

THE PROTECTION
OF THE CHRISTIAN INSPIRATION
OF MEDICAL, EDUCATIONAL,
AND CHARITABLE INSTITUTIONS:
THE OBAMACARE CASE

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ABSTRACT: In recent years, within the context of both civil law and common law, it is possible to detect a general trend to create legislative scenarios of artificial discrimination, which are causing serious damage to many institutions of Christian inspiration operating in educational, healthcare, and social services. The present article tries to illustrate the main juridical aspects of these dynamics through the analysis of the Obamacare case, developed in the United States after the approval of legislation that requires insurers – or employers who cover their employees – to include the provision of contraception and sterilization in their health insurance plans.

KEY WORDS: Christian Inspiration, Non-discrimination Laws, Religious Discrimination.

ABSTRACT: Nell'occidente giuridico, sia nell'ambito del *civil law* che del *common law*, si può parlare negli ultimi anni di una tendenza generalizzata alla creazione legislativa di scenari di discriminazione artificiale, che stanno recando grave danno a molte istituzioni d'ispirazione cristiana nell'ambito dell'educazione, della salute e dell'assistenza sociale. Nel presente articolo si cerca di mostrare i principali profili giuridici di queste dinamiche attraverso l'analisi del caso Obamacare, sviluppatosi negli Stati Uniti dopo l'approvazione della normativa che richiede agli assicuratori – o ai datori di lavoro che garantiscono ai loro impiegati – di includere l'offerta di contraccezione e sterilizzazione nei loro piani di assicurazione sanitaria.

PAROLE CHIAVE: Ispirazione cristiana, leggi antidiscriminazione, discriminazione religiosa.

SUMMARY: 1. Introduction. - 2. The Affordable Care Act: the initial controversy concerning the individual mandate. - 3. The Affordable Care Act and obligatory coverage of "preventative services for women". - 4. The contraception mandate and the religious exception for some religious institutions. - 5. The yearlong grace period and the "accommodation" promise to revise the religious exception. - 6. Lawsuits against the contraception mandate: participants and issues. - 7. The legislative creation of scenarios of artificial discrimination, to the harm of institutions of ethical

and religious inspiration. - 8. The artificial discrimination scenario created by the contraception mandate. - 9. The freedom of institutional inspiration as a part of the freedom of conscience, thought and religion: toward a more balanced articulation with the right to non-discrimination.

1. INTRODUCTION

THE topic initially proposed to me for this presentation was certainly not concrete: “The protection of Christian inspiration in medical, educational, and charitable institutions”. Obviously, there could be multiple approaches to such a theme. I therefore decided to use the Obamacare case as a central focus of this article in order to show some of the chief problems that, in my estimation, institutions of Christian inspiration in many countries encounter today as they promote and protect their identity.¹

At this time, there are in the United States other important cases that involve the protection of religious freedom.² Nevertheless, I have chosen this case because the reactions to some of its contents have occasioned the joining together of diverse forces: medical, educational, and charitable institutions connected in different ways to the principal Christian denominations, as well as for-profit entities that seek to inspire their activities according to the values contained in the religious patrimonies of those denominations. This religious and institutional diversity – together with similarities to other cases that have occurred throughout the world in recent years – make of the Obamacare case a helpful linchpin for the themes that I think could be useful to develop in this article.³

As is well-known, one cannot speak strictly of a single case. Today there are more than fifty related cases pending before numerous courts (and appeals courts) in the United States. For this reason, we will go to the origin of the legislative measure that instigated the cases, seeking to identify the main juridical outlines of the positions that have arisen around it in these now-three years of events.

¹ This paper was originally presented at the Pontifical University of the Holy Cross during the Seventeenth Congress of the Faculty of Canon Law (“Faith, Evangelization, and Canon Law”), held April 11-12, 2013. The term ‘Obamacare’ has been very widely used to refer to the entire healthcare reform process undertaken by the Obama Administration.

² Cf. <http://www.usccb.org/issues-and-action/religious-liberty/religious-liberty-at-home.cfm>.

³ “The recent controversy over the contraceptive mandate provides a kind of case study in some of the more contentious aspects of religious freedom” (V. B. LEWIS, *Religious Freedom, the Good of Religion and the Common Good: The Challenges of Pluralism, Privilege and the Contraceptive Services Mandate*, «Oxford Journal of Law and Religion», October 2012, pp. 1-25).

2. THE AFFORDABLE CARE ACT:

THE INITIAL CONTROVERSY CONCERNING THE INDIVIDUAL MANDATE

In 1965, President Johnson was successful in enacting the historic healthcare reforms of Medicare and Medicaid.⁴ Medicare remains, to this day, the public healthcare coverage for those over sixty five years of age and for certain gravely disabled people in the United States. Medicaid, on the other hand, is a healthcare assistance system for those with low incomes. For the rest, most insured individuals in the American healthcare system were covered until now by policies issued by private companies.

In 2009, after years of discussion in the Democratic Party, President Obama made his own the idea to launch a new healthcare reform: not through the adoption of a European-style system (with the contributions and costs centralized in a single public fund), but by means of an individual mandate system. Beginning in 2014 it would require those without current healthcare coverage to acquire an insurance policy, helping them financially in certain cases and fining them should they fail to comply.⁵ The healthcare reform was finally enacted by the Federal Government via the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act, which together form the Affordable Care Act, approved definitively by the United States Senate in March of 2010.⁶

The first adverse reactions emerged immediately following the approval. For those opposed to the reform, the Affordable Care Act exceeded the constitutional limits of congressional legislative power. It was precisely the individual mandate that was at the center of the discussion: Was it constitutional to force upon citizens the purchase of a commercial product, such as a health insurance policy?⁷

The Supreme Court adjudicated the case on June 28, 2012, rejecting the prior judgment of non-constitutionality advanced by the Atlanta Court of Appeals (Eleventh Circuit), which had received the petition presented jointly by twenty six states, one business, and other individuals.⁸ The Supreme Court determined that the individual mandate did not establish a commercial obligation to purchase a product (in this case, an insurance policy), but

⁴ Cf. *Social Security Amendments*, Pub.L. 89-97, 79 Stat. 286, 30 July 1965.

⁵ Cf. K. KATE-T. BAYTOR, *Outlook for Obamacare*, «Cairo Review» 7, 2012, p. 89).

⁶ Pub.L. 111-148, 124 Stat. 119, 23 March 2010; Pub.L. 111-152, 124 Stat. 1029, 30 March 2010 (cf. <http://democrats.senate.gov/pdfs/reform/patient-protection-affordable-care-act-as-passed.pdf>).

⁷ The main novelty planned by the reform has to do precisely with the fact of its being mandatory for every American citizen to take out an insurance policy (cf. 26 U.S.C. §5000A).

⁸ Cf. 648 F.3d 1235 (11th Cir. 2011).

a tax that fell within the constitutional limits of the taxing power of Congress.⁹

3. THE AFFORDABLE CARE ACT AND OBLIGATORY COVERAGE OF “PREVENTATIVE SERVICES FOR WOMEN”

After the announcement of the reform, intended to extend healthcare to all citizens of the United States, the first reactions of the American bishops were positive. In fact, in 1981 and 1993 the prelates had already expressed their conviction that healthcare was a right and not a privilege. They insisted upon the following key principles for a good reform: an assistance program that was as universal as possible, sustainable costs for citizens, and a respect for life from conception to natural death.¹⁰

During the congressional debates on the legislation, however, the American bishops immediately began to express their concern over the manner in which some aspects of the project of reform were materializing.¹¹ These fears became more pressing when the final version of the Affordable Care Act called for the inclusion, by all healthcare programs and insurance plans, of certain preventative services for women that would later be specified by the Department of Health and Human Services (HHS).¹² The United States Conference of Catholic Bishops (USCCB) then made an initial intervention in order to warn on some problems posed by this legislation – the final concretization of which had been left in the hands of the Executive Branch, not Congress.¹³

⁹ Cf. *National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services*, 567 U.S., 2012 WL 2427810 (cf. <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>).

¹⁰ Cf. USCCB, *Health and Health Care, A Pastoral Letter of the American Catholic Bishops*, 19 November 1981 (<http://www.usccb.org/sdwp/national/health.pdf>); USCCB, *Framework for Comprehensive Health Care Reform*, 18 June 1993 (<http://www.usccb.org/sdwp/national/compicare.pdf>).

¹¹ The first bill approved by the Senate Finance Committee at the end of 2009 was not judged favorably by the American bishops; cf. USCCB, *Letter to Congress*, 26 January 2010 (<http://old.usccb.org/healthcare/HC-Letter-to-Congress-012610.pdf>). With respect to two problems – the defense of the right to conscientious objection and the financing of abortion – some items in the bill went beyond the limits of the Hyde-Weldon Amendment. This amendment prevents, except in a few particular cases, the use of public funds to finance abortion; it is also connected with laws that provide for the annual financing of the activity of the Department of Health and Human Services. Cf. National Committee for a Human Life Amendment, *The Hyde-Weldon Amendment*, April 2008 (<http://www.nchla.org/data-source/ifactsheets/4FSHydeAm22a.08.pdf>).

¹² Cf. 42 U.S.C. § 300gg-13(a)(4).

¹³ Cf. USCCB, *Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order regarding Abortion and Conscience Protection*, 25 March 2010 (<http://old.usccb.org/ogc/Healthcare-EO-Memo.pdf>).

In July of 2010 the HHS made public an initial list of preventative services for women that were to be covered by all health insurance programs without additional cost to the insured; it also announced that the definitive list and guidelines for those services would be published in the summer of 2011.¹⁴ The USCCB then issued a new comment on the draft legislation, pointing out that the future list's potential inclusion of abortive practices, contraception, or sterilization would mean the inclusion of items that – in addition to not being true healthcare services – threatened the freedom of conscience of many American citizens.¹⁵

4. THE CONTRACEPTION MANDATE AND THE RELIGIOUS EXCEPTION FOR SOME RELIGIOUS INSTITUTIONS

The term 'contraception mandate' is understood in the United States as referring to a regulation, state law, or federal law that requires insurers, or employers who insure their employees, to include contraception in their health insurance plans. Before the approval of the Affordable Care Act, a total of twenty eight regulations of this kind had already been approved in the United States.¹⁶

In August of 2011 – as had already been announced the previous summer – the HHS, following a report from the Institute of Medicine, released the guidelines on preventative services for women; these were compulsory for inclusion in healthcare and insurance programs established in the United States starting from August of 2012.¹⁷ Among other things, the guidelines foresaw mandatory coverage (without cost for recipients) of all contraceptive methods and sterilization procedures, as well as of educational and consultative services approved by the Food and Drug Administration for women with reproductive capacity.¹⁸

¹⁴ Cf. *Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act*, 75 Fed. Reg. 41726, 19 July 2010, at. 41728 (<http://www.healthcare.gov/law/resources/regulations/prevention/recommendations.html>).

¹⁵ Cf. USCCB, *Comments on Interim Final Rules Relating to Coverage of Preventive Services*, 17 September 2010 (<http://www.usccb.org/about/general-counsel/upload/comments-to-hhs-on-preventive-services-2010-09.pdf>).

¹⁶ For a list of the States that had already approved them, cf. USCCB, *Comments on Interim Final Rules Imposing Contraception Mandate*, 31 August 2011, Addendum B: *State Contraceptive Mandates and Exemptions*.

¹⁷ Cf. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, 19 July 2011 (<http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>).

¹⁸ Cf. Department of Health and Human Services, *Health Resources and Services Administration. Required Health Plan Coverage Guidelines for Women's Preventive Services*, 1 August 2011 (<http://www.hrsa.gov/womensguidelines>); HHS, *Amended Interim Final Rule*, 76 Fed. Reg.

The publication of the guidelines on preventative services provoked an additional intervention by the episcopal conference, in which it condemned the various extremes in the final version of the contraception mandate.¹⁹

In the first place, it was underlined that the HHS, by virtue of the Hyde-Weldon Amendment, was prohibited by law from recommending any drug that could cause an abortion; whereas among the contraceptive methods approved by the contraception mandate was found Ulipristal (HRP 2000/Ella), a product analogous to the RU-486 pill, which can cause an abortion.²⁰

In the second place, the obligation to include services of contraception and sterilization (and the corresponding consultative services) among the preventative services for women meant a violation of the freedom of conscience of many individuals and institutions affected by the provision, especially considering the very narrow exception permitted by the contraception mandate.²¹ According to that exception, only religious employers are exempt from the obligation to offer the services provided for in the mandate; that is, those organizations that fulfill the following requirements: a) Their purpose is that of spreading religious values; b) They hire persons who share the organization's religious values; c) They offer services to individuals who share those same values; d) They are non-profit organizations related with the exclusively-religious activities of churches, conventions, or associations of churches that do not have autonomous legal personality ("integrated auxiliaries").²²

Under these regulations, there were many organizations of a religious character – Catholic and non-Catholic, including hospitals, universities, schools, and charitable organizations – that did not fall within the exception formulated by the new federal mandate. These institutions thus found themselves facing the choice to include contraceptive and sterilization services in their insurance plans, thereby going against their own values, or the obligation of paying very substantial fines, a fact that put their financial survival at risk.²³

46621, 3 August 2011 (<http://www.gpo.gov/fdsys/pkg/FR-2011-08-03/html/2011-19684.htm>). So-called grandfathered plans were the only ones that remained exempt from this obligation; that is, insurance plans that were in force before the approval of the Affordable Care Act (cf. 42 U.S.C. 18011 a2; *Roman Catholic Archdiocese of New York v. Sebelius*, Memorandum Decision and Order, 12 Civ. 2542, 5 December 2012, p. 3).

¹⁹ Cf. USCCB, *Comments on Interim Final Rules Imposing Contraceptive Mandate*, 31 August 2011 (<http://www.usccb.org/about/general-counsel/rulemaking>).

²⁰ Cf. *ibid.*, p. 4.

²¹ Cf. *ibid.*, pp. 13-22.

²² Cf. 76 Fed. Reg. 46,621, 46,626, 3 August 2011.

²³ Cf. USCCB, *Comments on Interim Final Rules Imposing the Contraceptive Mandate*, 31 August 2011, pp. 8-9.

5. THE ONE-YEAR GRACE PERIOD AND THE “ACCOMMODATION”
PROMISE TO REVISE THE RELIGIOUS EXCEPTION

The criticisms of the contraception mandate and the narrow exemption contained therein gave rise to a new intervention by the U.S. Government at the beginning of 2012. On January 20, the HHS confirmed that beginning in August of that year, all insurance plans offered or negotiated by any type of institution with more than fifty full-time employees – except religious employers – would have to obey the mandate. Simultaneously, it announced that there would be a one-year grace period before the obligation came into force for non-profit organizations that expressed a religious objection to the mandate and which, until then, had not included contraception services in their insurance plans. In addition, the Administration announced that in the following months further rules would be developed for the application of the mandate to organizations of this type that had not been exempted from it via the religious employer exemption.²⁴

With this in mind, on March 21, 2012 a regulatory proposal (an “accommodation”) for said situations was made public.²⁵ The proposal’s central point consisted in the fact that non-profit organizations of a religious character that were not covered by the religious exemption, yet had some objection to the mandate, would not be directly implicated in the coverage of contraception and sterilization services if they did not wish to be so; such services would instead be offered directly to their employees (or to students in the case of schools and universities) by the insurance companies themselves.²⁶

This time, the first formal reaction was not by the episcopal conference. In April, a group of more than three hundred academics, journalists, and religious leaders from throughout the United States (among them, various Catholic bishops) published a document in which they denounced the contradictions contained in the accommodation proposal offered by the HHS.²⁷ The document highlighted the fact that the only novelty in the new regulation was that it would be the insurance companies who would contact the employees of religiously-inspired institutions, advising them of the fact that their policies also included contraception and sterilization services, offered at no cost for the fact that they worked in those institutions. It was an illusion to suggest – the document concluded – that, in this way, entities of religious inspiration would not pay for that part of the insurance coverage; the

²⁴ Cf. 77 Fed. Reg. 8725-01 (15 February 2012).

²⁵ Cf. *Advance Notice of Proposed Rulemaking*, 77 Fed. Reg. 16501, 21 March 2012.

²⁶ Cf. <http://www.hhs.gov/news/press/2012pres/03/20120316g.html>.

²⁷ For an updated list of the document’s signers, cf. *Unacceptable*, 11 April 2012 (<http://www.becketfund.org/unacceptable-2/>).

insurance companies would obviously in some way pass on the costs of the additional services to their clients.

In the month of May, the USCCB sent its opinion on the newly-proposed legislation to the HHS. The American prelates reaffirmed the principal points of the above-cited document and noted additional problems concerning the religious freedom of those potentially affected by the provision.²⁸ In the first place, the formulation envisaged in the new legislation did not take into account the fact that a large number of organizations connected in some way with the Catholic Church, which were also subject to other state-level contraception mandates, had previously chosen the route of self-insurance as a means for being exempt from the obligation of offering contraception services to their employees and students. In those cases, the employer and insurance company were identical, thus rendering superfluous the newly-proposed mechanism. In the second place, the new regulation referred only to non-profit employers of a religious character.²⁹ Therefore, any potential conscientious objection – both moral and religious, individual and institutional – would not be covered in the cases of: 1) For-profit organizations of a religious character; 2) For-profit and non-profit employers that, even if not of a religious character, did not wish that their companies should be conduits for the coverage of contraception and sterilization services; 3) Insurance companies themselves – of a religious character or not – that did not qualify for any exemption in the legislation.³⁰

With the breadth of these observations, the bishops made clear that their fight in this case had nothing to do with the Catholic doctrine on contraception (though this was logically at the root of the potential conscientious objection of many individuals and employers), but with the defense of the freedom of conscience, thought and religion of all American citizens.

6. LAWSUITS AGAINST THE CONTRACEPTION MANDATE: PARTICIPANTS AND ISSUES

The U.S. bishops' comment on this further attempt to modify the contraception mandate affirmed that, given the lack of attention on the part of the Executive Branch to this clear violation of civil liberties, from then on there would be no other choice but that of recourse to judicial authority.³¹ In fact,

²⁸ Cf. USCCB, *Comments on "Advance Notice of Proposed Rulemaking on Preventive Services"*, 15 May 2012 (<http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf>).

²⁹ Thus it again left for later legislation the definition of religious organizations that, not included in the religious exception of the Affordable Care Act, would fall within the new "accommodation" (cf. *ibid.*, p. 6).

³⁰ Cf. *ibid.*: p. 3, p. 10, note 10.

³¹ Cf. *ibid.*, p. 4.

prior to this last statement by the episcopal conference, a total of eleven lawsuits had already been brought against the contraception mandate and its proposed religious exception.³²

Starting from May of 2012, the number of lawsuits multiplied continuously. As we said at the beginning, among the plaintiffs – spread across twenty states – great institutional diversity can be found: there are dioceses and various agencies of social concern; medical and charitable organizations; schools and universities; a television station and a publisher; and firms of other types as well.³³ In addition, not only individuals or institutions of Catholic inspiration are to be found among the plaintiffs, as was affirmed by some at the beginning of the controversy: there are also other institutions of Christian inspiration that, even if they do not share the Catholic teaching on contraception, do share the condemnation of abortion and contraceptive practices that can lead to abortive outcomes.³⁴ Furthermore, from the beginning there have been several expressions of support from other religious denominations to those taking recourse against the contraception mandate. In some cases – though clarifying that their moral teaching is not in agreement with that of the Catholic Church or of other Christian denominations in the area of contraception and sterilization – they have wished to underline how the core of the legal debate surrounding the contraception mandate is substantially related to the freedom of conscience, thought and religion.³⁵

³² Cf. *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989 (D.D.C.) (filed 10 November 2011); *Colorado Christian University v. Sebelius*, No. 11-cv-03350-CMA-BNB (D. Colo.) (filed 21 December 2011); *Eternal Word Television Network v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala.) (filed 9 February 2012); *Priests for Life v. Sebelius*, No. 12-cv-753 (E.D.N.Y.) (filed 15 February 2012); *Louisiana College v. Sebelius*, No. 1:12-cv-00463 (W.D. La.) (filed 18 February 2012); *Ave Maria University v. Sebelius*, No. 2:12-cv-88-FRM-29SPC (M.D. Fla.) (filed 21 February 2012); *Geneva College v. Sebelius*, No. 2:2012-cv-00207 (W.D. Pa.) (filed 21 February 2012); *State of Nebraska v. United States Department of Health and Human Services*, No. 4:12-cv-03035 (D. Neb.) (filed 23 February 2012); *O'Brien v. United States Department of Health and Human Services*, No. 4:2012-cv-00476 (E.D. Mo.) (filed 15 March 2012); *Newland v. Sebelius*, No. 1:12-cv-1123 (D. Colo.) (filed 30 April 2012); *Legatus v. Sebelius*, No. 2:12-cv-12061-RHC-MJH (E.D. Mich.) (filed 7 May 2012).

³³ Cf. <http://www.becketfund.org/hhsinformationcentral/> for an updated list of appellants and to follow the development of all of the cases.

³⁴ East Texas and Houston Baptist Universities, Wheaton College (Evangelical liberal arts college and graduate school), Colorado Christian University (non-denominational Christian university), Geneva College (Reformed Presbyterian college), Louisiana College (Baptist college), Grace Schools (Evangelical Christian colleges), College of Ozarks (Protestant college), Criswell College (Baptist college).

³⁵ The contraception mandate was officially criticized by – among others – the leaders of the National Association of Evangelicals, by the Union of Orthodox Jewish Congregations of America, by the Southern Baptist Convention, and by the Council for Christian Colleges and Universities (<http://www.orthodoxytoday.org/blog/2012/02/true-ecumenism-christians-united-against-obamas-hhs-mandate/>). In the congressional consultative session on the issue, held in February 2012, the USCCB's position was openly defended by the President

The initial judgments brought with them the result of making a most important distinction between plaintiffs: namely, between beneficiaries of the grace period given by the government for the implementation of the contraception mandate (in general, non-profit entities of a religious character), and those organizations that did not benefit from the extension (mainly private companies without any type of religious affiliation).

With respect to the lawsuits brought by the first type of institution, government lawyers went in the line of affirming that the granted one-year grace period ensured that these institutions could not claim the existence of imminent harm to their religious freedom – a necessary requirement for the concession of injunctive relief.³⁶ According to the government, these institutions' insurance policies could be exempted from the contraception mandate through the revision of the religious exemption, promised for March of 2012.³⁷ Therefore, in order for the judges to be able to enter into the merit of the question, it would be necessary to wait for some potential future damage caused by the regulation finally enacted by the government.³⁸

Until the end of 2012, this argumentation was generally accepted by the competent district courts; thus they did not enter into the merit of the question regarding appellant institutions' religious freedom. At the end of 2012, however, in two resolutions related to cases brought forward by the Archdiocese of New York and two universities (one Catholic and one Protestant), the judges, even though they accepted the argument on the existence of im-

of the Lutheran Church–Missouri Synod, a well-known orthodox rabbi, and by other representatives of Protestant universities (cf. <http://oversight.house.gov/hearing/lines-crossed-separation-of-church-and-state-has-the-obama-administration-trampled-on-freedom-of-religion-and-freedom-of-conscience>).

³⁶ “To have standing, the plaintiff must show a concrete and imminent injury-in-fact, a causal relationship between the injury and defendants' challenged conduct, and a likelihood that a favorable decision will redress the injury suffered” (cf. *University of Notre Dame v. Sebelius*, Motion to Dismiss, 31 December 2012, p. 6). “Injunctive relief” is a decree by the judge ordering that one of the parties in the suit should carry out or refrain from determined actions in favor of the opposing party, such as: paying a sum of money, granting a right, refraining from certain behaviors, etc. (cf. K. STOLL-DEBELL, N. L. DEMPSEY, B. E. DEMPSEY, *Injunctive Relief: Temporary Restraining Orders and Preliminary Injunctions*, American Bar Association, 2009).

³⁷ Cf. 77 Fed. Reg. 16501, 15504 (21 March 2012).

³⁸ “Taking the defendants at their word concerning the intended reworking of the rule, this regulatory requirement won't require Notre Dame to conduct itself in ways its Catholic mission forbids” (*University of Notre Dame v. Sebelius*, Motion to Dismiss, 31 December 2012, p. 8). Cf. also *Zubik v. Sebelius*, 2012 WL 5932977 (W.D.Pa., 27 November 2012); *Catholic Diocese of Nashville v. Sebelius*, 2012 WL 5879796 (M.D.Tenn., 21 November 2012); *Wheaton College v. Sebelius*, 2012 WL 3637162 (D.D.C. 2012), appeal held in abeyance 2012 WL 6652505 (D.C.Cir. 2012); *Belmont Abbey College v. Sebelius*, 2012 WL 2914417 (D.D.C. 2012), appeal held in abeyance sub nom *Wheaton College v. Sebelius*, 2012 WL 6652505 (D.C.Cir. 2012); *Nebraska ex rel. Bruning v. U.S. Dept. of Health and Human Svcs.*, 2012 WL 2913402 (D.Neb. 2012).

minent harm, at the same time obligated the government to take on the task of enacting the new regulation by the month of August 2013; it was also to inform on the progress of the legislation's development at least every sixty days.³⁹

Regarding the lawsuits brought by the second type of institution (companies with no type of formal religious affiliation), the U.S. Government's defense went in the other direction, mainly following two lines of reasoning. In the first place, government lawyers maintained the impossibility of claiming that a for-profit entity could have title to the right of religious freedom.⁴⁰ In the second place, they affirmed that the owners of the firms appealing in these cases made an organizational choice that involves a separation between their personal economic patrimony and that of the company; therefore, they could not later expect that their personal moral values should be observed in the company's business and social undertakings, as this would be a way of imposing those values on the employees.⁴¹

These two arguments, taken separately or together, have been adopted in certain cases by district judges and appeals courts; thereby they have denied temporary injunctive relief to the companies involved.⁴² In other cases, the government's arguments were rejected by the judges. This occasioned the suspension of the obligation to pay the foreseen fines until such time as those cases were resolved.⁴³

³⁹ Cf. *Roman Catholic Archdiocese of New York v. Sebelius*, 2012 WL 6042864 (E.D.N.Y. 4 December 2012); *Wheaton College v. Sebelius*, District of Columbia Circuit Court of Appeals, 18 December 2012.

⁴⁰ Cf., e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, Western District Court of Oklahoma, Defendants' Memorandum, 22 October 2012, pp. 2-3, 14-15: *Hobby Lobby is a for-profit, secular employer, and a secular entity by definition does not exercise religion.*

⁴¹ Cf., e.g., *Ibid.*, p. 16-20.

⁴² In the case *Hobby Lobby Stores, Inc. v. Sebelius*, the appellants requested the Supreme Court's intervention after the Tenth Circuit Court of Appeals declined to grant preliminary injunctive relief, but their request was denied (cf. United States Supreme Court, *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 2012, On Application for Injunction, 26 December 2012). For other cases of this type, cf. *Autocam Corp. v. Sebelius*; *Conestoga Wood Specialties Corp. v. Sebelius*; *Briscoe v. Sebelius*; *Fresh Unlimited v. Sebelius*.

⁴³ *Annex Medical v. Sebelius*, No. 13-1118 (8th Cir. 1 February 2013); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. 30 January 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. 28 December 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. 28 November 2012); *Monaghan v. Sebelius*, No. 12-15488 (E.D. Mich. 14 March 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. 28 February 2013); *Triune Health Group v. U.S. Dep't of Health & Human Servs.*, No. 12 C 6756 (N.D. Ill. 3 January 2013); *Sharpe Holdings v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. 31 December 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. 20 December 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. 31 October 2012); *Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. 27 July 2012).

Along with these procedural arguments, government lawyers – together with the various legal opinions submitted in their favor (amicus briefs) – have sought from the first to make some institutions' refusal to comply with the contraception mandate appear to be a case of discrimination against women and their right to healthcare.⁴⁴ In our opinion, this is an issue of particular importance, given the relationship it has with the protection of the social activity of institutions of Christian inspiration throughout the world. For this reason, we will now pause on its principal elements before referring to the latest amendment of the contraception mandate.

7. THE LEGISLATIVE CREATION OF SCENARIOS
OF ARTIFICIAL DISCRIMINATION, TO THE HARM OF INSTITUTIONS
OF ETHICAL AND RELIGIOUS INSPIRATION

In the juridical environment of the West, both in the sphere of civil law and of common law, one can speak of a general tendency in recent years toward the legislative creation of scenarios of artificial discrimination; these are causing grave damage to many institutions of Christian inspiration that operate in the educational, healthcare, and social service environments.⁴⁵

The legislative measures that lead to the appearance of these scenarios have varied contents, but they always feature the uniform application of their norms to all institutions that operate in the social sphere, regardless of their character. It is a matter of the strict application of legal norms without leaving space for institutional conscientious objection – which leads, for not a few institutions, to the choice between having to go against

⁴⁴ Cf. *Hobby Lobby Stores, Inc. v. Sebelius*, Western District Court of Oklahoma, Defendants' Memorandum, 22 October 2012, pp. 2, 4-5, 8, 20. As an example of the argumentation used in some of these cases, of particular interest is the opinion given by the *American Civil Liberties Union* in one of the cases relating to a for-profit company (*O'Brien v. HHS*). The ACLU alleges in its decree that an important part of gender equality is that of offering to women the effective possibility of having "full control of their reproductive life". According to them, the plaintiffs in the case would be seeking "to discriminate against women and deny them benefits because of [their employers'] religious beliefs". The ACLU affirms in the end that in similar prior cases, the judges reaffirmed that "the right to religious liberty does not encompass the right to discriminate against others". And they conclude: "Not only do these neutral anti-discrimination laws further a compelling government interest, but as courts have held, they also minimally – if at all – burden religion" (cf. http://www.aclu.org/files/assets/amicus_brief_o.pdf, pp. 2 and 10).

⁴⁵ Already in the conference held in Subiaco, Italy on April 1, 2005 – where he received the St. Benedict Award – Joseph Cardinal Ratzinger warned: "The concept of discrimination is constantly being enlarged, and thus the prohibition on discrimination may increasingly become a limitation of the freedoms of opinion and of religious freedom" (J. RATZINGER, *L'Europa di Benedetto nella crisi delle culture*, Rome-Siena 2005, p. 42, our translation).

their own identity or interrupting their services (with consequent harm also for the beneficiaries). Indeed, a veritable redefinition of the nature of many services continues to be effected; such services are also cloaked with a public/state character, inconsistent with their origins as commitments of the civil society.

At the base of these legislative interventions are often found generally-shared ethical hypotheses tending toward the abolition of every form of discrimination. The problem – as is well known – is found both in the ideological exploitation of the contents of these norms, and in the consequences that flow from them through the legal redefinition of the criteria of the juridical articulation of fundamental rights and freedoms.⁴⁶ The combination of these factors not infrequently facilitates that the congressional approval of this type of norm, though relying on very narrow voting margins, should have important constitutional consequences in the short term.⁴⁷

Of recent note in this regard are the measures in many countries seeking to force all organizations that operate in the realm of social services to admit all individuals (whether as collaborators or as clients) who, by means of a new anti-discrimination law, are qualified for the service offered, without taking into account the interested entity's nature. For example, in the case of foster care and adoption agencies, both in Great Britain and in several American States, many Catholic organizations have had to close due to their refusal to recognize unmarried or homosexual couples as family structures apt for the reception of children; the agencies' closure has brought with it resultant social harm for the recipients of their services. The anti-discrimination laws intended to protect homosexual persons from discrimination have

⁴⁶ Cf. *Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations, on the 'Declaration on Human Rights, Sexual Orientation, and Gender Identity'*, 18 December 2008 (http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html). I have already referred to this idea in "La discriminazione religiosa fondata sulle leggi antidiscriminazione: un rischio giuridico ormai globale" (comments on the judgment *Hosanna-Tabor v. EECO*, U.S. Supreme Court, 11 January 2012), *Ius Ecclesiae* 24 (2012), pp. 733-744.

⁴⁷ Even in cases relating to the Affordable Care Act the question was immediately posed: "Although supporters of the HHS Mandate argue that women have a constitutional right to contraceptives, this does not include a constitutional right to receive such medical services free of charge at the behest of private employers, through mandated insurance coverage. The constitutional right associated with contraceptives is the right to be free from government interference in the personal, intimate decisions concerning the use of contraceptives. Even the Supreme Court's recent decision upholding the individual Mandate of the ACA does not convert a statutory right to insurance into a constitutional right. There is no constitutional right to health care in general or to contraceptive services, specifically" (T. DAY-L. DIAZ, *The Affordable Care Act and Religious Freedom: The Next Battleground*, «Georgetown Journal of Law & Public Policy» 11, 2012, p. 49).

been used in these cases as means for creating veritable scenarios of artificial discrimination.⁴⁸

We find other types of situations in the area of education; for example, when schools of Christian inspiration choose gender-specific education for pedagogical reasons and then are accused of sex discrimination. This comes as the result of a broad and abusive interpretation of anti-discrimination norms, which would otherwise – in their normal interpretation – be sharable by everyone.⁴⁹ Staying in the ambit of education, we find the most serious cases where it is sought to impose upon the various types of classroom ethics instruction the obligatory inclusion of those ideological propositions that are employed juridically in the creation of artificial discrimination scenarios. Obviously, what is intended by means of these measures is – in the final analysis – to accomplish a forced social leveling, seeking to eliminate divergences from the ideology that is to be imposed in the educational phase.⁵⁰

Finally, in all of these types of cases, in the face of institutions' refusal to adapt their services to the demands arising from the abusive use of anti-discrimination laws, public authorities always have at their disposal the coercive tool of those institutions' public financing.⁵¹

As can be well-verified in all of these instances, public authorities, through the abusive use of anti-discrimination norms (always accompanied by well-timed media strategies), are able to provoke a change in the

⁴⁸ Regarding the situation created in Great Britain, it is useful to consult the Equality Act of 2010 (<http://www.legislation.gov.uk/ukpga/2010/15/contents>); also the decision *Johns v. Derby City Council*, EWHC 375 (Admin), 28 February 2011. For the situation created in various U.S. cities, cf. <http://www.usccb.org/issues-and-action/religious-liberty/current-threats-to-religious-liberty-bulletin-insert-summer-2012.cfm>.

⁴⁹ Cf., for the Spanish case, the sentence of the Supreme Court 5492/2012 of 23 July 2012, which for this reason denies public funding to two schools of Christian inspiration with gender-specific education.

⁵⁰ Cf. Benedict XVI, *Address to the Members of the Diplomatic Corps Accredited to the Holy See*, 7 January 2013 (http://www.vatican.va/holy_father/benedict_xvi/speeches/2013/january/documents/hf_ben-xvi_spe_20130107_corpo-diplomatico_en.html): "It even happens that believers, and Christians in particular, are prevented from contributing to the common good by their educational and charitable institutions. In order effectively to safeguard the exercise of religious liberty it is essential to respect the right of conscientious objection (...) Thus, outlawing individual and institutional conscientious objection in the name of liberty and pluralism paradoxically opens by contrast the door to intolerance and forced uniformity."

⁵¹ Cf. Benedict XVI, *Address to Participants in the Plenary Meeting of the Pontifical Council "Cor Unum"*, 19 January 2013: "In the face of this anthropological reduction, what is the task expected of every Christian, and especially of you who are engaged in charitable activities and therefore, in direct contact with many other social agents? We must of course exercise critical vigilance and, at times, refuse funding and partnerships that, directly or indirectly, foster actions and projects that are contrary to Christian anthropology."

informational and legal portrayal of their relationships with institutions – in this case, those institutions that operate in the social sphere but whose moral inspiration does not coincide with the vision that the authorities intend to impose. Therefore, wherever the institutions might traditionally appear as victims and the public authorities as oppressors, the matter of discrimination is brought to the fore in order to shift the focus. For example, whereas the authorities might have said, “If you as an institution do not adapt your services to these requirements concerning clients or collaborators, you will be punished”, the emphasis is instead placed on discrimination: “If you as an institution do not adapt your services to these requirements, you are discriminating”. In this way, the ethical-religious institution becomes the oppressor, those against whom they are discriminating (in the abstract) become the victims, and the public authority becomes their defender.

The right to non-discrimination is not new, but by means of the foregoing process of abusive interpretation a new version of that right has, as it were, been created; a new version which is capable of modifying the basic principles of reciprocal articulation among the fundamental rights. The freedom of conscience, thought and religion thus loses its role as a right at the basis of other rights, and so the recognition of the organizing function of society’s different moral patrimonies is set aside.⁵²

8. THE ARTIFICIAL DISCRIMINATION SCENARIO CREATED BY THE CONTRACEPTION MANDATE

As was previously stated, the refusal on the part of many American institutions of ethical-religious inspiration to adhere to the contraception mandate has also been presented as a case of discrimination against women’s right to

⁵² In relation to this role, Carlo Cardia explains: “A further push in this direction could flow from those organizations (of research, healthcare, or charitable assistance) that, in principle, on the basis of the principle of collective or structural conscientious objection, do not carry out scientific research initiatives that they oppose for moral or religious reasons, or are not open to abortion or euthanasia practices, or do not grant the adoption of minors to same-sex couples. These organizations, where individual subjects work who would be (or are) conscientious objectors even from the subjective point of view, have a greater possibility for advancing an alternative perspective on the various above-mentioned areas; they can also serve as driving forces for the development of the cultural debate, offering tools for reflection and knowledge to the legislator” (C. CARDIA, *Tra il diritto e la morale. Obiezione di coscienza e legge in Stato, Chiese e pluralismo confessionale*, vol. Maggio 2009, pp. 27-28; our translation). “This means that the approved legislation may not constitute the legal system’s final landing place regarding that specific issue. It also means that the opposition expressed by the individual – beyond being representative of individual conscience – expresses a wider social discontent, also because the legislator himself senses that he is delving into subjects that are still scientifically and culturally undefined” (*ibid.*, p. 25; our translation).

healthcare.⁵³ We now wish to point out the principal peculiarities and paradoxes of the artificial discrimination scenario created by the Affordable Care Act; here we will refer to the edition of the Act emanated prior to the most recent draft amendment proposed by the government.

A first paradox is that, though it is known that this legislation wanted to expand healthcare services fundamentally through private institutions, the initiative and the federal financing necessary for such an operation have given the appearance of the new set of services' having a public/state character; therefore, they are more easily perceived as not being subject to the necessary respect for the freedom of institutional conscience of the organizations involved. In this way, the contraception mandate presents the novelty – with respect to several previous cases – of creating an artificial discrimination scenario starting from the service offered by the institutions, and not from their collaborators or recipients. Indeed, it is not asked in the measure that every type of person be accepted as a collaborator or recipient, even though such acceptance might do harm to the institution's values; it is asked, rather, for the institution to renounce those values, allowing that its own organization be used as a channel for services that violate them.⁵⁴ The refusal to comply with this obligation – as in the preceding cases – is interpreted abusively as discriminating against women (in the abstract) and against their right to healthcare.

A second peculiarity of the contraception mandate is that non-profit organizations that operate in the social sphere and for-profit entities that conduct various business activities are included together. This adds a new question to the case: Does there exist a right to inspire business activity by ethical values that do not correspond with those that are legally in force?⁵⁵ Reading the argumentation advanced by government lawyers in some of these cases, it seems that the perception is as follows: the designation of an entity as “for-profit” ensures that its money-making purpose overshadows

⁵³ Cf. USCCB, *The Mandate for Contraception/Sterilization Coverage: An Attack on Rights of Conscience*, 20 January 2012 (<http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/preventiveqanda2012-2.pdf>).

⁵⁴ According to the opinion of the Seventh Circuit Court of Appeals (Chicago, Illinois), “the religious liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, *not* (or perhaps more precisely, *not only*) in the later purchase or use of contraception or related services” (*Korte v. Sebelius*, No. 12-3841, 28 December 2012, p. 5).

⁵⁵ On the question at hand, particularly important are Benedict XVI's words in his encyclical, *Caritas in Veritate*, 29 June 2009, n. 37: “Space also needs to be created within the market for economic activity carried out by subjects who freely choose to act according to principles other than those of pure profit, without sacrificing the production of economic value in the process. The many economic entities that draw their origin from religious and lay initiatives demonstrate that this is concretely possible.”

other business objectives to such an extent that it causes the institution's right to freedom of conscience to cease – and thus also that of the owners, the shareholders, and the employees.⁵⁶ In effect, there is an interesting parallelism between the situation in which companies find themselves with the Obamacare case and that which the European Court of Human Rights recently analyzed in the Fourth case of the judgment *Eweida and Others v. the United Kingdom*.⁵⁷ In its decision, the Strasbourg Court reaffirmed the right of companies to have their own ethical code and to make decisions concerning their employees according to the values present in that code; in this case, however, these rights were reaffirmed in order to legitimize a private relational therapy firm's decision to terminate a Christian employee.⁵⁸

In the third place, from a global perspective on cases of this type, it must be stressed that with regulations like the contraception mandate a sort of grip is gained on the worldwide legal scene that stands ready to crush the freedom of conscience of persons who manage and work in social institutions of religious inspiration; at the same time, it threatens to stifle the organizing social role of the values that they promote.⁵⁹ In fact, according to the exception contained in the contraception mandate, only two types of institutions are exempted from the obligation to offer insurance plans that include contraception and sterilization services: those that offer purely religious services, and those offering social services uniquely to persons who share the same faith (hiring for that purpose people of like values). In light of the foregoing, the question arises: Has it not already happened in several countries that institutions of this type have been accused of discrimination, precisely when they did not wish to accept persons who did not share their ethical values as collaborators and beneficiaries? The situation is oxymoronic: religiously-inspired institutions seeking to offer their services in the social sphere may inspire their action with their own moral values only when they

⁵⁶ "Hercules Industries' overriding purpose is to make money (...) There is nothing to indicate that Hercules Industries is anything other than a for-profit, secular employer (...) By definition, a secular employer does not engage in any exercise of religion" (United States Department of Justice, Defendants' Memorandum in Support of Their Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Newland, et al. v. Sebelius*, No. 1:12-cv-01123JLK, D. Colo., 8 June 2012).

⁵⁷ *Eweida and Others v. the United Kingdom*, Fourth Applicant (Mr. McFarlane), 15 January 2013 (App. No. 51671/10).

⁵⁸ *Eweida and Others v. the United Kingdom*, cit., §§ 107-110, with the decision's providing in this case that the company's right should prevail over the employee's right to freedom of conscience.

⁵⁹ "The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection Article 9 affords" (CEDU, *Obst v. Germany*, App. No. 425/03, 23 September 2010, § 44).

interact with individuals who share those values – but doing so results in a reason for which they can be accused of discrimination.

In the case that we are analyzing and in all prior cases of the same tenor, what is ultimately denied through the abusive use of the right to non-discrimination is the right to inspire institutional and social activity with ethical values not corresponding with those that are legally in force – whether of a religious, philosophical, ideological, or other basis. Not infrequently, the justification for this denial is reinforced with the argument of being faced with organizations that operate in the area of social services. In reality, this reasoning seeks to merge the realm of social services into the realm of those that are public, with the aim of widening the authorities' control over those services.

In our opinion, there is a certain presumption to be found behind the reasoning against institutional freedom of conscience that we have been showing; that presumption, in the final analysis, is of the existence of a potential harm that could be caused by those who seek to inspire their social activity with values of an ethical-religious character. This means, in the contemporary juridical context, that when the State does not find legal legitimacy for opposing the freedom of institutional inspiration in social activity (within the boundaries of the common good and public order), it still has available the possibility of placing the inspiring ethical-religious patrimonies of certain persons and institutions under suspicion. The State appears, in this way, as a guardian in the face of potential discrimination against virtual third parties. And one can therefore speak of a veritable inversion of the burden of proof.

9. THE FREEDOM OF INSTITUTIONAL INSPIRATION
AS A PART OF THE FREEDOM OF CONSCIENCE, THOUGHT
AND RELIGION: TOWARD A MORE BALANCED ARTICULATION
WITH THE RIGHT TO NON-DISCRIMINATION

As we have already indicated, on February 1, 2013 the Federal Government introduced a new bill for the amendment of the contraception mandate, fulfilling the judges' request in the cases brought by the Archdiocese of New York, Wheaton College, and Belmont Abbey College. As already happened with the first attempt at accommodation, the government wished to present this new amendment as a final and definitive solution to the problems regarding institutions of religious inspiration that opposed the mandate. The proposal – eighty pages long – provided for a span of sixty days for the submission of comments by all interested parties before proceeding to final approval.⁶⁰

⁶⁰ Cf. *Notice of Proposed Rulemaking on Recommended Preventive Services Policy*, 1 February 2013 (<https://www.federalregister.gov/articles/2013/02/06/2013-02420/coverage-of-certain-preventive-services-under-the-affordable-care-act>).

After briefly studying the proposal, the United States Bishops were again the first to speak out officially, reaffirming once again that the contents of the new provision continued to fall short of respecting the freedom of conscience, thought and religion of many Americans.⁶¹ In sum, the prelates denounced three problems: 1) In the proposed amendment, non-profit organizations of a religious nature are exempted from the contraception mandate (essentially healthcare, educational, and social centers), but insurance companies are required to cover contraception and sterilization services for the institutions' employees and students free of charge;⁶² 2) The mechanism by which religious non-profit organizations are exempted (again, involving the insurance companies' intervention) is still very complex and, in any case, it is still not clear how non-profit organizations that act simultaneously as insurers of their workers would be exempted (i.e., self-insurance situations);⁶³ 3) The new provision does not foresee in any way the exemption of non-profit organizations that are not formally religious and of companies whose activity is inspired by religious values.⁶⁴

At present there are still more than fifty lawsuits in progress against the mandate. It is difficult to foresee what path they will follow in the coming months and what their outcome will be. In any case, it will be necessary to wait for the final approval of the new amendment proposed by the government, the contents of which could undergo still further changes provoked by the submitted comments. If there are not too many changes, it is quite probable that in the coming months the first rulings of American appellate

⁶¹ Cf. *Statement of Cardinal Timothy Dolan Responding to Feb. 1 Proposal from HHS*, 7 February 2013 (<http://www.usccb.org/news/2013/13-037.cfm>). The listed objections are fully developed in the recent document of the USCCB, *Notice of Proposed Rulemaking on Preventive Services*, 20 March 2013 (<http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf>), which contains the final comments on the government's proposed new regulation, and which we will cite below.

⁶² In this way their conscientious objection is presented as secondary with respect to the religious institutions that were fully exempted from the beginning. The USCCB's comment regarding the employees of these organizations is important: "Employees of religiously-affiliated hospitals, colleges, universities, and charities have *chosen* to be employed by such organizations and therefore, as to any employee benefits that those employers provide, have implicitly agreed to the employer's terms of employment, including compensation and benefits" (USCCB, *Notice of Proposed Rulemaking on Preventive Services*, 20 March 2013, cit., p. 14, original emphasis).

⁶³ Cf. *ibid.*, pp. 15-23; in particular, on p. 18: "[E]ven if the purchaser's premiums were somehow segregated to eliminate the funding tie, it is not evident that it would resolve the moral problem. In effect, offering a group health plan would operate automatically as a 'ticket' or 'trigger' for contraceptive coverage. The employee (and her dependents such as female minor children) will receive this 'entitlement' whether she wants it or not, triggered by her enrollment in a health plan from her religious employer."

⁶⁴ Cf. *ibid.*, pp. 7-8.

courts on the core of the question could arrive; this could allow the Supreme Court to take over some of these cases and include them in its agenda for next year⁶⁵.

If any of these cases were finally to make it to the Supreme Court, the plaintiffs' first challenge would be to prove that the obligation of making their organizational structure available for contraception and sterilization coverage involves a substantial burden. This burden weighs upon the freedom of conscience, thought and religion of the employers, insurers, and workers who present moral objections to that coverage.⁶⁶ As has already been seen in the lower courts, the organizations filing suit have encountered the most serious difficulties in alleging that even for-profit entities have a right to institutional religious freedom, protected by the Religious Freedom Restoration Act (RFRA).⁶⁷

If the Supreme Court admits that a substantial burden to religious freedom exists on account of the contraception mandate, it will have to apply to the case the strict scrutiny test called for in the RFRA, as it has done in the most recent cases of this type.⁶⁸ The government will thus have to demonstrate, on the one hand, that the limitation of religious freedom contained in the contraception mandate is necessary to protect a compelling state interest; on the other hand, it will have to show that alternative means, less restrictive of religious freedom, do not exist to serve that interest.⁶⁹

According to the government, the compelling interest in this case is the promotion of women's health and well-being during pregnancy; it also involves the equilibrium of healthcare costs between men and women of the

⁶⁵ As these pages were going to press, the U.S. Government asked that the Supreme Court rule on whether for-profit entities affected by Obamacare could exercise the right to religious liberty as defined in the Religious Restoration Act (1993), and so be exempt from the contraception mandate (cf. *Hobby Lobby Stores, Inc. v. Sebelius*, Petition for Writ of Certiorari, September 2013).

⁶⁶ Cf. USCCB, *Comments on Interim Final Rules Imposing Contraception Mandate*, 31 August 2011, cit., pp. 8-11.

⁶⁷ *Religious Freedom Restoration Act* (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (16 November 1993). As Justice S. Sotomayor noted in the response to the injunction pending appellate review requested by Hobby Lobby Inc., until now the Supreme Court has never ruled on this particular point (cf. United States Supreme Court, *Hobby Lobby v. Sebelius*, Application for Injunction, 568 U.S., 26 December 2012, p. 3).

⁶⁸ Regarding the development of the U.S. Supreme Court's jurisprudence in the application of the balance process and the strict scrutiny test, beginning with the *Sherbert v. Verner* case (374 U.S. 398, 1963), cf. V. VALENTINI, *Gli Stati Uniti e la religione. Separatismo e libertà religiosa nella democrazia americana*, Roma 2010, pp. 43-50.

⁶⁹ The RFRA requires that any action of the Federal Government that significantly burdens the free exercise of religion should be submitted to the strict scrutiny test (cf. 42 U.S.C. 2000bb-1c).

same age group.⁷⁰ Nevertheless, it is not an easy task to establish that the inclusion of contraception and sterilization among preventative care services for women should be a compelling interest.⁷¹ Alongside favorable scientific studies produced by the HHS, there exist other relevant studies showing risks associated with the use of certain types of contraceptives covered by the mandate.⁷² It will also not be an easy task for the government to show that no alternative means exist – less restrictive of religious liberty – to safeguard the above-mentioned interest, inasmuch as the government itself has repeatedly suggested possible ways to adapt the prevailing law to respond to the demands of institutions that are not exempted in the present version of the mandate.⁷³

Moreover, it is very probable that the defense's argumentation before the Supreme Court will include other rights protected by the First Amendment, together with arguments founded upon the freedom of conscience, thought and religion. In particular, the defense might argue the right to freedom of expression, even in its collective dimension, since some institutions have been compelled to fund services that go against the ethical-religious patrimony that inspires their activity.⁷⁴ These complementary arguments would

⁷⁰ Cf. *Ave Maria University v. Sebelius* (No. 212-cv-00088-UA-SPC, M.D. Fla., 16 May 2012), Defendants' Motion to Dismiss and Memorandum in Support, pp. 4-5.

⁷¹ "The proposed regulation keeps in place a regulatory definition of 'preventive' health care which includes items that do not prevent disease, but rather are intended to render a woman temporarily or permanently infertile, and may be associated with adverse health outcomes" (cf. USCCB, *Notice of Proposed Rulemaking on Preventive Services*, 20 March 2013, cit., p. 23).

⁷² Cf., among others: U.S. Food and Drug Administration, *Drug Safety Communication: Safety Review of Possible Increased Risk of Blood Clots with Birth Control Pills containing Drospirenone*, 31 May 2011 (<http://www.fda.gov/Drugs/DrugSafety/ucm257164.htm>). Furthermore, at the end of last year, the first penal charges were brought against a company producing birth control pills in France, in a case that enjoyed wide media coverage; it also brought to light a social health problem until then concealed (cf. *Le Monde*, 14 December 2012: "Pilule: Marion Larat, l'injustice transformée en combat", <http://www.lemonde.fr/sante/article/2012/12/14/>).

⁷³ Cf. *Ave Maria University v. Sebelius* (No. 212-cv-00088-UA-SPC, M.D. Fla., 16 May 2012), Defendants' Motion to Dismiss and Memorandum in Support, pp. 10-11.

⁷⁴ "To the extent that a nonexempt religious employer must either provide an employee health insurance plan which covers services contrary to religious belief or pay a penalty, Plaintiffs argue that the HHS Mandate violates their right not to speak, a freedom guaranteed under the Free Speech Clause. Nevertheless, whether objecting employers incur costs or merely facilitate access to the services, they maintain it violates their free speech rights not to endorse or associate with a message at odds with their moral conscience. The Free Speech Clause protects both the right to speak and the right not to speak. While the Mandate does not involve actual speech, communication of ideas can be expressed through conduct. The HHS Mandate represents the government's message that women's health services of the kind required are important. Further, the idea that contraceptives provide health benefits furthers the government's belief that they are 'life affirming' instead of 'life defying'.

serve to reaffirm that when freedom of institutional expression is denied, the right of association of individuals who voluntarily join those institutions is attacked at the same time; furthermore, in the final analysis, their freedom of conscience, thought and religion is also attacked.⁷⁵

We do not know if any of these cases will finally reach the Supreme Court. If that were to happen, it could ensure that the principles used in these cases' judicial resolution have a particular influence upon later jurisprudence (both in the North America legal environment and in comparative law), given the fact that the artificial discrimination scenario created by the contraception mandate is particularly sophisticated.⁷⁶ This could be a great opportunity to show that the rights of individual and institutional freedom of conscience are not private interests contrasted with public interests; rather, they are also public interests of first importance, insofar as they concern fundamental constitutional rights and freedoms generally recognized by international treaties.⁷⁷

The challenge, once again, will be to find the most balanced articulation possible among the rights present in this complex scenario. Only by means of this deliberation will it be possible to guarantee the highest level of recognition to all the rights involved, avoiding restrictions that might entail a

Clearly, this view of contraceptives is totally at odds with the beliefs of religious objectors. To require nonexempt religious employers to carry insurance satisfying the HHS Mandate is compelling those employers to adopt the government's message about contraceptives" (T. DAY-L. DIAZ, *The Affordable Care Act and Religious Freedom: The Next Battleground*, cit., pp. 39-41). Cf., also, USCCB, *Comments on Interim Final Rules Imposing Contraception Mandate*, 31 August 2011, cit., pp. 11-13, which directly cites *Boys Scout of America v. Dale*, 530 U.S. 640 (2000).

⁷⁵ "When a religious organization in particular pays for private conduct, the inescapable message is that it does not disapprove of that conduct. As noted above, a religious organization cannot communicate an effective message that conduct is morally wrong at the same time that it subsidizes that conduct. In particular, Catholic organizations cannot effectively and persuasively communicate the Church's teaching that contraception and sterilization are immoral if they simultaneously pay for contraceptives for their employees or (in the case of colleges and universities) for their students (...) The compelled subsidization in this case strikes at the heart of the Church's ability to communicate its unambiguous commitment to basic moral teachings and to form associations that maintain their adherence to those teachings" (USCCB, *Comments on Interim Final Rules Imposing Contraception Mandate*, 31 August 2011, cit., pp. 12-13).

⁷⁶ "Despite stereotypical assumptions of divergence between American and European church-state jurisprudence due to the American Establishment Clause, the reality is one of substantial convergence (...). European precedents were argued to the Supreme Court in the most recent autonomy case in the United States (*Hosanna-Tabor*), and for the same reason, we hope comparative analysis will be helpful here" (CEDU, *Sindicatul "Păstorul cel bun" v. Romania*, App. no. 2330/09, *Written Comments of Third-Party Interveners: Becket Fund for Religious Liberty and International Center for Law and Religion Studies*, § 4).

⁷⁷ Cf. R. NAVARRO-VALLS / J. MARTÍNEZ-TORRÓN, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, Madrid 2011, p. 39.

denial of their essential content.⁷⁸ We truly hope that in this effort of harmonization, the freedom of ethical and religious inspiration in social activity – as a specific element of the freedom of conscience, thought and religion – might be clearly recognized by the United States Supreme Court. In this way, one of the most important boundaries of human freedom will once again be assured.⁷⁹

⁷⁸ Cf. J. WEILER, *State, Faith and Nation: the European Conundrum*, 33rd Corbishley Lecture, House of Commons, London, 14 September 2011. This is ultimately the aim of the balancing test and the strict scrutiny foreseen by U.S. Supreme Court's jurisprudence, in order to confirm violations of the Free Exercise Clause. And this should also be the final goal of the "fair balance between the interests of the individual and a community as a whole" and of the distinction between "legitimate aim" and "proportionate aim" often used in the sentences of the European Court of Human Rights (cf., recently, *Eweida v. the United Kingdom*, cit., §§. 84, 105-106 and 109).

⁷⁹ "Religious freedom must also include the freedom to abide by Church teachings, even outside the four walls of the sanctuary" (USCCB, *Notice of Proposed Rulemaking on Preventive Services*, 20 March 2013, cit., p. 11). Cf. also Benedict XVI, *Address to the Members of the Diplomatic Corps Accredited to the Holy See*, 7 January 2013 (http://www.vatican.va/holy_father/benedict_xvi/speeches/2013/january/documents/hf_ben-xvi_spe_20130107_corpo-diplomatico_en.html): "In order effectively to safeguard the exercise of religious liberty it is essential to respect the right of conscientious objection. This 'frontier' of liberty touches upon principles of great importance of an ethical and religious character, rooted in the very dignity of the human person."