



## Obamacare's Collision with Religious Liberty

The original United States Constitution and Bill of Rights included two basic principles which the Founding Fathers believed were essential to the preservation of liberty for the new nation: constraint of centralized power and assurance of religious liberty for all citizens. The Patient Protection and Affordable Care Act (Obamacare), both in its content and in its implementation by autocratic bureaucrats in Washington, D.C. and their minions in state government, aims to thrust a knife deep into the heart of American liberty as established by the Constitution.

Obamacare extended centralized power in an unprecedented way. An up-to-now apathetic public is only beginning to wake up to the pocketbook costs of the 2010 legislation. The *Hobby Lobby* and *Little Sisters of the Poor* cases awaiting court decisions should awaken Americans to the biggest cost of Obamacare: the subversion of liberty itself.

### Central Planning of U.S. Health Care

Given the complexity of Obamacare, the confused apathy of the general public is understandable. After all, even the members of Congress did not fully understand what they were voting for. Then House Speaker Nancy Pelosi's declaration to her caucus that "We have to pass the bill so you can find out what's in it" was all too true.

The 2,400-plus-page legislation is not socialized medicine per se, but is a major advance toward it. The bill was so stunning in its arrogant assumption that the federal government could run one-sixth of the entire U.S. economy that many opponents believed the program was deliberately designed to fail. The fear was that with Obamacare's inevitable failure, progressives could achieve what they really wanted all along, a single-payer health care system – which Barack Obama was on record as supporting before he ran for president in 2008.

At the heart of Obamacare is a punitive system based on regulations, mandatory coverage and higher taxes. Obamacare mandates that all Americans carry insurance

obtained through their employers, the individual insurance market, state health insurance exchanges or Medicaid. From the outset the system proved underfunded, expensive and hideously bureaucratic. Obamacare is projected to cost at least \$1.05 trillion over a decade, and some experts project double that cost. Yet the Congressional Budget Office estimates that 23 million people will remain uninsured in 2019. Obamacare made coverage mandatory, but it is worth noting that *even before this law the United States had universal health care for urgent conditions regardless of the ability of the patient to pay.*

The complexity of the act and its full implementation defy easy summary. The act commands Americans to purchase insurance and coerces businesses into providing insurance to their employees. If they refuse, they are fined. Subsidies are provided to individuals and families to purchase insurance within newly erected American Health Benefits Exchanges if they fall within income guidelines established by the act. The Supreme Court in 2012 reinterpreted the individual mandate penalty as a tax to evade a constitutional challenge, and ruled that the law could not force states to expand Medicaid; about half the states have opted not to expand.

Individuals who refuse to sign up for health insurance are required to pay a penalty of \$695 or 2.5 percent of household income up to \$2,085, whichever is higher. Employers of fifty or more workers who refuse to offer federally approved insurance are to be fined \$2,000 per employee, with the first thirty workers exempted when calculating the fine. The CBO estimates that employers will drop coverage for 14 million workers. The Obama administration has unilaterally delayed enforcement of the employer mandate in order to defer the inevitable layoffs, hours reductions and eliminations of coverage that will ensue.

Insurance companies must approve 100 percent of health insurance applications, regardless of risky behavior or poor health. To cover the costs of the system, individuals making more than \$200,000 and couples making more than \$250,000 will face a rise from 1.45 to 2.35 percent of income for the Medicare tax. They will also have to pay a new 3.8 percent tax on unearned income including capital

gains, dividends, interest, partnership income, royalties and rents. Meanwhile, funds for Medicare will be reduced by at least \$529 billion over ten years.

Health insurers are to be extremely regulated, with the government telling them who must be covered, the premiums that can be charged, and how much they will pay in claims. The legislation calls for the initial establishment of 159 new boards. The federal government will oversee the establishment of an array of state health insurance exchanges and medical coordinating committees. *To enforce this compulsory system, the Internal Revenue Service is being expanded.* An estimated 16,000 new agents are being assigned to track down individuals and businesses that fail to enlist in the program. *Medical devices and instruments will be taxed.* Regulations released in late May will make potentially billions of federal dollars available to backstop insurance companies that lose money because of Obamacare.

Obamacare has been subject to countless delays and waivers by bureaucratic fiat as particular provisions proved unworkable. The rollout of the health insurance exchanges, various new mandates, and related federal software in late 2013 and early 2014 wreaked havoc on the individual insurance market, reduced many people's treatment options, and embarrassed the Obama administration with computer glitches, waste and fraud. Scandals concerning wait times for treatment at Veterans Administration hospitals came to light in May, demonstrating the lethal pitfalls of government-run health care.

## Abortion and Contraception

**D**uring the battle over Obamacare in Congress, supporters assured members of Congress and the general public that the program would not mandate or finance abortions. For several decades Congress has barred federal payments for abortions (with limited exceptions) through the Hyde Amendment, legislation that has been ruled constitutional by the Supreme Court.

In June 2013 the Department of Health and Human Services (HHS) issued a final version of certain rules under Obamacare. One rule required most employers to provide free insurance coverage of FDA-approved contraception, including so-called emergency contraceptives such as Plan B One-Step and ella. This final version confirmed a proposal first made by HHS in April 2011. The contraceptive mandate was a clear violation of the rights of organizations with religious objections to contraception, especially morning-after pills, intrauterine devices (IUDs) and other mechanisms that can operate after conception, which are believed to be abortifacients.

The HHS contraceptive mandate included a "conscience clause" exempting some nonprofit religious organizations from having to provide services that conflicted with their moral or religious beliefs. Opponents of this mandate charged that the criteria for invoking this "conscience clause" were too narrow and caused a direct conflict with their religious principles. The United States Conference of Catholic Bishops called the mandate an attack on religious liberty. The Family Research Council joined in this complaint, arguing that the contraceptive mandate "undermines the conscience rights of many Americans." To rectify the situation, Republican Senator Roy Blunt from Missouri proposed the Respect for the Rights of Conscience Act, which would permit employers and insurance companies to refuse to cover any health care service required under the new law that conflicted with their "religious beliefs or moral convictions." The Blunt amendment was defeated in the Senate by a partisan vote of 51-48, with only three Democrats voting for it and one Republican against it.

In response to the outcry against the contraceptive mandate, Obama directed the HHS to revise the mandate. This request came in 2012, an election year. In response, HHS issued new rules that expanded the number and kinds of organizations that would qualify for religious exemption. The final rules issued by HHS excluded some religious organizations from having to pay directly for contraceptives, but at the same time, HHS placed requirements on insurance companies providing mandated health insurance through Obamacare to require coverage for contraception, including morning-after pills and IUDs. HHS rules thus provided a back-door means of requiring employers, including many religious nonprofit organizations, to provide contraception coverage to their employees. The disingenuous message was: You don't have to pay directly for contraception for your employees if it's against your conscience, but your health plans provided through insurance companies need to cover contraception. Of course, one way or another, the employer is ultimately bearing the cost of its health plan.

## Contraceptive Mandate Lawsuits

**T**he mandate generated more than ninety lawsuits. These cases are about evenly divided in representing nonprofit groups and for-profit businesses. The Becket Fund, a legal advocacy organization founded to protect religious liberty, has alone filed 72 lawsuits challenging the HHS mandate.

The U.S. Supreme Court accepted two appeal petitions. The first petition asked the Supreme Court to review a Third Circuit decision, *Conestoga Wood Specialties v. Sebelius*, which held that the company, a wholesale manufacturer of custom cabinet doors and other cabinet-related goods, could not qualify for a religious exemption from the contraceptive

mandate. The plaintiffs, a devout Mennonite Christian family, the Hahns, who owned the company, argued that the prevention of the implantation of a human embryo through so-called contraception was an act of abortion. In ruling against the Hahn family, the Third Circuit Court ruled that the Conestoga company was distinct from the Hahns (and their conscience). The mandate required only the company to provide contraception coverage, not the Hahns personally. The court declared, “Our conclusion that a for-profit secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert” any claim to religious freedom.

This was nice legalese for saying that owners of a company had religious freedom, but the company did not have any claim to religious freedom. In response, the plaintiffs pointed out that the company was a closely held family woodworking business and they objected as a matter of conscience to facilitating certain contraceptives that they believe destroy human life.

The day after the plaintiffs appealed to the Supreme Court, on September 19, 2013 the U.S. Department of Justice, under Attorney General Eric Holder, asked the Supreme Court to review the Tenth Circuit Court of Appeals decision in *Hobby Lobby v. Sebelius*, which had reached an opposite decision. The appeals court held in *Hobby Lobby* that to require the company, a retailer of arts and crafts supplies, to provide contraception coverage was a violation of the corporation’s religious freedom as protected by the First Amendment and the Religious Freedom Restoration Act. The *Conestoga Wood* case became linked to the *Hobby Lobby* case in *Sebelius v. Hobby Lobby*, which awaits a decision by the Supreme Court this month.

The Religious Freedom Restoration Act (RFRA) was signed into law in 1993, after passing by a unanimous vote in the House and a nearly unanimous vote in the Senate, with only three dissenting votes. Reaffirming the Free Exercise Clause of the First Amendment, RFRA stated in quite direct language that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” except in “furtherance of a compelling government interest.” In seeking an exemption from this law, the federal government must show more than a routine interest simply in improving government efficiency. A second condition to a RFRA exemption is that the rule must be the least restrictive way to further the governmental interest.

Thus the main issues before the Supreme Court in the *Hobby Lobby* case are whether the federal government has

a compelling interest in requiring owners of companies and religious organizations to act against their conscience in providing contraception, whether through their own health care plan or a mandatory health insurance plan; and whether the contraceptive mandate is the least restrictive way to further that interest.

The *Hobby Lobby* case is complicated by the involvement of private for-profit corporations. The federal government over the course of the last century has imposed an array of regulations on private businesses including minimum wages, work practices, Social Security taxes, product safety, and on and on. Legislation and regulatory oversight concerning businesses have been upheld by the courts in multiple lower and higher court decisions.

### Little Sisters of the Poor

More problematic for the government is the case of *Little Sisters of the Poor v. Sebelius*, because the employer in question is a clearly defined religious group and not a for-profit corporation. The Little Sisters of the Poor is a religious order, a Roman Catholic Congregation of Religious Sisters whose mission is to care for the poor, elderly and dying. Today the Little Sisters maintain thirty houses across America to care for the dying. They aspire to treat dying patients with love and dignity as if they were Jesus himself.

The Little Sisters believe, in accordance with their faith as Christians, that human life is a precious gift imparted by God. The federal government’s contraception/abortion mandate contradicts their religious beliefs in the inviolable dignity of all human life. The HSS mandate allows exemptions for church and church-type organizations, but the government has unaccountably refused to classify the Little Sisters as a “religious employer.” As a result, the Little Sisters are being forced to hire a third party to provide health services to their employees, thereby involving the nuns in a government program they find to be an offensive violation of their religious beliefs.

The Becket Fund filed a class action lawsuit on behalf of the Little Sisters of the Poor and other Catholic organizations that provide health benefits through Christian Brothers Employee Benefit Trust and Christian Brothers Services. After the Tenth Circuit Court denied a preliminary injunction protecting the Little Sisters from the mandate, Justice Sonia Sotomayer in January granted a temporary injunction, later upheld by the entire Supreme Court. The parties in this case are awaiting a hearing date from the Tenth Circuit Court of Appeals. This case is probably headed toward the Supreme Court.

Opponents of the Little Sisters, Conestoga Wood and Hobby Lobby maintain that if HHS cannot impose contraceptive

coverage requirements, millions of women will be denied the right to contraception. What they really mean is that millions of women might have to pay for contraception, abortifacients and sterilizations themselves. The right to religious liberty is clearly set forth in the Constitution. The right to have the government pay for medical expenses of whatever sort is not expressed in the Constitution. At issue is the meaning of religious liberty in America.

### Political and Religious Liberty

Nancy Pelosi insists that the Founding Fathers would be pleased with Obamacare because it means that Americans can pursue happiness without being stuck with a job just to have health insurance. The critics, she said, have been an obstacle to “the American people having healthier lives that our founders wanted for them, like a healthier life, liberty and the freedom to pursue their happiness.” As with many things Pelosi says, one wonders if she truly believes what she says. Whatever she believes, it’s doubtful that any Founder would have agreed that the “pursuit of happiness” is found in Obamacare.

Religious liberty and fear of centralized governmental power are both integral to the Constitution and the Founding Fathers’ vision for the new republic. Liberty depended on a federal government restrained by checks and balances among the three branches of government, the legislature, the executive and the judiciary. Further restraint on centralized power was imposed by a federal system that gave only a short list of limited powers to the national government while reserving other powers to the states and the people under the Tenth Amendment.

The Founders believed religion was essential to sustaining the American republic. Their experience under English rule imparted a suspicion of established religion. A state-sponsored church such as the Anglican Church had created a powerful clerical class that too often joined with a corrupt political class to subvert long-established republican principles in England. At the same time, the Founders, even deists such as Madison and Franklin, believed that ultimately a healthy republic depended on a virtuous people, for whom religion, and freedom of conscience, were important. Political liberty and religious liberty went hand in hand in the minds of the Founders.

Obamacare threatens in a way never imagined by our Founding Fathers the basic constitutional principles of small government and religious liberty in America. Much is at stake for our experiment in republican government. Will the Supreme Court uphold the freedom of Catholic and other religious employers not to subsidize abortifacients for their employees? Stay tuned.

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