

LAW OF LIFE: ARTICLE: THE MORALITY AND LEGALITY OF THE HHS MANDATE AND THE "ACCOMMODATIONS"

Spring, 2013

Reporter

11 Ave Maria L. Rev. 211 *

Length: 16025 words

Author: Eugene R. Milhizer+

+ President, Dean, and Professor of Law, Ave Maria School of Law. This Article is a composite of presentations given by the author at several venues. The author would like to thank Ms. Madison Kvamme and Ms. Carime Aldana for their outstanding contributions as research assistants.

Text

[*211]

The Department of Health and Human Services' mandate requires employers to provide insurance coverage for contraception, sterilization, and abortifacient (abortion inducing) drugs. ¹ The fight against the HHS mandate is the most important issue of religious freedom and conscience in our lifetimes, so it is important to dig into the subject matter in some depth.

I will begin by addressing a few of the basics. The HHS mandate, as originally designed, required that all employers provide so-called preventative health care products and services to their employees that include contraception, abortifacients, and sterilization, even if the employer is a religious institution that opposes such practices as a matter of faith, morals, and religious doctrine. ² The only religious-based exception recognized by the mandate is extremely narrow and applies, in essence, exclusively to entities such as churches, seminaries, and convents. ³

¹ See [45 C.F.R. § 147.130\(a\)\(1\)\(iv\) \(2011\)](#). The mandate does not specifically define the benefits to be covered, but rather delegates authority to the Department of Health and Human Services to define "preventive care and screenings [as] provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration." Id. These guidelines include contraceptive methods to cover "all Food and Drug Administration approved contraceptive methods [and] sterilization procedures." U.S. Dep't. of Health & Hum. Servs., Women's Preventive Services: Required Health Plan Coverage Guidelines, HRSA, <http://www.hrsa.gov/womensguidelines/> (last visited Sept. 13, 2012).

² [42 U.S.C. § 300gg-13\(a\)\(4\)](#) (2011) (without "religious employer" exception). See also Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, [75 Fed. Reg. 41,726, 41,728](#) (July 19, 2010) (to be codified at 45 C.F.R. pt. 147).

³ [45 C.F.R. § 147.130\(a\)\(1\)\(iv\)\(A\)](#) (stating the HRSA "may establish exemptions" for religious employers) (emphasis added). The Act defines "religious employer" as

an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

This is because in order **[*212]** to qualify for a religious-based exception, the entity's membership and activities, for all practical purposes, must be exclusively limited to a single religious denomination. Thus, Catholic hospitals, charities, universities, and Catholic law schools, like Ave Maria School of Law, would not be exempted from the mandate because they employ and serve non-Catholics,⁴ and thus they would be forced to provide coverage for morally objectionable products and services for all of their employees. In fact, it has been contended that Jesus Christ himself and His Apostles would not be exempted from the mandate as they ministered to people of many religious traditions.

Why would such a narrow definition of a religious organization be adopted? The purpose is to relegate religious expression and influence to the confines of houses of worship, separating religion and its influence from the broader culture. In other words, the government has no objection to people of faith gathering together on Sundays and engaging in quaint rituals and singing hymns, provided that their beliefs and convictions do not spill over into the public square and have any influence in the marketplace of ideas. This impoverished conception of religion is wholly at odds with the American experience, and it amounts to putting the judicially imposed doctrine of "separation of church and state"⁵ on steroids. This reductionist **[*213]** view of religion comports with the rhetoric we hear so

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization [under sections of the code that refer to churches, integrated auxiliaries, and conventions or associations, as well as to the exclusively religious activities of any religious order].

Id. § 147.130(a)(1)(iv)(B) (emphasis added). See also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623.

⁴ In order to qualify for the exemption, these organizations would have to quit serving non-Catholics, which is against Catholic tradition. Catholic institutions are called to work for the common good of society, not solely for other members of the religion. See John 13:34 (Revised Standard, Catholic Edition) ("Love one another; even as I have loved you."); Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] P 30 (1965), reprinted in *The Sixteen Documents of Vatican II* 513, 541 (Nat'l Catholic Welfare Conference trans., 1967) ("It grows increasingly true that the obligations of justice and love are fulfilled only if each person, contributing to the common good, according to his own abilities and the needs of others, also promotes and assists the public and private institutions dedicated to bettering the conditions of human life.") (emphasis added); Catechism of the Catholic Church P 2288 (2d ed. 1997) ("Concern for the health of its citizens requires that society help in the attainment of living-conditions that allow them to grow and reach maturity: food and clothing, housing, health care, basic education, employment, and social assistance."); Id. P 1913 ("'Participation' is the voluntary and generous engagement of a person in social interchange. It is necessary that all participate, each according to his position and role, in promoting the common good. This obligation is inherent in the dignity of the human person.") (emphasis added).

⁵ The "wall of separation" was actually first articulated by Thomas Jefferson in his letter to the Danbury Baptists:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

Letter from Thomas Jefferson to Committee of Danbury Baptist Association (Jan. 1, 1802), in 16 *The Writings of Thomas Jefferson* 281-82 (Andrew A. Lipscomb ed., 1903). Other translations used the "legislative" powers of government. Johann N. Neem, *Beyond the Wall: Reinterpreting Jefferson's Danbury Address*, 27 *J. Early Republic* 139, 139-40 (2007) (emphasis added). It was introduced into American jurisprudence in *Everson v. Board of Education*, where Justice Hugo Black used the concept to allow for public funds to be used to support school buses for Catholic schools. *Id. at 140*. It is argued, however, that the motives behind Jefferson's letter were not to hinder the free exercise of religion, but rather as a political act to rebut allegations of atheism from his Federalist opponents. See James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 *Wm. & Mary Q.* 775, 781-82 (1999); cf. Neem, *supra*. For further discussion regarding the history of this doctrine, see David E. Steinberg, *The Myth of Church-State Separation*, [59 *Clev. St. L. Rev.* 623 \(2011\)](#); John Garvey, For

often from the left, including President Obama and others in his Administration, when they increasingly refer to freedom of worship rather than freedom of religion.⁶

Before proceeding further, I should explain what is meant by the term mandate in the context of the HHS mandate. The HHS mandate is not a law; that is, it is not legislation that is passed by Congress and signed by the President. Nor is it a policy statement or guideline that merely encourages rather than compels compliance. Rather, it is a requirement imposed by a [*214] non-elected bureaucrat, in this case the Secretary of Health and Human Services, Kathleen Sebelius, based on authority delegated to her by Congress.⁷ Further, the HHS mandate compels adherence with its terms under penalty of law, which in this case is a substantial fine.⁸ One final point of clarification: the HHS mandate is different than the Affordable Care mandate⁹ (popularly known as the Obamacare mandate) that was affirmed by the Supreme Court in June.¹⁰ The Obamacare mandate is part of legislation passed by Congress, and it requires non-exempt individuals to purchase health insurance or suffer, according to a five-justice majority of the Supreme Court, a penalty in the form of a tax.¹¹ The HHS mandate is an executive

the Government, What Counts as Catholic?, Wash. Post (May 25, 2012), http://www.washingtonpost.com/opinions/for-the-government-what-counts-as-catholic/2012/05/25/gJQAcWFPqU_story.html.

The Establishment Clause was not designed to isolate the state from religion. Rather, Jefferson's metaphorical wall was designed to protect state regulation of religion from interference by the federal government. In other words, the Establishment Clause was a shield, designed to protect the states from the federal government. Paradoxically, the Supreme Court has used the Establishment Clause as a sword, to strike down state laws regulating religion. In these decisions, the Court has turned the Establishment Clause on its head.

Steinberg, *supra* at 643.

⁶ Randy Sly, Obama Moves Away From "Freedom of Religion" Toward "Freedom of Worship", Catholic Online (July 19, 2010), http://www.catholic.org/national/national_story.php?id=37390. The difference between freedom of religion and freedom of worship may appear small; however, the policy implications are quite different from the historical interpretation of the First Amendment's protection. Freedom of worship is a limited protection that permits the freedom of private religious expression, i.e. within one's home or church. See Wesley J. Smith, Free Birth Control vs. Freedom of Religion, Nat'l Rev. Online (Jan. 30, 2012), <http://www.nationalreview.com/articles/289536/free-birth-control-vs-freedom-religion-wesley-j-smith> (The difference between "freedom of worship" and "freedom of religion" is that "the former means that one may believe whatever one wants and worship privately without interference, whereas the latter allows one freedom to live in the world at large consistent with one's faith tenets, even if they are not endorsed by the state."). See also Peg Luksik, Peg Luksik on Why Freedom of Worship is Not Freedom of Religion, Catholic Online (June 27, 2012), http://www.catholic.org/national/national_story.php?id=46790 (relating freedom of worship to being able to cheer for your favorite NFL team, but only within the stadium).

⁷ [42 U.S.C. § 300gg-92](#).

⁸ See [26 U.S.C. § 4980H\(a\)](#) (2011). For "large employers not offering health coverage," the statute states:

If-

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

Id.

⁹ Patient Protection and Affordable Care Act, **Pub. L. No. 111-148, 124 Stat. 119** (2010).

¹⁰ [Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 \(2012\)](#).

edict, not legislation, that requires religious organizations to cover the costs of contraception, abortion-inducing drugs, and sterilization for their employees.

Also, it is important to understand that even though the Supreme Court affirmed the Obamacare mandate, this does not necessarily mean that the HHS mandate will be found constitutional. These are two distinct, albeit related, legal questions. Two principle distinctions between the mandates should be emphasized when discussing the possible unconstitutionality of the HHS mandate. First, as previously mentioned, the Obamacare mandate is a law, while the HHS mandate is an executive edict. Accordingly, the HHS mandate is deserving of less deference from the courts and would be more susceptible to being declared unconstitutional.¹² Second, while the [*215] Obamacare mandate does not implicate the First Amendment, the HHS mandate directly burdens religious liberty protected by the First Amendment,¹³ and thus courts should be much less willing to affirm the HHS mandate.¹⁴

Before addressing various aspects of the HHS mandate and the so-called "accommodations," it is important to address the characterization of contraception as "preventive health care."¹⁵ Those who support the HHS mandate frame the issue as whether religious organizations and institutions should be required to provide preventative health care by providing contraception to their employees. In response to this deceptive characterization, I would first observe again that the mandate extends beyond mere contraception, and includes abortion-inducing drugs and sterilization.¹⁶

But even leaving this aside, it cannot be fairly said that the contraception services covered by the mandate constitute "preventative health care"¹⁷ in any way, except insofar as they are dispensed for the ostensible and comparatively rare purpose of addressing a serious medical issue unrelated to contraception.¹⁸ Pregnancy is not

¹¹ *Id.* at 2608 (citing [United States v. Sotelo](#), 436 U.S. 268, 275 (1978)).

¹² The Constitution expressly grants Congress the power to make laws; it grants the President only the power to enforce laws. See John C. Duncan, Jr., A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role, [35 *Vt. L. Rev.* 333, 334 \(2010\)](#). While the President is given discretion in issuing executive orders to aid enforcement, they must not exceed the constitutional authority accorded to the executive branch. *Id.* at 348-49. "Strictly speaking, no executive order issued in the absence of statutory authority, which confers power on the President for implementation on the legislative model, is construable as a law of the United States." *Id.* at 337.

¹³ [U.S. Const. amend I](#).

¹⁴ See, e.g., [Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC](#), 132 S. Ct. 694, 710 (2012) (holding unanimously that a church school cannot be sued over the dismissal of a religious teacher); [Van Orden v. Perry](#), 545 U.S. 677, 681 (2005) (permitting the display of the Ten Commandments on the Texas State Capitol grounds); [Newdow v. Rio Linda Union Sch. Dist.](#), 597 F.3d 1007, 1014 (9th Cir. 2010) (upholding the constitutionality of "under God" language in the Pledge of Allegiance); [Fraternal Order of Police Newark Lodge No. 12 v. City of Newark](#), 170 F.3d 359, 360 (3d Cir. 1999) (invalidating requirement that police officers shave their beards); [United States v. Hammer](#), 121 F. Supp. 2d 794, 802 (M.D. Pa. 2000) (invalidating mandatory autopsy policy).

¹⁵ See USCCB: HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights, U.S. Conf. of Cath. Bishops (Aug. 1, 2011), <http://www.usccb.org/news/2011/11-154.cfm> ("HHS says the intent of its 'preventive services' mandate is to help 'stop health problems before they start ... but pregnancy is not a disease, and children are not a 'health problem' - they are the next generation of Americans.") (internal quotation marks omitted).

¹⁶ *Id.* ("The drugs that Americans would be forced to subsidize under the new rule include Ella, which was approved by the FDA as an "emergency contraceptive" but can act like the abortion drug RU-486. It can abort an established pregnancy weeks after conception.") (internal quotation marks omitted).

¹⁷ The use of condoms might be considered preventative health care insofar as this can limit the transmission of some venereal diseases but their use is not encouraged by the HHS mandate.

an illness or disease; therefore, the [*216] prevention of pregnancy cannot be considered "preventative health care." ¹⁹ After all, when a doctor treats a pregnant woman, his professional training says he has two patients rather than a single patient suffering from a disease. Also, contraceptives themselves can be harmful. Studies show that besides the serious harm that sometimes can be caused directly by the use of some contraceptives, ²⁰ women on contraceptives are more susceptible to sexually transmitted diseases because contraceptives can compromise their immune systems. ²¹

Further, if the government was truly interested in promoting preventative health care, then, in addition to allowing insurance companies to raise premiums for smokers, ²² it should similarly allow insurers to raise premiums for those who are sexually promiscuous and thus more susceptible to disease and illness. But of course it does not. Finally, and more broadly - and while I am certainly not advocating this - if the government was really concerned about subsidizing and protecting so-called reproductive rights, one would assume that it would require coverage for in vitro fertilization as well as contraception, which it does not. For these and other reasons, the characterization of the HHS mandate as being concerned with preventative health care for women is false, cynical, politically-motivated, and designed to obfuscate the real issues that are involved.

But even assuming, for the sake of argument, that the HHS mandate is actually concerned with "preventative health care," the fact remains that its requirements are categorically wrong - both morally and legally. The mandate is morally wrong because it obligates institutions - whether they are Catholic or not - to engage in activity that is immoral as a matter of natural law apart from any religious teaching. It is fundamentally true that to [*217] deliberately kill children, whether they are born or unborn, is contrary to natural law. ²³ Nothing could be clearer. It is also contrary to the natural law to sterilize people to prevent reproduction, or to use artificial methods of contraception to accomplish the same purpose. ²⁴ To compel individuals to provide such services against their strongly held convictions, especially religious convictions, is doubly immoral.

¹⁸ These medical conditions include, but are not limited to: amenorrhea, dysfunctional uterine bleeding, dysmenorrhea, hypermenorrhea, endometriosis, hirsutism in females, ovarian hyperandrogenism, and polycystic ovary syndrome. Estrogen and Progestin Oral Contraceptives (Oral Route), Mayo Clinic, <http://www.mayoclinic.com/health/drug-information/DR602119> (last visited Sept. 13, 2012).

¹⁹ See Kathleen Gilbert, "Pregnancy is Not a Disease": Bishops Slam Planned Parenthood Push for Free Birth Control, LifeSiteNews.com (July 20, 2011), <http://www.lifesitenews.com/news/pregnancy-is-not-a-disease-bishops-slam-planned-parenthood-push-for-free-bi/> (quoting Cardinal Daniel DiNardo, chairman of the Committee on Pro-Life Activities of the USCCB: "Pregnancy is not a disease, and fertility is not a pathological condition to be suppressed by any means technically possible.") (internal quotation marks omitted).

²⁰ Side effects can include "nausea, headache, breast tenderness, weight gain, irregular bleeding, and mood changes," and may contribute to "increased blood pressure, blood clots, heart attack, and stroke." Melissa Conrad Stoppler & Jay W. Marks, Birth Control Pills (Oral Contraceptives), MedicineNet.com, http://www.medicinenet.com/oral_contraceptives_birth_control_pills/article.htm (last visited Sept. 13, 2012).

²¹ Jennifer Kimball & Steven W. Mosher, Birth Control Pills and AIDS: Increasing Women's Risk, LifeSiteNews.com (Aug. 1, 2011), <http://www.lifesitenews.com/news/aids-and-population-control-increasing-womens-risk>.

²² See Reed Abelson, The Smokers' Surcharge, N.Y. Times (Nov. 16, 2011), <http://www.nytimes.com/2011/11/17/health/policy/smokers-penalized-with-health-insurance-premiums.html?pagewanted=all> (explaining that Wal-Mart and other companies require employees who smoke to pay higher premiums).

²³ See Mitchell Kalpakgian, The Right to Life and the Natural Law, in Life and Learning IX: Proceedings of the Ninth University Faculty for Life Conference 101, 103 (Joseph W. Koterski, S.J., ed., 2000).

²⁴ See *id.* at 108 (arguing that contraception, sterilization and abortion have been historically utilized in eugenics movements and for population control, and are contrary to natural law).

It is likewise abundantly clear to faithful Catholics that the services and products required by the mandate are contrary to Catholic moral teaching.²⁵ You may have heard that former Speaker of the House, Nancy Pelosi, has argued that since most Catholics who were surveyed said they have used contraceptives, the Church's position on contraception lacked legitimacy as a religious teaching.²⁶ Others have urged the Church to change its teachings about contraception to incorporate the views of, in the words of these critics, "enlightened" Catholics.²⁷ This is really an absurd argument, is it not? **[*218]** Popular opinion or dissident theologians, of course, do not determine Church doctrine. For example, even if most Catholics who were surveyed said that it was permissible to miss Mass on Sunday, and some dissident theologians agreed with this, their shared opinion would not justify repealing the Third Commandment.²⁸ Church doctrine is certainly not determined by government edicts based on opinion polls. This discussion highlights a fundamental difference between religious authority and civil authority: religious authority comes from God and is thus coherent with the natural law, meaning it is immutable.²⁹ Civil authority, on the other hand, comes from the consent of the governed and, to be legitimate, must comport with the natural law.³⁰ An example of the latter - that is, civil authority that comports with the natural law - is the First Amendment's protection of religious liberty. In any event, and with respect to the power of purely civil authority, I am sure that even Representative Pelosi would agree that if most people thought it was reasonable to drive fifty miles per hour in a twenty-five mile per hour speed zone, this fact does not change the legal speed limit.

²⁵ As Pope John Paul II wrote:

Therefore, by the authority which Christ conferred upon Peter and his Successors, and in communion with the Bishops of the Catholic Church, I confirm that the direct and voluntary killing of an innocent human being is always gravely immoral. This doctrine, based upon that unwritten law which man, in the light of reason, finds in his own heart (cf. Rom 2:14-15), is reaffirmed by Sacred Scripture, transmitted by the Tradition of the Church and taught by the ordinary and universal Magisterium.

...

I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium.

Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] PP 57, 62 (1995).

²⁶ See Eric Scheiner, *Pelosi: Catholic Church "Has Not Enforced" Its Teaching on Contraception*, CNSNews (Feb. 22, 2012), <http://cnsnews.com/news/article/pelosi-catholic-church-has-not-enforced-its-teaching-contraception> ("Ninety-eight percent of women in childbearing age that are Catholic use contraception. So, in practice the church has not enforced this and now they want the federal government and private insurance to enforce it. It just isn't consistent to me ...").

²⁷ Christine Dhanagom, *Dolan: White House Invoked Support of "Enlightened" Catholics in Refusing to Budge on Mandate*, LifeSiteNews.com (Mar. 08, 2012), <http://www.lifesitenews.com/news/dolan-white-house-invoked-support-of-enlightened-catholics-in-refusing-to-b> ("White House staff members have told U.S. bishops that the administration will not consider further revision of the mandate forcing religious employers to pay for birth control, sterilizations, and abortion-inducing drugs, and that the religious leaders should listen to "enlightened" Catholics who accept the president's terms ...").

²⁸ Exodus 20:8-10 (Revised Standard, Catholic Edition).

²⁹ In his work, *Summa Theologica*, Saint Thomas Aquinas recognized four types of law: (1) Eternal Law (God's law), (2) Divine Law (God's commands conveyed through revelation), (3) Natural Law (law written in nature), and (4) Human Law (laws written by man). St. Thomas Aquinas, *Summa Theologica*, Pt. I-II, Q. 91, Arts. 1-4 (Fathers of the English Dominican Province trans., Christian Classics 1981). By comporting with natural law, one's act "is a participation of the eternal law ... and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature." Id. Q. 97, Art. 1.

³⁰ Human law, on the other hand "has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence." Id. Pt. I-II, Q. 93, Art. 3.

I should pause for a moment here to emphasize that the religious and philosophical objections to the mandate are broad-based and involve much more than a parochial Catholic cause. As Professor Patrick Gillen of Ave Maria School of Law faculty has observed:

A wide range of individuals who do not subscribe to Catholic teaching have publicly decried the mandate as tyrannical, including Christians, Jews and Muslims. Likewise, this is not a feminist issue; see, for example, the "Women Speak for Themselves" website. Finally, this is not an issue about spending taxpayer moneys; the government spends vast sums to make [*219] contraception available to women here and abroad; the mandate concerns private moneys.³¹

In a similar vein, Governor Mike Huckabee, a Protestant minister and former presidential candidate, has said that in regard to the HHS mandate: "We are all Catholics now."³²

Rather than expanding upon why the mandate is morally wrong, I would now like to turn instead to why it is legally wrong - in other words, why it is unconstitutional. In my judgment, the mandate also violates the Religious Freedom Restoration Act,³³ or RFRA, but I will limit my comments here to the mandate's constitutional infirmity.

The [First Amendment of the United States Constitution](#) provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³⁴

It is not coincidental that the very first right protected by the First Amendment to our Bill of Rights is religious freedom. This right is often referred to as our first freedom and most important constitutional right. Freedom of religion includes both the freedom to exercise religion freely and freedom from an established religion.³⁵ It is a sad fact that America has seen a rather unrelenting erosion of religious freedom over the past several decades, largely because of an unwarranted zealotry to avoid the establishment of religion. Let me explain what I mean by this. The First Amendment's Establishment Clause was intended to prevent the [*220] establishment of a specified or official government religion, such as an official religion of the United States.³⁶ In recent decades, however, the Establishment Clause has been misinterpreted by the Supreme Court to prohibit the government from favoring or supporting religion generally.³⁷ For example, the Supreme Court and other courts have concluded that to avoid

³¹ Patrick T. Gillen, Guest Column: The HHS Mandate and the First Amendment, Naples Daily News (Mar. 25, 2012), <http://www.naplesnews.com/news/2012/mar/25/guest-column-the-hhs-mandate-and-the-first/>.

³² Patrick B. Crane, Baptist Gov. Mike Huckabee on Obama Mandate: "We are all Catholics Now," LifeSiteNews.com (Feb. 16, 2012), <http://www.lifesitenews.com/news/baptist-gov.-mike-huckabee-we-are-all-catholics-now>.

³³ Religious Freedom Restoration Act of 1993, [42 U.S.C. § 2000bb-1](#) (2009) (requiring the government to justify a burden on a person's exercise of religion by demonstrating that such burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."); see David B. Rivkin, Jr. & Edward Whelan, Birth-Control Mandate: Unconstitutional and Illegal, Wall St. J., Feb. 15, 2012, <http://online.wsj.com/article/SB10001424052970204795304577223003824714664.html>. RFRA has been ruled inapplicable as it applies to the states, but continues to be applied to the federal government. See [City of Boerne v. Flores](#), 521 U.S. 507, 536 (1997); but see [Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal](#), 546 U.S. 418, 439 (2006).

³⁴ [U.S. Const. amend. I](#).

³⁵ *Id.*

³⁶ See Patrick N. Leduc, Christianity and the Framers: The True Intent of the Establishment Clause, 5 Liberty U. L. Rev. 201, 224-26 (2011).

the "establishment" of religion public prayer must be extremely limited,³⁸ displays of the Ten Commandments are problematic,³⁹ and manger scenes need to be accompanied by an exhibition of plastic elves and reindeer.⁴⁰ This is a bit of an exaggeration, but regrettably not too much of one.

On the other hand, the government and the courts have generally remained respectful of the free exercise of religion when the Establishment Clause is not directly implicated, insofar as they have resisted imposing requirements upon religious institutions that would force them to violate their own religious beliefs.⁴¹ It has been widely understood that to do so would deny the constitutional protection of free exercise of religion by unduly burdening that right, at least in the absence of some compelling reason to require a religious institution to violate its tenets. For example, Catholic priests have always been free to consecrate the blood of Christ in the form of wine, even during Prohibition.⁴² Over our history, the government has rarely [*221] intruded upon the free exercise of religion, at least in a fashion that is as blatant, extreme, and unprincipled as the HHS contraception mandate.

While this discussion is not political in nature, I must express that the Obama Administration has been particularly disrespectful of religious expression. Even before the HHS mandate was announced, the Supreme Court decided the *Hosanna-Tabor* case.⁴³ In this decision, the Court recognized a ministerial exception to employment discrimination laws, saying that churches and other religious groups must be free to choose and dismiss their leaders without government interference.⁴⁴ The Obama Administration argued in that case instead that it did not matter whether the dismissed employee worked for a church, a labor union, a social club, or any other group with free association rights under the First Amendment.⁴⁵ The Court, in a 9-0 decision, soundly rejected the

³⁷ See, e.g., [Lee v. Weisman, 505 U.S. 577 \(1992\)](#) (disallowing practice of clergy offering prayers during public school graduation ceremonies); [Wallace v. Jaffree, 472 U.S. 38 \(1985\)](#) (disallowing state law requiring moment of silence for prayer or meditation in public schools); [Engel v. Vitale, 370 U.S. 421 \(1962\)](#) (disallowing state program of daily classroom prayer); [Everson v. Bd. of Ed., 330 U.S. 1 \(1947\)](#) (invoking separation of church and state as a limiting principle when first considering aid to religious schools). See also [Catholic Charities v. Serio, 859 N.E.2d 459, 463-65 \(N.Y. 2006\)](#); [Catholic Charities v. Superior Court, 85 P.3d 67, 81-84 \(Cal. 2004\)](#).

³⁸ See [Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 \(2000\)](#) (denying student-initiated, student-led prayer at high school football games); [Lee, 505 U.S. at 599](#) (allowing clergy to perform prayers during public school graduation ceremonies violates the Establishment Clause).

³⁹ See [Stone v. Graham, 449 U.S. 39, 39-40 \(1980\)](#) (finding a Kentucky statute that required the Ten Commandments to be posted in each public school classroom in the state violated the Establishment Clause); [Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768 \(7th Cir. 2001\)](#) (enjoining the acceptance and placement of a monument of the Ten Commandments on the statehouse grounds for violating the Establishment Clause).

⁴⁰ See [County of Allegheny v. ACLU, 492 U.S. 573 \(1989\)](#) (holding that a nativity scene on the courthouse staircase violated the Establishment Clause); [ACLU v. City of Birmingham, 791 F.2d 1561, 1567 \(6th Cir. 1986\)](#) (holding that a nativity scene unaccompanied by nonreligious symbols on the city hall lawn violated the Establishment Clause).

⁴¹ See, e.g., [Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 \(2012\)](#); [Sherbert v. Verner, 374 U.S. 398, 409 \(1963\)](#).

⁴² National Prohibition Act, ch. 85, **41 Stat. 305** (1919) (repealed 1933). See Michael deHaven Newsom, Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine, [70 Brook. L. Rev. 739, 741-42 \(2005\)](#).

⁴³ [Hosanna-Tabor, 132 S. Ct. at 694](#).

⁴⁴ [Id. at 706](#) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.")

⁴⁵ *Id.*

government's position. The unanimity of the Court is remarkable, as it is nearly impossible to get the nine justices to agree about anything controversial, let alone a First Amendment issue.

In the *Hosanna-Tabor* case, Chief Justice Roberts wrote that the "result [advocated for by the Obama Administration] is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."⁴⁶ He continued: "We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."⁴⁷

The HHS mandate represents a similar type of assault by the federal government on the free exercise of religion. But this time the government, rather than entangling itself in the selection of religious ministers, is instead picking and choosing which of a religion's deeply held doctrines and convictions its institutions must violate. There is no precedent that authorizes this. In fact, the precedent is just the opposite.

In response to withering criticism of the HHS mandate from a variety of sources,⁴⁸ the Obama Administration announced its first so-called [*222] "accommodation."⁴⁹ Under this accommodation, which took effect on August 1, 2013, all insurance providers would be compelled to provide contraceptives and other objectionable services and products for free to the employees of religious institutions.⁵⁰ The Administration argued that this avoids any compelled violation of conscience or religious beliefs, as the religious organization would not be funding the objectionable services.⁵¹ But even with this first accommodation, the HHS mandate remains objectionable for several reasons. I will limit my criticism here to two: one is factual and the other is legal.

Factually, it is highly doubtful that private insurance companies will cover contraceptive products and services to consumers for free - products and services that the government claims are very costly - without trying to pass on these expenses to consumers in some fashion. Surely insurance premiums will be raised and other revenue generating measures will be undertaken by the companies to make up the difference. Think back to the ways in which banks have tried to recoup revenues lost when the government put limits on what they may charge for certain services,⁵² or the way automobile companies pass on to consumers the cost of mandated safety features.⁵³ When the cost of the HHS mandate's ostensibly "free" products and services are eventually passed on to consumers, among their numbers will be religious organizations and institutions. As a factual matter, therefore, the accommodation solves nothing because religious institutions will continue to be compelled to fund morally objectionable products and services.

As a legal matter, the accommodation lacks any legitimate constitutional basis. This is not an overstatement or hyperbole. In fact, I know of no constitutional authority - and the government to my knowledge has not even

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Steven Ertelt, *Obama Faces More Lawsuits Over Pro-Abortion HHS Mandate*, LifeNews.com (Feb. 20, 2012, 12:40 PM), <http://www.lifenews.com/2012/02/20/obama-faces-more-lawsuits-over-pro-abortion-hhs-mandate/>; Rivkin & Whelan, *supra* note 33.

⁴⁹ See *Certain Preventive Services Under the Affordable Care Act*, [77 Fed. Reg. 16,501](#) (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See [Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 \(2005\)](#).

⁵³ See Robert Steinbuch, *The Executive-Internalization Approach to High-Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, [10 N.Y.U. J. Legis. & Pub. Pol'y 321, 339-40 \(2007\)](#).

bothered to suggest one - for compelling a private company to provide a product or service free of charge because the government deems it to be beneficial. Under this same rationale, I suppose the government could order that mammograms and prostate exams should be covered at no cost by insurance companies. Perhaps we should skip the middleman, and the government can dictate to doctors that they must provide these products and [*223] services to their patients for free. Likewise, in the name of preventative health care, a wide range of private companies could be compelled to provide to consumers, for example, free drugs and vitamins, organic food, water filters, orthopedic shoes, and exercise equipment. How about a free hot tub or jacuzzi for everyone?

And why should this approach be limited to the medical realm? Are not child car seats beneficial? If so, should they not be provided free of cost by car manufacturers? How about burglar alarms for homeowners? How about better insulation and radon testing? Cell phones? Safety glasses? Wi-Fi and cable television? A free vacation? The list is endless. With the alleged "accommodation" of the HHS mandate, the government has in fact compounded its disregard for the Constitution and conscience, and its contempt for free enterprise, by ostensibly seeking to mitigate an undue burden on religious freedom by imposing an undue burden on private companies.

On February 2, 2013, a second or revised accommodation was announced by the Obama Administration.⁵⁴ This new revision, not to mention the underlying Obamacare statute, is long and complex, and so it is difficult to predict the precise consequences that would follow from its implementation. It is telling that the American Civil Liberties Union,⁵⁵ NARAL Prochoice America,⁵⁶ and the New York Times⁵⁷ were all quick to praise it. On the other hand, Timothy Cardinal Dolan, President of the United States Conference of Catholic Bishops, immediately rebuffed the revised accommodation saying:

Throughout the past year, we have been assured by the administration that we will not have to refer, pay for, or negotiate for the mandated coverage We remain eager for the administration to fulfill that pledge and to find acceptable solutions - we will affirm any genuine progress that is made, and we will redouble our efforts to overcome obstacles or setbacks.⁵⁸

["*224] Philadelphia Archbishop Charles Chaput likewise dismissed the revised accommodation as "coercive and gravely flawed."⁵⁹

While it is true that the latest proposed accommodation appears to expand modestly what constitutes a religiously-affiliated entity, there remain many specific problems with the latest approach announced by the administration. Catholic hospitals are still not exempted.⁶⁰ Religious charities are likely not exempted unless they are run by a church and tightly integrated into the church, such as a typical St. Vincent DePaul Society.⁶¹ In contrast, Catholic

⁵⁴ See Coverage of Certain Preventive Services Under the Affordable Care Act, [78 Fed. Reg. 8456](#) (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, 156).

⁵⁵ See Obama Administration Issues Proposed Contraception Rule, ACLU (Feb. 1, 2013), <http://www.aclu.org/reproductive-freedom/obama-administration-issues-proposed-contraception-rule>.

⁵⁶ See Stephanie Condon, New Obamacare Birth Control Rules Seek Middle Ground, CBS News (Feb. 1, 2013, 12:36 PM), http://www.cbsnews.com/8301-34222_162-57567155-10391739/new-obamacare-birth-control-rules-seek-middle-ground/.

⁵⁷ See Editorial, A Good Compromise on Contraception, N.Y. Times, Feb. 1, 2013, <http://www.nytimes.com/2013/02/02/opinion/a-good-compromise-on-contraception.html?ref=politics>.

⁵⁸ David Gibson, Catholic Bishops Rebutt Modified Contraception Mandate, USA Today (Feb. 12, 2013, 5:49 PM), <http://www.usatoday.com/story/news/nation/2013/02/07/catholic-contraception-birth-control-bishops/1900305/>.

⁵⁹ Id. (internal quotation marks omitted).

⁶⁰ See Rick Ungar, The Truth About Contraception, Obamacare and the Church, Forbes (Feb. 2, 2012, 2:45 PM), <http://www.forbes.com/sites/rickungar/2012/02/02/the-truth-about-contraception-obamacare-and-the-church/>.

Charities and similar organizations would likely not be exempted.⁶² Further, while parish grade schools might be exempted, Catholic high schools are probably not exempted, and certainly Catholic colleges, universities, and law schools, such as Ave Maria School of Law, would not qualify as religious employers.⁶³ It is true that for schools that are not exempted, the revised accommodation shifts - at least nominally - the cost and administration of immoral services to the health insurance issuer, which adds some additional layering or insulation for the school.⁶⁴ The result nevertheless remains problematic for the reasons discussed earlier concerning the original accommodation, and the consequences of its implementation will be especially troubling for schools that self-insure. Finally, the revised mandate continues to disregard the conscience rights of for-profit business owners who clearly would not be covered by it.⁶⁵

In addition to these many particular failings just described, the revised accommodation presents broad and overarching problems. It continues the Administration's minimalist and overly-narrow conception of religious ministries and First Amendment protections as discussed earlier. It seems to be little more than the grudging product of a cynical political calculation, which is designed to appease the courts⁶⁶ and create a wedge among **[*225]** believers without giving any real ground. The latest proposal is not deserving of the title "accommodation," if for no other reason than that it is not genuinely accommodating.

This is serious business. Unless the mandate and the subsequent accommodations are defeated, Catholic institutions such as Ave Maria School of Law will be left, in the words of Francis Cardinal George, with four terrible choices: (1) secularize yourself, by breaking connections with the Church (this is a form of theft by the government); (2) pay exorbitant annual fines to avoid paying for insurance policies that cover abortifacients, contraception and sterilization; (3) sell the institution to a non-Catholic group; or (4) close it down.⁶⁷

At Ave Maria School of Law, unless the mandate is defeated, the only viable option will be to pay the fines. But this will have a six-figure price tag as things presently stand, which is a cost that is morally and legally outrageous and, in the long run, may be economically unsustainable.

⁶¹ See Archbishop Chaput, Making Sense of Another Ambiguous "Compromise" (Feb. 4, 2013), <http://catholicphilly.com/2013/02/think-tank/weekly-message-from-archbishop-chaput/making-sense-of-another-ambiguous-compromise/>.

⁶² *Id.*

⁶³ *Id.*; [I.R.C. § 6033](#) (2011).

⁶⁴ See Coverage of Certain Preventive Services Under the Affordable Care Act, [78 Fed. Reg. 8456, 8461-62](#) (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, 156) (stating that the proposed accommodations would provide contraceptive coverage without cost while insulating institutions or schools from having to contract, arrange, or pay for such coverage).

⁶⁵ *Id. at 8462* (exempting "for-profit secular employers" from the definition of "eligible organization").

⁶⁶ See Catholic Diocese of Nashville v. Sebelius, No. 3-12-0934, [2012 WL 5879796, at 2 \(M.D. Tenn. 2012\)](#) (granting Government's Motion to Dismiss after Government's assurance that "the Departments will work with stakeholders to develop alternative ways of providing contraceptive coverage"). See generally Zubik v. Sebelius, No. 2:12-cv-00676, [2012 WL 5932977 \(W.D. Pa. 2012\)](#) (holding plaintiffs failed to sufficiently allege an injury in fact to satisfy burden to establish standing); [Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630 \(E.D. Mich. 2012\)](#) (holding nonprofit organization lacked standing); [Wheaton Coll. v. Sebelius, No. 12-1169, 2012 WL 3637162 \(D.D.C. 2012\)](#) (holding college's claims were not ripe for adjudication); [Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 \(D.D.C. 2012\)](#) (holding suit was not impending nor ripe for adjudication); [Nebraska v. U.S. Dep't of Health & Human Serv., 877 F. Supp. 2d 777 \(D. Neb. 2012\)](#) (holding that plaintiffs lacked standing). But see Roman Catholic Archdiocese of N.Y.C. v. Sebelius, No. 12 Civ. 2542, WL 6042864 (E.D. N.Y. 2012) (holding temporary delay in enforcement under safe harbor provision did not prevent plaintiffs from establishing imminent injuries for purposes of standing).

⁶⁷ Francis Cardinal George, O.M.I., What Are You Going to Give Up This Lent?, Catholic New World (Feb. 26, 2012), <http://www.catholicnewworld.com/cnwonline/2012/0226/cardinal.aspx>.

I conclude by observing that the fight over the HHS mandate is not a fight of our choosing, nor is it a fight that was inevitable. Rather, it has been thrust upon the American people and the Catholic Church by the Obama Administration and the Department of Health and Human Services. And while we did not provoke this fight, neither can we shrink from it. I believe the Administration has seriously underestimated the depth and strength of the American citizen's religious convictions and respect for the Constitution. I likewise believe that the secular forces behind the HHS mandate have miscalculated the influence and persuasive authority of a mobilized and energized Catholic Church. In the end, I believe that the American people will insist that the mandate and its so-called "accommodation" not be allowed to stand. I can assure you that Ave Maria School of Law will continue to engage political leaders and the broader culture to help achieve this most important objective.

Ave Maria Law Review
Copyright (c) 2013 Ave Maria Law Review
Ave Maria Law Review

End of Document