj.com/news/articles/SB10001424052702304250204579433312607325596?mod=hp_opinion&mg=reno64-wsj. The mandate contains a number of exemptions, such as low income, present in U.S. illegally, prisoners, members of Indian tribes, and those who qualify for a "hardship." Sec. 5000(d) & (e)

[116] Or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company through a state exchange . Beginning March 31, 2014, those individuals who do not comply with the mandate must make a "shared responsibility payment," also described as a "penalty," to the IRS with their tax return.

The individual mandate is contained in the Internal Revenue Code at 26 U.S.C. sec 5000A. "Chapter 48 Maintenance of Minimum Essential Coverage."

[117] In 2013, 78% of covered workers were enrolled in a group health plan with a general annual deductible. Employer-sponsored insurance covers about 149 million non-elderly people. *2013 Employer Health Benefits Survey*, Kaiser Family Foundation, http://kff.org/report-section/2013-summary-of-findings/ (accessed 3/8/14)

[118] *National Federation of Independent Business v. Sebelius*, No. 11-393 Slip Op. (June 2012); The Court also held that the individual mandate was not a constitutional exercise of Congress' Commerce Clause or

also held that the federal government does not have the power to order individual people to buy health insurance, so the individual mandate would therefore be unconstitutional if read as a command. However, it does have the power to impose a tax on those without health insurance.[119]

In addition to the individual mandate, the ACA also imposed an "employer mandate" which, like the individual mandate, did not directly compel the purchase of health coverage, but if employers did not provide "minimum essential" health coverage to their full-time employees they would be subject to a very large penalty under the Internal Revenue Code called an "assessable payment," which has also been referred to as an "employer responsibility payment."[120] This payment is technically a tax. The requirement of maintaining minimum essential coverage is the same for the employer and the individual mandates.[121] Like the individual mandate, it is subject to exemptions.[122]

The ACA's provision for coverage of "preventive health services" requires all private group health insurance plans and insurers to provide coverage for free, at no cost sharing, for "preventive" services such as immunizations, cancer screening, vaccinations, prenatal care, and, specifically for women, "additional preventive care and screenings" as

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Necessary and Proper Clause powers.
http://en.wikipedia.org/wiki/National_Federation_of_Independent_Business_v._Sebelius;

[119] *Nat'l Fed. of Ind. Bus. v. Sebelius,* Slip Op (2012) at 50-51

[120] The employer mandate is in the Internal Revenue Code at 26 U.S.C. sec. 4980H

[121] 26 U.S.C. sec 5000A, Internal Revenue Code Chapter 48 "Maintenance of Minimum Essential Coverage."

[122] There is a significant exemption for grandfathered plans, which are exempt entirely and remain so indefinitely as long as they do not make certain significant changes. There is also an exception for small employers with less than 50 employees. To the extent these employers do not offer a health plan, they do not have to comply with any of the health coverage requirements, including the contraception mandate.

provided by guidelines to be issued by HRSA, an agency within HHS.[123] It is directed to the plans themselves, not the employers, and amends the Public Health Services Law rather than the Internal Revenue Code where the employer and individual mandates, with their fines for noncompliance, are based.

HHS, through HRSA, adopted comprehensive guidelines, which it commissioned from the Institute of Medicine (IOM), part of the semi-private National Academy of Sciences. The IOM issued guidelines which require group health insurers to provide "contraceptive methods and counseling" coverage without cost sharing.[124] This included "all FDA-approved contraception methods, sterilization, and patient education and counseling for all women with reproductive capacity." These guidelines were part of a full package of preventive services for women, including well woman visits, diabetes and HIV testing, STD and domestic violence counseling, and breastfeeding support.[125]

Abortion services are specifically not included as part of the mandated essential health services.[126] However, in the eyes of many, certain methods of contraception are in fact abortifacients.[127] There is an ongoing medical and scientific debate about how certain contraception methods actually function. Evidence points to the view that drugs

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[123] ACA sec 1001 adding sec 2713(4) to the Public Health Services Act. Temchine, D. Epstein Becker Green *Ibid* p. 8. The Health Resources and Services Administration ("HRSA") is an agency of the U.S. Department of Health and Human Services ("HHS") formed in 1982.

[124] *Clinical Preventive Services for Women: Closing the Gaps*. Institute of Medicine http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Action-Taken.aspx (accessed 3/34/14)

[125] HRSA Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/(last accessed 3/25/14)

[126] ACA, 42 U.S.C. sec. 18023(b)(1)(A) "nothing in this title…shall be construed to require a qualified health plan to provide coverage of [abortion] services…as part of its essential health benefits for any plan"

[127] The FDA does not recognize that any of its approved contraceptives function as abortifacients, but there is scientific disagreement in this area.

such as Plan B and the newer more effective drug Ella have the ability to function by preventing ovulation, but they also work by preventing implantation of the embryo.[128] How much of the time they function as true contraceptives is also a matter of debate, some saying it can depend on the individual woman. Of the 20 FDA-approved methods of contraception, there is a view that four of these can function as abortifacients –two types of IUD's, and the "emergency contraceptives" Plan B (morning after pill) and Ella (week after pill). Ella (Ulipristal) is chemically similar to the controversial abortion pill RU486.[129] The FDA recognizes the possibility that the drugs may prevent implantation and requires warning labels with this disclosure on the drug packages. This is important to the many women who will not use birth control that acts after fertilization.[130]

Many religious objectors believe that human life begins at conception and that any drug or device which prevents a fertilized egg from implanting in the uterus will destroy a human embryo. However, federal law does not classify the drugs as abortifacients because such law "defines pregnancy as beginning at implantation."[131] Therefore, according to the government definition, even if the drugs fail to prevent conception, if they prevent implantation they do not terminate a pregnancy and do not

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[128] R. Wilson, *The Calculus of Accommodation*, Boston College Law Review (Oct. 20120) p. 1459-1460. The drugs work as contraceptives but also work as contragestives.

[129] R. Wilson, Ibid., p. 1459 fn 155 and 156.

[130] J. Palazzolo, *In Contraceptives Case, Court May Run Into Plan B*, WSJ Law Blog (3/24/14), http://blogs.wsj.com/law/2014/03/24/in-contraceptives-case-court-may-run-into-plan-b/; R. Wilson, *Ibid*. Regardless of how a drug is described, a 2005 study found that 53% of women would not use a birth control method that acts after fertilization.

[131] Pet. Brief p. 9-11 fn. 4 citing 45 C.F.R. 46.202(f) definitions. "Pregnancy encompasses the period of time from implantation until delivery" for purposes of research involving pregnant women or fetuses. "FDA-approved contraceptive methods, including Plan B, Ella, and IUDs are not abortifacients within the meaning of federal law." Coverage of Certain Preventive Services Under the Affordable Care Act 78 Federal Register 39888 (July 2, 2013)

cause abortion. Secretary of HHS Kathleen Sebelius testified before Congress that the HHS mandate does not apply to abortifacients.[132]

The Mandate Encounters Religious Resistance

HHS issued the regulation (the "interim final rule") on women's mandated preventive care incorporating these guidelines on August 1, 2011. Enforcement was delayed one year to August 1, 2012, as a concession to religious groups who would need extra time to comply.[133] The new regulation mandated that all group health plans and group health insurers cover FDA-approved contraception methods and sterilization, including all the controversial abortifacients.[134] This was in effect a mandate to all religious *employers* as well who believed they were facilitators, while limiting exemptions only to houses of worship, which are the same narrow exemptions contained in the California and New York mandates.

With this new rule, religious groups could no longer avoid the mandate by self-insuring or using the opt-outs available before the ACA was passed. The only way out was to drop coverage altogether and pay huge fines. Although the mandate was not new, the strict across-the-board application of the mandate and elimination of the old opt outs was new. Religious employers were suddenly hit with the full effect of a mandate that

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[132] M. Cover, *Sebelius Claims No Abortifacient Drug Covered by Contraception Mandate*. (3/1/12) http://cnsnews.com/news/article/sebelius-claims-no-abortifacient-drug-covered-contraception-mandate

[133] The Secretary of HHS was joined by the Department of Labor and Department of the Treasury in promulgating this rule. Rudary, *Ibid*, p. 2

[134] Rudary D. *Ibid* p., Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services" 276 Fed. Reg. 46621, 26626 (Aug 3, 2011) (codified at 45 C.F.R. sec. 147.130 (a)(1)(iv)(2011); Women's Preventive Services: Required Health Plan Coverage Guidelines, HRSA http://www.hrsa.gov/womensguidelines accessed on 2/26/14

they had been able to legally work around for years and had gotten used to as a *de facto* accommodation. The mandate in this manner provoked a crisis.

This rule sparked a national outcry by many religious groups, particularly leaders of the Catholic Church, because it did not exempt "religious non-profits," with broad community outreach such as Catholic Charities. Religious non-profits like Notre Dame University argued that they would be placed in the position of paying for contraception in violation of the Church's moral teaching or discontinuing employee and student health plans in violation of the Church's social teaching.[135]

Management of a crisis may be made easier through use of personal relationships but the parties did not have any good personal relationships to build on. The outcry marked a new low in the relationship between the administration and the U.S. Catholic hierarchy, which saw the government's public policy as directly affecting the Church's religious liberty. The relationship had been rocky since the start of President Obama's candidacy in 2007, but had gone seriously downhill from the time he was elected.[136] With the release of the new rule, the relationship would continue to worsen, and disagreements would increase between President Obama and the powerful Timothy Cardinal Dolan, Archbishop of New York and President of the United States Conference of Catholic Bishops (USCCB).[137] The USCCB and the president became adversaries at a time when it was in both their best interests to try and find common ground. But it proved difficult

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[135] Rudary, *Ibid* p.2;

[136] D. Gibson, *Analysis: Can Pope Francis help 'reset' frayed ties between Obama and the Catholic Bishops?* (3/24/14) Religion News Service

[137] Archbishop Dolan was elevated to the rank of Cardinal on February 18, 2012 by Pope Benedict XVI. Cardinal Dolan, who is extremely popular, was on the short list to become pope before the election of Pope Francis. D. Gibson, Religion News Service, *An American pope? Eyes Turn to New York's Cardinal Timothy Dolan* (2/12/13) http://www.faithstreet.com/onfaith/2013/02/12/an-american-pope-eyes-turn-to-new-yorks-cardinal-timothy-dolan

to do when both sides felt embattled - the president from the overall strong opposition to the ACA and the bishop from the moral dilemma that Catholic religious employers now had to face directly and could no longer legally sidestep.

On the day that the new mandate was announced, the USCCB sharply criticized it for forcing Catholic social service agencies and healthcare providers to provide contraceptive and abortifacient drugs to employees. The argument was that those Catholic organizations which would qualify as a 'house of worship' under the IRC sec. 6063 still had to meet the other requirements of the test to be exempt, and they could do this only if they were to stop hiring and serving non-Catholics. The result was that they would be forced to discontinue their good works in order to fit within the exemption and avoid the mandate. Cardinal DiNardo, chairman of the USCCB Committee on Pro-Life activities, deplored this result, and urged new legislation, the Respect for Rights of Conscience Act, to create a broader religious exemption to the mandate, stating in a letter that "[employers] should not be forced to violate their deeply held moral and religious convictions in order to take part in the health care system…[138]

On November 8, 2011, New York Archbishop Timothy Dolan met with President Obama without fanfare at the White House to discuss the pending contraception mandate and a range of issues related to the tense relationship between the administration and the USCCB.[139] The White House downplayed it as "one among many meetings" with officials of the Catholic Church and the administration, but it was an important meeting and came one week in advance of the USCCB meeting in Baltimore in which the bishops

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[138] *USCCB: HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights* (8/1/11) http://www.usccb.org/news/2011/11-154.cfm

[139] M Winters, *Obama meets quietly with head* of *U.S. Bishops* (11/12/11), National Catholic Reporter, http://ncronline.org/news/politics/obama-meets-quietly-head-us-bishops

would discuss their new ad hoc committee on religious liberty. That committee would create the "Fortnight for Freedom" initiative, which would vigorously oppose the mandate, although with mixed results.

In mid-January 2012 when the president called Dolan to tell him that he was not expanding the conscience exemption to include religious non-profits, Dolan felt personally betrayed and let everyone know it.[140] He said later in an interview that he and the president had a productive and "extraordinarily friendly" meeting, and that the president had seemed earnest when he said that he considered the protection of conscience sacred. The president did not want the administration to do anything to impede the work of the church, which he held in high regard. Dolan left the meeting with his hopes up and then upon hearing the bad news had to tell the president that he was "terribly let down, disappointed and disturbed."[141] He felt that he had the president's word that the mandate would respect the conscience rights of religious non-profits. Now there was a credibility gap.

On January 29, 2012 Catholic priests around the country read a letter in church from the USCCB charging the administration with violating the First Amendment and threatening civil disobedience if forced to conform to the mandate.[142] Secular publications published opinions that the administration had awakened a "sleeping giant" with a rule that would have "dire political consequences" in an election year.[143] Civil

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[140] D. Gibson, Religion News Service *Top Catholic Bishop feels betrayed by Obama* (1/25/12) USA Today

[141] D. Gibson, *Ibid*.

[142] Rudary *Id*.

[143] Rudary, *Id*; Peggy Noonan, *A Battle the President Can't Win*, Wall Street Journal Feb 4-5, 2012, http://online.wsj.com/news/articles/

disobedience was very much a part of the "Fortnight for Freedom" initiative, which was formally launched in a statement issued by the USCCB on April 12, 2012.

Overturning the contraception mandate was part of a broader initiative of The Fortnight for Freedom. The Fortnight for Freedom was concerned with several other public policy issues that the Church believed threatened religious freedom such as abortion, and gay marriage and adoption.[144] The campaign set aside two weeks in the church calendar starting June 21 each year for events and services in each diocese nationwide to commemorate the saints who gave their lives defending the faith. It was intended to be a nonpartisan focus on "freedom of conscience" and protect against encroachment of "radical secularism." It gave a focus for Catholic opposition to the mandate. However, it was criticized by some for strong rhetoric, and not involving the laity enough.[145] There was a view by some Catholics that the laity should help to lead and that the church hierarchy should not lose track of what was important to the laity.

Given the strong reaction of religious groups, on January 20, 2012, HHS announced more complicated rules, this time, a delay of enforcement of the mandate (a temporary "safe harbor") to give employers more "time and flexibility to adapt to the new rule." The delay would not be automatic. Religious non-profits had to "certify" that compliance with the rule violated their religious beliefs in order to obtain a one-year stay of enforcement, from August 1, 2012 to August 1, 2013.[146] They would also have to

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[144] D. Gibson, Religion News Service, *Catholic Bishops issue rallying cry for 'religious freedom.'* http://www.religionnews.com/2012/04/12/catholic-bishops-issue-rallying-cry-for-religious-freedom/

[145] D. Gibson, *Ibid*.

[146] The safe harbor would remain in effect until the first plan year beginning on or after August 1, 2013. Press Release HHS statement by Sec. Kathleen Sebelius (Jan 20, 2012) The certification required that religious nonprofits report that they have consistently not covered, or have unsuccessfully attempted not to cover, either all recommended contraceptives or the contraceptives identified on a list because of religious

show that they had a track record of not covering, or trying not to cover, contraceptives in the past. Despite the protests, the administration allowed the "interim final rule" to became a "final rule" on February 10, 2012 without any change to the mandate. Instead of an exemption, the administration now floated the idea of an accommodation.

The Accommodation: Moral Complicity and Practical Politics

On the same day that the mandate became final, President Obama announced that the administration would issue a new policy that "accommodates religious liberty" while protecting the health of women, thus offering hope for some relief for the many religious non-profits left out of the exemption. Religiously-affiliated employers would not be forced to directly provide contraceptive coverage, the president said. Instead, their insurance companies would directly provide it for free.[147] This new accommodation would shift the burden of directly funding contraceptives from religious non-profit organizations to their health insurers, which must provide the contraceptives free of charge.[148] According to the terms of the press release, religious employers would not have to "contract, arrange, pay, or refer for such coverage" because that would all be passed off to the insurance company.

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objections. *Guidance on Temporary Enforcement Safe Harbor for Certain Employers*, Dept of HHS Center for Consumer Information and Insurance Oversight (CCIIO) reissued June 28, 2013. http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf

[147] Rudary, *Ibid* p. 18 Press Release The White House, Office of Press Sec'y, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012) http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

[148] *Health Reform GPS* (George Washington University Health Law and Policy Program http://www.healthreformgps.org/resources/contraception-coverage-under-the-acas-preventive-services-coverage-requirements-and-employer-implementation-an-update/ (April 2012)

The decision angered the USCCB, as well as Catholics who had been generally supportive of the administration's policies, such as Democratic senators, because religious employers were still not given the legal protection of an exemption.[149] To many non-exempted religious employers, the mandate continued to burden their free exercise of religion. They pointed out that simply shifting costs from the employer to the insurance company did not accomplish anything because the employer was still involved and the plan still covered contraceptives. While reserving judgment on the new proposed rule, and expressing concerns about how it would actually work, Archbishop Dolan cautiously said that the decision to revise the rule was a "first step in the right direction."[150]

The announcement also stated that, "the new policy does not affect existing state requirements concerning contraception coverage." This was probably a reference to the fact that the ACA would leave in place state mandates that allowed greater access to contraception coverage than federal standards.

In response, 12 new lawsuits by Catholic organizations were filed against the mandate, bringing the total in 2012 to 43, representing many dioceses, many Catholic Charities, and universities. The lawsuits, which were filed in federal district courts across the country, claimed that the mandate violated the plaintiffs' fundamental religious liberty.[151] The proposed accommodation came under immediate criticism in the press on the basis that the two goals stated by the Administration were irreconcilable, and if religious employers were allowed to opt out of the mandate, it made no sense to prevent

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[149] B. Montopoli, *After Uproar, Obama Tweaks Birth Control Rule*, http://www.cbsnews.com/news/after-uproar-obama-tweaks-birth-control-rule/

[150] B. Montopoli, *Ibid*.

[151] Rudary Ibid p. 18; http://www.catholicnewsagency.com/news/forty-three-catholic-organizations-file-lawsuits-against-hhs-mandate/

the insurers they hired from opting out as well.[152] Ordering private companies to offer a product for free would inevitably result in higher premiums and religious employers would still pay for contraception.

Many religious groups that had objected to the original regulations believed that the accommodation did not change the situation.[153] Religious non-profits would still have to offer health insurance that included contraceptive coverage and insurers would find a way to shift the costs back to the employer that would end up paying for it. Religious employers did not want to be involved in any way in the provision of contraceptive services, whether or not the employer directly paid for the services. The new rule did not sufficiently remove the "sinful complicity" of the employer.

Further, it was noted that the rule failed to address the situation where an employer self-insures, which was a serious omission on the part of the administration. In a large number of cases involving many thousands of employees, there was no insurance company to shift costs onto, so the accommodation would not work there.[154] Many Catholic employers had already moved to self-insured plans as a result of the state mandates.

In response to these objections and concerns, HHS announced in March 2012 that it proposed a rule that would work for religious employers that self-insure and sought comment from all interested parties.[155] The proposed rule, similar to the rule for insured

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[152] "*Immaculate Contraception: An 'accommodation' that makes the birth-control mandate worse*, Wall St. J. (Feb 13,2012); *Self-Insured Complicate Health Deal*, New York Times, K. Thomas (Feb. 15, 2012)

[153] Pew Research; Religion and Public Life Project, *The Contraception Mandate and Religious Liberty* (2/1/13), http://www.pewforum.org/2013/02/01/the-contraception-mandate-and-religious-liberty/

[154] *Id.*

[155] Health Reform GPS, *Ibid* p. 1 "Advance Notice of Proposed Rulemaking (ANPRM) March 21, 2012" issued by Depts. of Treasury, Labor and HHS.

plans, was that third party administrators of (TPAs) of self-insured plans would offer such coverage free of charge to the self-insuring employer as part of the TPA service itself.

HHS issued the final regulations on July 2, 2013. The Final rule applied to group health plans and group health insurers for plan years on and after January 1, 2014, which was when the majority of plan years would begin.[156]

The final rule announced three changes: (1) a simplified definition of exemption for religious employers, (2) new accommodations for religiously-affiliated employers who did not merit an exemption, including special rules for self-insured plans, and (3) a requirement that both type of employers execute a self-certification in order to opt out.

The religious employer exemption applied immediately to plan years beginning on and after August 1, 2013. The changes were said to merely "simplify" and "clarify" the exemption and were not intended to "expand the universe of religious employers that qualify for the exemption."[157] The new definition of "religious employer" was: "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." The first three requirements of the definition were simply removed, in order to avoid the public policy

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[156] The temporary safe harbor from enforcement of the contraceptive coverage requirement was given a short extension to encompass plan years that began on and after August 1, 2013 and before January 1, 2014. Oxman, *Ibid*

[157] Dept of HHS Fed. Register Vol. 78 No. 127 (July 2, 2013), 45 CFR Parts 147 and 156 Coverage of Certain Preventive Services Under the Affordable Care Act; Final Rules; HRSA Women's Preventive Services Guidelines http://www.hrsa.gov/womensguidelines/ (accessed 3/6/12)

result of excluding churches that provide educational, charitable and social services to their communities, not just to their own co-religionists.[158]

At this point the exemption consisted of only IRC section 6033 that grants tax-exempt status only to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. Only organizations whose primary function was worship and religious teaching would be exempt from the mandate. Religious non-profits were excluded from the exemption, as before.

Beginning January 1, 2014 a new accommodation was available for those non-exempt "eligible organizations" that certified they met certain criteria. Employers were required to sign a certification form called the Employee Benefit Security Administration ("EBSA") form 700 – Certification. An employer was required to provide the signed certification to its health insurer in the case of an insured plan, or its TPA in the case of a self-insured plan, which then would relieve the employer of responsibility. The form must be maintained on file by the religious employer for six years and must be made "available for examination upon request."

The "eligible organization" would be required to certify that:[159]

(1) on account of religious objections it opposes providing coverage to some or all of the contraceptive services required to be covered, and
(2) it is organized and operates as a nonprofit entity, and
(3) it holds itself out as a religious organization; and

[158] The constitutionality of the requirements of only serving and hiring members of one's own faith has already been questioned as not serving a rational state interest. See dissenting opinions and a concurring opinion in the *Catholic Charity* cases.

[159] Women's Preventive Services Coverage and Non-Profit Religious Organizations CMS.gov, the Center for Consumer Information and Insurance Oversight, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last accessed 3/6/14)

Under the accommodation, an eligible organization does not have to contract, arrange, pay or refer for contraceptive coverage. The rule was intended to sever any connection between the payment of insurance premiums and the coverage of contraception. Instead, the insurer would pay for contraception services from funds that must be kept separate from the premiums paid by the eligible organization. The new policy proposed segregation of funds, but was unclear as to whether it would be completely separate.

According to the guidance accompanying the final rule, issuers have flexibility in how to structure these payments. Contraception coverage would be cost neutral because costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health.[160] However, just to be sure, the guidance provides that the payments made by insurers for contraceptive services are given favorable treatment for their loss ratios so they will be reimbursed.[161]

There is a separate section on the EBSA form 700 providing additional representations and acknowledgments for self-insured plans that has proven to be controversial. This is because of the nature of self-insured plans. If an eligible organization is self-insured, the employer directly pays for all health services. If the employer declines to do this, the TPA must become obligated to pay for the contraceptive

[160] Fed. Reg. Vol 78 No. 27 (July 2, 2013) p. 39877

[161] Ibid, p. 39878 "…an issuer of group health coverage may treat those payments as an adjustment to claims costs for purposes of medical loss ratio and risk corridor program calculations. This adjustment compensates for any increase in incurred claims associated with making payments for contraceptive services."

services.[162] For the arrangement to work, the employer, using the form, must tell the TPA that it will not act as the plan administrator. The TPA must then become the plan administrator and will become legally responsible under ERISA with respect to the contraceptive services. Shifting of legal responsibility for a self-insured plan occurs when the employer signs the Form EBSA self-certification and provides it to its TPA, which may then decide whether it will decline this responsibility or remain as the plan's TPA.

The form is quite important, as it is "one of the instruments under which the employer's plan is operated under ERISA…" according to the regulations. The designation of the TPA using this form "ensures that there is a party with legal authority" to make payments for contraceptive services.[163] The form itself states that it is "an instrument under which the plan is operated."

Some saw this final rule as innovative because it shifted costs and payments, but religious non-profits that self-insure saw it quite differently. They saw themselves as retaining moral responsibility for a sin, which cannot be shifted so easily. They were morally complicit in that sin because they were still required by the government to be involved in the delivery of contraceptives to their employees. They rejected the rule because the accommodation does not accomplish what it purports to do - completely insulate the eligible organization from having to "contract, arrange, pay, or refer for" contraception coverage. The very act of objecting to providing contraception coverage functions as the legal authorization for the TPA to secure the objectionable coverage.

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[162] It is not clear what the result would be if the employer acts as its own TPA, as more than one-third of employers do. In that case, there is no TPA to provide the coverage. Wilson, R. (2012, Oct.). *The Calculus of Accomodation*. Boston College Law Review p. 1493-1494

[163] Ibid p. 39880

The final regulation was denounced by religious leaders as an "accounting gimmick" and an "accounting shell game" which made no substantial change to the objectionable original rule.[164] A broad coalition spearheaded by Catholic and Southern Baptist leaders charged that the rule threatened religious liberty for people of all faiths.[165] In an open letter titled "Standing Together for Religious Freedom" the group charged that the final rule violated their freedom of conscience. The letter was spearheaded by the USCCB's ad hoc committee for religious liberty.

Because the mandate remained unchanged, the focus turned to the complex accommodations, in particular the self-certification form, which the Little Sisters of the Poor and dozens of other eligible organizations have objected to.[166] Their position was that they could not sign or send the form because it "designates, authorizes, incentivizes and obligates to provide or arrange contraceptive coverage in connection with the plan."[167] As such, it violates their religious beliefs regarding the sanctity of human life. They would not authorize a third party to perform the very act that they refused to do themselves, which is to provide religiously objectionable drugs to their employees.[168] This would amount to an endorsement of and facilitation of the services.

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[164] M. Chapman, *Catholic and Religious Liberty Leaders Denounce Latest ObamaCare Contraceptive* 'Compromise' (2/1/13) CNSNews.com, http://cnsnews.com/news/article/catholic-and-religious-liberty-leaders-denounce-latest-obamacare-contraceptive

[165] A Banks, Religion News Service, *Broad Coalition says contraception mandate a religious liberty threat*, http://www.religionnews.com/2013/07/02/broad-coalition-says-contraception-mandate-a-religious-liberty-threat/

[166] *Little Sisters of the Poor v. Sebelius*, Brief of Appellants filed 2/24/2014 U.S. Court of Appeals, 10th Cir. p. 5. On appeal from denial of a motion for injunction of the mandate. The appellants are protected by the Supreme Court's injunction (Judge Sotomayor) pending the outcome of this appeal.

[167] *Ibid* p. 5

[168] *Ibid* p. 18

The ACA employer mandate imposed severe penalties if coverage is provided that does not comply with the mandate, so the stakes for religious non-profits could not be higher. The penalties for plans which are not in compliance by January 1, 2014 are $100 per affected individual per day.[169] If the employer instead drops insurance altogether, the penalty less but still substantial - $2000 per year for each full-time employee if no coverage is provided beginning in 2015.[170] This lead to the strange result that the ACA punishes much more heavily for having the wrong insurance than it does for having no insurance at all.[171] The employer mandate was given an additional extension.[172]

In the case of the Little Sisters, noncompliance would amount to "millions of dollars" in fines.[173] In the case of Notre Dame, noncompliance would amount to $250 million per year.[174] In the case of Catholic Charities, noncompliance would amount to $140 million in the first year.[175] These fines are severe. One could question whether it

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[169] 26 U.S.C. sec. 4980D, *Hobby Lobby Stores* Brief of Resp. p. 38

[170] By 2016 for mid-size employers with 50 to 99 average full-time employees. 26 U.S.C. 4980H *Little Sisters* Brief of App. p.11. Although the ACA does not technically require employers to provide health insurance, an employer is subject to penalties if any of its employees have to obtain insurance through an Exchange because the employer does not offer insurance or it is not "affordable." Rudary, *Ibid*, p.22 fn. 82.

[171] J. Anderson *No Insurance is Better than Unapproved Insurance Under ObamaCare* (3/26/14) http://www.weeklystandard.com/blogs/no-insurance-better-unapproved-insurance-under-obamacare_786056.html

[172] *Administration Delays ObamaCare Mandate for Midsize Businesses*, B. Hughes (2/10/2014) http://washingtonexaminer.com/administration-delays-obamacare-mandate-for-midsize-businesses/article/2543785 Mid-sized businesses will have an extra year to comply to 2016. Large employers (at least 100 employees) must still comply in 2015 but will escape fines if they can show progress in covering at least 70% of their employees (95% in 2016)

[173] *Ibid* p. 6

[174] Univ. of Notre Dame, *Ibid*. p. 9

[175] H. Smith, *Contraception Mandate Doesn't Protect Religious Liberty* (Feb. 9, 2012) http://www.becketfund.org/hhsinformationcentral/ Estimate based on 70,000 full-time employees

really serves any kind of state interest to destroy the ministry of religious organizations that serve the public good.

The view of the Little Sisters and others like them is that the self-certification form is not just a piece of paperwork, it is central to the plan delivery of contraceptive services, as it provides legal authorization for a TPA to provide contraceptives that are excluded from a self-insured plan. It is forced cooperation. To others, the form provides a practical solution that allows the religious employer to "step aside" from having to provide contraception coverage and lets the federal government identify substitute providers for that coverage. They saw this interpretation of the form as unreasonable and far-fetched. The employer would not be enabling anything, as the ACA mandate already directly required insurers as well as TPAs to cover contraceptive services.[176] It was already their legal responsibility.

After all the negotiations over the mandate and its accommodation, religious non-profits and the government did not reach agreement because the accommodation, particularly for the self-insured plans favored by many, still required their facilitation of something immoral. Continued litigation was likely as the parties were indeed sparring over a "hostile and competing vision of the good."[177]

The University of Notre Dame was one of many religious non-profits to file a lawsuit in federal court against the contraception mandate, but it was the only one as of April 25, 2014 to be denied an injunction against the enforcement of the mandate. Writing for the 2-1 majority in *University of Notre Dame v. Sebelius*, Judge Posner found

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[176] *Univ. of Notre Dame v. Sebelius* No. 13-3853 (2/21/14) U.S. Court of Appeals, 7th Cir. majority opinion denying injunction p. 14

[177] *Catholic Charities*, 10 Cal. Rptr.3d 283, 326

that the plaintiff was given an accommodation under the final rule and must sign the EBSA form to obtain it. The court stated, "no certification, no exemption."[178] It saw the form as simply a convenient method to completely shift responsibility to the TPA, and seemed frustrated that Notre Dame would not take "five minutes" to sign some "boring boilerplate" and get it all over with.

In his dissent Judge Flaum took a more conciliatory approach but acknowledged that the problem is not that simple and in some ways may not be best resolved by the courts. He put it well when he said, "…how best to accommodate the twin demands of religious faith and secular policy has become a challenging political problem as much as a legal one," noting that there is only so much the courts can do in reconciling the competing demands on government.[179] This echoes the concern of the majority in *Smith* that, given the diversity of beliefs in our society, courts cannot be put in the position of constantly weighing laws against religious beliefs and the political process must also take responsibility for accommodation of religious practices.

The *Notre Dame* dissent pointed the way out, which is that the parties themselves must strive to reach a mutual agreement: "Whatever the eventual outcome of this litigation, it would be unfortunate if it dissuaded either the government or religious institutions from taking further steps towards mutually acceptable accommodation."[180]

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[178] *Ibid*., p. 10.

[179] *Ibid* p. 43-44

[180] *Ibid* p. 43-44.

Chapter 6
The For-Profit Challenge to the Mandate

Litigation Against the Mandate

The final HHS mandate neither exempted nor accommodated for-profit employers in any way, as they do not come within the definitions of non-profit religious organizations or eligible organizations. The guidance issued with the Final Rule specifically does not accommodate them.[181] This has led to numerous for-profit religious employers suing HHS Secretary Sebelius under RFRA in a direct challenge to the mandate.[182] The *Hobby Lobby* case has argued that for-profit religious employers fall within the group of religious entities entitled to constitutional protection.

As of April 25, 2014, 96 lawsuits had been filed by both non-profit and for-profit religious employers in federal district courts challenging the mandate as a violation both of RFRA and the First Amendment's guarantee of the free exercise of religion. Religious non-profits had filed 48 lawsuits representing hundreds of employers (including three class action lawsuits) claiming that the exemption and the accommodation made by HHS were not sufficient.[183] Since many of these cases were initially filed before the final mandate was promulgated on July 2, 2013, they needed to be re-filed. Many were dismissed. Therefore, they were not as far along in the court system as the cases brought by for-profit corporations such as Hobby Lobby Stores and Conestoga Wood Specialties,

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[181] The Guidance for the Final Rule states that, "the definition of eligible organization in these final regulations does not extend to for-profit organizations….The Departments decline to expand the definition of eligible organization to include for-profit organizations." Vol. 78 Federal Register No 127 (July 2, 2013) p. 39875.

[182] *Legal Challenges to the HHS Mandate*, http://www.becketfund.org/hhsinformationcentral/ (last accessed 3/10/14). There are currently 47 lawsuits by for-profit employers.

[183] Kaiser Family Foundation (Dec. 2013), *A Guide to the Supreme Court's Review of the Contraceptive Coverage Requirement,* The Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/(accessed 3/17/14); Hobby Lobby Stores Brief p. 6 fn 3.

which reached the Supreme Court first. For-profit religious employers had filed 48 lawsuits, and of these, 33 had been granted preliminary injunctions and six had been denied. Religious non-profits had won 20 injunctions against enforcement of the mandate while their cases were being heard and one was denied.

All these cases will likely petition the Supreme Court for review after they are heard by the U.S. Courts of Appeals, with religious non-profits following a route similar to the religious for-profits.[184] The Supreme Court decision in *Hobby Lobby Stores* decision will affect the outcome of all of this litigation.

Hobby Lobby Stores and Conestoga Wood Specialties were separate for-profit religious employers that filed complaints in federal courts in Oklahoma and Pennsylvania respectively against the mandate alleging that it forced them to provide coverage for abortion-inducing drugs and devices in their plans despite their religious objections. Hobby Lobby has a self-insured plan and Conestoga has an insured plan. They both brought challenges under RFRA and the Free Exercise Clause of the First Amendment. The Hahn family of Conestoga Wood Specialties were Mennonites and the Green family of Hobby Lobby Stores were evangelical Christians. The Greens had a large business with about 13,000 employees, which included a chain of Christian bookstores called Mardel. The Hahns had a much smaller business with 950 employees, but their situations were similar. They were both closely-held family-owned companies run strictly according to the religious faith of their owners who maintained that the mandate forced them to provide and pay for abortifacients contrary to their sincerely held religious

[184] Kaiser Family, *Id*.

beliefs or else pay huge fines. However, the federal courts treated their claims very differently.

Hobby Lobby and Mardel asked for a preliminary injunction on September 12, 2012 to avoid paying crippling fines while the case was pending. The mandate (at that time) would have required compliance as of January 1, 2013. The district court and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit both denied preliminary relief. Hobby Lobby and Mardel sought emergency relief from the Supreme Court (Justice Sotomayer), which also denied relief. The full court of the Tenth Circuit then agreed to reconsider the request, with the plaintiffs citing "exceptional importance" of the issues and issued a decision on June 27, 2013. The court ruled on the RFRA claim first, finding that Hobby Lobby and Mardel were entitled to bring claims as for-profit corporations under RFRA and had established a likelihood of success of those claims. After that finding it stated that it did not need to rule on the Free Exercise claim. The case was remanded to the district court for decision, which granted the plaintiffs an injunction. The government petitioned the Supreme Court for a writ of certiorari to review whether Hobby Lobby and Mardel may bring claims under RFRA. Hobby Lobby's Free Exercise claim remained live in the district court pending review. The petition was granted on November 26, 2013 and consolidated with the petition of Conestoga Wood Specialties for oral argument on March 25, 2014.

Meanwhile, Conestoga Wood Specialties' request for a preliminary injunction was denied by the district court on January 11, 2013 as not establishing a likelihood of success on the merits of its claims. A stay pending appeal to the U.S. Court of Appeals for the Third Circuit was denied on February 8, 2013, forcing Conestoga, at the insistence

of its insurer, to comply with the mandate. The district court denied the preliminary injunction and Conestoga appealed the denial to the Third Circuit. On July 26, 2013 the court issued a decision that a for-profit secular corporation cannot engage in religious exercise, nor can it bring a claim under RFRA. In so doing, the Third Circuit took a different approach from the Tenth Circuit by deciding the constitutional question first. Conestoga Wood petitioned the Supreme Court for a writ of certiorari to review whether the religious owners of a family business, and their closely held business corporations have free exercise rights that are violated by the mandate.

Both cases raised challenges to the mandate under RFRA, which was their most significant claim, but Conestoga also raised a direct Free Exercise challenge to the mandate.

The Religious Freedom Restoration Act

The major issue of the *Hobby Lobby* and *Conestoga Wood* consolidated case is the right of family-owned for-profit business corporations to bring claims under RFRA, a statute aimed at preventing federal laws that substantially burden a person's freedom of religion.[185] RFRA was a non-partisan collaboration by both liberal and conservative groups seeking to protect First Amendment rights. It passed almost unanimously in Congress and was quickly signed into law by President Clinton in 1993.[186] RFRA was enacted to protect religious freedom by requiring the government to demonstrate that government action placing a burden upon religion is the least restrictive means of advancing a compelling interest. It protects unpopular and minority religious viewpoints

[185] http://en.wikipedia.org/wiki/Religious_Freedom_Restoration_Act (last accessed 3/10/14)

[186] Wikipedia.org, Religious Freedom Restoration Act, *Ibid*.

and was a rebuke by Congress to the Supreme Court. It is all about the burden on religious exercise.

RFRA was enacted in direct response to the result in the 1990 *Smith* case, which was highly controversial and outraged the public because it placed a substantial burden on the free exercise of religion particularly as applied to Native Americans.[187] The standard in the *Smith* case, unlike the RFRA standard, is indifferent to the burden on religious exercise. The *Smith* case dramatically narrowed the scope of the Free Exercise Clause because employers do not have to make any reasonable accommodation for a religious practice as long as the law is neutral and not targeted at religion.

RFRA reinstituted the "strict scrutiny" of test of *Sherbert v. Verner* and *Wisconsin v. Yoder* for all Free Exercise claims, which ensured that religious claimants got their day in court by allowing them to present evidence of how they were burdened. Congress sought to correct the effects of the *Smith* decision with RFRA, but as it turned out, it was only partially successful.

RFRA stated that in *Smith* the "Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[188] It stated that its purpose was to "restore the compelling state interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*" [citations omitted] and to "guarantee its application in all cases where free exercise of religion is substantially burdened."[189] It recognized that "laws 'neutral' toward religion may burden

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[187] *Id*.

[188] 42 U.S.C. sec 2000bb(a)(4)

[189] 42 U.S.C. sec. Purpose 2000bb(b)(1)

religious exercise as surely as laws intended to interfere with religious exercise"[190] and that the government should not substantially burden religious exercise without "compelling justification."[191] Upon showing a substantial burden, RFRA requires the government to prove that "application of the burden to the person- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interests."[192]

RFRA significantly provides a "claim or defense" to "persons whose religious exercise is substantially burdened by government." The question of whether a for-profit corporation is "person" who may sue for burdening of religious exercise is the major threshold issue in the *Hobby Lobby* consolidated case.

However, there is a more recent perception of RFRA, which is that it is a "super statute" which can be used to block the goals of government entitlement programs such as the ACA. RFRA is no longer bipartisan, as many now see it as a curb on the government. Congress structured it to override other legal mandates, including its own statutes, if and when they encroach on religious liberty.[193] All federal laws after November 16, 1993 are subject to RFRA, unless they explicitly say they are not. Congress obligated itself to explicitly exempt later-enacted statutes from RFRA, which is why some case law has analogized it to a constitutional right.[194] Congress enacted RFRA to tame the Supreme Court, but now it has created a rule that it must also follow.

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[190] 42 U.S.C. sec 2000bb (a)(2)

[191] 42 U.S.C. sec. 2000bb(a)(3)

[192] 42 U.S.C. sec 2000bb-1(b)

[193] *Hobby Lobby Stores, Inc. et al v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013) concurring opinion p. 12

[194] *Ibid* majority opinion p. 64

In 1997, despite RFRA's tremendous popularity, the Supreme Court in *City of Boerne v. Flores* ruled it unconstitutional as applied to the states on the basis that Congress had exceeded its limited authority to regulate the states under the Equal Protection Clause of the Fourteenth Amendment.[195] Congress could not impose the compelling state interest test on the states and so was a win for federalism. In an interesting example of checks and balances between the Congress and the Judiciary, some might even call it a clash, the Supreme Court did not take kindly to RFRA's rejection of *Smith* and let Congress know it could not adopt an interpretation of the Constitution contrary to the Court. In so doing, Congress had gone beyond the limits of its power to enforce the Fourteenth Amendment.

In *Flores*, a Catholic diocese sought to enlarge its church building, located in the city's historic district, to accommodate its growing congregation, but zoning laws prevented it from doing so. The diocese used RFRA to challenge the zoning law. The Court held that the enforcement power of Congress extended to laws that are "remedial" or "preventive" only and not laws which make any substantive change in constitutional protections. Congress changed constitutional protections by rejecting *Smith* and altering its holding to create a different standard of review which would create a great deal of trouble with state laws which could not stand up to such strict scrutiny. The Court reminded Congress that the federal government has only enumerated powers and should not be intruding into areas of state responsibility. The Court was unhappy with the fact that Congress was concerned with the incidental burdens imposed, not the object or purpose of the legislation.

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[195] 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997),

The Court made it clear that the power to interpret the Constitution in a case or controversy is for the judiciary alone, that the Congress should have accorded the Court more respect for the *Smith* decision and that the Court in the future would continue to determine the law based on its own settled principles, including *stare decisis* and "…contrary expectations must be disappointed."[196] So the Court let Congress know of the limits of separation of powers and that this was not the end of it. RFRA was subsequently amended in 2003 to include only the federal government and its entities.[197]

Advocates of religious liberty were disappointed in the *Flores* case because, of the laws that burden religious exercise, only a tiny fraction of them are federal ones.[198] Most religious liberty disputes arise over state and local laws. Now RFRA and cases decided under it will not apply to these laws. Instead, the *Smith* case will continue to provide valid precedent to make religious accommodation cases very difficult. It seems ironic that the bipartisan RFRA cannot be made to apply to the states, but the strictly partisan ACA contraception mandate can force the states to comply with its will.[199]

At present, the HHS contraception mandate has focused all the attention on federal law to which RFRA applies, but there is a view that the real future of religious freedom rests with the states.[200] Since the passage of RFRA, 16 states have passed state RFRAs and a number of others already have religious protections in their constitutions,

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[196] *City of Boerne*, 521 U.S. 507, 536

[197] Rudary, *Ibid*, p. 9

[198] Lund, C. *Religious Liberty After Gonzales: A Look at State RFRAs*. South Dakota Law Review (Fall 2010) .

[199] See the state of Missouri litigation, supra at note 68.

[200] Lund, *Ibid*.

for a total of 30 states with protections for religious liberty beyond what *Smith* provides.[201]

In 2006 the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* confirmed the constitutionality of RFRA as applied to federal law when it held in a unanimous decision that the federal government had failed to make its case under the strict scrutiny test set out by RFRA for enforcing a federal drug law against a religious group for use of a prohibited drug.[202] In *O Centro*, the strict scrutiny test that Congress created with RFRA came back to bite the government and thwart its objectives. This irony was not lost on the Court, which noted that the problems encountered with the strict scrutiny test are the very reason that the Court adopted the *Smith* rule in the first place. "Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. See Smith...."[203] The Court was saying, "I told you so."

In *O Centro*, the religious claimant under RFRA was a Brazilian Christian sect organized as a New Mexico corporation that used a sacramental tea called hoasca. The tea contained a drug designated as a Schedule I controlled substance with a high potential for abuse and no currently accepted medical use under federal law. Customs agents had confiscated the tea. The court noted that under the new statutory rule imposed by RFRA a religious claimant need only show that a law would substantially burden a sincere

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[201] As of the Fall of 2010. Enforcement of these state laws has been uneven. Some state RFRA's have been heavily litigated and others not much at all. RFRA bills have failed in New York and California. Lund, *Ibid*.

[202] 546 U.S. 423, 126 S.Ct. 1211 (2006), Rudary, *Ibid*.

[203] 546 U.S. 423, 439.

exercise of religion. The government then needed to make its showing of a compelling state interest advanced by the least restrictive means. The Court found that the government's claim that it always has an interest in prohibiting "exceptionally dangerous" Schedule I substances is too generalized. It must show with particularity how its strong interest in prohibiting use of hoasca would be harmed by allowing an exemption for the particular and limited purpose of sacrificial use. The Court found that the government failed to make this showing.

Further, the Court found that the government's argument that the Controlled Substances Act is a closed regulatory scheme which can allow no exceptions and requires uniformity is undermined by the long-standing exception made for peyote, another Schedule I drug. The government must demonstrate a compelling state interest in uniform application of a law by offering actual evidence that granting the accommodation would seriously compromise its ability to administer the program. The government had to provide actual proof of harm, not mere "possibility" of harm. A "slippery slope" argument that any exception inherently undermines a law was derided by the Court as the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[204]

The Court noted that RFRA operates by mandating consideration of exceptions to rules of general applicability and the very reason that Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance.

[204] 546 U.S. 423, 436

Advocates for religious liberty were pleased with the result in *O Centro* because the Court made clear that under RFRA the government has a difficult burden to comply with the strict scrutiny test and must prove its interests, not just assert them. However, the applicability of *O Centro* is limited to federal law. Despite the *O Centro* holding in favor of religious free exercise, hoasca is still illegal in all of the states except two, as it is a prohibited drug under the state versions of the Controlled Substances Act.[205] A Free Exercise claim today against a state or local law still requires getting over the substantial hurdle in *Smith*.

The Free Exercise Clause

A Free Exercise claim may survive a *Smith* analysis under the right circumstances, as demonstrated by the 1993 Supreme Court case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* cited in both the *Hobby Lobby* and *Conestoga Wood* briefs.[206] In *Lukumi*, a church organized as a religious non-profit and its members brought suit against the City of Hialeah alleging that city ordinances targeted and prohibited their religious practices under the Free Exercise clause of the First Amendment. The Supreme Court, applying a *Smith* analysis, found that the city ordinances were not neutral and not of general applicability, and therefore applied the strict scrutiny standard. The city government, not surprisingly, failed to meet this standard. The Court held that, "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict

[205] Lund, C. *Ibid*.

[206] 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993).

scrutiny only in rare instances. It follows from what we have already said that these ordinances cannot withstand this scrutiny."[207]

The church and its congregants practiced the Santeria religion, which involved animal sacrifice as one of its principal religious rites. The primitive nature of the religion combined with animal slaughter was highly offensive and disturbing to many citizens and provided the Court with an extreme example of Free Exercise to review. The Court noted that while the nature of the Santeria religion may "seem abhorrent to some, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[208]

The city counsel adopted four emergency ordinances to prohibit the "ritual sacrifice" of animals, but left many exemptions for other types of animal slaughter, such as that done in certain food establishments (where permitted by zoning), euthanasia, Kosher slaughter, science experiments, hunting, and fishing. So many, in fact, that just about the only conduct prohibited was the religious exercise of Santeria.

The Court found the law not neutral, setting out the standard that neutrality requires first that a law must be neutral on its face. In addition, it must also not have as its "object" the suppression of religious beliefs. Although the city had legitimate interests in preventing animal cruelty and promoting the public health, the design of the law revealed its true object to the Court. It contained a "pattern of narrow prohibitions" combined with "pattern of exemptions" with the result that only religious slaughter of animals were prohibited.

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[207] 508 U.S. 520, 546

[208] 508 U.S. 520, 531

The Court noted that the city's legitimate interests could be protected in other ways stopping short of an overbroad flat prohibition of all Santeria sacrificial practice. The city should have addressed its concerns in narrow laws that are applicable to everyone. Instead, it chose to prohibit killings motivated by religion.

After the Court found the ordinances not neutral, it was fairly straightforward for the Court to find that they also did not meet the second requirement of general applicability. Although all laws are selective to some extent, a law cannot apply only to religious conduct, which must be treated equally with non-religious conduct. All of society, not just the religious conduct, must bear the burden.

The Court did not like all the other exemptions for other types of animal killings. It stated the principle that where the government restricts only religious conduct and fails to restrict other conduct producing the same sort of harm, the government's interest will not be accepted as compelling. If the interest were truly compelling, the state would give it more protection than it did. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."[209]

Justice Souter in his concurring opinion urged the Court to re-examine the *Smith* rule and sided with the four justices who rejected it in favor of more expansive Free Exercise protection. He put forth the idea that neutrality should be expanded to include not only "formal neutrality" which only bars laws with an object to discriminate but also "substantive neutrality" would also require the government to accommodate religion by providing an exemption from formally neutral laws that create a burden.

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[209] 508 U.S. 520, 547

Interestingly, Justice Blackman in his concurring opinion, joined by Justice O'Connor, said that, "I continue to believe that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."[210] This statement, made over ten years ago, was prophetic. It identified the clear growing tension between the principles of the First Amendment and the principles of Equal Protection. An unfortunate political perception of the First Amendment, perhaps aided by the Court itself, is that it stands in the way of, rather than protects, individual liberty. Instead of seeing religious free exercise as protective, some Americans are now regarding it as oppressive and they fear "religious coercion."

U.S. Circuit Court of Appeals Decisions in Hobby Lobby and Conestoga Wood

In *Hobby Lobby Stores v Sebelius*,[211] the Tenth Circuit Court of Appeals ruled in favor of the plaintiff's RFRA claim, finding that for-profit businesses, just like individuals, can engage in religious exercise because they are "persons" for the purposes of RFRA. Justice Tymkovich, writing for the majority, would not rule on the Free Exercise claim, following the principle of judicial restraint that constitutional claims are decided only when necessary. Since RFRA does not define the word "person," the court looked to the Dictionary Act, which defines a "person" for purposes of federal law to include corporations regardless of their profit making status.

Citing *O Centro*, the court stated that the Supreme Court has allowed non-profit corporations to take advantage of RFRA protections and since Congress did not

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[210] 508 U.S. 520, 578

[211] 723 F 3d 1114 (10th Cir. 2013), (en banc). cert. granted, 134 S.Ct. 678 (2013)

specifically exclude for-profit corporations, they come within RFRA's scope. The court also found that the Free Exercise clause is not a purely personal guarantee unavailable to associations and corporations. Individuals may incorporate for religious purposes and keep their Free Exercise rights through the right of association. The court pointed to the predicament of an incorporated kosher butcher shop being unable to challenge a law mandating non-kosher butchering practices. It noted that Free Exercise cannot turn on Congress' definition of non-profit tax status. It did not make sense to grant protection to a corporation under the First Amendment for speech but not for the exercise of religion.

On the merits of the RFRA claim, court found that the mandate imposed a substantial burden on the plaintiffs' exercise of religion, because it put substantial pressure on them to violate their religious beliefs. It does not depend on whether the burden is direct or indirect, but depends on the coercion the claimant subjectively feels to violate his beliefs. The sincere belief of the plaintiffs is that life begins at conception and this belief is burdened by the government's demand that they provide access to abortifacients they deem immoral. If the plaintiffs do not comply, they must pay huge fines, which is itself a clear burden.

The government next had to demonstrate that mandating compliance is the least restrictive means of advancing a compelling interest. It had to show the particular harm of granting a specific exemption to a particular religious claimant. The court found that the asserted interests of public health and gender equity important but not compelling because they are too broad. Citing *Lukumi* and *O Centro*, the court found that the interest could not be compelling because tens of millions of people had already been exempted from the requirements of the mandate.

Regarding least restrictive means, the court found that the government had not explained how its broad interests would be fundamentally frustrated by granting the plaintiffs their limited request for an exemption from providing four of the twenty required contraceptives.

A concern was expressed by the government that Hobby Lobby and Mardel were imposing their religious views on their employees. The court responded to this concern by pointing out that the employees are free to purchase the four contraceptives themselves. The court acknowledged this as an economic burden but noted that accommodations for religion frequently operate by lifting a burden and then placing it elsewhere, which the government had already done for other religious employers. The government must show why the employee's additional expense creates a compelling interest that can only be met by requiring the plaintiffs to comply with the mandate.

In *Conestoga Wood Specialties v. Sec. of the U.S. Dept. of Health & Human* Servs., the Third Circuit Court of Appeals ruled against the Conestoga and the Hahn family who challenged the mandate because they did not want to be forced to provide coverage for two drugs out of the twenty contraceptives that they considered to be abortifacients. The court found that a for-profit secular business cannot assert a claim under the Free Exercise Clause and therefore cannot engage in the exercise of religion. [212] Because it cannot engage in free exercise, it cannot assert a RFRA claim. The court then found it unnecessary to decide whether the corporation was a "person" for purposes of RFRA. The Hahns had objected to two of the twenty methods of contraceptives in the mandate- Plan B and Ella, because they did not want to be forced by the government to provide contraception. The Third Circuit, unlike the Tenth Circuit, addressed the

[212] 724 F.3d 377(3rd Cir. 2013)

threshold constitutional question of whether for-profit corporations have Free Exercise rights first. The court noted that the First Amendment right of free speech has historically been applied to corporations, but that the right of free exercise has not. Each clause of the First Amendment has been interpreted separately and the Free Exercise clause does not automatically follow the Free Speech clause.

Judge Cowen for the majority stated that religious beliefs take shape within the minds and hearts of individuals and a for-profit artificial being that was formed to make money cannot possibly exercise an "inherently human right" like free exercise of religion. The religious organizations in *Lukumi* and *O Centro* were not secular for-profit entities and so those cases are not convincing. The court drew a line between non-profit and for-profit entities when it comes to free exercise rights. Churches are the means by which individuals practice religion, not money-making business corporations.

The Hahns created a distinct legal entity with legal rights different from the natural people who created it and therefore the court would not accept the "pass through theory" that Conestoga may exercise the legal rights of the Hahns. The court noted that since Conestoga is distinct from the Hahns, the mandate does not require the Hahns to do anything. The choice to incorporate determines the right of free exercise, as a corporation and its owners are separate. The court also held that the Hahns as individuals are not likely to succeed on either free exercise or RFRA claims because the mandate does not apply to them, it applies to their company. The penalties under the ACA for plan non-compliance fall on the employer, not its individual owners.

Chapter 7
The Mandate Reaches the Supreme Court

The consolidated cases of *Sebelius v. Hobby Lobby Stores* and. *Conestoga Wood Products v. Sebelius* were argued before the Supreme Court on March 25, 2014 in the spotlight of national attention, with political experts from major news sources such as the *Washington Post, the Wall Street Journal,* and *National Public Radio* commenting on its significance and even late night television entertainment such as *The Daily Show with Jon Stewart* chiming in.[213] While national media attention exploded during the days leading up to and after oral argument, *Hobby Lobby* had received constant media attention dating back to the early days when the Green family first began to fight the HHS contraception mandate in 2012.

The Daily Oklahoman was the first media source to pick up the Hobby Lobby story on September 13, 2012 just one day after the arts and crafts company filed for an injunction against the mandate in federal district court in Oklahoma City.[214] The Green family received praise and support for their efforts from members of Congress including Sen. Tom Coburn (R-OK) and Rep. James Lankford (R-OK) who said "federal coercion to require business to provide free drugs that render abortions clearly violates the religious beliefs and moral practice of hundreds of thousands of Oklahomans."[215] At the time, it seemed that this story would only remain important within Oklahoma, where

[213] Cosman, B., Jon Stewart Reveals the Absurdity of Hobby Lobby's Supreme Court Case, The Wire, (3/27/14), http://www.thewire.com/entertainment/2014/03/jon-stewart-reveals-the-absurdity-of-hobby-lobbys-supreme-court-case/359705/

[214] Mecoy, D., Hobby Lobby Seeks to Block Contraception Coverage Rules, The Daily Oklahoman, (9/13/14), Retrieved from LexisNexis database on 4/12/14.

[215] Cosman, Ibid.

Hobby Lobby has its headquarters. No major newspapers besides *The Daily Oklahoman* consistently covered the story.

However, all this began to change when Hobby Lobby's legal counsel, The Beckett Fund for Religious Liberty, issued a press release when a two-judge panel of the Tenth Circuit agreed with the district court and also denied preliminary injunctive relief on December 20, 2012. The release was distributed by the press wire *Targeted News Service* and the story began to make national headlines, with the *Associated Press* running a brief version of the story the next day.[216]

Press coverage then increased dramatically on December 26, 2012 when Supreme Court Justice Sonia Sotomayor also denied Hobby Lobby's emergency request to block the enforcement of the contraception mandate, including imposition of heavy fines, while the case was being litigated.[217] Arlington, Virginia-based political journalism website *Politico.com* ran an article on Sotomayor's decision at 6:20pm that very day.[218] That night at 10:25pm *CNN* published an article on the Supreme Court denial on its website.[219] At this point the *Hobby Lobby* case became a lead subject of the national news cycle.

The very next day *Fox News*, *The Washington Post*, *The New York Times* and countless other news sources, both small and large, published content on this story of a first challenge to the mandate. When six months later the full Tenth Circuit handed

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[216] Hobby Lobby Forced to Ask Supreme Court to Halt the Abortion Drug Mandate, Targeted News Service, (12/20/12), Retrieved from LexisNexis database on 4/13/14.

[217] *Hobby Lobby Stores v. Sebelius*, 568 U.S. (2012) No. 12A644. 12/26/12. On Application for Injunction.

[218] Haberkorn, J. and Smith, K., Injunction Denied in Contraception Case, Politico.com, (12/26/12), Retrieved from LexisNexis database on 4/13/14.

[219] CNN Staff, Justices Won't Block Obamacare's Required Emergency Contraception Coverage, CNN, (12/26/12), Retrieved from LexisNexis database on 4/13/14.

Hobby Lobby a sweeping victory in a decision issued on June 27, 2013, the case became a constant major news story.

The case of Conestoga Wood developed through the court system on a parallel course to Hobby Lobby, but about a month behind, and involved the same issues. As a result, it did not receive as much media publicity. The Third Circuit Court of Appeals denied Conestoga's request for and injunction on July 26, 2013, almost exactly a month after Hobby Lobby's win. When the Supreme Court granted certiorari on November 26, 2013 and consolidated both cases, Conestoga Wood was swept up in the national publicity about the Hobby Lobby case.

By the time the Supreme Court heard oral argument on March 25, 2014, the consolidated case was national news of the highest order with interest groups of nearly every point of view offering analysis and comment. In addition to news articles, many prominent interest groups submitted amicus curiae briefs to promote their positions. There were over 90 amicus curiae briefs filed, the great majority (almost 3 to 1) opposing the mandate, but many in favor, representing all kinds of religious, social and medical organizations, many Catholic groups, women's groups, The Guttmacher Institute, the American Jewish Committee, the ACLU, think tanks, assorted advocacy groups, senators, universities, and even the Church of the Lukumi Babalu Aye (the Santeria congregation that had prevailed in a major Supreme Court free exercise case two decades earlier).[220]

There was extensive media coverage of the scene outside at the Supreme Court leading up to and during the oral argument itself, with passionate demonstrators holding

[220] Supreme Court docket for *Hobby Lobby Stores, Inc.* retrieved from www.supremecourt.gov on 2/9/14; Garrett, L. *Religious Firms Support Obamacare Challenge*. (2/7/14), retrieved from Publishers Weekly on 2/9/14: http://www.publishersweekly.com.

up signs like "religious freedom" and "not my boss's business." There were women in pink hats and priests kneeling and praying on the plaza. People were in line overnight and slept in beach chairs as if they were getting tickets to a rock concert or a play-off game, rather than a chance to view a scholarly discussion and debate of complex legal principles. Commentators offered their predictions of the Court's decision.[221] A decision is expected by late June.

Issues Before the Court

The threshold issue that the Court would have to decide is whether for-profit, closely held corporations can bring suit under RFRA for an exemption on the basis that the mandate has placed a substantial burden on their religious free exercise. The Respondents, Hobby Lobby and Conestoga Wood, said yes, they are "persons exercising religion" for purposes of RFRA.[222] Their argument was that RFRA does not separately define "person," but the Dictionary Act provides that in interpreting any Act of Congress the word "person" includes a corporation. RFRA also protects *any* exercise of religion, which includes for-profit corporations.

The Petitioner, the government, argued no, RFRA does not grant free exercise rights to for-profit corporations and the Dictionary Act does not define "religious exercise." To allow for-profit companies to sue under RFRA would allow a vast expansion of the religious exemption Congress intended to create. Congress intended that under RFRA, free exercise cases decided prior to *Smith* should provide guidance.

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[221] See M. Silk, *Will Scotus let religious freedom trump gender equity?* (3/26/14) Religion News Service, Blogs, Spiritual Politics, http://marksilk.religionnews.com/2014/03/26/will-scotus-let-religious-freedom-trump-gender-equity/

[222] 42 U.S.C. sec. 2000bb-1(a), (b)

The Supreme Court has never held that for-profit corporations have religious beliefs, which are attributed only to churches and religious communities. Therefore RFRA only protects "individuals and religious non-profit institutions." Further, a corporation and its owners are distinct and separate entities and the corporation is not entitled to an exemption based on the family's beliefs. There is an important distinction between for-profit and non-profit entities that Congress intended to preserve in RFRA. A for-profit corporation also cannot make an independent Free Exercise claim for these same reasons.

Based on the comments of the justices at oral argument, the Court would also have to consider the practical results and common sense of its ruling, not just legal argument. It would have to consider whether opening RFRA to for-profit corporations would put employees in a disadvantaged position if the corporation has religious objections to critical health care like vaccinations or blood transfusions.[223] If too many employers can opt out, then medical coverage would be piecemeal and nothing would be uniform.[224] On the other hand, for-profit corporations will be disadvantaged if they could not make RFRA claims. A small, incorporated kosher market would have no remedy against a law that prohibits kosher slaughter as inhumane, like a recent law in Denmark.[225] A for-profit corporation could be forced to pay for abortions, which is the case before the Court.[226] If religious people associate in an enterprise, the Court must consider whether it would matter if they called themselves individuals or called themselves a corporation[227]

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[223] Tr. p. 6 Justice Kagan
[224] Id.
[225] Tr. p. 78 Justice Alito
[226] Tr. p. 76 Ch. Justice Roberts
[227] Tr. p. 80 Justice Breyer

The Court would have to consider whether to treat the case primarily as a statutory case under RFRA or as a First Amendment case.[228] The Respondents wanted the case to be decided on the basis of RFRA alone. It would make a difference because RFRA may have a stricter standard of review than the pre-*Smith* cases. The government favored an interpretation of RFRA that requires guidance of and reference to these cases, which would avoid strict scrutiny. There was a concern among certain justices that if RFRA is interpreted to have a strict scrutiny standard, then the entire U.S. Code will be subject to review of possible burdens to corporate religions rights.[229] The Court would have to consider how likely it would be that religious objectors would come out of the woodwork to make such claims[230] in the future, given that there has been very little objection in the past.[231] It would have to consider whether RFRA directs the Court back to a body of constitutional law that applies a balancing test, not a compelling interest test.[232]

If the Court were to find that the Respondents are able to bring a claim under RFRA, it would proceed to the merits of the RFRA claim. The Court would not inquire into the religious beliefs themselves but would accept them. The sincerity of religious beliefs may be questioned, but in this case they were not questioned.

The Court would then need to determine whether the Respondents were able to demonstrate that the mandate burdens their sincere religious exercise. Respondents said yes, because their religious beliefs prohibit them from providing contraception coverage that destroys a human embryo and the government has placed substantial pressure on

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[228] Tr. p. 8 Justice Kennedy
[229] Tr. p.13 Justice Kagan
[230] Tr. p. Justice Kagan
[231] Tr. p. Justice Alito
[232] Tr. p. 9 Justice Kagan

them to violate this belief by imposing a legal mandate which is enforced by penalties ($475 million a year). If the employer drops the plan against its faith-based interest in providing adequate benefits to employees, it would still need to pay a substantial tax ($26 million a year). It would suffer a competitive disadvantage because generous benefits are important to recruit and retain the best employees. Increasing wages may not make up for lack of a good health plan and would cost more out of pocket. The combination of the mandate and the penalty felt punitive to the Respondents. In addition, the government exempted others for the exact same beliefs so it recognized the burden the mandate imposed.

The government said no, the employer has a choice of dropping the plan altogether, not providing the coverage against its belief, and only paying a tax. The tax is substantial, but would not drive the employer out of business and would be offset by the cost savings of not providing insurance. To avoid hurting employees, employers could pay higher wages, which employees could use to pay for their own health insurance on the exchanges.[233] In addition, providing coverage is too attenuated because individual decisions by employees to select contraceptives are not attributable to the employer or its owners. It is up to the Court objectively to decide if there is actually a substantial burden and this does not depend on how the burden feels to Respondents.[234]

If the Court were to find a substantial burden on the Respondents' exercise of religion, under RFRA, the government must then prove a compelling state interest that is narrowly tailored to apply to the particular claimant. The Court must decide if it would extend this strict scrutiny standard to for-profit companies or if it would apply another

[233] Tr. p. 23 Justice Sotomayor;
[234] Tr. p. 70 General Verrilli

standard, urged by the government, taking the burden on the employees of having to obtain contraception coverage by other means into account. The issue as articulated by the government is whether RFRA allows a for-profit company, based on religious objections, to deny employees a right conferred by federal law. The standard that the government urged the Court adopt is whether providing contraception coverage to employees is in furtherance of the government's interest in ensuring that contraceptive coverage is available. The government's three compelling interests were in order: uniformity of a comprehensive insurance law, public health, and gender equity.

The new standard urged by the government was that limitations must be placed on the exercise of religious freedom that collides with the liberties of others.[235] The Court would need to decide if this standard is inconsistent with RFRA, which provides exceptions for religious views and sets out a strict scrutiny test to be followed.[236] The Court would have to decide if it would look for guidance to the pre-Smith cases and apply a "balancing" test, used for religious accommodations under the Establishment Clause. The Court could decide instead that the standard set forth in RFRA is the correct standard to be applied. It demands more of a strict review than the pre-Smith cases provide and does not involve "balancing of interests."[237]

The Court would need to consider Respondents' claim that so many exemptions have been granted already to tens of millions of people for secular and religious reasons, particularly in grandfathered plans and small plans, that this has undermined the claimed compelling interest in uniformity. It would need to consider the claim that public health and gender equity interests are far too broad for meaningful application of strict scrutiny.

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[235] Tr. p. 41 General Verrilli
[236] Tr. p. 41-42 Ch. Justice Roberts
[237] Tr. p, 42-43 Justice Scalia

Respondents maintained that the government must show real proof that the exclusion of the four contraceptives in this instance would threaten public health or gender equality. The Court would need to consider that, if these interests were so important, then why have so many other employers been exempted from the mandate and why has HHS been granted open-ended authority to grant exemptions. One member of the Court voiced a concern that where there is a First Amendment issue of this consequence, the Congress, and not merely an agency, should have made decisions on exemptions.[238]

If the Court were to find that there is a compelling state interest, it would need to decide whether the government has accomplished it by the least restrictive means. The Respondents said that the government must prove that its compelling state interests would be fundamentally frustrated by any other means chosen. In other words, its interests cannot be met if Respondents are exempted from providing four of the twenty contraceptives. The Respondents suggested that one least restrictive alternative is for the government to pay for its contraceptives itself, as it is already doing with other government subsidy family planning programs such as Title X.[239] The government argued that this would result in an open-ended increase in the cost of the government. It also argued that other means such as the accommodation granted to the religious non-profits by HHS would be "less effective in achieving the interest." The government's different statement of the test was whether the alternative means suggested by Respondents advanced the compelling state interest as effectively.

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[238] Tr. p. 56-57 Justice Kennedy

[239] Title X of the Public Health Service Act is the only federal program devoted to supporting family planning services. It subsidizes women who do not meet requirements for Medicaid. Facts on Publically Funded Contraceptive Services in the United States (March 2014) Guttmacher Institute In Brief: Fact sheet http://www.guttmacher.org/pubs/fb_contraceptive_serv.html

At the end of oral argument, at the Respondents' rebuttal, the accommodation offered to the religious non-profits was raised and Respondent's counsel, Paul Clement, was asked whether that would be acceptable. Mr. Clement declined to say what his clients would do, but suggested that the government could offer something similar that was done for the Little Sisters of the Poor, a highly publicized non-profit in which the Supreme Court had granted an emergency stay of the mandate pending outcome of litigation. If such an offer were made to his clients, "there wouldn't be a problem with that."[240]

[240] Tr. p. 87 Mr. Clement

Conclusion

The Court's decision in *Hobby Lobby*, no matter what the outcome, will help to provide some stability in the volatile and polarizing debate over the limits of religious freedom between the faith community and the government, but will not end it. The most important holding would be whether for-profit corporations may exercise religion. If the Court were to find that for-profit organizations do not have the same religious free exercise rights as individuals under RFRA, it would not reach the merits of the RFRA claim, and for-profits would not be able to bring any more claims under RFRA. Pending for-profit cases would be dismissed, but the many non-profit cases would continue.[241] It is possible, but not likely, that the Court may decide the same question under the First Amendment, following the Third Circuit's reasoning. It that case, it would avoid a ruling under RFRA.

If the Court were to allow standing to the for-profits and make a ruling on the merits of the RFRA claim, following the approach of the Tenth Circuit, such a ruling would have far reaching consequences on all the cases filed by religious for-profits and non-profits. Court observers are concerned that a broad ruling in favor of for-profit corporations may create much more litigation with religious objections trumping civil rights.[242] However, a narrow ruling limited to closely held companies would not have this effect. A ruling against the for-profits would involve at least a finding that the government has established a compelling interest. The Court may even apply the more relaxed balancing test to define that interest. Whether the interest can only be achieved

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[241] Pew Research Religion and Public Life Project, Health Care Law's Contraception Mandate Reaches the Supreme Court (3/20/14) http://www.pewforum.org/2014/03/20/health-care-laws-contracetion-mandate-eaches-the-supreme-court/

[242] *Ibid,* Pew Research

by forcing religious objectors to comply is open to question, which is why the issue of accommodation would then become the important issue before the Court.

The mandate originated as a positive reform, but it was promulgated without achieving consensus with religious objectors who viewed it as a threat to fundamental religious liberty. Proponents of the mandate on the other hand see accommodation of religion and even RFRA itself as a threat to fundamental civil rights. In a way, equal protection has been pitted against the First Amendment. If leaders of both sides had been able to work together more effectively, perhaps this type of polarization could have been avoided.

For many years the mandate was used by federal law to promote gender inequality as well as public health and avoided controversy, although it helped by a few important court decisions. By 2007, without much litigation, over 90% of private insurance plans covered prescription contraceptives.[243]

The state insurance laws provided good examples of different kinds of exemptions for religious employers, exclusion of abortifacients, and ways of ensuring that employees still got the coverage they needed, usually with a rider on the policy which cost was controlled. Besides the litigation in New York and California, there was no great controversy. The concept of federalism was successful here because that which originates in the states is closer to the people and is therefore more secure. But these moderate solutions that were working were not chosen.

The HHS mandate was modeled after the New York and California mandates with the narrowest exemptions with the result that the strictest of mandates was now the rule

[243] K. Culwell and J. Feinglass, Guttmacher Institute, Perspectives on Sexual and Reproductive Health, the Association of Health Insurance with Use of Prescriptive Contraceptives, https://www.guttmacher.org/pubs/journals/3922607.html

for all the states. This strategy promoted the government interest in distributing contraceptives as widely as possible, but it upset the balance that the states had created and did not take into account the needs of religious institutions. In addition, the mandate did not appear until after the ACA had been in effect for a year, which added an element of surprise for religious groups, which increased distrust.

Ideas have been put forth to avoid a clash between religious liberty and gender equity, ranging from adopting a broader exemption like most of the state mandates to various types of accommodations. These accommodations include offering individual health policies, and providing contraception through government subsidized Title X providers like Planned Parenthood that are already providing family planning services. The particular items that are identified as abortifacients could be provided for separately but most of the contraceptives would be unobjectionable, at least to the for-profit religious employers in the *Hobby Lobby* case. Counsel for Respondents suggested at oral argument that this is really about who pays, and the least restrictive means requirement of RFRA may be satisfied in this manner.[244] A third party insurer paying would not be objectionable to the Respondents, but may not be to religious non-profits depending on how they perceive their degree of involvement.

HHS as a rulemaking body may come under scrutiny itself for its inability to find the right balance of accommodation, but HHS may not have been the right body to hand the decision making. At oral argument Justice Kennedy seemed to say that HHS should not have been delegated the important power to grant religious exemptions in the first place and that Congress should have made the decision.[245]

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[244] Tr. p. 85 Mr. Clement
[245] Tr. p. 56 Justice Kennedy

Professor Doug Laycock, whose scholarly articles on religion have been cited in many Supreme Court opinions, is concerned about the tide of public opinion turning against religious liberty, because what conservative churches view as a sin is seen by others as a fundamental human right.[246] The two sides each are insisting on a total win. In a recent symposium on the occasion of the twentieth anniversary of RFRA, he said that the debate about religious liberty and sexual morality has turned much of the country against religious liberty, or at least the view that it must be construed very narrowly. If this trend in public opinion continues, then RFRA will be no help, and the loss of religious liberty will be a loss for America.

[246] Allen, B. *Lawyer Says Religious Liberty at Risk* (11/8/13), http://www.abpnews.com/culture/politics/item/8999-lawyer-says-religious-liberty-at-risk#

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