A Retrospective on Public Policy Threats to Religious Liberty in the Workplace

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Catholic employers and employees have been under increasing attack in the last fifty years by a growing number of public policy encroachments in the workplace that are in direct conflict with their religious convictions. In some instances, these threats have been successfully parried. Others remain a source of serious conflict. This article will summarize highlights of the last fifty years of public policy and jurisprudence as they relate to the ability of Catholic institutions to practice and enforce non-negotiable Catholic moral doctrines.

Conflict between church and state over religious liberty is a perennial one. Various governments have attempted to accord religious liberty expressly through public policy. For example in 1215, King John stipulated in the Magna Carta that the English Church would have religious liberty. "First, that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired" (Magna Carta 1215). Since the dawn of its existence, the United States has been a haven for religious liberty. Religious freedom is accorded protection under the Constitution. Specifically, the First Amendment states, "Congress shall make no law respecting *an establishment* of religion, or prohibiting the *free exercise* thereof." The Establishment clause contained in the first part of the Amendment prohibits the government from establishing an official religion, favoring one religion over another, or favoring religion over non-religion or vice versa. Furthermore the Free Exercise Clause, according to standing constitutional interpretations, prohibits the government from interfering with the right to believe or practice any religion, or no religion.

The Free Exercise Clause has been interpreted over the years to compel exemptions from some statutory requirements because of religious or moral objections. Catholics and other people of faith holding traditional values have therefore been able to secure exemptions from some public policies that conflict with their religious convictions. Nonetheless, as society has become more pluralistic and secular in the United States, religious or moral exemptions have come into question. Increasing public policy

 The Catholic Social Science Review 17 (2012): 241–257

encroachments on religious exemptions pose a serious threat to continued religious liberty. This article will summarize highlights of the last fifty years of public policy and jurisprudence as they relate to the ability of Catholic institutions to practice and enforce non-negotiable Catholic moral doctrines.

CHURCH TEACHING ON ABORTION AND CONTRACEPTION

No public policy threats have resonated so strongly with Catholic employers and employees as those dealing with abortion and contraception. In this arena, policy has often come into direct conflict with Catholic doctrine. The Catholic Church teaches that fecundity is an end of marriage and that couples must remain open to the transmission of life (*Catechism of the Catholic Church* 1994: para. 2366). Pope Paul VI underscored this teaching in *Humane Vitae* (Paul VI 1968: nos. 11, 14).[1] Thus, the Church holds that the use of contraception is intrinsically evil (*Catechism of the Catholic Church* 1994: para. 2370). The Church has also consistently condemned abortion as a grave sin. "Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life"(*Catechism of the Catholic Church* 1994: para. 2272).

Paul VI's successors have consistently confirmed the teachings of *Humane Vitae*. "Contraception . . . is always a moral disorder since objectively and intrinsically (independently of subjective intentions, motives, and circumstances) it contradicts the innate language that expresses the total reciprocal self-giving of husband and wife" (*L'Osservatore Romano* 1989: 7). On the fortieth anniversary of *Humane Vitae*, Benedict XVI reconfirmed the convictions of his predecessors by stating, "The transmission of life is inscribed in nature and its laws stand as an unwritten norm to which all must refer. Any attempt to turn one's gaze away from this principle is in itself barren and does not produce a future" (Benedict XVI 2008). While acknowledging widespread dissent from Church teaching on contraception, Benedict emphasized that "The basic lines of *Humanae Vitae* are still correct. Finding ways to enable people to live the teaching, on the other hand, is a further question. . . . We are sinners. But we should not take the failure to live up to this high moral standard as an authoritative objection to the truth. . . . By the same token, the results of surveys about what people do or how they live is not in and of itself the measure of what is true and right" (Seewald and Pope Benedict XVI 2010: 146–47).

Many individual Catholics, including prominent politicians and government officials, publicly reject the Church's teaching on contraception (Jones and Dreweke 2011: 4). In addition to facing internal dissent, the Catholic Church has found itself trying to countervail public policy encroachments that conflict with the faith. Sometimes the Church has been successful and sometimes not.

PUBLIC POLICY THREATS AND CONSCIENCE CLAUSES

Religious exemptions are found in many federal and state statutes or regulations and are manifested as conscience clauses. Conscience clauses are exemptions in statutes that grant certain employers or employees the legal right to refuse to perform work or provide services which violate their religious or moral beliefs. These exemptions are most commonly seen in the health care field where they protect the religious liberty of doctors, nurses, and, to a much lesser degree, pharmacists.

Conscience clauses first arose in response to the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), which legalized abortion and struck down most state law restrictions on the right to an abortion. *Roe* posed an immediate public policy threat to religious liberty for Catholic entities. Faced with an outcry from the Catholic community and others, Congress quickly passed legislation providing a right of refusal for health care workers with conscientious objections to abortion: the Church Amendment (42 U.S.C. 300a-7). Sponsored by Sen. Frank Church of Idaho, the bill represents the first conscience clause related to abortion. The Church Amendment states that public officials may not require health care facilities receiving federal funds to provide or participate in abortions or sterilization procedures if such actions are contrary to the employee or health care institution's religious beliefs or moral convictions. The law also expressly prohibits discrimination against doctors or other health care personnel who refuse to perform abortions or sterilizations as a matter of conscience. In the aftermath of the Church Amendment, most states passed similar legislation.

Conscience clause legislation remained relatively dormant for the next twenty years. In 1996, Congress enacted section 245 of the Public Health Services Act (42 U.S.C. §300a-7(b)), in which federal, state, and local governments were prohibited from discriminating against health care entities that refused to undergo abortion training, provide such training, perform abortions, or provide referrals for such training or abortions.

As a strong right-to-life advocate, President George W. Bush actively promoted the conscience rights of health-care workers. He signed into law the Weldon Amendment, which was an amendment to the Consolidated

Appropriation Act of 2005 (Pub. L. No. 110-161, §508(d)). The Weldon Amendment prohibits federal, state, or local agencies from requiring a health-care entity or individual health-care provider to provide, counsel, pay for, provide coverage of, or provide referrals for abortions. The definition of health-care entity includes an individual physician or other health-care professional, hospital, health-maintenance organization and health-insurance plan.

In the final days of his administration in 2008, President Bush issued a rule giving federally funded health-care providers the right to decline to participate in health services to which they object as a matter of conscience, such as providing emergency contraceptives or performing in-vitro fertilization (U.S. Department of Health and Human Services 2008). On February 18, 2011, President Barack Obama rescinded most of the Bush administration's conscience regulation. "The new rule leaves intact only long-standing 'conscience' protections for doctors and nurses who do not want to perform abortions or sterilizations. It also retains the process for allowing health workers whose rights are violated to file complaints" (Stein 2011).

Pharmacists and Conscientious Objections

Another threat to religious liberty in the health-care field has arisen in regard to pharmacists who refuse for moral reasons to dispense emergency contraception, colloquially known as the "morning-after pill." The latter prevents pregnancy if taken within seventy-two hours of unprotected sex. The Catholic Church condemns the use of emergency contraception since it can act as an abortifacent by preventing implantation of the embryo to the wall of the uterus (Congregation for the Doctrine of the Faith 2008). The issue became a serious moral concern for Catholic pharmacists in particular when the Food and Drug Administration (FDA) approved two forms of emergency contraception: Previn in 1998 and Plan B in 1999. In 2006, The FDA approved over-the-counter access for Plan B for women who are at least eighteen years old (U.S. Food and Drug Administration 2006).

Unlike widespread conscience protection for doctors and nurses opposed to performing abortions, pharmacists have little legal protection for refusing to dispense. After the FDA approval, pharmacists refusing to dispense emergency contraception on moral grounds faced discharge, discipline, and confrontations with state licensing boards (Duvall, 2006). Four states (Arkansas, Georgia, Mississippi, and South Dakota) passed statutes that expressly permit a pharmacist to refuse to dispense emergency contraception on moral grounds. However, the majority of states offer no such protection (National Conference of State Legislatures 2011b).

Pharmacists have little effective protection under the anti-discrimination laws for conscientious objection. While an employer has a legal duty to accommodate the religious beliefs of their employees under Title VII of the Civil Rights Act of 1964, that duty is a de minimis (limited) one, which requires a reasonable accommodation that does not constitute more than a minimal expense or inconvenience. If a pharmacy normally has only one pharmacist on duty, it could readily demonstrate undue hardship. Having to hire an additional pharmacist to be on site with the conscientious objector pharmacist would entail an unreasonable financial expense. More perniciously, a number of states have passed duty-to-fill laws regarding emergency contraception, which expressly prohibit pharmacists from refusing to dispense such prescriptions. Illinois, California, and New Jersey have such laws (National Conference of State Legislatures 2011b).

PUBLIC POLICY THREATS AND MANDATES FOR CONTRACEPTIVE COVERAGE IN INSURANCE PLANS

Today, over 38 million American women, including many Catholics, use some form of contraceptive, with eleven million of those using the pill (Guttmacher Institute 2010). Not all health insurance plans cover prescription contraceptives, and many women fund their contraceptives directly out of pocket. Public policy mandates for coverage of prescription contraceptives under employer-sponsored health plans derive from statutes, administrative regulations and, increasingly, case law. Each of these is discussed below.

Pregnancy Discrimination Act

In 1978 Congress amended Title VII of the Civil Rights Act of 1964 with the passage of the Pregnancy Discrimination Act (PDA), P.L. 95-555, 92 Stat. 2076. The PDA banned discrimination on the basis of sex "because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy" (*Pregnancy Discrimination Act*, 1978). Passage of the PDA immediately led to complaints among women's rights groups that contraceptives should be covered under health insurance plans. Despite the controversy that ensued, many insurance plans continued not to cover contraceptives. It wasn't until the FDA approved Viagra in 1998 that the controversy took on new life (U.S. Food and Drug Administration, 2011). The ensuing widespread coverage of Viagra under employer-sponsored health plans sparked concerns over gender equity in insurance coverage and numerous complaints were filed with the Equal Employment Opportunity Commission (EEOC).

In a 2000 case involving a secular employer, the EEOC ruled that exclusion of prescription contraceptives from employer-sponsored health care plans constituted unlawful discrimination in violation of Title VII and the PDA. The Commission noted that

> Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices. (U.S. Equal Employment Opportunity Commission 2000)

The Commission went on to note that Congress invoked statutory language in the PDA to specifically exempt employers from the obligation to provide health benefits for abortion. "Had Congress meant to limit the applicability of the PDA to contraception, therefore, it would have enacted a statutory exemption similar to the abortion exemption. Such an exemption, of course, does not exist for contraceptives" (U.S. Equal Employment Opportunity Commission 2000). The EEOC's position on prescription coverage of contraceptives remains unto this day.

In another case involving a secular employer less than a year after the EEOC's decision, a federal district court ruled in *Erickson v. Bartell Drug* 141 F. Supp. 2d 1266 (2001) that Title VII and the PDA do not require employers to offer a prescription drug plan. However if they do, the plan must provide equally comprehensive coverage for both sexes. An employer who selectively excludes contraceptives from its otherwise comprehensive prescription drug plan discriminates on the basis of sex (*Erickson v. Bartell Drug Co.* 2001). The *Erickson* decision garnered considerable publicity. Other discrimination suits quickly followed in the federal courts over coverage of prescription contraceptives. This increase in litigation was the impetus behind state mandates to cover contraceptives, which are discussed later in this article (Lee 2011: 195).

Patient Protection and Affordable Care Act

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (PPACA), P.L. 111-148, which greatly expanded health insurance coverage to both employees covered under

employer insurance plans and to some 30 million uninsured Americans (U.S. Department of Health and Human Services, 2011). The U.S. Department of Health and Human Services (HHS) was charged with developing regulations to implement the PPACA. On August 1, 2011, HHS Secretary Kathleen Sebelius, who is Catholic, announced interim final regulations that required new health insurance plans to cover certain women's preventative services, including, among others, contraception, without charging a co-payment, co-insurance, or a deductible. The contraceptive coverage would also encompass provision of the morning-after pill.

On August 3, 2011, HHS published in the *Federal Register* the amendments to the interim final regulations. Included in the guidelines was an exemption for religious employers for contraceptive coverage. HHS noted that this exemption was consistent with similar exemptions under state laws mandating contraceptive coverage. The exemption states that a religious employer is one that: (1) "Has the inculcation of religious values as its purpose; (2) Primarily employs persons who share its religious tenets; (3) Primarily serves persons who share its religious tenets; and (4) Is a non-profit organization" (*Federal Register* 2011: 46623).

The religious exemption clause represented an extremely restrictive interpretation of a "religious employer" and provoked an outcry from the Catholic community. In response to this outcry, President Obama in February 2012 modified the contraceptive coverage mandate to require insurance companies to absorb the cost of providing free contraceptive services rather than requiring religious employers to pay for them through their health care premiums. This did little to ameliorate concerns among Catholic institutions, whose leaders argued that their insurance premiums would still be indirectly paying for objectionable services.

State Mandates on Contraceptive Coverage

As noted above, interest in coverage of prescriptive contraceptives took on new life in the mid-1990s with the onslaught of male potency drugs like Viagra and the increasing number of anti-discrimination law suits demanding gender equity in prescription coverage. States began responding by passing laws to promote contraceptive equity (Nelson 2009).

According to the National Conference of State Legislatures, twenty-six states require insurers that cover prescription drugs to also cover any Food and Drug Administration (FDA) approved contraceptives. Those states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, West Vir-

ginia, and Wisconsin (National Conference of State Legislatures 2011a). Michigan and Montana require coverage through administrative ruling or Attorney General Opinion. Texas and Virginia require that employers be offered the option of covering prescription contraception in their health insurance plans (National Conference of State Legislatures 2011a).

Twenty states offer exemptions from coverage of prescription contraceptives. These states are Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Texas, and West Virginia (National Conference of State Legislatures 2011a). Of those states, fifteen permit religious employers to refuse to provide coverage for prescription contraceptives (Guttmacher Institute 2011). Additionally, a number of states through legislation or judicial decisions are currently making execution of conscience exemptions difficult by narrowing the definition of a religious employer to include only nonprofit agencies that serve or employ primarily members of their own faith. However, seven states—Georgia, Iowa, Montana, New Hampshire, Vermont, Washington, and Wisconsin—offer no religious exemptions in their mandatory coverage laws (Lee 2011: 197).

Legally, states cannot pass laws regulating insurance coverage for employers who have self-funded insurance plans, since such plans come under the purview of the Employee Retirement Income Security Act (ERISA), which preempts state law (Mandell 2008). As discussed previously, however, employees have found ways around ERISA by challenging those plans that selectively exclude prescription contraception as violating Title VII.

PUBLIC POLICY THREATS AND THE RELIGIOUS EMPLOYER

The Free Exercise clause has been interpreted over the years to compel exemptions from certain statutory requirements because of religious reasons. However, the precise definition of "religious employer" has been increasingly under scrutiny. Many of the exemptions for religious employers are being so narrowly defined or interpreted as to render them ineffective. Nowhere is this trend more obvious than in the National Labor Relations Board's (NLRB) narrow construction of what constitutes a religious employer.

NLRB v. Catholic Bishops of Chicago

The National Labor Relations Board (NLRB) has a history of denying religious exemptions to Catholic institutions, dating back to the 1970s.

In *Diocese of Fort Wayne-South Bend, Inc*., 223 N.L.R.B. 1222 (1976) and *Catholic Bishop of Chicago* 224 N.L.R.B. 1221 (1976), the NLRB certified unions as collective bargaining representatives for lay teachers at several Catholic high schools. When the respective school administrations refused to bargain, the unions filed unfair labor relations practice complaints with the NLRB. The Board held that it had jurisdiction over the schools since they were not "completely religious" such as a seminary or a church would be and only "religiously associated" and therefore subject to the Board's jurisdiction. Further, the Board stated that their exercise of jurisdiction did not interfere with religious beliefs or the First Amendment and involved minimal intrusion of religious conduct. The Board ordered the schools to bargain. The schools refused to bargain on constitutional (separation of Church and State) and statutory (the Board exceeded its statutory authority) grounds and appealed to the Seventh Circuit in *Catholic Bishops of Chicago v. NLRB*, 559 F.2d 1112 (1977). The Seventh Circuit denied enforcement of the NLRB's bargaining order, holding that the First Amendment's free exercise and establishment clauses prevented the Board from exercising jurisdiction over diocesan schools, which would cause excessive entanglement between church and state. The Seventh Circuit also rejected the Board's distinction between "completely religious" and "merely religiously associated" employers as failing to provide a workable guide for the exercise of jurisdiction.

On appeal, the Supreme Court affirmed the Seventh Circuit's decision. The Court sidestepped the constitutional issue and instead chose to base its decision on statutory grounds. In *NLRB v. Catholic Bishop of Chicago* 440 U.S. 490 (1979), the Supreme Court overturned the NLRB's policy of declining jurisdiction over religiously sponsored organizations only when they were "completely religious" and not just "merely religiously associated." Further, the Court found that Congress had shown no clear affirmative intention to cover religious entities under the National Labor Relations Act. "The absence of an 'affirmative intention of the Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers" (*NLRB v. Catholic Bishop of Chicago* 1979: 506).

In subsequent cases, the Board interpreted the *Catholic Bishop* decision by looking at whether: (1) a particular employer is "church-operated" within the meaning of *Catholic Bishop*; (2) colleges and universities should be regulated differently from primary and secondary schools; and (3) non-teaching employees should be treated differently than faculty members (Willen 1991: 40).

Saint Xavier and Manhattan College

In 2011, the Board once again addressed the issue of religious exemptions in two decisions. In *Saint Xavier University*, Case 13-RC-22025 (N.L.R.B. May 26, 2011), the National Labor Relations Board (NLRB) rejected the religious exemption for Saint Xavier University in a dispute over adjuncts attempting to unionize. St. Xavier was founded in Chicago in 1846 by the Sisters of Mercy and is the oldest Mercy university in the world. In his decision, the NLRB Regional Director noted that the mission of the university which was adopted in 1993 contains no reference to religion, God, Catholicism or the Sisters of Mercy, and only speaks to the purpose of education. Further, the articles of the university expressly stated that no religious profession would ever be held as a requisite for admission to the school or to hold a position at the institution as faculty or staff. The university had no requirement that Catholicism be emphasized in any of the instruction at the institution. Instead, espousal of various faiths and viewpoints was actively encouraged. Students were not required to take courses in Catholic religion. The Regional Director found that St. Xavier was not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and, therefore subject to Board jurisdiction.

Earlier in the year, the NLRB reached the same conclusion in *Manhattan College*, Case 2-RC-23543 (NLRB, January 10, 2011). Similar to Saint Xavier, adjunct faculty were trying to unionize. Manhattan College was founded by the Christian Brothers in 1853. The Regional Director noted that the College's public statements made it clear that it was not presenting itself to the public as a religious organization. The Admissions Brochure made reference to John Baptist De La Salle in purely secular terms, but not to the Catholic Church, religion, or Catholicism in general. The mission statement was couched in similar terms. In various other public documents, the College stressed that it was not controlled by the Church. In its hiring and recruitment policies, the College emphasized its diverse faculty, staff and student body, noting its commitment to freedom of conscience and the religious liberty of every member of the College community. The NLRB concluded that the college was too secular to be a church-operated institution within the meaning of *Catholic Bishop* and ordered the college to bargain with the union. At this writing, appeals are pending in both the *Saint Xavier University* and *Manhattan College* cases.

The findings of the NLRB indicate that institutions such as Saint Xavier University and Manhattan College have long ceased to emphasize their Catholic identity. Nevertheless, their status as Catholic institutions and

their treatment under the law has implications for other Catholic institutions. While the *Saint Xavier University* and *Manhattan College* cases both dealt with unionization situations, they nonetheless are illustrative of a growing trend on the federal and state levels to narrowly define what constitutes a "religious employer." This trend is reflective in the current attempt by the HHS to codify an extremely restrictive interpretation of that definition. A narrow construction essentially precludes most Catholic organizations, short of parishes and seminaries, from meeting the definition of a religious employer. Catholic hospitals, social-service agencies and universities that attract many non-Catholic employees, students, and clients, for example, would be at risk of being deemed a non-religious employer. In essence, Catholic organizations would be required to serve and employ primarily Catholics in order for them to fully meet the definition of a religious employer.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC-Ministerial Exception

In a major victory for religious liberty in 2012, the Supreme Court upheld the exemption for religious employers in its ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 U.S. 694 (2012). The case involved a Lutheran-commissioned minister who taught at a church-owned school. The school's faculty consisted of two categories: (1) lay teachers hired on one-year contracts and (2) "called teachers." The called teachers were hired by the Hosanna-Tabor church congregation, upon the recommendation of the Board of Elders, Board of Directors, and Board of Education. Called teachers were hired on an open-ended basis and could not be dismissed without cause. To be eligible for a call, a teacher must have completed classes in theology offered by the Lutheran Church-Missouri Synod (LCMS). Upon completion of those classes, a teacher received a certificate of admission into the teaching ministry. Once selected by a congregation, a called teacher received the title of "commissioned minister."

Cheryl Perich was initially hired as a contract teacher for one year. Upon completion of the required theology classes, Perich was subsequently hired as a called teacher. Perich's teaching assignments remained identical as a called teacher to what they were when she was a contract teacher. In June 2004, Perich contracted an unknown illness and agreed to go on disability leave for medical treatment for the upcoming school year. The LCMS congregation hired a replacement for her. In December 2004, she notified the congregation that she was diagnosed with narcolepsy and would be able to return to work in two or three months after she was sta-

bilized on medication. On February 8, 2005, Perich's doctor gave her a written release to return to work. The congregation, fearing that she posed a safety hazard to the students, subsequently asked Perich to resign and offered to pay her health insurance through the calendar year. She refused to resign and threatened to sue the LCMS for disability discrimination. The congregation then voted to fire her for threatening litigation rather than attempting to resolve her dispute within the church.

Perich subsequently filed claims of disability discrimination and retaliation with the EEOC who found in her favor. However, Perich lost her case at the District Court where the court granted summary judgment in favor of Hosanna-Tabor. The court found Hosanna-Tabor to be a religious institution and Perich to be a commissioned minister. The court dismissed her claims on the basis that they fell within the "ministerial exception" to the Americans with Disability Act (ADA). The ministerial exception holds that discrimination laws do not apply to claims between ministers and their churches. On appeal, the Sixth Circuit reversed and found that Perich was not a ministerial employee despite her title as a called teacher. The court's rationale was that the primary teaching duties of both contract and called teachers were exactly the same. The few religious duties performed by Perich were tangential to her job. Thus she did not come under the purview of the ministerial exception.

In January 2012, the Supreme Court reversed the Sixth Circuit and expressly recognized for the first time a "ministerial exception" to employment discrimination law. The court noted that religious employers must be free to choose their ministers and teachers involved in formal religious training without governmental interference. The court stated that while society had strong interest in enforcing the employment discrimination laws, the interest of religious groups in choosing their ministers and religious teachers was equally compelling. Noting its reluctance to adopt a rigid formula, the court provided no bright line guidance in its decision on how courts should decide who is a minister. The court also declined to comment on whether the "ministerial exception" barred lawsuits other than those based on employment discrimination (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 2012).

FIRST AMENDMENT ISSUES

It is not the purpose of this paper to conduct a detailed legal analysis of the constitutional issues surrounding religious liberty concerns. However, clearly there are serious religious liberty concerns arising under the First Amendment's Free Exercise Clause that affect Catholic institutions. The Free Exercise Clause prohibits the federal government from forcing reli-

gious views on its citizens, punishing them for expressing religious views, or imposing impediments on the basis of religion. Derivatively, the Free Exercise Clause is applicable to the states through the Fourteenth Amendment. In the two seminal cases highlighted below, the Supreme Court addressed the issue of the Free Exercise Clause when religious liberty conflicts with the law.

Free Exercise Interpretation by the Supreme Court

In *Sherbert v. Verner*, 374. U.S. 398 (1963), a Seventh Day Adventist refused a job that required her to work on the Sabbath. She was denied unemployment compensation benefits under the South Carolina Unemployment Compensation Act because of her Sabbath restrictions. The South Carolina statute stated that a claimant is ineligible for benefits if he or she refuses work offered to him or her by the Employment Office without good cause. The Supreme Court held the unemployment compensation law unconstitutional since the ineligibility for benefits derived solely from the practice of her religion and effectively pressured her to forgo practice of that religion. In doing so, South Carolina imposed a burden on the free exercise of religion. The Supreme Court established a balancing test in *Sherbert*, which stipulated that governmental actions that substantially burdened a religious practice must be justified by a compelling governmental interest standard.

In *Employment Division v. Smith,* 494 U.S. 872 (1990), two employees were fired because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. They were subsequently denied unemployment compensation because Oregon state law denied benefits to employees discharged for work-related misconduct, which included illegal drug use. The employees sued the state, contending that the state violated their free exercise rights and that the First Amendment requires a religious exemption for religious use of peyote. They contended that Oregon did not have the constitutional right to criminally ban religious use of peyote. The Supreme Court rejected the employees' argument, noting that Oregon's criminal drug law was generally applicable and not specifically directed at their religious practice. The Court ruled that the Free Exercise Clause does not relieve an individual of the obligation to comply with *valid or neutral laws of general applicability* on the grounds that the law is at odds with their religious beliefs. The government's need to enforce generally applicable laws to protect the public and maintain order is constitutionally sound. Allowing a religious individual to break those laws contingent upon their

religious belief is to make that person a law unto himself (*Employment Division v. Smith* 1990: 885).

The *Employment Division v. Smith* decision has great relevance in terms of public policy mandates that conflict with religious convictions. States with such laws argue that they are valid or neutral laws of general applicability whose aim is not suppression of religion. "Even where a law substantially burdens religion, that law may be deemed neutral if the law's purpose is not to suppress religious exercise, and the resulting burden is merely incidental. In the case of mandatory contraceptive coverage laws, the burden on a religious employer stemming from the laws is an incidental effect of the legislation and not its primary effect or purpose" (Lee 2011: 204–05). States further argue that such laws are aimed at promoting gender equity under the anti-discrimination laws and promoting public health by mandating a basic health care need, namely contraceptives (Lee 2011: 205). Religious employers face the burden of overcoming the *Smith* rationale when contesting state mandatory contraceptive coverage laws. Notably, *Smith* involved denying a benefit to an individual because of violation of an existing law, while state mandates are requiring religious employers to provide a benefit in direct opposition to their moral teachings.

SUMMARY

This article summarized highlights of the recent history of public policy and jurisprudence as they relate to the ability of Catholic institutions to practice and enforce non-negotiable Catholic moral doctrines. Public-policy encroachments on religious liberty pose serious challenges to Catholic organizations. At times the Church and other traditional faith groups have been able to negotiate exemptions from public policies that conflict with church doctrine. Increasingly however, those exemptions have been challenged. In those instances, Catholic institutions are faced with a Hobson's choice: They must either implement policies and procedures that would directly negate their allegiance and commitment to their own religious identity or face stiff legal penalties for failing to do so.

The Church, and the facilities and organizations that represent her, will have to combat this encroachment by the federal government and states by developing and utilizing a high level of political and legal strategic initiatives. In essence they will truly have to exercise skills that exhibit strongly their ability to be, as Christ instructed, "as shrewd as snakes and gentle as doves" (Matthew 10:16).

Note

1. "The Church, nevertheless, in urging men to the observance of the precepts of the natural law, which it interprets by its constant doctrine, teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life" And later: "Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means."

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