The Catholic Lawyer

Volume 41
Number 2 *Volume 41, Fall 2001, Number 2*

Article 4

Illusion or Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception

Edward T. Mechmann, Esq.

ILLUSION OR PROTECTION? FREE EXERCISE RIGHTS AND LAWS MANDATING INSURANCE COVERAGE OF CONTRACEPTION

EDWARD T. MECHMANN, ESQ.*

INTRODUCTION

In recent years, many state legislatures and the United States Congress, have introduced bills to require employee benefit plans and health insurance providers to include coverage for contraceptives. These bills are a major legislative objective for certain women's organizations and "pro-choice" groups. The bills, however, clearly raise troubling problems for Catholic institutions, unless the bills provide for exemptions that would respect faith-based objections to the covered medications and procedures. If the legislature refuses to include a "conscience clause" in the bill itself, can the Church find relief in court? To put the question more specifically, does either federal or state constitutional law require a "conscience clause" exempting religious employers and insurance providers from legislation mandating coverage of certain procedures or medications in all health insurance plans?

This article will examine this question in the context of several insurance mandate bills considered by the New York State Legislature in 2001 that do not include a conscience clause.

---

* Assistant Director, Family Life+Respect Life Office, Archdiocese of New York. B.A.., Columbia University (1981), J.D., Harvard Law School (1984), M.A. St. Joseph's Seminary (1983). Author of GOD, SOCIETY AND THE HUMAN PERSON: CATHOLIC SOCIAL TEACHING AS PRESENTED IN THE CATECHISM OF THE CATHOLIC CHURCH (Alba House, 2000). The opinions expressed in this article are solely those of the author, and do not represent the offical positions of the Archdiocese.

I will argue that under current jurisprudence a "conscience clause" is not required by the First Amendment to the United States Constitution. Although New York State constitutional law may rely on a more favorable standard, it is not certain that a religious exemption could be obtained. A carefully-drafted federal conscience protection bill is the only sure way to obtain relief.

I. CONTRACEPTIVE MANDATE BILLS

There are a variety of bills that have been introduced and enacted across the United States to require coverage of contraceptives by all health insurance plans that already cover other prescription medications. A bill passed by the New York State Assembly in 2001 is typical:

> Every policy which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices approved by the Food and Drug Administration of the United States government or generic equivalents approved as substitutes by such Food and Drug Administration under the prescription of a health care provider. . . .[1]

It is also common for states that pass such laws to include a conscience clause that provides an exemption for religious organizations. The clause in a bill passed by the New York State Senate is representative:

> Provided, however, if the group or entity, on whose behalf the policy is issued is operated, supervised or controlled by or in connection with a religious

---

[1] A.02002, 2001 Leg. *at* http://assembly.state.ny.us/leg/?bn=A02002&sh=t (last visited Nov. 5, 2001). The following states have enacted contraceptive mandate laws and/or administrative rules related to insurance coverage for contraceptives: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Rhode Island, Texas, Vermont, Virginia, West Virginia, and Wyoming. *See* National Conference of State Legislatures, "Women's Health: Health Insurance for Contraceptives," *available at* http://www.ncsl.org/programs/health/contrace.htm (last updated Oct. 2001). Federal employee benefit plans are also required to provide contraceptive coverage. Treasury and General Government Appropriations Act of 2000, Pub. L. No. 106-58, §635, 113 Stat. 430, 474 (1999).

> organization or denominational group or entity, then nothing in this subsection shall require the policy to cover any diagnosis or treatment that is contrary to the religious tenets of such group or entity. If the insurer or health maintenance organization delivering the policy or issuing the policy for delivery in this state is operated, sponsored or controlled by or in connection with a religious organization or denominational group or entity, then nothing in this subsection shall require the policy to cover any diagnosis or treatment that is contrary to the religious tenets of such insurer or health maintenance organization.[2]

The definition of the exempt organization is a key factor in drafting a conscience clause. The senate bill is fairly broad and would include agencies with a specifically religious purpose, such as parishes, as well as those that pursue partly-secular missions, such as schools, social service agencies, or hospitals that are controlled by a diocese or religious community. There are other states, however, which have defined the exemption in much narrower terms. For example, the contraceptive mandate law in California grants an exemption only to a "religious employer" that satisfies each of four conditions:

> (A) The inculcation of religious values is the purpose of the entity.
>
> (B) The entity primarily employs persons who share the religious tenets of the entity.
>
> (C) The entity serves primarily persons who share the religious tenets of the entity.
>
> (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue

---

[2] S.3, 2001 Leg. *at* http://assembly.state.ny.us/leg/?bn=S00003&sh=t (last visited Nov. 5, 2001). The following states have included some form of conscience clause in their legislation: California, Connecticut, Delaware, Hawaii, Maine, Maryland, Missouri, Nevada, North Carolina, Rhode Island and Texas. *See* National Conference of State Legislatures, *supra* note 1, *available at* http://www.ncsl.org/programs/health/contrace.htm (last updated Oct. 2001). Federal employee benefit plans also contain conscience exemptions. *See* Treasury and Referral Government Appropriations Act § 635.

Code of 1986, as amended.[3]

Clearly the California statute offers an extremely restricted exemption from the contraception mandate. For instance, it would not cover Church organizations that serve the general public and do not engage in religious education, such as Catholic Charities agencies, or Catholic-owned hospitals, and it would not even reach inner-city schools, which admit a majority of non-Catholic students. As a result, Church agencies must monitor legislative developments very carefully to determine the actual impact of the proposed laws and the impact of purported conscience clauses on their actual operations.

II. FEDERAL CONSTITUTIONAL LAW

A. The Standard for Free Exercise Claims

Prior to 1990, it was generally understood that the Free Exercise Clause of the First Amendment required that the government not impose a substantial burden on conduct motivated by religion, unless it can show that there is a compelling government interest and that the law is narrowly tailored to achieve that interest. This rule was established in the case of *Sherbert v. Verner*,[4] and was long considered to be the settled standard for federal Free Exercise claims. This is a very stringent test, at least in theory, and its most prominent application was in *Wisconsin v. Yoder*,[5] where an Amish parent's First Amendment rights were held to have been violated by compulsory education laws.

However, in *Employment Division v. Smith*,[6] the Supreme Court ruled that states are not required by the First Amendment to recognize religious exceptions to laws of general applicability.

---

[3] CAL. INS. CODE § 10123.196(d)(1)(A)–(D) (Deering Supp. 2000). The provision from the Internal Revenue Code only encompasses "churches, their integrated auxiliaries, and conventions or associations of churches. . . . [or] the exclusively religious activities of any religious order." 26 U.S.C. §6033(a)(2)(A)(i), (iii) (1994). A substantially similar conscience clause was contained in an insurance mandate bill, passed by the New York State Senate in the 2002 session. *See* s.625, 2002 Leg. *available at* http://assembly.state.ny.us/leg/?bn=506265 (*last visited* February 26, 2002).

[4] 374 U.S. 398 (1963).

[5] 406 U.S. 205 (1972).

[6] 494 U.S. 872 (1990).

The Court's holding means that religious institutions and individuals cannot automatically rely on the Constitution as a shield against unacceptable laws or regulations that are neutral on their face and that apply to everyone – no matter how much it may burden their religious beliefs. The facts of *Smith* are very important: the law in question worked to impose penalties on the consumption of peyote by Native Americans who believed that this practice was central to their religious faith. While the law may have been formally neutral – treating religious practice no differently from any other activity – it prohibited an act of prayer and worship. If such a core element of religious life does not require an exemption from a general law, then little else may be immune from regulation.

Justice Scalia's majority opinion in *Smith* contains strong language about the liability of religious groups to regulations enacted through the political process. Indeed, the Court seemed unconcerned that unpopular religions may be victimized by burdensome laws enacted in ignorance of or with indifference to their beliefs:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process . . . .It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[7]

Congress attempted to overrule the *Smith* decision by enacting the Religious Freedom Restoration Act in 1993.[8] However, in *City of Boerne v. Flores*,[9] the Supreme Court found the statute unconstitutional (at least as it applied to state laws) and re-affirmed its decision in *Smith*. It must be recognized that

---

[7] *Id.* at 890.

[8] 42 U.S.C. §§ 2000bb – 2000bb–1.

[9] 521 U.S. 507 (1997).

since *Smith*, only three of the current members of the Court have expressed their disagreement with the rule of that case or a desire to re-examine it. The other six Justices have either openly or implicitly accepted *Smith*. It is thus extremely unlikely that the Supreme Court will reinstate the *Sherbert* rule in the near future.

B. Exceptions to the Smith Rule

There is little doubt that the *Smith* rule is extremely unfavorable to any litigant seeking to obtain an exemption from a statute based on religious objections. However, the Supreme Court did recognize several circumstances in which the state would still be required to satisfy the compelling interests test: when a law is passed whose object "is to infringe upon or restrict practices because of their religious motivation,"[10] when another fundamental right, such as free speech, is violated along with religious liberty rights,[11] and when the government permits exceptions in some cases but denies one to a religious objector.[12]

The Supreme Court has given an indication of its approach to applying a *Smith* exception in a case involving a local law that proscribed animal sacrifice.[13] Finding that the law was not neutral and generally applicable, the Court applied the compelling interests test, and found the statute unconstitutional. The basis of this holding was that Santeria religious practices were being specifically targeted for prohibition,[14] and the ban on religious killing of animals was not applied equally to other forms of animal killing.[15]

In light of *Church of Lukumi*, in seeking to determine if one can claim the protection of one of the *Smith* exceptions, a series of questions should be asked about the statute in question, and the way it is being enforced:[16]

---

[10] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993).

[11] Employment Division v. Smith, 494 U.S. 872, 881–82 (1990). There can be no question that this "hybrid" right exception does not apply to the insurance mandate bill, since no other fundamental constitutional rights are implicated. *Id.* at 882.

[12] *See id.* at 883–84.

[13] *Church of Lukumi*, 508 U.S. at 526.

[14] *Id.* at 534–35.

[15] *Id.* at 542–45.

[16] Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1076–83

1. Neutrality

With regard to whether a statute is neutral, the fundamental concern is whether it aims to restrict conduct purely because it is religiously motivated.[17] Three questions should be asked about the law: does the law target religion on its face; even if it does not, is it discriminatory in its object or purpose; and even if there is a discriminatory intent, "[d]oes the law discriminate in its actual operation or effect?"[18]

Under this test, the New York State Assembly insurance mandate bill, which contains no conscience clause, would not qualify for the exception from the *Smith* rule. Unlike the ordinance in *Church of Lukumi*, there is no evidence that Catholic religious practices are being targeted or, that Church organizations are being treated differently from any other faith. Moreover, the legislation in question applies to many other employers and the majority of insurance providers. It is also probably insufficient proof of anti-Catholic animus that the legislation would have a disproportionate impact on Church agencies, because of their unique faith-based objections.[19] By way of comparison, it can be argued that the California law fails the neutrality test by being discriminatory in its effect, since it offers favorable treatment only to those religions whose institutions fit within its narrow definition.

As a result, although some of the bill's supporters may indeed harbor religious bias against Catholics, the most that can plausibly be claimed, based on the public record, is that the Legislature is indifferent to Catholic concerns or that it views them as less compelling than the government interest at stake. That is probably not enough to convince a court that the bill does not fall within the reach of the *Smith* rule. Instead, it seems clear that legal arguments regarding the mandate bills should not focus on alleged anti-religious bias, which creates an excessively high burden of proof on religious objectors, but rather on any inequitable application of the law.[20]

(2000).

[17] *See Church of Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. 878–79).

[18] Kaplan, *supra* note 16, at 1077.

[19] *See, e.g.*, St. Agnes Hosp. v. Riddick, 748 F. Supp. 319, 332–36 (D. Md. 1990).

[20] *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000).

2. General Applicability

As to whether the law is truly generally applicable, the issue is whether the legislation targets the practices of a particular religion for discriminatory treatment "through their design, construction, or enforcement."[21] Two questions should be asked: is the law designed to achieve a general or a specific purpose; and is the law constructed so that in its actual operation it targets only religious conduct or singles out a particular religion.[22]

Again, it is clear that the Assembly's insurance mandate bill would not qualify for the exception to the *Smith* rule. The bill makes clear on its face that it intends to reach all insurance plans and employers. It is thus unlikely that it can be established that the bill was constructed to target only religious objections, or to single out the Catholic Church.

3. Individualized Exceptions

When considering whether a statute falls outside *Smith* because it permits "individualized exemptions," the focus is not just on the terms of the law, but also on its enforcement. In particular, the issue is whether executive discretion is being exercised in a way that is impartial between religious groups, and between religious and secular concerns.[23]

It is clear that if exceptions are granted for secular concerns, then religious interests must be treated equally and cannot be denied comparable treatment.[24] To determine whether the law is being improperly enforced two questions should be asked: is there a provision in the law that permits the exercise of unchecked discretion; and if so, is that discretion being exercised in a discriminatory way.[25]

Obviously, it cannot be certain how the pending assembly

---

[21] Kaplan, *supra* note 16, at 1078 (quoting *Smith*, 494 U.S. at 557 (Scalia, J., concurring)).

[22] *See id.* at 1078–79.

[23] *See id.* at 1081.

[24] *See* Laycock, *supra* note 20, at 3. (reasoning that "the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places in the free exercise of religion"). *See also* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (holding that police department that allowed exemptions for the prohibition of beards for secular reasons but not religious reasons violated the First Amendment).

[25] *See* Kaplan, *supra* note 16, at 1081.

bill would be enforced. On its face, however, it contains neither explicit exceptions nor authorization for administrative discretion in enforcement. In contrast, the California law may be vulnerable to attack under this test, since its conscience clause implicitly creates authority to determine whether a Church agency has the purpose of inculcating religious values, and whether it serves and employs co-religionists "primarily." The latter is such an amorphous term that it could easily be seen as a grant of almost unchecked discretion.

The question of whether a law grants individualized exceptions may depend on how widely the net is cast. For instance, the same section of the New York State Insurance Law that would be amended by the contraceptive bill actually contains many exceptions, including one that is specific to certain religious organizations.[26] However, the lower courts that have considered this exception have focused on the specific law from which a religious exemption is sought, rather than searching through other provisions in the statute.[27]

As a result, it seems likely that the insurance mandate bill will not qualify for the *Smith* exception under this test.

In conclusion, it seems clear that under current jurisprudence, as set forth by the Supreme Court in *Smith*, the Free Exercise Clause of the First Amendment would not require a conscience exception to the New York State Assembly's insurance mandate law.

III. STATE CONSTITUTIONAL LAW

A. The Standard for Free Exercise Claims

Given the inhospitable climate of federal constitutional jurisprudence, it is necessary to examine if Church organizations can obtain relief under the state constitution. A state constitutional argument should not be a mere afterthought to a

---

[26] N.Y. INS. CODE § 3221(e)(9) (McKinney 2000) (relating to eligibility requirements for group or blanket accident and health insurance policies).

[27] *See, e.g.*, *Fraternal Order of Police*, 170 F.3d 359; *but see* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (in considering whether the law was neutral and generally applicable, the Court did not confine its analysis to the challenged ordinances, but looked to other provisions of state and municipal law governing killing of animals).

federal claim, but should be presented as a major point of any challenge to the mandate bills. In fact, one scholar has stated that "it is malpractice not to plead, brief and fully develop your state constitutional free exercise claim."[28]

The right to practice religion is defined in Article I, Section 3 of the New York State Constitution. Section 3 provides, in relevant part, that:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; . . . but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.[29]

Section 3, like most provisions of the State Constitution, has been the subject of very few judicial interpretations. The Court of Appeals has not yet adopted the *Smith* standard for Section 3.[30] In one case, the Appellate Division relied upon the traditional balancing test derived from *Sherbert* as the state constitutional standard.[31] In another, however, the court applied both the *Smith* and *Sherbert* standards, even though it appears that only a federal free exercise claim was made.[32]

The Court of Appeals has maintained that the State Constitution guarantees a higher level of individual rights than the federal constitution. For instance, the court has said that "on

---

[28] Laycock, *supra* note 20, at 43.

[29] N.Y. CONST. art. 1, § 3.

[30] *See* Miller v. McMahon, 684 N.Y.S.2d 368, 370 (App. Div. 4th Dep't 1998) ("The Court of Appeals has not definitively stated whether the scope of [Section 3] is coextensive with the Free Exercise Clause of the First Amendment. . . nor has it decided whether the analytical approach adopted by the United States Supreme Court in. . . *Smith* should be applied."). *See also* Grumet v. Pataki, 720 N.E.2d 66 (N.Y 1999) (which did not even cite *Smith*, although the federal Free Exercise Clause was an issue); New York State Employment Relations Bd. v. Christ The King Reg'l High Sch., 682 N.E.2d 960 (NY 1997) (applying the *Smith* standard, but only as a matter of federal law, since a state constitutional claim was not raised).

[31] Rourke v. New York State Dep't of Corr. Servs., 615 N.Y.S.2d 470, 472–73 (App. Div. 3d Dep't 1994) (declaring the hair length policy of the Dep't of Corrections violated petitioner's right to free exercise of religion).

[32] Lightman v. Flaum, 717 N.Y.S.2d 617, 626 (App. Div. 2d Dep't 2000) (explaining that under either the *Smith* or *Sherbert* standard, the relevant New York statute is consitituional).

innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution."[33] In addition, it may be argued that the wording of the constitutional provision itself – a broad statement of the free exercise right, limited only by authority to regulate practices that are licentious or that affect peace or safety – implies that the appropriate standard is the *Sherbert* balancing test.[34]

It is also worth noting that Section 3 is cast specifically in terms similar to the Equal Protection Clause, in that it guarantees that there can be no "discrimination or preference" in the free exercise of religion. In fact, the analysis in some of the old decisions on Section 3 have centered precisely on disparate treatment of religious denominations.[35] New York courts have long adhered to the notion that the law may not show preferences for one religion over another, and have not sought to intervene in internal disputes regarding the validity of church doctrines.[36] Indeed, the courts have been particularly solicitous in protecting the integrity of smaller denominations that are unpopular.[37] This may favor the adoption of the *Smith* test, which emphasizes the examination of the neutrality and general applicability of a law and would thus focus precisely on the question of disparate treatment.

It is possible, but by no means certain, that when the issue is squarely presented, the Court of Appeals may choose to follow the more protective *Sherbert* rule, rather than adopting the

---

[33] Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1173 (N.Y. 1978) (interpreting the State Constitution's due process clause).

[34] *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1117–18 (1990) (discussing a similar provision of the colonial-era Georgia constitution).

[35] *See e.g.,* O'Neill v. Hubbard, 40 N.Y.S.2d 202 (Sup. Ct. Kings Co. 1943); *In re* Saunders, 37 N.Y.S.2d 341, 343 (Sup. Ct. N.Y. Co. 1942) (invalidating provisions of the Domestic Relations Law permitting marriages to be performed only by ministers of certain denominations).

[36] *See e.g.,* People v. Steele, 333 N.Y.S.2d 959, 960, 963 (Crim. Ct. N.Y. Co. 1972) (dismissing complaint and refusing to interpret church doctrine where nuns and a Catholic lay teacher were charged with distorting a religious service because they were lying in a central aisle during high mass).

[37] *See e.g., Saunders*, 37 N.Y.S.2d at 343 (invalidating statute which required that ministers of certain religions must perform marriages as a violation of freedom of religion).

Smith standard. Assuming that the courts were to apply a standard similar to the traditional *Sherbert* test, it would involve a two-part analysis:

> (1) whether the party claiming the free exercise right has established a sincerely held religious belief that is burdened by the statutory requirement; and (2) whether the State has demonstrated that "the requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal."[38]

Accordingly, the question is whether the goal of the contraceptive mandate is a compelling governmental purpose, and whether that purpose is being "pursued by the least restrictive means."[39] The burden then rests on the state to prove with "particularity how its. . .strong interest. . .would be adversely affected by granting an exemption. . . ."[40]

Although the *Sherbert* test appears to be very respectful of religious liberty in theory, it does not guarantee victory to a religious objector. For instance, after the *Yoder* decision in 1972, the Supreme Court rejected every claim that sought an exemption from burdensome laws or policies based on the Free Exercise Clause, except for those involving unemployment compensation, which were governed by clear precedent.[41] Indeed, one study has found that in the cases decided under the short-lived Religious Freedom Restoration Act, which essentially codified the *Sherbert* test, the courts ruled in favor of fewer than one-third of the religious objectors; this was only a slightly higher success rate than cases decided under the *Smith* rule.[42] Although the New York Court of Appeals may be more open to the *Sherbert* test, one should not assume that a Free Exercise argument offers

---

[38] Miller v. McMahon, 684 N.Y.S.2d 368, 371 (App. Div. 4th Dep't 1998) (quoting Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426 (N.Y. 1989)).

[39] *Ware*, 550 N.E.2d at 429.

[40] *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 236 (1972)).

[41] *See* McConnell, *supra* note 34, at 1109–10 (discussing the stability of the free exercise doctrine until the theory of religious discrimination in employment arose).

[42] *See* Craig Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS 149, 152 (1997).

automatic relief.[43]

B. Burden on Sincerely Held Religious Beliefs

Church organizations should not take for granted that the courts will find their religious beliefs to be burdened by insurance mandates.[44] Nor can they presume that the courts will understand the nature or substance of their beliefs, or the theology that underlies them, unless they engage in forthright and strong advocacy to explain their faith.

Therefore, the Church should not place too much reliance on the Ethical and Religious Directives or on Canon Law, which may strike a non-Catholic as having little more religious significance than self-serving corporate by-laws. Instead, the Church's teaching must be presented in a forceful way that ties its position on contraception treatments directly into fundamental articles of faith on the sacrament of marriage, the nature of the human person, the meaning of human sexuality, the dignity of human life, the nature of the church, and ultimately the Fifth and Sixth Commandments. The Church should not hesitate to cite definitive pronouncements, such as *Gaudium et spes,*[45] *Humanae Vitae,*[46] *Donum Vitae,*[47] *and*

---

[43] *Compare Ware*, 550 N.E.2d at 424 (holding that exposure to an AIDS curriculum could destroy the foundation of certain religious groups' faith), *with* Soc'y for Ethical Culture v. Spatt, 415 N.E.2d 922, 926 (N.Y. 1980) ("Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation [i.e., a landmark designation] when it acts in purely secular matters.").

[44] *Compare* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1996) (holding that California's imposition of sales and use tax liability on sales of religious materials does not contravene the Religion Clauses of the First Amendment) *and* Hernandez v. Comm'r, 490 U.S. 680, 694 (1989) (ruling that payments made to the Church's branch churches for auditing and training services are not deductible as charitable contributions *with* St. Agnes Hosp. v. Riddick 784 F. Supp. 319, 332 (D. Md. 1990) (asserting that a hospital accreditation association was not required to exempt a Roman Catholic hospital from its requirement that all obstetrics gynecology residency programs provide clinical training in family planning).

[45] SECOND VATICAN ECUMENICAL COUNCIL PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *GAUDIUM ET SPES* (1965) (examining the human search for meaning: our origins, our goals in life, the presence of sin and suffering, the inevitability of death, and promoting the dignity and holiness of matrimony and family life).

[46] PAUL VI, ENCYCLICAL LETTER *HUMANE VITAE* (1968) (regulating contracaption and birth as an act of conjugal love in marriage).

Evangelium Vitae.[48] The court must be convinced that it is not dealing with mere technical disciplinary rules, but instead with integral parts of core Catholic doctrine that are given by divine revelation.

This overtly theological argument is the bedrock of the Free Exercise claim. The courts will not respect the need for an exemption unless they appreciate the significance of the burden these laws impose on Catholic beliefs. In addition, the Church should emphasize the personal, rather than merely the institutional, impact of these laws. It should be stressed that the failure to grant conscience protection means that thousands of Catholics will be forced to pay for medicines and procedures they find morally repugnant, and that priests and bishops will be forced by state law to directly support conduct that they would otherwise seek to oppose or correct in their preaching, teaching and sacramental activity (e.g., in the Sacrament of Reconciliation).

This argument cannot be presented in conclusory or legalistic terms. Instead, it must be crafted by moral and dogmatic theologians, with a goal of catechizing the court about fundamental elements of Catholic belief. Unless the Church demonstrates the true significance of contraception and abortion to the Catholic faith, it will never be able to convince the courts of the injustice of denying it of freedom from these laws.

The importance of close attention to the nature of the burden on Catholic religious belief and practice cannot be underestimated. Under the *Sherbert* test, the courts must inquire into the sincerity of a person's religious beliefs and the centrality of the conduct in question to those beliefs, in order to assess whether the claimed burden on free exercise was substantial.[49] Although the courts were clearly uncomfortable with this role, and scholars recognized the difficulties inherent in it, the courts still conducted inquiries into the legitimacy and

---

[47] Congregation for the Doctrine of Faith, *Donum Vitae, in* GIFT OF LIFE 1 (Edmund D. Pelligrino et al., ed. 1990) (calling for the respect of human life from the moment of conception in the face of technological intervention processes).

[48] JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* (1995) (discussing the inherent value and sanctity of all human life).

[49] *See e.g.*, Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963).

sincerity of religious belief.[50] As a result, it is vital to realize that in conducting this analysis, courts have on occasion taken a very narrow view of the rights of religious organizations, especially those engaged in commercial activity.

In *Jimmy Swaggart Ministries v. Board of Equalization of California*, the Supreme Court unanimously held that a state's imposition of taxes on a religious organization's sale of religious materials did not violate the First Amendment.[51] While it may seem unexceptional to subject commercial activity to generally-applicable taxes, the Court's reasoning is very troubling: it stated that burdens on religion are "not constitutionally significant" unless they substantially pressure a believer to violate specific doctrinal tenets of their faith.[52] To support this principle, the Court cited earlier decisions that limited inquiry under the Free Exercise Clause to circumstances where a substantial burden is placed "on the observation of a central religious belief or practice."[53]

In particular, the *Swaggart* Court cited *Hernandez v. Comm'r of Internal Revenue,*[54] which held that payments made to the Church of Scientology's branch churches for auditing and training services are not deductible charitable contributions. Interestingly, in *Hernandez* the Court asserted that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[55] It did just that, however, by finding that "[n]either the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically."[56]

Essentially, these cases create a very narrow range of protected religious activities. Unless a law puts direct pressure on a person to commit a sin or recant a defined dogma that is at the heart of their faith – as the courts see it – the Free Exercise

---

[50] *See e.g.* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310–11 (1991).

[51] *Swaggart*, 493 U.S. at 392.

[52] *Id.* at 391–92.

[53] *Id.* at 384–85 (citing Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989)).

[54] *Hernandez*, 490 U.S. at 699.

[55] *Id.*

[56] *Id.*

Clause offers them no protection.[57] Given the attitude of the courts in *Swaggart* and *Hernandez*, it is far from guaranteed that the courts will find the Church's religious beliefs to be burdened by insurance mandate laws. Indeed, unless the point is presented persuasively, the courts may find that the bills are not a burden on Catholic beliefs at all because there is no explicit ban on insurance coverage for contraception in the central tenets of the Catholic faith.

C. Compelling State Interest

Two potentially powerful arguments will likely be made to establish compelling governmental purposes with regard to the contraceptive mandate: the state's interest in preventing gender discrimination, and the significant interest in family planning in order to minimize risk of unplanned pregnancies to public safety and welfare.

It is certain that the state can assert a compelling interest in reducing unplanned pregnancies. Indeed, there is an abundance of statutory and budgetary schemes to advance this goal, such as the sizeable budgetary expenditures on the federal and state level for family planning programs, as well as the much smaller abstinence education programs in which Church agencies participate.

There is also no doubt that the state has a compelling interest in eliminating unjust discrimination based on gender.[58] A recent ruling by the Equal Employment Opportunity Commission ("EEOC") illustrates the potential danger of the argument that contraceptive mandates are in furtherance of this interest.[59] In response to a complaint filed by two female employees, the EEOC found that the denial of contraceptive coverage in an employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.[60]

---

[57] *See* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992).

[58] *See e.g.*, N.Y. EXEC. §§ 296(1)–(13) (West 2001).

[59] EEOC Decision, *available at* http://www/eeoc.gov/docs/decision_contraception.html (last visited December 14, 2000) (finding that exclusion of prescription contraceptives from a health insurance plan violated Title VII).

[60] *See id.* (relying on 42 U.S.C. §4002e(k)).

This ruling is not binding on non-parties and is distinguishable on its facts from the case of Church institutions: it did not involve a religious employer or faith-based objections, and the secular employer provided coverage that is comparable to contraception, such as sterilization. However, the ruling is still very significant. It suggests that the EEOC may rule the same way in similar cases. It is also undoubtedly the forerunner of litigation that would rely on a gender discrimination theory to compel insurance coverage for contraception.

In its ruling, the EEOC adopted almost verbatim the arguments presented in an article by a law professor whose work was supported by the Center for Reproductive Law and Policy, a prominent organization dedicated to "reproductive rights."[61] This article argues that the states are obligated to enforce Title VII by prohibiting health insurance plans from discriminating against women in denying contraceptive coverage.[62] As a result, in defending the contraception mandate, the state may argue that it is fulfilling its duty to ensure that state law complies with Title VII and the Pregnancy Discrimination Act.

The response to the Title VII argument is to explain that the Church's position regarding the denial of insurance coverage for contraception is not an act of gender discrimination; rather, it is based on the Church's theology of marriage and sexuality, and is representative of other morality-based employment policies that are applied even-handedly to men and women. For example, there have been a number of instances in which Church agencies have discharged employees for flouting Catholic moral doctrine (i.e.., divorced teachers who remarry outside of the Church). The Church does not provide employee benefits in situations that offend its moral doctrine, regardless of whether it is being done by male or female employees or their spouses (e.g., Church agencies provide no coverage for male or female sterilizations or for cohabiting couples or same-sex couples, and there is no coverage for abortion). These policies have nothing to do with sex discrimination, but everything to do with maintaining the Church's moral integrity.

The courts have held that when religious organizations

---

[61] *See* Silvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998).

[62] *Id.* at 396.

enforce their moral doctrine in an even-handed way, they do not violate Title VII. For instance, the Sixth Circuit has held that if a religious institution's purported discrimination is based on a policy against non-marital sexual activity, which emanates from its religious and moral doctrine, and if that policy is applied equally to its male and female employees, then there is no violation of Title VII.[63]

Furthermore, at least one court has held that the Pregnancy Discrimination Act does not prohibit the denial of employee benefits for pre-pregnancy conditions, such as infertility.[64] In that case, a hospital's exclusion of infertility treatment from its employee medical benefits plan was found not to be a sex-based classification because the exclusion applied equally to all individuals, male and female. The court stated that "the plain language of the PDA does not suggest that 'related medical conditions' should be extended to apply outside the context of 'pregnancy' and 'childbirth.' Pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."[65] Clearly, this reasoning would also apply to contraceptives.

It is also important to note that the court in *Krauel* specifically distinguished *International Union v. Johnson Controls, Inc.*,[66] which held that a policy of prohibiting women of child-bearing age from working in positions where they could be exposed to chemicals that were potentially damaging to ova and/or fetuses violated Title VII because it "explicitly classifies on the basis of potential for pregnancy."[67]

Although one can expect a strong argument that the denial of contraceptive coverage violates Title VII, Church organizations have a reasonable argument in response, albeit one that is not guaranteed to prevail.

---

[63] *See* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414–15 (6th Cir. 1996); *see also* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999).

[64] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996).

[65] *Id.* at 679.

[66] 499 U.S. 187 (1991).

[67] *Id.* at 199, *see also* Michael Hawkins, *Liberties in Conflict: The Free Exercise Clause, Title VII, and Morality-Based Personnel Decisions in Religious Schools*, 27 J. L. & EDUC. 335 (1998).

D. Substantial Impairment of the Compelling State Interest

Assuming a court were to find a compelling state interest in support of insurance mandates, the *Sherbert* test requires a determination if this interest would override a religious person's Free Exercise rights.[68] The court must specifically evaluate whether granting a religious exemption would substantially impede the governmental goal.

In considering this part of the *Sherbert* test, it must be recognized that religious organizations which engage in commercial activity are highly vulnerable to government regulation. *St. Agnes Hospital* demonstrates this point by presenting analogous facts to the present situation, that resulted in a very unfavorable decision.[69] A Catholic hospital brought suit to retain accreditation of its residency program, which had been withdrawn because of the hospital's refusal to perform and provide clinical training in abortion, sterilization and contraception. The hospital claimed that its free exercise rights had been violated by the accreditation decision,[70] and it relied heavily on the Ethical and Religious Directives as statements of the institution's Catholic beliefs.[71] Applying the *Sherbert* standard, the court agreed that the religious beliefs of the hospital were being burdened.[72] However, the court held that the Free Exercise Clause did not require an exception because there was a compelling government interest in ensuring satisfactory education of physicians, including family planning training for obstetricians/gynecologists. Furthermore, granting an accommodation to the hospital would "unduly interfere with the accomplishment the governmental interest."[73]

One of the most significant factors in the court's analysis was that in order to accomplish the objective of producing qualified physicians who could practice medicine in any state, the training program had to carried out on a uniform, nationwide basis.[74] The court also found it to be "of critical importance" that the hospital

---

[68] *See* Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 429–30 (N.Y. 1989) (determining whether the State's interest in AIDS education was so compelling that it would override plaintiff's free exercise rights).

[69] St. Agnes Hosp. v. Riddick, 748 F. Supp. 319 (D. Md. 1990).

[70] *Id.* at 320.

[71] *Id.* at 322-23.

[72] *Id.* at 327-330.

[73] *Id.* at 331 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

[74] *Id.*

was training physicians of all faiths, and not just Catholics.[75] The court specifically relied on the Supreme Court's decision in *United States v. Lee*[76], which rested on the notion of uniform national standards and the impropriety of imposing religious beliefs on employees who do not follow them.[77] Strikingly, the court stated that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be super-imposed on the statutory schemes which are binding on others in that activity."[78]

The importance of this point cannot be underestimated because many Church agencies are engaged in activities that are arguably commercial, and they are licensed and regulated by the state in a variety of ways. Catholic hospitals, nursing homes, charities agencies and schools are all already subject to state licensing and oversight. Even parishes are subject to general laws governing employment.

The court's analysis in *St. Agnes Hospital* does offer some hope. Certainly, a reasonable argument can be made that a religious exemption from the insurance mandates would not hamper the legislative goals because the exception would only encompass a small percentage of New York employees. Moreover, the Church can argue that the insurance mandates do not necessarily depend on national or even statewide uniformity, and thus a religious exemption would not be a barrier to their success. In addition, the availability of other less-restrictive approaches (e.g., mandating referrals to other insurance plans to obtain the coverage) may also bolster the argument that the state's objectives would not be impeded.

It must also be recognized, however, that the outlook is much less hopeful if the New York courts follow the reasoning of *Lee* and *St. Agnes Hospital* regarding the imposition of Catholic beliefs on non-Catholic employees and insurance holders by a Church agency engaged in commercial activity. Since this part of the *Sherbert* test is necessarily a fact-based analysis, a close analysis of the terms of the statute must be done, along with any

---

[75] *Id.* at 330.

[76] 455 U.S. 252 (1982).

[77] *St. Agnes Hosp.* 748 F. Supp. at 330 (citing *Lee*, 455 U.S. at 261).

[78] *Id.* at 331 (quoting *Lee*, 455 U.S. at 261).

implementing regulations, and the specific effects on the actual work of Church agencies must be understood.

E. Equal Treatment of Religions

As noted above, the New York State constitutional provision is written in terms reminiscent of the federal Equal Protection Clause, since it prescribes that there be no "discrimination or preference" in the free exercise of religion.[79] As a result, in seeking a religious exemption from a statute, it would be relevant to consider whether it grants preferential treatment to some faiths over others. In this case, the answer is quite clear – the Assembly bill does not provide for any exceptions, much less exceptions for certain religions and not for others. However, if a conscience clause modeled after the California law were included in the bill, there may be a basis for attack because that provision seems to favor some religious organizations, namely those that fit within the narrow statutory definition.

The effectiveness of this equal protection argument may depend on persuading the court to look beyond the particular statute in question for statutory grants of special treatment. For instance, one provision of New York law grants a religious exemption to school children whose parents object to their being immunized against certain illnesses.[80] Since that statute directly affects public health, which is also at issue in regard to the contraception bills, an argument can be offered that the state is showing preferential treatment to those faiths that disagree with one form of medical treatment, while discriminating against those that oppose contraception.

However, the few New York cases that have applied an equal protection analysis under Section 3 have focused on the specific statutory provision in question. Additionally, they have not shown an inclination to search through the law books for other instances of preferential treatment.[81] Consequently, it is not certain that exceptions found in other areas of the law will help Church agencies escape from the contraceptive bills.

---

[79] N.Y. CONST. art. I, § 3.

[80] N.Y. PUB. HEALTH § 2164(9) (2001) (exempting from the immunization requirement those "children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required. . .").

[81] *See In re* Saunders, 37 N.Y.S.2d 341, 343 (Sup. Ct. N.Y. Co. 1942).

In short, even if the New York courts apply the more favorable *Sherbert* rule to Free Exercise cases, the prospects for obtaining a religious exemption under the New York State Constitution are very unclear.

IV. ALTERNATIVE WAYS TO OBTAIN PROTECTION

Efforts to obtain relief through state law, for instance through individual conscience exceptions to insurance mandate laws or a state Religious Freedom Restoration Act, might not provide a sufficient shield against a gender discrimination claim under Title VII and the Pregnancy Discrimination Act.[82] In any event, a state RFRA modeled on the federal bill would merely codify the *Sherbert* test, which, as discussed above, does not guarantee that a religious organization will be able to obtain an exception from the insurance mandate bill.

The most effective way to obtain protection for Church employers would be to seek federal legislation in the form of an amendment to ERISA,[83] which protects employee benefit plans from "the threat of conflicting and inconsistent State and local regulation".[84] A conscience clause amendment to ERISA would thus bar state governments from imposing morally-offensive mandates on employee benefit plans.

This would, however, still leave insurance providers vulnerable to state regulation. In any attempt to provide conscience protection for Church-owned insurance plans, it should be recalled that *City of Boerne* precludes Congress from overruling the *Smith* standard by legislation. Therefore, any legislation granting conscience protection to insurance plans must be based on specific authority entrusted to Congress in the Constitution.[85]

---

[82] *See* Law, *supra* note 61, at 399–400. *Compare* Bob Jones University v. United States, 461 U.S. 574, 604 (1982) (asserting that a compelling government interest in eradicating racial discrimination overrides school's religion-based objection to interracial dating); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (holding that a strong compelling state interest in preventing gender discrimination justifies restrictions on freedom of association).

[83] 29 U.S.C. §§1001–1461.

[84] Shaw v. Delta Airlines, 463 U.S. 85, 98-99 (1983) (noting that ERISA pre-empted state law requiring the provision of pregnancy benefits).

[85] *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 (2000) (relying on the Spending and Commerce

CONCLUSION

Since the Supreme Court has interpreted the Free Exercise Clause of the federal First Amendment very narrowly, a religious objection will not ordinarily justify an exemption from a valid, neutral law of general applicability. Even assuming that New York State courts would apply a broader standard under the state constitution, requiring proof of a compelling government interest that is being pursued in the least restrictive way, there is no guarantee that litigation to obtain a religious exemption will be successful. As a result, the Church may be hard pressed to find a safe harbor for its religious beliefs regarding the immorality of contraception, and may be faced with the unpalatable choice of conforming to the values of society or finding other avenues to maintain its integrity.

Clauses).