Strategic Targeting of Sincere Religious Complicity Claims: You Don't Know What Your Religion Requires

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Introduction

- This presentation has lots of slides that I won't discuss, due to the press of time (and because some of them include points that most of you already are familiar with). Peruse them at your leisure.
- The key point is that the government has no business telling a believer what his or her religion requires.
- There is also reason to think that the administration is either clueless or strategically targeting certain religious beliefs.
- Religious association – not just individual practice of religion – is central to protection of religious liberty.
- So attempts to force religious associations to comply with government demands that violate the sincere religious conscience of their constituents must be opposed. Note also that religion is not necessarily an individual matter: "the mystical union of believers;" the "church" as a living body.
- And regulation that would effectively bar persons with certain religious beliefs from the public square – including the commercial sphere – must be treated with suspicion.

Complicity

- One of the most important moral questions is the degree to which we are responsible for actions we consider to be immoral or to be in violation of religious conscience.
- There are religious views on that question that have been developed over centuries.
- Those views are part of religious belief and doctrine, and they inform, sometimes deeply, religious conscience.

Does religious belief – even theology – have anything to say about complicity?

NOS. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

IN THE SUPREME COURT OF THE UNITED STATES

DAVID A. ZUBIK, ET AL. v. SYLVIA BURWELL, ET AL.

PRIESTS FOR LIFE, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL. v. SYLVIA BURWELL, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL. v. SYLVIA BURWELL, ET AL.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL. v. SYLVIA BURWELL, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL. v. SYLVIA BURWELL, ET AL.

GENEVA COLLEGE v. SYLVIA BURWELL, ET AL.

On Writs of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits

BRIEF OF 50 CATHOLIC THEOLOGIANS AND ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Catholic Theologians and Ethicists say:

"The courts below concluded that Petitioners' compliance with the Government's directive aimed at providing insurance coverage for abortifacients, contraceptives, and sterilization to their employees (the 'Mandate') would not render the Petitioners complicit in religiously forbidden behavior, and thus would not substantially burden Petitioners' religion. In so ruling, these courts erroneously sought to 'arrogat[e]' to the federal judiciary 'the authority to provide a binding national answer to this religious and philosophical question.' Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2778 (2014). Moreover, these judgments by federal courts about profound and difficult questions of moral complicity evidently rested on misapprehensions about the theological principles of the religious traditions at issue, including the Roman Catholic tradition."

“The Catholic tradition draws a distinction between ‘formal’ and ‘material’ cooperation. Broadly speaking, ‘formal’ cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. See Orville N. Griese, CATHOLIC IDENTITY IN HEALTH CARE: PRINCIPLES AND PRACTICE 387-88 (1987); Germain Grisez, THE WAY OF THE LORD JESUS, VOL. 3: DIFFICULT MORAL QUESTIONS 872-73 (1997). ‘Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending.’ Grisez, at 873. ‘Material’ cooperation occurs when the believer could reasonably foresee that his or her action will facilitate or assist the performance of the objectionable action by the third party, but does not share in the principal agent’s intention to commit the action. Grisez, at 873; Griese, at 388. Material cooperation is sometimes permissible, and sometimes impermissible. To determine whether it is permissible, one must balance the good one hopes to achieve by indirectly cooperating in wrongdoing against the nature of the bad action and the closeness of one’s contribution to it. Grisez, at 876.

- Are courts equipped to answer the question whether an act is, under Catholic (or any religious) doctrine an impermissible act of material cooperation in a forbidden action?
- Even if so, would the Constitution permit courts to answer that religious question?

Free Exercise: "Congress shall make no law … prohibiting the free exercise" of religion

- Sherbert v. Verner (1963) and Thomas v. Review Bd. (1981)
  - Strict scrutiny applied where government puts substantial pressure on person to engage in conduct prohibited by religious faith (or not to engage in conduct required by religious faith)
  - *Thomas*: **"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."**

- But: Employment Div. v. Smith (1990):
  - No exemptions if law is "neutral and generally applicable"
    - Unless individualized assessments or hybrid rights

The Religious Freedom Restoration Act
42 USC § 2000bb–1

(a) In general

Government shall not **substantially burden** a person's exercise of religion **even if the burden results from a rule of general applicability**, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a **compelling** governmental interest; and

(2) is the **least restrictive means** of furthering that compelling governmental interest.

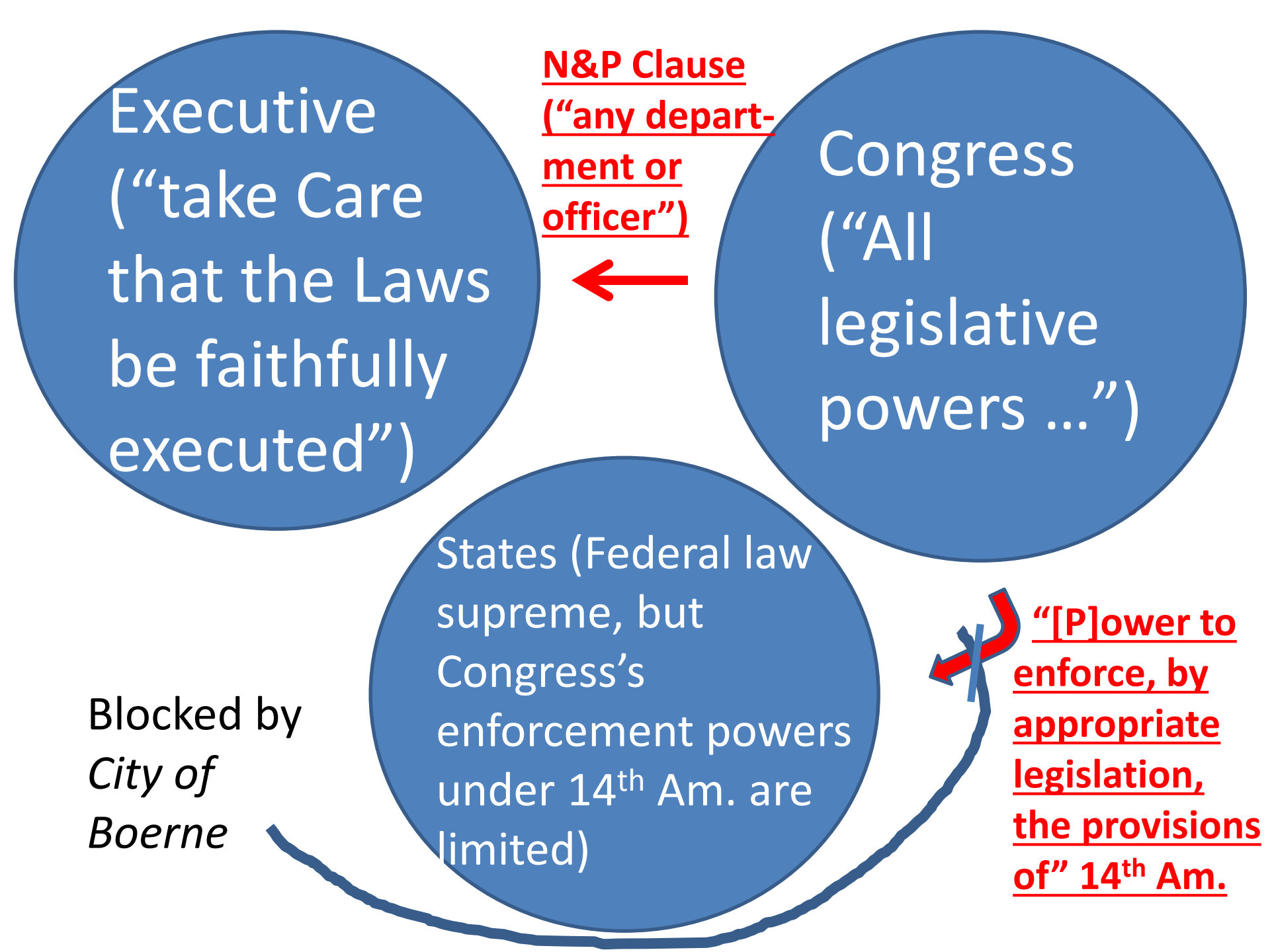
…

Which governments are covered by RFRA?

- Originally, “government” was defined to include states and subdivisions of states.
- As amended in 2000, RFRA does not apply to the states or their subdivisions, but does cover the federal government, the DC government, the government of Puerto Rico, and governments of US territories and possessions.
- Coverage includes any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” of any of those governments.
- Why this change?

City of Boerne v. Flores (1997)

- The Court held that RFRA was unconstitutional **as applied to the states**, because Congress had no power to require states to protect religious liberty beyond what the Court had determined was required by the First Amendment.
- Predictably, the Court did not permit Congress to reverse the Court's constitutional decision in *Smith*.
- "You don't tug on Superman's cape, you don't spit into the wind, you don't pull that mask off the old Lone Ranger, and you don't mess around with" the Supreme Court.
- But is RFRA constitutional as applied to the federal government? Can Congress **choose** to protect religious liberty against federal government action to a greater extent than the First Amendment (as interpreted by the Court) requires?


Executive ("take Care that the Laws be faithfully executed")
N&P Clause ("any depart-ment or officer")
Congress ("All legislative powers …")
States (Federal law supreme, but Congress's enforcement powers under 14th Am. are limited)
Blocked by *City of Boerne*
"[P]ower to enforce, by appropriate legislation, the provisions of" 14th Am.

So Congress can decide how it wants the federal government to exercise its powers. It doesn't need a separate power of any kind to decide that the federal government will not interfere with religious liberty, as it understands religious liberty, as Congress understood that liberty. **Congress can certainly control and limit the power that it delegates to an executive department like HHS** to make regulations.

After *City of Boerne*, the Supreme Court has applied RFRA to the federal government, holding without dissent in Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal (2006) that a religious group was entitled under RFRA to an exemption from a neutral and generally applicable federal law.

There is no serious argument here that granting a religious exemption from the HHS mandate would violate the Establishment Clause.

But does RFRA apply to federal statutes enacted post-RFRA and to regulations enacted under those statutes? **YES.**

RFRA applies unless later legislation says that it does not.

- By its terms:
- RFRA "**applies to all Federal law**, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993;" and
- "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] **unless such law explicitly excludes such application** by reference to this chapter."
- Congress did not exclude application of RFRA in the Affordable Care Act.
- **RFRA applies.** Q.E.D.

RFRA Legislative History

- Quotes from the House Report:

- Prior to *Smith*, the Court consistently relied upon the Free Exercise Clause in a variety of circumstances and even when the Court upheld the burden on religion, it did so only after employing strict scrutiny.

- The Committee believes that the compelling governmental interest test must be restored. As Justice O'Connor stated in *Smith*, "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.' "

Thomas v. Review Board, 450 U.S. 707 (1981)

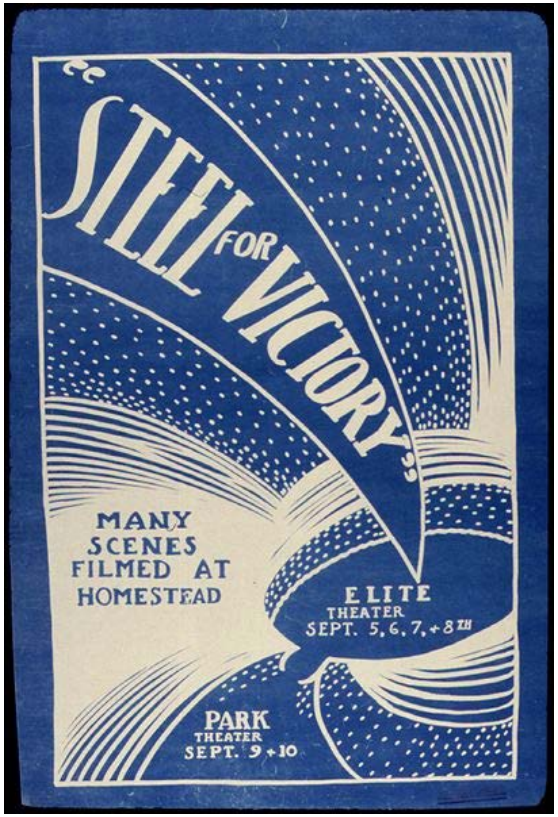
- Moral Complicity: **“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”**
- Thomas’s Jehovah’s Witness faith (as he understood it) “specifically precluded him from producing or directly aiding in the manufacture of items used in warfare.”
- But his understanding of how directly he could be involved in production of war materials differed from that of at least one other member of his faith. Thomas thought it was permitted to help in producing sheet steel some of which might well be used to make weapons, but not in producing tank turrets. His friend told him that their faith permitted him to work on the tank turrets.

The Indiana Supreme Court denied his unemployment insurance claim. Even if he quit for religious reasons, there was only an indirect burden on his religious exercise – denial of unemployment payments. The state's interest in saving money and encouraging workers to stay on the job outweighed that indirect burden. (Both of those conclusions were rejected by the U.S. Supreme Court)

The Indiana court also thought his theory of moral complicity unsound and not sufficiently thought out; so it held that he quit for personal, not religious reasons. It was inconsistent, the Indiana court thought, for him to be willing to make sheet steel, some of which likely would be used by others to make weapons, but unwilling to make components of weapons.

The U.S. Supreme Court rejected that view and treated Thomas's understanding of moral complicity as part of his faith:

"Thomas' statements reveal no more than that he found **work in the roll foundry sufficiently insulated** from producing weapons of war. We see, therefore, that **Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one**."



"Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms …."

But he was transferred to a job making turrets, (tank components). No positions were available that did not involve such work. He quit and was denied unemployment compensation.

“Thomas' religious beliefs specifically precluded him from producing or directly aiding in the manufacture of items used in warfare.”

M60 Main Battle Tank

“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”

The Court treated his understanding of complicity as a command of his faith. It did not matter that other members of his faith thought the Bible permitted him to work in the plant:

"Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. … [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a reljgious sect. Particularly in this sensitive area, **it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith**. **Courts are not arbiters of scriptural interpretation."**

Affordable Care Act Provision

42 U.S.C. § 300gg-13:

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a **minimum** provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such **additional preventive care and screenings** not described in paragraph (1) as **provided for in comprehensive guidelines** supported by the Health Resources and Services Administration for purposes of this paragraph.

HSS Requirements

Employers who provide health insurance (or who self-insure) must include coverage for all FDA approved contraceptive drugs and devices, and coverage for sterilization procedures , with no co-pays and no deductibles.

This includes all the latest and most expensive brand name contraceptives, even if less expensive or generic brands are as safe and as effective for the particular woman.

“Big Pharma”?

Abortifacients?

The mandate also also includes devices and drugs – IUDs, "Plan B," "Ella" – that many people **sincerely believe cause abortions and the taking of innocent human life**. They believe (and are probably right) that in some cases these devices and drugs prevent implantation of fertilized eggs in the uterus. If pregnancy begins when the sperm fertilizes the egg, then this will be a **termination** of the pregnancy, which can be considered to be an abortion.

If human life begins at conception, then this will be the destruction of **innocent human life**.

Many people cannot, as a matter of religious conviction and principle, facilitate the use or distribution of these devices and drugs. By complying with the mandate, they would be violating a command of their faith.

Of course, many people believe that contraception is contrary to God's will, and that they cannot, as a matter of religious conviction and principle, facilitate the distribution or use of contraceptive drugs or devices, even those not thought to cause abortion. But they generally have stronger objections to abortion (cf. Pope Francis and Zika); and most people who disagree with them understand that it is simply wrong to force them to be involved in any way with abortion.

That understanding may not be legally relevant, but it may help others to see that the mandate is a serious violation of the rights of religious conscience. It also shows how HHS and the Obama administration have failed to take seriously – either out of cluelessness or hostility – the religious liberty of those with whom they disagree.

Moral Complicity and Religious Conduct

- Religious organizations and persons who seek exemptions, as employers, from the HHS mandate do not claim that their employees' use of contraceptives or abortifacients (or sterilization services) violates the employers' religious liberty.
- They claim that their religious liberty is violated when they are required to **pay for, arrange for, or cooperate in arranging for** the provision of such drugs or services.
- Their claim is that **their faith prohibits them from being complicit** in the use of contraceptives or abortifacients or sterilization services or in the provision of such drugs or services. (Note that not all claimants object to providing all the drugs or services. In the Hobby Lobby case the objection was only to providing drugs that the plaintiffs considered to be abortifacients.)
- Opponents argue that the burden on the employers' religious liberty is too indirect to be substantial. But again, it is the complicity that is at issue, not the use of the drugs or services.
- Are religious organizations and persons entitled to hold a religious view of when their complicity is sufficient to be prohibited by their religion? Of course. **Their understanding of complicity is part of their faith.**
- A requirement that they be complicit in a way that their faith prohibits is **no different** from any other requirement that they violate the commandments of their faith.
- Since RFRA takes us back to the pre-Smith understanding of religious freedom, **what do the pre-Smith cases say? Thomas v. Review Board, as discussed above.**

But how is **my** exercise of religion burdened when **someone else** – my employee – does something my religion prohibits **me** from doing?

- That question misses the point. It is my actions that are at issue. My religion prohibits me from **facilitating** certain acts. My faith includes beliefs about what it means to be complicit in immoral or evil actions. Those beliefs are part of my religion, and I am entitled to hold those beliefs. My religious exercise is burdened if I am required to be **complicit in ways prohibited by my faith, as I understand it.**
- Complicity has been a constant subject of religious discourse and belief.

Examples …

- Consider a religious group or a feminist group (or a feminist religious group) that believes pornography is harmful and that it is degrading to women.
- What if the law required the group to buy Hustler magazine subscriptions for others?

Or the Vegan group that is required to buy its employees gift certificates for the Omaha Steakhouse?

Or the pacifist group required to give its employees vouchers to be used to for purchases at the local gun shop?

Of course, the law incorporates some views of complicity. But there is no need to apply cookie-cutter notions on that subject. There are different views of when a person is morally responsible for facilitating the wrongful act of another. Differences of religious views on that subject need to be respected just as other religious beliefs are respected.

Variations on a Theme

- The initial mandate: very narrow religious employer exemption, with no accommodation for other religious groups or employers.
- The mandate as revised. (Complex; Marty Lederman at Georgetown may have the most expertise among law professors.)
  - Somewhat broader but still narrow religious employer exemption (churches and integrated auxiliaries).
  - "Accommodation" for some "eligible organizations."
  - No accommodations for others. But see *Hobby Lobby* (S. Ct., 2014).

Original Religious Employer Exemption

- Four part test demanding that group be formed to inculcate teachings, hire only its own, and serve only its own.
- Strange view that those who serve the needy instead of preaching aren't really religious, especially if they serve those who aren't of their own faith, and even more so if they invite others to help.
- Jesus and the apostles wouldn't have qualified.
- Billy Graham Ministries wouldn't have qualified.
- World Vision wouldn't qualify.
- Consistent with the notion that religion should stay private and not show itself in the public square.
- Consistent with administration's narrow view of religious liberty: *Hosanna-Tabor Lutheran Church and School* (ministerial exception): 9-0

New Version

- Religious employer exemption only for churches, synagogues, etc., and their integrated ministries
- Eligible organization "accommodation" for other religious nonprofits, under which, if they do not self-insure, they have to buy insurance policies that come with automatic coverage for contraceptives, abortifacients, etc.
  - Not in the formal policy, but insurance company that sells the policy has to provide the coverage "for free" to the employees covered by the policy.
  - The employer is still effectively arranging for the coverage.
  - Supposed guarantee that the employer would not be paying anything for the coverage depends on very dubious assumptions.
- Self-insured organizations have to procure coverage through third party administrator, **using the structure of their medical coverage**.
- No accommodations at all for religious employers running for-profit businesses. But again see *Hobby Lobby*.
- Requirement that non-exempt religious nonprofits notify HHS using Form 700 (or simpler notice permitted only because of order issued by S. Ct. in favor of Wheaton College).

HHS Accommodation EBSA Form 700, Reverse Side

https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/index.html#Preventionhttp://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer(s) (for insured health plans) or third party administrator(s) (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a plan's third party administrator that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that:

(1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) Obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

Why require religious organizations to instruct TPAs that they are bound by the mandate? Delegation of forbidden act? Why require that the accommodation form be considered part of the objector's plan? It can't just be because the law otherwise precludes enforcement; Congress (or HSS) can change it.

And isn't a requirement that an insurance company provide a benefit the same as a mandatory policy provision?

Alternative Form of Notice (in response to S. Ct. order in *Wheaton College*)

https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-20-14.pdf

- To the Secretary of Health and Human Services: The following eligible organization has a religious objection to providing coverage of [ ] all or [ ] a subset of contraceptive services required to be covered …If the eligible organization objects to providing coverage of a subset of contraceptive services, insert a description of the services for which the eligible organization objects to providing coverage:

  _____

  (1) Name of eligible organization: _____
  - Contact information: _____
  - Eligible organization is a: [ ] Non-profit entity; OR [ ] Other eligible organization

  (2) Service provider information:
  - (a) Plan name (b) Service provider name (c) Service provider contact information

    _____ _____ _____
  - (d) Service provider category
    [ ]Issuer or [ ]TPA

    (e) Plan type (if applicable)
    [ ]Church plan [ ]Student plan

  …

Choices for Religious Dissenters who do not or cannot take advantage of the "accommodation":

1. Pay very heavy fines for providing non-compliant health benefits (Hobby Lobby: almost half a billion dollars per year); or
2. Drop health coverage for employees (perhaps in violation of religious obligation to employees), with resulting substantial damage to employer and employees (and pay smaller fines); or
3. Cease operations.

No escape from bearing a very substantial burden. Consider #2 carefully. What happens to your organization if you can't provide health coverage? What happens to your employees? What happens to your costs if you try to pay employees extra so that they can try to get their own insurance with after-tax dollars? Consider the payroll and income taxes on that extra compensation. And you will have to pay fines, too. Can it seriously be thought that this is not a substantial burden?

The flawed HHS study: Do buyers of policies really pay nothing for mandatory coverage?

- https://aspe.hhs.gov/basic-report/cost-covering-contraceptives-through-health-insurance
- This is the main basis for the claim that automatic addition of the free coverage won't actually make the premium higher (so that the eligible organization won't be paying for the coverage).
- Two real life examples (Hawaii "mandate" and Federal employee health system "mandate"). Embarrassingly shoddy analysis. Neither involved no-copay, no deductible coverage; one already covered some contraceptives; neither involved free access to all FDA approved devices and services. Hawaii mandate explicitly permitted restrictions on contraceptives.