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Constitutional Dilemma on Birth Control

Ignoring the Rights of Employees Violates Long-Held Tenets

By [Jonathan D. Sarna](#)

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Invoking George Washington's famous letter to the Jews of Newport, R.I., Rabbi Meir Soloveichik of New York's Congregation Kehilath Jeshurun, one of the foremost Orthodox rabbis of his generation, told a congressional committee on February 16 that requiring health insurance plans to cover contraception threatened "the liberties of conscience" of fellow Americans and "redefined by bureaucratic fiat" the definition of religion itself. He found it appalling that any religious organization — Catholic or not — should be "obligated to provide employees with an insurance policy that facilitates acts violating the organization's religious tenets."

In many ways, it is heartwarming to see an Orthodox rabbi standing up for the religious liberties of his Catholic cousins. Many of us felt ashamed when so many rabbis failed to do this in 2010, when the religious liberty of Muslim Americans was challenged during the controversy over building a mosque near Ground Zero. As a minority group that has fought hard for religious equality, and one that rightly takes pride in having received from Washington himself the assurance that religious liberty is an "inherent natural right" that cannot be abridged, we should all feel obliged to testify whenever religious liberties are challenged.

Yet for all that one may sympathize with Catholic institutions coerced into promoting contraceptive services that they consider sinful, Soloveichik's congressional testimony greatly oversimplifies the religious liberty conundrum confronted by those who oversee national health insurance. The guarantee of religious liberty, after all, applies not only to religious organizations, but also to individual citizens. However much Catholic institutions may invoke religious liberty when they deny those they employ access to contraception, it is critical to remember that from the perspective of those employees, the denial reeks of religious coercion.

The analogy to "forcing kosher delis to sell ham," put forward by Bishop William Lori, exemplifies the way the problem is misunderstood. In America (unlike in Israel), people have the right to choose whether they want to sell ham and whether they want to consume it; neither option is proscribed. We all might agree that kosher delis should not be coerced into selling ham, but hopefully we would also all agree that a deli's employees and customers should not be penalized for choosing to consume it.

Similarly, a kosher deli routinely gives its employees a day off on Yom Kippur, a fast day. But the deli would not be

within its rights if it provided that benefit to only those employees who fast on Yom Kippur; that would be coercive. Denying insurance claims for contraceptive services represents the same kind of coercion. In First Amendment terms, the contraception issue represents a classic tension between the “no establishment” and “free exercise” clauses of the First Amendment. What Soloveichik understandably sees as a limit upon Catholic institutions’ free exercise of their religion, employees of Catholic institutions see, no less understandably, as an attempt to “establish” Catholic doctrine coercively. The Supreme Court generally privileges the “no establishment” clause over the “free exercise” clause in such cases. It certainly does not ignore “no establishment” claims, as Soloveichik does.

Soloveichik, in his testimony, takes particular exception to a distinction that the government has drawn between religious employers who hire only members of their own faith and are permitted to conduct their affairs according to church tenets and religious employers who hire members of multiple faiths and are obligated by the government to accommodate them.

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“The administration implicitly assumes,” he charges, “that those who employ or help others of a different religion are no longer acting in a religious capacity and as such are not entitled to the protection of the First Amendment.”

In fact, the government makes no such assumption at all. Instead, it reasonably assumes that employers and employees both have First Amendment rights, including the “no establishment” right not to be religiously coerced. Precisely for this reason, chaplains in the military who certainly act in a religious capacity are prohibited from evangelizing those of other faiths, even when their religion otherwise requires them to do so. Where members of different religions dwell together (even when they do so under religious auspices), securing them all the right to the “free exercise” of their faith is much more conducive to social harmony than allowing employers to impose their faith requirements on their employees coercively.

Is there any way of satisfying both the religious strictures of the church and the religious predilections of its employees? If, as in most western countries, the burden of acquiring health care were placed upon individuals rather than employers being required to provide it, then everyone could choose for himself or herself whether to have a plan with contraceptive benefits. Those with other strong beliefs about health care (such as Christian Scientists) could similarly select plans that accord with their faith. Nobody would be coerced, and everybody could purchase the plan that he or she wants.

Meanwhile, one hopes that Congress will ignore the testimony of Soloveichik. To focus on the religious liberties of employers while overlooking those of their employees, and to focus on only the free exercise clause of the First Amendment while ignoring the dangers of coercive religious establishments, is to pervert what Washington meant when he spoke of “liberty of conscience” and to set back the cause of liberty and justice for all.

Jonathan D. Sarna is the Joseph H. & Belle R. Braun professor of American Jewish history at Brandeis University, and chief historian of the National Museum of American Jewish History. His newest book, “When General Grant Expelled the Jews,” will be published this month by Schocken/Nextbook.

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[esthermiriam](#) · 87 weeks ago

+7

The basis of the administration's policy in this matter was -- as it should be -- medical/scientific: contraception was included among the many preventative health services that solid research and analysis can demonstrate are both important for individual health and, ultimately, cost-saving for the health of the society. That right-wing forces have chosen to make it a matter of political/religious debate is sad and unfortunate.

Oh, and Sarna's argument is perfectly sound.

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[Barbara Kavadias](#) · 87 weeks ago

+3

Finally, a commentator gets to the heart of the problem. Where have we gotten to in this country when we have to be reminded that people have rights, individuals have religious freedom? The Bill of Rights is directed at people, not institutions. People have a right to gather together with their rights to create institutions that meet the needs of their group. Faith based institutions, like Catholic or Jewish or Methodist etc hospitals are not religious institutions like our

Synagogues and Churches. They employ people of all faiths, they serve people of all faiths, and they are funded by people of all or no faiths. They are created to promote a public good, health, rather than to promote or spread the faith of the founders, even if their faith motivates their efforts. Why should the faith beliefs of the founders limit the conscience rights of the employees or even the people they serve? If anything Jonathan Sarna does not go far enough. Not only should employees be able to access contraceptives if they choose, they should be able to prescribe to their patients (if doctors) and provide other medically needed services without being constricted by the beliefs of the founding board.

I recommend to Mr. Sarna and other readers a report from the Religious Coalition for Reproductive Choice called "In Good Conscience, A guide to providing health care in a religiously pluralistic society" produced by an Interfaith Working Group that I chaired. I think it is a very useful document when navigating the current debate. It can be found through their website, www.rcrc.org

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Pat Hickey · 87 weeks ago

+2

We are all in the same boat, Cousins! At the moment this Ship of Fools is captained by a land-lubber.

God Bless You Rabbi!

Your Mick Cousin,

Pat Hickey, Chicago

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ucfengr2000 · 87 weeks ago

+2

How, in an meaningful way, are Catholic employers denying their employees access to contraceptive? Are priest and nuns standing outside drug stores preventing their employees from entering? Are they threatening their employees with termination if they use contraception? If not, you're only argument is that by refusing to pay for their contraceptives they deny them access. Using that logic, my employer denies me access to lots of things, like beer, wine, hamburger, chicken, automobiles, gasoline, etc. Should my employer be forced to pay for those things as well, or is contraception so uniquely important that all other considerations must give way?

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Ali Minkin · 67 weeks ago

0

Your gasoline and hamburgers are not a part of the contract between your employer and you. But your pharmaceuticals are. That's why your employer can deny you gasoline, but should pay for your medications.

Reply

Report



Lenewyorkais · 87 weeks ago

+2

For such a smart guy, Soloveichik was scammed by the Republicans and the Church. 95% of the population, including him and his congregants I bet, believes that contraception is entirely moral, and certainly more moral than its alternative, more abortions. Contraception is certainly part of health care, which is most often the obligation of the

visited on 11/12/2013

employer.

The religious leaders r circling the wagons, and rallying with each other versus our secular nation. I say "duped" because Slolveichik was led to endorse a position that he may not endorse in good faith. My guess is that he is biased by the Republican views of his well-to-do congregants.

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@NCJW · 87 weeks ago

+2

Prof Sarna gets it right! Few people are talking about the religious rights of the individuals who work for religiously affiliated institutions. To allow employers to impose their religious beliefs on their workers is coercion plain and simple! As the Blunt Amendment, recently killed by the US Senate showed, this is a slippery slope. Under that measure, ANY employer would be allowed to deny ANY health care service if he or she objected. Employers who disapprove of sex before marriage could deny unmarried women prenatal care. Those opposed to homosexuality could deny ARV's to HIV positive employees -- you get the picture.

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SC&A · 87 weeks ago

+2

Walmart offers women contraception at \$9.00 a month, free at women's health clinics (interestingly, condoms run between 20-30per month)..

The next time a raise is given by any business, institution or religious entity , it can be made clear reproductive health sensitivities have been considered and the individual is free to take responsibility for their own needs.

Can we move on now? Or is this in fact about something other than mandated reproductive health?

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Anisah David · 87 weeks ago

+1

And as these people circle the wagons of "religious rights of institutions and religious communities" to deny women health care services, they support the attack of religious rights of another group/institution (Muslim Americans). Call it what it is... sexism and bigotry . Bigots against Muslims and Sexist against women. "birth control" pills are prescribed for other issues to by doctors, not just to prevent pregnancy. If its a "sin" to use birth control, then it should be a sin for old men to use viagra.

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Perturbed sniper · 87 weeks ago

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Barbara: Your argument is wrong.

"They are created to promote a public good, health, rather than to promote or spread the faith of the founders, even if their faith motivates their efforts."

This was not a public interest until very recently, long after the establishment clause was created. It was a religious, not public interest in the first place. Thus, the separation of church and state should exclude the state out of these organizations operations. If the state can create a public interest out of any activity, then the freedom of religion statement is completely meaningless, as freedom of religion includes much more than just allowing for prayer and ritual ceremonies.

Second, the bill of rights are set to protect the individual from the state, not from other private individuals. While the government, I grant, cannot infringe on the freedom of expression or religion on anyone; an employer can limit its employees the type of communications it may want to have with the public to protect its reputation, etc.

What we have here is a state that can declare anything of "public interest" effectively crowding out religious institutions or people of faith.

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[Perturbed sniper](#) · 87 weeks ago

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I apologize for that name tag... not sure where it came from.

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[Jacob L. Wright](#) · 87 weeks ago

0

I have been drinking all night and I can still see a big fallacy in Meir S.'s argument...

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[Jacob L. Wright](#) · 87 weeks ago

-1

I have been drinking all night (it's Purim) and still I can still a big fallacy in Meir S.'s argument!

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[Tzvi Grossman](#) · 87 weeks ago

-1

I am unaware of any constitutional right to have your birth control paid for by your employer. Employees are free to enjoy their reproductive freedoms without infringing on the Catholic Church's constitutional right to freedom of religion. Not a very rigorous argument from Sarna.

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[WildJew](#) · 87 weeks ago

-2

Notwithstanding the fact that Catholics have not historically stood by the Jews when we we suffered state sanctioned persecution and discrimination (Germany being a case in point) I am standing with the Catholics against this act of state-sanctioned discrimination.

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[HerbertB4](#) · 87 weeks ago

-3

visited on 11/12/2013

Professor Sarna has confused the nature of "Rights" and " Priveledges". US citizens have rights as delineated in our Constitution. We also have many priveledges which include the use of contraception. Nowhere in our body of laws, is there a clause that mandates the government to subsidize contraceptive pharmaceuticals. That is a priveledge left to all of us as individuals.

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