STATE ATTEMPTS TO DEFINE RELIGION: THE RAMIFICATIONS OF APPLYING MANDATORY PRESCRIPTION CONTRACEPTIVE COVERAGE STATUTES TO RELIGIOUS EMPLOYERS

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I. INTRODUCTION

There has been much attention given of late to the issue of whether the law should require private employers to cover prescription contraceptives under their health care plans. Although the exclusion of prescription contraceptive coverage by plans that offer coverage for other prescription medication was for many years not an issue that received attention, the decision by significant numbers of plans in the mid-1990s to cover Viagra made the failure of plans to cover prescription contraceptives a cause célèbre of women's groups, who began to fight for such coverage.[1] As a result, at least twenty states have passed laws of various types requiring mandatory coverage of prescription contraceptives.[2]

For most employers, a requirement that contraceptive coverage be provided in plans that otherwise provide coverage for prescription medication is not a serious matter. Although for the most part employers are free to decide what benefits they will or will not

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1. *See infra* text accompanying notes 121–122.

2. The Alan Guttmacher Inst., *Insurance Coverage of Contraceptives*, STATE POLICIES IN BRIEF, *available at* http://www.agi-usa.org/pubs/spib_ICC.pdf (March 11, 2005).

provide to their employees, there have been other instances where state insurance law has imposed mandatory requirements on employers.[3] Moreover, unlike some of those other mandates, providing contraceptive coverage does not tend to increase the cost to an employer of providing prescription coverage. To the contrary, there is some evidence that medical costs in some plans that are amended to provide for contraception coverage actually decline due to a reduction in the costs of unintended pregnancies.[4]

However, for Catholic organizations, mandatory contraceptive coverage creates an issue of conscience. Because of the Catholic Church's strong moral objection to the use of birth control,[5] forcing organizations affiliated with the Catholic Church to provide prescription contraceptive coverage to their employees is anathema. The same is true of religions organizations affiliated with other religions having moral objections to the use of artificial means of contraception.[6]

Recognizing the conscience concern, many of the mandatory contraceptive coverage statutes have some carve-out for religious

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3. *See, e.g.*, CAL. INS. CODE § 10144.5(a) (Deering Supp. 2005) (requiring that all disability insurance covering hospital, medical or surgical expenses must provide coverage for diagnosis and medically necessary treatment of severe mental illness); MO. ANN. STAT. § 376.811 (West Supp. 2005) (requiring that all insurance policies issued by companies doing business in the state must provide coverage for chemical dependency that meets certain specified minimum standards); N.C. GEN. STAT. § 58-51-57(a) (2004) (requiring that every accident and health policy must provide coverage for examinations and laboratory tests for screening for early detection of cervical cancer and for low-dose screening mammography).

4. The Alan Guttmacher Inst., *The Cost of Contraceptive Insurance Coverage*, ISSUES IN BRIEF, NO. 4 at 1–2, *available at* http://www.guttmacher.org/pubs/ib_4-03/pdf (2003) (citing numerous findings demonstrating that providing contraceptive coverage reduces costs to employer).

5. *See infra* text accompanying notes 37–45.

6. For purposes of this discussion, my focus will be on Catholic religious employers, since the position of the Catholic Church on birth control is clear and vocal.

Similar issues to those here discussed would arise with respect to questions of coverage of reproductive technologies, which do present the issue of cost to private employers. However, since there are currently no proposals to require coverage of such technologies, I do not discuss that issue here. Courts are likely to be less receptive to claims that the exclusion of plans of certain infertility treatment procedures violates Title VII than they have been to claims regarding the failure to cover prescription contraceptives, so long as the exclusion affects a procedure that is used to treat both male and female infertility. *See* Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003) (holding that a plan's exclusion of surgical impregnation procedures does not violate Title VII's prohibition of discrimination on the basis of sex or the Pregnancy Discrimination Act's prohibition of discrimination on the basis of pregnancy and "related medical conditions"). *See also* Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America v. Johnson Controls, Inc., 499 U.S. 187 (1991) (finding Title VII violation where plan excluded treatments for female infertility but not treatments for male infertility).

employers.[7] However, the exclusions in statutes adopted in several major states, such as New York[8] and California,[9] define religious employer very narrowly, with the idea of excluding from the operation of the statute Catholic churches themselves, but not arms of the Catholic Church such as Catholic Charities, or Catholic hospitals, universities or nursing homes.[10]

Because the application of mandatory contraception statutes to religious employers creates a major issue of conscience for the affected religious employers, religious groups in both states have challenged the laws as unconstitutional. Although there has not yet been a final ruling by the New York Court of Appeals on the issue,[11] on March 1, 2004, in *Catholic Charities of Sacramento, Inc. v. The Superior Court*,[12] the California Supreme Court rejected the constitutional claims of Catholic Charities and held that it must provide its employees with prescription contraception coverage in accordance with the statutory mandate.[13]

The question of whether the law should so narrowly define what it means to be a religious employer is not a minor one. The number of

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7. *See The Cost of Contraceptive Insurance Coverage*, *supra* note 4 (describing exemption for religious employers in various state statutes).

8. N.Y. INS. LAW §§ 3221(l6)(A)(1), 4303(cc)(1)(A) (Consol. Supp. 2005).

9. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering Supp. 2005); CAL. INS. CODE § 10123.196(d)(1) (Deering Supp. 2005).

10. *See infra* text accompanying notes 31–32.

11. On November 25, 2003, a lower New York court granted defendant's motion for summary judgment and dismissed plaintiffs' complaint. *See* Catholic Charities of the Diocese of Albany v. Serio, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003).

12. *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67 (Cal. 2004), *cert. denied*, 125 S. Ct. 53 (Oct. 4, 2004).

13. I have found no prior instance where the legislature or judiciary has forced a religious institution to fund something to which it is morally opposed. Nor have others. *See* Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 141 (2003) (observing that "[r]esearch by the United States Conference of Catholic Bishops (USCCB) legal office has not yielded any case where government has forced a religion to pay for something out of its funds that the religion teaches is immoral").

The California decision was hailed as a great victory for gender equity by some and as a blow to religious freedom by others. *See* Planned Parenthood Federation of America, *Planned Parenthood Applauds Court Decision Upholding California's Contraceptive Equity Act*, *at* http://www.plannedparenthood.org/pp2/portal/files/portal/media/pressreleases/pr-040303-california-contraceptive-act.xml (Mar. 3, 2004); American Civil Liberties Union, *ACLU Applauds CA Supreme Court Decision Promoting Women's Health and Ending Gender Discrimination in Insurance Coverage* (applauding the decision), *at* http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=15141&c=225 (Mar. 1, 2004); *California Supreme Court Says Catholic Agency Must Provide Birth Control Coverage*, CATHOLIC HEALTH WORLD, Mar. 15, 2004 (quoting negative reactions by various Catholic social services agencies to the decision), *at* http://chausa.org/PUBS/PUBSART.ASP?ISSUE=W040315& ARTICLE=F.

workers employed by religious employers is extremely large. For example, in California, Catholic Charities of Sacramento has 1600 employees and Catholic hospitals in California employ 52,000 persons.[14] In New York, Catholic affiliated health organizations employ over 50,000 persons and provide health coverage for as many as 500,000.[15] In addition, the Church in New York operates 800 schools, 61 nursing homes and hundreds of social service agencies.[16] Nationwide, Catholic hospitals employ over 620,000 employees.[17]

This Article does not analyze the constitutional claims of the religious organizations. The ruling by the California Supreme Court comes as no great surprise given the Supreme Court's most recent statement on the subject of burdens on a religion's free exercise,[18] and one would expect the New York Court of Appeals ultimately to reach

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14. *See* SIECUS, *New York's and California's Contraceptive Coverage Laws Challenged*, POLICY UPDATE, *available at* http://63.73.227.69/policy/Pupdates/Arch03/arch030083.html (Nov. 2003).

15. Catholic Charities of the Diocese of Albany v. Serio, No. 8229-02, slip op. at 17 (N.Y. Sup. Ct. Nov. 25, 2003).

16. *See* Clifford J. Levy, *Bishops Sue State to Block Coverage for Birth Control*, N.Y. TIMES, Dec. 31, 2002, at B5.

17. United States Conference of Catholic Bishops, *Catholic Information Project: The Catholic Church in America – Meeting Real Needs in Your Neighborhood*, at p.12, *available at* http://www.usccb.org/comm/cipfinal.pdf (Dec. 2003). Three of the ten largest health care systems in the United States are Catholic run systems. *See* Deanna Bellandi et al., *Profitability a Matter of Ownership Status*, 30 MODERN HEALTHCARE 24 (June 12, 2000) (listing Ascension Health, Catholic Health Initiatives and Catholic Healthcare West as among the ten largest healthcare systems). Overall, the Catholic health care system "is the largest private nonprofit effort to deliver health care in the United States." LIZ BUCAR, WHEN CATHOLIC AND NON-CATHOLIC HOSPITALS MERGE REPRODUCTIVE HEALTH COMPROMISED 3 (1998).

18. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (upholding Oregon's decision to withhold unemployment benefits from employees terminated from employment for using peyote in religious ceremonies). In *Smith*, the Supreme Court determined that religious exemptions are not exempt from ordinary neutral laws, finding that the free exercise clause does not prohibit a state from applying a law of general application to a religious group even if the application of the law interferes with the group's religious beliefs. Although Congress sought effectively to overrule *Smith* by enacting the Religious Freedom Restoration Act in 1993, the Court held that statute unconstitutional in *City of Boerne v. Flores.*, 521 U.S. 507 (1997). In *Flores*, the Court cited its earlier ruling in *Smith* as enunciating the view that the "only instance where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake." *Id.* at 513–14. For a discussion of the history of the *Smith* case, see Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953 (1998). Many commentators have expressed criticism of the Supreme Court's decision in *Smith*, but it remains settled law. *See, e.g.*, Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1993); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

the same conclusion. Rather, the Article suggests that as a matter of both public policy and respect for religion, state statutes (and, by implication any federal law that may be enacted to address the same issue) should not mandate contraceptive coverage without broadening their definition of who is a religious employer. The failure to broaden the statutory definitions forces religious organizations, which can not provide such coverage to their employees without violating their conscience, into one of several choices, none of which are desirable for either those institutions or for society. The fact that the application of mandatory contraceptive coverage statutes to religious employers may pass constitutional muster does not make the decision to do so desirable or wise.

More broadly, the Article raises a concern about the implications of the application of mandatory contraceptive coverage statutes to religious employers with respect to issues other than birth control. Regardless of one's own religion or one's personal view of the Catholic Church's position on birth control,[19] the state action here establishes a dangerous precedent that fails to respect the integrity of religious institutions, threatening the Church's autonomy and right of self-definition. For this reason, several religious entities that do not share the Catholic Church's position on birth control joined in amicus briefs in litigation challenging both New York's and California's mandatory contraceptive coverage statutes.[20] The legislation in

19. There is no shortage of individuals and institutions who criticize the Catholic Church's position on contraception. *See, e.g.*, Ann Pettifer, *Papal Politics and Women, available at* http://www.population-security.org/pett-98-10.htm (last visited March 23, 2005) (expressing the view that the Church's position on birth control is "basically aimed at keeping women subservient – making childbearing their primary function."); Leslie Woodcock Tentler, *A Bitter Pill: American Catholics and Contraception*, COMMONWEAL, Apr. 23, 2004, at 11–17 (discussing history of, and alleged damage created by, the Catholic Church's position on birth control). This includes criticism by a number of Catholic theologians. RICHARD A. MCCORMICK, THE CRITICAL CALLING: REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II 74–76 (1989); CHARLES E. CURRAN, TENSIONS IN MORAL THEOLOGY 26 (1988). Over 600 theologians signed a public statement criticizing *Humanae Vitae.* Patrick McCormick, *Catholicism & Sexuality: The Sounds of Silence, available at* http://guweb2.gonzaga.edu/faculty/alfino/McCormickSilence.htm (last visited March 23, 2005).

However, as I explore in more detail in this Article, the troubling issue of the application of these statutes to Catholic employers is not fundamentally about one's view about contraceptives. Rather, it is about how Catholic social service agencies that are "integral part of the Roman Catholic Church" practice their "beliefs as religious organization[s] by providing food, clothing, shelter, and other vital services to people in need." *See California Supreme Court Says Catholic Agency Must Provide Birth Control Coverage, supra* note 13 (quoting statement of Catholic Charities USA).

20. Brief of Amicus Curiae of The Becket Fund for Religious Liberty, Catholic Charities of the Diocese of Albany v. Serio, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003); Brief Amici Curiae of National Religious Organizations, Catholic Charities of

question raises a fundamental question of who decides what a religious institution is, and who defines the institution's mission. It also sets a dangerous precedent for even greater intrusions on religion in the future.[21]

II. THE BIRTH OF MANDATORY CONTRACEPTIVE COVERAGE

Although prescription contraceptives have been available for many years, until recently it was very rare for health insurance plans provided by employers for their employees to cover them.[22] While women who used birth control pills may have been unhappy about having to pay for them out of their own pockets, and while other women may have chosen less expensive alternative means of birth control, the issue was not one that received any significant public attention.

The failure of plans to cover prescription contraceptives started to receive significant attention in 1996, when the FDA approved Viagra. Within a matter of months after the approval, most insurance plans had moved to cover it.[23] The coverage of the latter and not the former led to demand for "contraceptive equity,"[24] resulting in a series of

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Sacramento, Inc. v. Super. Ct., 85 P.3d 67 (Cal. 2004) (No. S099822), *available at* http://www.nccbuscc.org /ogc/amicuscuriae5.htm.

21. This Article does not address an issue that has recently received a lot of attention in the press – that of individual pharmacists refusing to fill prescriptions for emergency contraceptives on the grounds that doing so violates their religious beliefs. Although the issue raises similar questions of conscience, the resolution of those questions is beyond the scope of this Article.

22. "[H]alf of all traditional indemnity plans in 1993 did not cover any reversible prescription methods of contraception, and only 15% covered all of the five leading methods." *See The Cost of Contraceptive Insurance Coverage*, *supra* note 4, at 1 (also citing 2001 Kaiser Family Foundation findings that only 41% of insured employees had coverage of all reversible contraceptives while "virtually all employees" had coverage of prescription drugs in general).

23. U.S. FOOD & DRUG ADMINISTRATION, FDA MEDICAL BULLETIN, VOL.28, NO.1, FIRST ORAL THERAPY FOR ERECTILE DYSFUNCTION (1998), http://www.fda.gov/medbull/summer98/erectile.html; Laura McGinley, *Medicaid Programs are Told to Pay for Viagra but Monitoring Continues*, WALL ST. J., July 2, 1998, at B5. Interestingly, given that widespread coverage of Viagra galvanized the fight for contraceptive coverage, more recent statistics show that more companies provide their employees with coverage for contraception than for erectile dysfunction. A national survey of 250 benefits managers conducted by Greenberg Quinlan Rosner Research, Inc. in the spring of 2004 found that 89% of companies cover contraceptives and only 45% cover erectile dysfunction medication. *See* Greenberg Quinlan Rosner Research Inc. et al, *Female Reproductive Health Coverage,* http://www.arhp.org/files/061504execsumm.pdf (last visited March 23, 2005).

24. *See* Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing link between coverage of Viagra and fight for coverage of contraception coverage); *Insurers Criticized for Covering Viagra and Not the Pill*, BOSTON GLOBE, May 13, 1998, at A8; *Insurers Urged to Cover Contraceptives*, PORTLAND PRESS HERALD, May 13, 1998, at 6C.

lawsuits challenging the failure of private employers to provide for contraceptive coverage as a violation of Title VII[25] and to the passage of contraceptive-equity laws in about twenty states over the last eight years.[26]

These state law mandates take the form of insurance law provisions that require that insurance plans that provide for any prescription coverage must also provide for coverage of prescription contraceptives. That is, the statutes do not actually mandate that an employer provide employees with contraceptive coverage. Rather, the statutes say that if the employer provides medical benefits to its employees through an insured plan and if the plan provides for any prescription coverage, it must also cover prescription contraceptives.[27]

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25. The courts and the EEOC have been receptive to such claims. *See* Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003) (denying an employer's motion to dismiss a sex discrimination claim based on exclusion of contraceptive coverage from health plan); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (holding an employer's failure to provide insurance coverage for prescription contraceptives to be a violation of Title VII); Equal Employment Opportunity Comm'n v. United Parcel Service, 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying an employer's motion to dismiss sex discrimination claim based on exclusion of coverage for oral contraceptives from health plan); Wessling v. AMN Healthcare, No. 01-CV-0757 W (S.D. Cal. Aug. 8, 2001) (denying employers' motion to dismiss sex discrimination claim based on exclusion of coverage for prescription contraceptives from health plan); U.S. Equal Employment Opportunity Commission, *Decision on Coverage of Contraception* (Dec. 14, 2000), http://www.eeoc.gov/policy/docs/decision-contraception.html (ruling an employer violated Title VII by excluding prescription contraceptives from employee health insurance plan). The gender equity issue is further discussed at text accompanying notes 111–122 *infra*.

Presumably Title VII would be an independent basis upon which one might attempt to seek judicial support to force Catholic employers to provide contraceptive coverage even in the absence of state statutes. However, no federal lawsuits have been brought against religious employers, perhaps out of fear that if such suits were brought, Congress might respond by expanding the religious exemption under the federal statute. Title VII currently exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *See* 42 U.S.C. § 2000e-1(a) (2000). In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court held that Title VII's "ministerial exception" was applied whether the person hired by the religious entity was filling a religious or a secular position. *Id.* at 339.

26. *See Cost of Contraceptive Insurance Coverage, supra* note 4.

27. The reason the laws proceed in this way is that the Employee Retirement Income Security Act ("ERISA"), the federal statute that regulates most employee benefit plans of private employers preempts state laws relating to employee benefit plans. *See* 29 U.S.C. § 1144(a) (2000). However, the statutes preemption provision contains an exception for state insurance law. *See Id.* § 1144(b)(2)(A) (2000). Thus, ERISA forbids states from imposing direct mandates on an employer to provide certain benefits. It, however, does not forbid indirect regulation of employer benefit plans that operate through state law insurance law mandates. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). *See infra* text accompanying notes 136–139.

Most, but not all, of the state statutes that mandate prescription contraceptive coverage contain some exclusion for churches and other religious organizations.[28] Those exclusions are framed in various ways. Although some statutes exempt church groups and "qualified church-controlled organizations," others are drafted substantially more narrowly. Illustrative of the narrow approach that creates difficulties for Catholic Church organizations are the California Women's Contraception Equity Act, which was enacted in 1999,[29] and the New York Women's Health and Wellness Act, which went into effect in January 2003.[30]

Both the New York and the California statutes require all commercial health insurance plans that offer prescription drug coverage to provide coverage of prescription contraceptives.[31] The New York and California statutes also impose a four-part test for whether an entity qualifies as a religious employer and is thus excluded from the statutory mandates. To qualify for the religious employer exclusion, (1) the purpose of the organization must be to inculcate religious values; (2) the organization must primarily employ persons of same faith; (3) the organization must primarily serve persons of same faith; (4) the organization must be organized as a non-profit under Internal Revenue Code section 6033(a)(2)(A)(i) or (iii), rather than section 501(c)(3).[32]

Congress, which has since 1998 required coverage of prescription contraceptives in health plans providing benefits to federal

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28. *See Cost of Contraceptive Insurance Coverage*, *supra* note 4 (describing exemption for religious employers in various state statutes).

29. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering Supp. 2005); CAL. INS. CODE § 10123.196(d)(1) (Deering Supp. 2005).

30. N.Y. INS. LAW §§ 3221(l6)(A)(1), 4303(cc)(1)(A) (Consol. Supp. 2005). Hawaii and North Carolina are examples of states that have definitions of religious employer that are similar, although not identical, to the definition in the New York and California statutes. *See* HAW. REV. STAT. ANN. § 431:10A-116.7 (Michie 2004); N.C. GEN. STAT. ANN. § 58-3-178.

31. The New York legislation also contains requirements that plans cover the costs of mammograms, cervical cancer screenings and bone density tests. *Id.* None of these requirements create any difficulty for the Church, which has consistently supported coverage of these types of tests. *See* Roman Catholic Bishops of New York State, *Statement on Contraceptive Coverage Mandate*, http://www.nyscatholicconference.org /pages/news/show_newsDetails.asp? id=75&cat=Bishops%20Statements (Feb. 5, 2002) ("We fully support those provisions of the Women's Health and Wellness bill that deal with screenings for diseases, such as breast and cervical cancer and osteoporosis"); Levy, *supra* note 16, at B5 (stating support of New York Bishops for aspects of New York law that require coverage for mammograms and other women's health services").

32. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering Supp. 2005); CAL. INS. CODE § 10123.196(d)(1) (Deering Supp. 2005); N.Y. INS. LAW §§ 3221(l6)(A)(1), 4303(cc)(1)(A) (Consol. Supp. 2005).

employees,[33] has also considered imposing on private employers a federal contraceptives coverage mandate. Similar to state laws, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC),[34] first proposed in 1997, would require private health plans to provide equitable coverage for prescription contraceptives. The bill, both as originally introduced in 1997 and as reintroduced in July 2003, contains no religious employer exemption. The bill has been referred to committee in both the House and Senate and is awaiting further consideration.

The state interest said to be promoted by mandatory contraceptive coverage statutes is twofold: the promotion of equal treatment of women, and the preservation of public health. The fact that women spend more than men on out-of-pocket health care costs due to the cost of prescription contraceptives and of unintended pregnancies suggested to legislatures and courts that the statute was a means to eliminate gender discrimination.[35] The public health argument is premised on the belief that contraception is "a basic healthcare need."[36] The following sections of this Article challenge the validity of these government interests and suggest that the state has chosen an unwise path toward meeting its articulated interests.

III. MANDATORY CONTRACEPTIVE COVERAGE FROM THE PERSPECTIVE OF RELIGIOUS ORGANIZATIONS

A. The Statute's Mandate is Contrary to Church Teachings

There is no ambiguity about the Catholic Church's position on contraception. The Catechism of the Catholic Church labels as "intrinsically evil" any "action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to

33. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681.

34. Equity in Prescription Insurance and Contraceptive Coverage Act of 2003, S.1396, H.R. 2727, 108th Cong. (2003) (introduced by Senators Olympia Snowe and Harry Reid in the Senate and by Representative James Greenwood in the House).

35. The "principal object" of the California statute was the elimination of the economic inequity caused by the failure of employers to cover prescription contraceptives. *See* Catholic Charities of Sacramento, Inc. v. Super Ct., 85 P.3d 67, 92–93 (Cal. 2004).

36. Alexandra Marks, *Legal Battles Over "Contraceptive Equity,"* CHRISTIAN SCIENCE MONITOR, Dec. 4, 2003, at USA1 (quoting Eve Gartner, senior staff attorney at Planned Parenthood Federation of America).

render procreation impossible."[37] In 1930, in his encyclical *Casti Connubii*, Pope Pius XI reaffirmed earlier Church statements that procreation was the primary end of human sexuality and that the use of means to deprive the sexual act of its power of procreating life "violates the law of God and nature, and those who commit anything of this kind are marked with the stain of grave sin."[38]

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37. CATECHISM OF THE CATHOLIC CHURCH § 2370 (quoting PAUL VI, HUMANAE VITAE § 14 (July 25, 1968)). The Church's position on birth control stems from the notion of an inextricable link between sex and procreation, a notion that solidified around the fourth and fifth centuries and Augustine of Hippo. Augustine saw marriage as a legal contract designed for procreation—a conception that has colored the Church's marriage legislation ever since. *See* ST. AUGUSTINE OF HIPPO, SERMONS ON SELECTED LESSONS OF THE NEW TESTAMENT, Benedictine Edition, Sermon I, § 22, *available at* http://www.newadvent.org/fathers/160301.htm. During the Dark Ages, abortion was considered a grave sin, but little was stated about contraceptives (probably due to the fact that the distinction between the two was not clear). *See* ROBERT MCCLORY, TURNING POINT: THE INSIDE STORY OF THE PAPAL BIRTH CONTROL COMMISSION 12 (1995). By the end of the Middle Ages, "[m]ore balanced attitudes toward marriage and sex gradually developed," permitting intercourse for other than procreation, so long as the couple generally intended to procreate. *Id.* at 13–14. The sixteenth and seventeenth centuries saw a revival of the link between "sin and sex." *Id.* at 15. By the eighteenth and early nineteenth centuries, the situation surrounding contraceptives again relaxed as confessors were told "to preserve the good faith of penitents by not prying too intently into their marital habits." *Id.* at 16. During the nineteenth century, however, the "[c]oncern about a declining birth rate . . . prompted Church authorities to move aggressively against contraception." *Id.* Nevertheless, the severity of condemnations of birth control was still not consistent. *See id.* at 17. The church's position on contraceptives took a strict turn in the 1930s with the publication of *Casti Connubii* by Pope Pius XI, written in response to the Anglican church's approval of birth control at their Lambeth Conference of 1930. PIUS XI, CASTI CONNUBII (Dec. 31, 1930); GARRY WILLS, PAPAL SIN 77 (2000). The encyclical made reference to the Onan passage of Genesis; it also stated that "any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offence against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin." *Casti Connubii*, *supra*, § 56. *Casti Connubii* was the Church's official marriage document until 1968, when Pope Paul VI's published his encyclical *Humanae Vitae*. *See* MCCLORY, *supra*, at 22. Twenty years after *Casti Connubii* was written, the rhythm method was approved of by the Catholic Church as the only natural form of birth control. Pope Pius XII acknowledged his support of the rhythm method in an address to the a group of Catholic midwives in 1951. *See* WILLS, *supra*, at 80. This changed the focus on birth control from the intent of the couple to the actual act itself. *See id.* Nonetheless, Pope Pius XII condemned the birth control pill in 1958, even though technically the pill does not interfere with the act of intercourse itself. *See id.* at 81.

38. *Casti Connubii*, *supra* note 37, § 56. Although the Church now speaks of the unitive and procreative aspects of marriage and sexuality as being equally important, thus moving away from the position that human sexuality is primarily procreative, it continues to reaffirm the ban on artificial birth control. *See* SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, PERSONA HUMANA (Dec. 29, 1975); JOHN PAUL II, FAMILIARIS CONSORTIO (Nov. 22, 1981); JOHN PAUL II, VERITATIS SPLENDOR (Aug. 6, 1993).
Recently, a leading Catholic cardinal, Belgian Cardinal Godfried Danneels, suggested that condoms could be used in a situation where one partner in a relationship is HIV positive, drawing a distinction between the use of condoms to prevent conception and the use of condoms to prevent death. *See* John Hooper & Andrew Osborn, *Cardinal Backs Use of Condoms*, THE GUARDIAN (London), Jan. 13, 2004; John L. Allen, Jr., *Cardinal Danneels*

Despite recognizing the substantial opposition to the Church's teachings on birth control,[39] Pope Paul VI reiterated the position in *Humanae Vitae*, his 1969 encyclical on the regulation of birth, firmly stating that "there are certain limits, beyond which it is wrong to go, to the power of man over his own body and its natural functions," limits which "are expressly imposed because of the reverence due to the whole human organism and its natural functions."[40] In his 1995 encyclical, *Evangelium Vitae*,[41] Pope John Paul II expressed the Church's continued moral opposition to birth control, based on the "sacredness" and "inviolability" of life.[42] Consistent with Church teachings, the Religious Directives for Catholic Health Care Services[43] developed by the National Conference of Catholic Bishops to provide authoritative guidance on moral issues facing Catholic health care institutions[44] include a provision that Catholic hospitals may not promote or condone contraceptive practices.[45]

Thus, from the perspective of a religious entity, forcing it to provide contraceptive coverage to its employees is to force it to violate its conscience and its teachings, to force it to facilitate sin. Although we are accustomed to thinking of issues of conscience as individual matters, here we are dealing with an issue of institutional or corporate conscience – the conscience of the Catholic entity. The Catholic Church is committed to the view that artificial contraceptives are a moral evil; the statute forces it to implicitly endorse it by forcing its affiliated entities to provide contraceptive coverage as part of a

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on Condoms, NATIONAL CATHOLIC REPORTER, Jan. 16, 2004, *available at* http://nationalcatholicreporter.org/word/pfw011604.htm.

39. PAUL VI, HUMANAE VITAE § 14 (July 25, 1968).

40. *Id.* § 17. As this language intimates, the Church does not oppose natural means of family planning. *See supra* note 37. The Church's position is that "spouses have an inalienable right to found a family and to decide on the spacing of births and the number of children to be born, taking into full consideration their duties toward themselves, their children already born, the family and society, in a just hierarchy of values and in accordance with the objective moral order," which permits natural but not artificial means of birth control. HOLY SEE, CHARTER OF THE RIGHTS OF THE FAMILY, art. 3 (Oct. 22, 1983).

41. POPE JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* (1995).

42. *Id.*

43. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES [hereinafter NCCB DIRECTIVES], *available at* http://www.usccb.org/bishops/directives.htm (June 15, 2001).

44. The Directives have a twofold purpose: "first, to reaffirm the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person; second, to provide authoritative guidance on certain moral issues that face Catholic health care today." *Id.* at Preamble.

45. *Id.* § 52. In addition to prohibiting the prescribing or dispensing of contraceptive devices and drugs, the Directives prohibit such things as tubal ligations, vasectomies, and in vitro fertilization. *See id.* §§ 40, 41, 43, 53.

benefit package to employees.

The Church's moral opposition to birth control is not the only religious belief at issue here. This is true for two reasons. First, state statutes mandating coverage of prescription contraceptives typically require that a plan providing any prescription coverage must provide coverage of all FDA approved methods of birth control.[46] Among the FDA approved prescription contraceptives are several that are abortifacients which operate post-conception to inhibit the implantation of an embryo.[47] These include IUDs and the morning-after pill.[48]

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46. Thus, for example, the New York statute provides that "[e]very group or blanket policy which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices approved by the federal food and drug administration." N.Y. INS. LAW § 3221(l)(16) (McKinney Supp. 2003); s*ee also id.* § 4303(cc). Many other states use similar language. *See, e.g.*, California, CAL. INS. CODE § 10123.196 (West 2005); Connecticut, CONN. GEN. STAT. ANN. § 38a-503e (West Supp. 2004); Delaware, DEL. CODE ANN. tit. 18, § 3559 (Supp. 2004); Maryland, MD. CODE ANN., INS. § 15-826 (Supp. 2002); Nevada, NEV. REV. STAT. ANN. 689A.0415 (Michie Supp. 2003).

47. *See* J.C. Willke, M.D., *Abortifacients: American College of Obstetrics and Gynecology Changes Definition*, Life Issues Institute, Inc., *at* http://www.lifeissues.org/abortifacients/index.html (last visited Feb. 18, 2004); *see also* Charles M. Mangan, *Christian Morality: Abortifacients*, *available at* http://www.catholic.net/rcc/Periodicals/Faith/11-12-98/Morality5.html (Nov. 12, 1998). Some would argue that even the birth control pills sometimes act as an abortifacient. *See* John D. Hagen Jr., *Humanae Vitae's Legacy: Two Views*, COMMONWEAL, June 4, 2004, at 8.

48. *See, e.g.*, Carol Jouzaitis, *FDA Backs the Pill for Next-Day Use; Within 72 Hours, Double Dose Can Block Pregnancy*, CHI. TRIB., Feb. 25, 1997, at 1. Although there are some who claim that the morning-after pill prevents conception, inhibiting implantation of an already conceived embryo "could explain the majority of cases where pregnancies are prevented by the morning-after pill." Fabienne Grou & Isabel Rodrigues, *The Morning-After Pill, How Long After?*, 171 AM. J. OF OBSTETRICS AND GYNECOLOGY 1529-34 (1994); *see also* KEITH L. MOORE AND T. V. N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 58 (6th ed. 1998) ("The administration of relatively large doses of estrogens ('morning after' pills) for several days, beginning shortly after unprotected sexual intercourse, usually does not prevent fertilization, but often prevents implantation of the blastocyst."); *Even a Crime Doesn't Justify "Morning-After Pill", Says Cardinal*, ZENIT DAILY DISPATCH, May 4, 2004 (ZE 04050420) (quoting one Catholic cardinal regarding Church position against morning-after pill based on fact that it "eliminate[s] a human life in the embryonic state"), *available at* http://www.zenit.org.
The FDA considered making the "morning after" pill available without prescription, but recently declined to do so based on concern about over the counter use of the contraceptive, particularly among young users. *See* Gardiner Harris, *U.S. Rules Morning-After Pill Can't Be Sold Over the Counter*, N.Y. TIMES, May 7, 2004, at A1; s*ee also Science or Politics at the F.D.A.?*, N.Y. TIMES, Feb. 24, 2004, at A24 (reporting on December 2003 of two advisory committees to the FDA voting 23-4 to recommend that the FDA allow sales of the "morning after" pill without prescription).
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Although they speak in terms of contraceptive coverage, these statutes effectively blur the line between birth control and abortion. The result is to force religious organizations to provide coverage for procedures that are abortive, thereby violating a deeply held moral principle against killing. As is the case with birth control, there is no ambiguity about the Church's position on abortion: abortion is an "abominable crime"[49] that goes "against the human person and against God the Creator and Father"[50] and that distorts the "true nature and dignity" of motherhood."[51] The Catechism characterizes it as an "unchangeable" teaching that every "procured abortion" is a "moral evil."[52]

Catholic opposition to abortion is based on the sacredness of human life.[53] The 1984 papal *Charter on the Rights of the Family* provides that "human life must be respected and protected absolutely from the moment of conception," and that "abortion is a direct violation of the fundamental right to life of the human being."[54] Pope John Paul II strongly articulated the same views in his 1995 encyclical, *Evangelium Vitae*, which calls laws permitting abortion as "radically opposed not only to the good of the individual but also to the common good" and as "intrinsically unjust."[55] The Church's position is that this is not just a matter of individual conscience and sin. The Catechism goes on to state that "[t]he inalienable right to life of every innocent human individual is a constitutive element of a civil

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two advisory committees to the FDA voted 23-4 to recommend that the FDA allow sales of the "morning after" pill without prescription).

49. *Pope: Abortion an 'abominable crime,'* CNN, Oct. 4, 1997, *at* http://www.cnn.com/WORLD/9710/04/brazil.pope; *Pope Greets 1.5 Million Faithful at Rio Mass*, CATHOLIC WORLD NEWS, Oct. 6, 1997, *at* http://www.cwnews.com/news/viewstory.cfm?recnum=5973; Reuters, *Pope Calls Abortion Shame of Humanity*, Oct. 5, 1997, *available at* http://www.mosquitonet.com/~prewett/abortionshameofhum.html; *see also* CATECHISM OF THE CATHOLIC CHURCH §§ 2271–72.

50. Letter of Pope John Paul II to All the World's Bishops, On Combatting Abortion and Euthanasia (May 19, 1991), *available at* http://www.cin.org/jp2ency/aboreuth.html.

51. John Paul II, Pastoral Visit to Cuba, http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_22011998_lahavana-santa-clara_en.html (Jan. 22, 1998); *see also* Lisa Macdonald, *Feminism, Communism and Catholicism*, GREEN LEFT WEEKLY (Feb. 4, 1998), *available at* http://www.greenleft.org.au/back/1998/304/304p11b.htm.

52. CATECHISM OF THE CATHOLIC CHURCH § 2271.

53. CATECHISM OF THE CATHOLIC CHURCH ¶ 2258 (2d ed. 1997).

54. HOLY SEE, CHARTER OF THE RIGHTS OF THE FAMILY, art. 4 (Oct. 22, 1983).

55. EVANGELIUM VITAE, *supra* note 41, §§ 72, 73. This opposition is not a creature of the modern Church. The Didache, a first century teaching document of the early Christian community says, "Do not murder a child by abortion or kill a newborn infant." *See* JESUIT CONFERENCE, STANDING FOR THE UNBORN 3 (2003) (citing Didache and noting that Catholic tradition has consistently been opposed to abortion).

society and its legislation,"[56] thus leaving no room for a posture that accepts that abortion is a wrong but that the matter is one of individual choice.

Second, the Church's position on birth control is not a stand-alone item. From the Church's standpoint, its position on birth control is part and parcel of its commitment to the sanctity of life. Life, because it is a gift from God and because humans are made in the image and likeness of God, is viewed as sacred from beginning to end. Pope John Paul II has forcefully expressed the notion that "if *the right to life*, the most basic and fundamental right and the condition for all other personal rights, is not defended with maximum determination," then all other claims of human rights, such as the right to health, to home, or to work, become "false and illusory."[57] This need to defend the right to life from beginning to end manifests itself in a cohesive body of beliefs that starts with contraception and runs through abortion, the death penalty, and assisted suicide.[58] Thus, an attack on any part of that core set of beliefs strikes at the heart of

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56. CATECHISM OF THE CATHOLIC CHURCH § 2273.

57. JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* para. 38, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html (Dec. 30, 1988).

58. In his 1995 encyclical, *Evangelium Vitae*, Pope John Paul II discusses contraception, abortion, and euthanasia together as part of a "Promethean attitude which leads people to think they can control life and death by taking the decisions about them into their own hands." EVANGELIUM VITAE, *supra* note 41, para. 15. He specifically discusses the link between contraception and abortion, calling them "fruits of the same tree." *Id.* para. 13. Despite their "differences in nature and moral gravity," both treat life as "an enemy to be avoided at all costs." *Id. See also* John Paul II, Address of John Paul II to the Participants in the International Congress on "Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas" para. 3–5, *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040320_congress-fiamc_en.html (Mar. 20, 2004) (affirming the position that the "intrinsic value and personal dignity of every human being" does not change regardless of the circumstances of one's life, that a living human "will never become a 'vegetable' or an 'animal,'" and that a person is always entitled to basic health care, including nutrition and hydration).

With respect to the capital punishment, in *Declaration of the Holy See to the First World Congress on the Death Penalty*, The Holy See restated the Catholic Church's opposition to the death penalty. "The Holy See has engaged itself in the pursuit of the abolition of capital punishment and an integral part of the defense of human life at every stage of its development and does so in defiance of any assertion of a culture of death." Declaration of the Holy See to the First World Congress on the Death Penalty ¶ 3, *available at* http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010621_death-penalty_en.html (June 21, 2001). In *Abolition of the Death Penalty*, The Vatican's UN observer calls on the nations of the world to end capital punishment because the "right to life is an inalienable right of every human person." Intervention by H.E. Archbishop Renato R. Martino, Abolition of the Death Penalty ¶ 2, *available at* http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_02111999_death-penalty_en.html (Nov. 2, 1999).

what the Church deems sacred.

B. Subjecting Religiously-Affiliated Entities to the Reach of Mandatory Contraception Coverage Requirements Does not Give Sufficient Respect to the Catholic Faith

Whether or not one is Catholic or personally agrees with the Church's position on contraception, statutes such as those enacted in California and New York represent a troublesome approach to the definition of religious employer. The four-fold definition would excuse churches themselves from the statutes' mandates, meaning that employees of churches, parish rectories, diocesan chanceries and seminaries would not have to be provided with contraception coverage. This same definition, however, would not exclude entities such as Catholic Charities, Catholic hospitals or nursing homes, or Catholic institutions of higher learning, which serve and employ people without regard to religion.[59] In attempting to force such entities to comply with the statutory mandate to provide prescription contraceptive coverage, the statutory definition reflects a fundamental misunderstanding of, and therefore lack of respect for, what it means to be Catholic and what constitutes Catholic religious activity.

1. Narrow Definitions of Religious Employer Ignore The Pervasiveness of The Catholic Religious Mission

Defining a religious employer solely as an entity designed to inculcate religious values or beliefs mischaracterizes Catholicism by ignoring the impossibility for Catholics of separating worship from acts of charity and social justice and disregarding the pervasiveness of the Catholic religious mission. For the Catholic Church, running hospitals, nursing homes, schools and other social services is not a secular activity and cannot be isolated from its core religious mission.

In the Gospel of Matthew, Jesus defines the sole criterion for choosing who will be blessed in God's kingdom: "I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me."[60]

When asked by his confused followers when it was that they fed

59. In the California litigation, Catholic Charities conceded that it did not fall within the terms of the statutory exemption. Catholic Charities of Sacramento, Inc. v. Super. Ct. 85 P.3d 67, 80 (Cal. 2004).

60. *Matthew* 25:35–36 (New American).

him and cared for him, his response was: "whatever you did for one of these least brothers of mine, you did for me."[61] As theologian Michael Himes explains, "the criterion of judgment has nothing to do with any explicitly religious action. The criterion is not whether we were baptized, or prayed, or read Scripture, or received the Eucharist,"[62] that is, not only the things that fall into a narrow view of what constitutes "religious" activity but rather, caring for those in need.[63]

This teaching of Jesus Christ is one of the basic elements of Catholic social teaching today, expressed in the notion of "the option or love of preference for the poor."[64] In the words of Pope John Paul II, "[t]he many initiatives on behalf of the elderly, the sick and the needy, through nursing homes, hospitals, dispensaries, canteens providing free meals and other social centers are a concrete testimony of the preferential love for the poor which the Church in America nurtures. She does so because of her love for the Lord."[65] By offering healthcare and other social services, far more than merely satisfying material needs, the Church proclaims the Gospel; it "shows forth God's infinite love for all people and becomes an effective way of communicating the hope of salvation which Christ has brought into the world, a hope which glows in a special way when it is shared with those abandoned or rejected by society."[66]

Thus, when a Catholic organization cares for the sick and elderly or provides for education, it is performing an act as religious as those that take place inside the church itself. This is a fact that has been recognized and respected by the courts in other instances through recognition that, for example, the provision of "outdoor sleeping

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61. *Matthew* 25:40 (New American).

62. MICHAEL J. HIMES, THE MYSTERY OF FAITH: AN INTRODUCTION TO CATHOLICISM 9 (2004).

63. *See, e.g.*, *James* 1:27 ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction . . .").

64. JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* para. 42 (1987). *See* PAUL VI, ENCYCLICAL LETTER *POPULORUM PROGRESIO* para. 23 (1967).

65. JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *ECCLESIA IN AMERICA* para. 18 (1999).

66. *Id. See* Bishop Michael E. Putney, *Health Care and the Church's Mission*, HEALTH PROGRESS, Jan.-Feb. 2004, *available at* http://www.chausa.org/pubs/pubsart.asp?issue=hp0401&article=h (discussing mission of Catholic health care as continuing the ministry of the risen Christ by revealing God's love through providing healing and comfort); William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 491 (2001) (noting that provision of services by religious organizations "to the sick, injured and dying is not peripheral, nor are the particularized moral conclusions directing medical interventions unrelated to the core content of faith").

space for the homeless effectuates a sincerely held religious belief"[67] and that religious activities protected by the Free Exercise clause include "charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor."[68] That same acknowledgment is seen in court decisions ruling that the Boy Scouts of America is a religious organization[69] and recognizing that Catholic healthcare entities are religious organizations for purposes of exemptions from state fair employment statutes.[70] Moreover, with respect to Catholic Charities, the subject of the California litigation, a federal district court recently concluded that an employee benefit plan maintained by Catholic Charities was a "church plan" within the meaning of ERISA.[71] It reasoned that Catholic Charities "has close ties with the Roman Catholic Church in that it has membership, governing bodies, trustees and officers in common with the Roman Catholic Diocese of Portland [Maine] . . . *and aims to implement the social teachings of the Catholic Church.*"[72] As a result, the court concluded that the plans maintained by Catholic Charities were established and maintained by the church for its employees, making them church plans and thus exempt from ERISA.[73]

Jesus did not teach his followers to provide care only for those who have accepted his teachings. The mission of Christ's followers is to feed all who are hungry and care for all those who are in need. Thus, the fact that Catholic organizations serve members of other faiths as well as their own is part of their calling. Precisely because it is

67. Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 575 (2d Cir. 2002).

68. Espinosa v. Rusk, 634 F.2d 477, 481 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

69. *See* Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259, 1273 (S.D. Cal. 2003) (holding a lease of public parkland to the Boy Scouts of America an unconstitutional establishment of religion because the Boy Scouts is a religious institution). It is difficult to understand how one can come to the conclusion that the Boy Scouts is a religious organization and that Catholic Charities or a Catholic hospital is not.

70. *See* McKeon v. Mercy Healthcare Sacramento, 965 P.2d 1189 (Cal. 1998) (finding Mercy Healthcare to be a religious employer and therefore exempt from the state's fair employment statute while also observing that it admits patients of all faiths); Silo v. CHW Med. Found., 45 P.3d 1162 (Cal. 2002) (same).

71. *See* Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004).

72. *Id.* at 83 (emphasis added). The court also discussed in dicta the Bishop's control over the Board of Directors of Catholic Charities by virtue of his position as President of the Board of Directors and his ability to select corporation members who in turn select the Board of Directors. *Id.* at 85.

73. As permitted by the Internal Revenue Code, Catholic Charities elected to be covered by ERISA despite its church plan status. *Id.* at 89.

imperative to their religious mission to serve all, the fact that health and other social services are provided by Catholic organizations to members of other faiths does not transform the provision of such services from a religious to a secular act.[74]

Definitions such as those contained in the New York and California statutes fail to recognize this reality. They are built on a congregational model that sees religious activity as largely confined to the worship hall and religion as a private relationship between the individual and God. They define as secular, rather than religious, activity which is part of the core religious mission of the Catholic faith. As one commentator observed, under such a view, "Mother Teresa's Missionaries of Charity are 'secular' employers because they do not limit their care of AIDS victims to Catholics."[75]

The state's attempt to force Catholic religious belief and practice into a model not its own raises important issues of Church self-determination.[76] It is for the Church, not the state, to define what the Church is and what its mission is—in other words, what it means to be Catholic. For the state to decree that certain activities required by a Church's faith are not sufficiently religious is to interfere with

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74. Nor is a Catholic organization nonreligious because it may receive public money in the form, for example, of Medicare reimbursements or other funds paid to Catholic hospitals to cover individuals they have treated. Such public funding may be an argument for saying that a religious entity should not receive a blanket exemption from all secular laws, a point I address *infra* at note 154, but it is not an argument that the entity is not religious in character.

By raising this point I do not mean to suggest that any part of the mandatory contraception coverage statute stems from the fact that religious entities receive public funds. These statutes apply to all insurance plans purchased by employers and therefore are not at all tied to the receipt of public funds. I raise the point only because some might be tempted to argue that the fact that religious organizations receive public funds makes them more amenable to such statutory regulation.

75. Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 142-43 (2003). Or, to use the example given by the California Supreme Court in the Catholic Charities case, "a hypothetical soup kitchen run entirely by the ministers of a church, which inculcates religious values to those who come to eat (thus satisfying the first, second and fourth criteria [of the statutory definition of religious employer]), would lose its claim to an exemption from the WCEA if it chose to serve the hungry without discrimination instead of serving co-religionists only." Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 95 (Cal. 2004).

76. Dissenting from the California Supreme Court's decision in *Catholic Charities v. Superior Court of Sacramento*, 85 P.3d 67, 98 (Cal. 2004), Justice Janice Rogers Brown viewed the court's acceptance of the application of the California statute to religious employers "an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission." *Id.* at 102. One leading constitutional law scholar called the court's decision a "shocking interference with internal church affairs." *See* Stephanie Strom, *Catholic Group is Told to Pay for Birth Control*, N.Y. TIMES, Mar. 2, 2004, at A14 (quoting Douglas Laycock).

religion to an unwarranted extent,[77] making the "State the arbiter of religion according to vague, elastic, and inherently religious, concepts."[78] As Richard Garnett observes, "we should worry that, by determining for its own purposes the meaning and significance of religious organizations' work, and by allocating burdens and benefits on the basis of state-crafted distinctions between 'religious' and 'secular' activities, the government can subtly but powerfully reshape and domesticate the content and challenge of faith."[79] This is inconsistent with the longstanding belief that the State is not competent to decide matters of faith and religious doctrine.[80]

2. *Narrow Definitions of Religious Employer Ignore The Church's Evangelization Role*

In addition to ignoring the pervasiveness of the Catholic religious mission, the definition of religious employer contained in the New York and California statutes also ignores the evangelization role of the Catholic Church. The Catholic Church and its affiliated entities, like all Catholics, have an obligation to make Jesus known in all the world. Jesus instructed his disciples to go throughout the world to make followers of all nations[81] and Catholics are called to do the same. In *Christifideles Laici*,[82] Pope John Paul II wrote:

> The entire mission of the Church, then, is concentrated and manifested in *evangelization*. Through the winding passages of history the Church has made her way under the grace and the command of Jesus Christ: "Go into all the world and preach the gospel to the whole creation" (*Mk* 16:15). ". . . and lo, I am with

77. Justice Brennan recognized this danger in his concurring opinion in *Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 433 U.S. 327, 340 (1987). In arguing for a categorical exemption for nonprofit activities of religious organizations, he observed that any attempt by the courts to engage in a case-by-case analysis of whether activities carried on by religious organizations were secular or religious would risk that the religious "community's process of self-determination would be shaped in part by the prospects of litigation" and "would both produce excessive government entanglement with religion and create the danger of chilling religious activity." *Id.* at 344–45 (Brennan, J., concurring).

78. Chopko, *supra* note 75, at 143 (expressing concern because the California statutory exemption uses terms like "inculcation" of religious values, which have no secular meaning, meaning that the state cannot make a decision "without resorting to its own potentially unconstitutional definition about what religion is and what it means").

79. *See* Richard W. Garnett, *Confine & Conquer: The California supreme court and religious freedom*, NATIONAL REVIEW ONLINE (March 3, 2004), *at* http://www.nationalreview.com/comment/garnett200403030850.asp.

80. *See, e.g. Watson* v. Jones, 80 U.S. 679, 732 (1871).

81. *See Matthew* 28:19 (New American).

82. JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* (Dec. 30, 1988).

> you always, until the close of the age" (*Mt* 28:20). "To evangelize," writes Paul VI, "is the grace and vocation proper to the Church, her most profound identity."[83]

As the Pope's words make clear, the Church's central and fundamental evangelization duty requires that Catholics go out into the world among those who do not share the Catholic faith to proclaim the Gospel. Given this calling, one can hardly be surprised to learn that, in fulfilling their religious mission to serve the needy, Catholic institutions often serve and hire non-Catholics. They do so as part of their evangelizing vocation, standing on its head the statutory assumption that an entity can only be a religious employer if it both employs and serves exclusively or even primarily members of its own faith. From the Church's standpoint, its obligation is to nurture the spiritual growth, consistent with the Catholic faith, of all of its employees.

Evangelization occurs both directly and indirectly and requires that Catholic institutions act in accordance with their religious beliefs. One evangelizes not merely by what one says, but, more importantly, by what one does—through witnessing as well as instruction.[84] "In the Christian tradition, a faith not expressed in conduct is inauthentic."[85] It is thus necessary that what a Catholic institution does reflects the Gospel and Christ.[86] As Thomas Merton wrote, "[g]estures of conformity do not make a man a Christian, and when one's actual conduct obviously belies the whole meaning of the gesture, it is an objective statement that one's Christianity has lost its meaning."[87]

The fact that "actions speak louder than words" renders unpersuasive the argument that mandatory contraception statutes do not require endorsement of birth control by religious employers. Those who support the application of mandatory contraceptive

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83. *CHRISTIFIDELES LAICI*, *supra* note 57, para. 33. *See also ECCLESIA IN AMERICA*, *supra* note 65, para. 1 (calling evangelization a "fundamental task" of the Church).

84. In the context of evangelization, the action is perhaps more important than the word. True evangelization requires that the Gospel be conveyed by how the evangelizers conduct their lives and operations. Pope Paul VI, EVANGELII NUNTIANDI [EVANGELIZATION IN THE MODERN WORLD] para. 21 (1976) (Apostolic Exhortation promulgated on December 8, 1975).

85. Chopko, *supra* note 75 at 146 (citing 1 *John* 2:3–6 and *James* 2:14–26).

86. *See* Putney, *supra* note 66 (quoting Pope John Paul II's call for a new evangelization in his plea that it is "more urgent than ever that the Gospel of Jesus Christ should permeate every aspect of health care" and observing that "Catholic health care witnesses to the dignity and worth of every human person, the sanctity of human life . . . the value and dignity of a person's body, and God's love for each person").

87. THOMAS MERTON, CONJECTURES OF A GUILTY BYSTANDER 95 (1966).

clauses to religious employers argue that the statutes impose no significant burden on religion because the statute only requires employers to provide access to contraceptives and religious employers are still free to convey their moral opposition to the use of contraceptives to their employees.[88] Thus, they claim the statute involves no endorsement by the employer of the use of birth control. This is an argument that has some appeal to those who would prefer that the Church accomplish its aims by persuasion rather than force.[89]

Such an argument creates a bifurcation that ignores the need to act consistently with belief and thus cannot be a sufficient response to those with religious objections to contraception. It is not enough for religious employers to say they are morally opposed to contraception if they are simultaneously paying for employees to obtain it; the condemnation of the act is inauthentic if religious employers are paying for what they believe to be immoral. As Catholic Charities has argued,

> [w]hen an organization pays for an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. When a religious institution subsidizes particular conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur.[90]

The religious employer here is being asked to facilitate and pay for that which it believes to be morally evil. As Martin Luther King, Jr. once observed, "noncooperation with evil is as much a moral obligation as cooperation with good."[91]

The rationale expressed by the state in articulating a requirement that an organization hire members of its own faith in order to be considered a religious employer is a desire to avoid a burden on

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88. *See, e.g.*, Brief for Amici Curiae New York Civil Liberties Union and American Civil Liberties Union at 23, Catholic Charities of the Diocese of Albany v. Serio, (N.Y. Sup. Ct. Sept. 19, 2003) (No. 8229-02) [hereinafter NYCLU/ACLU Amicus Brief], *available at* http://www.nyclu.org/rrp_contraceptive_coverage_amicus_082203.pdf.

89. Having said that, one can prefer that the Church act by persuasion rather than force without reaching the conclusion that the Church itself should be forced to provide contraception to its employees. As the text suggests, since the Church does not force its employees to refrain from using contraception, there is no force involved in the status quo. Force would be involved when the Church was compelled to act in a particular way.

90. Petition for Writ of Certiorari to the Supreme Court at *13–14, Catholic Charities of Sacramento, Inc. v. California, 2004 WL 1243136 (U.S.) (No. 03-1618).

91. MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., 15 (WARNER BOOKS 1998). Similar sentiments were expressed by Gandhi. *See* www.famous-quote.net/quotes-activism.shtml (quoting Mohandas Karamchand Gandi).

employees who do not share the same faith. If a religious organization employs persons of different faiths, the concern is that the failure of the employer to cover contraceptives imposes its particular beliefs on a religiously diverse workforce.[92] Thus, the lower court decision in the California Catholic Charities litigation suggests that the idea behind the statutory definition is that in order to be excluded from the coverage mandate, the entity must only employ persons "who, one reasonably could conclude based on the religious nature of the employment, agree with or willingly defer their personal choices to the religious tenets espoused by their employer."[93]

There is some basis for this concern. If non-Catholics take employment with Catholic employers, there may be points where the Catholic nature of the employer causes it to act in ways that are inconsistent with the preferences of the non-Catholic employee.[94]

That being said, all of the employees hired by Catholic institutions are hired with the understanding that the religious nature of their employer has certain implications. Physicians hired by Catholic hospitals, for example, sign statements that they understand and will abide by the NCCB Ethical and Religious Directives for Catholic Health Care Services.[95] Other employees are told at orientations that

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92. NYCLU/ACLU Amicus Brief, *supra* note 88, at 26.

93. Catholic Catholic Charities of Sacramento, Inc. v. Super. Ct., 90 Cal. App. 4th 425, 442 (Cal. 2001), *aff'd* 85 P.3d 67 (Cal. 2004).

94. I say "non-Catholic," but it is also the case that many Catholics are not in agreement with the Church's position on birth control. *See* Charles P. Pierce, *The Crusaders: A Powerful Faction of Religious and Political Conservatives is Waging a Latter-Day Counterreformation, Battling Widespread Efforts to Liberalize the American Catholic Church*, BOSTON GLOBE, Nov. 2, 2003, at Magazine p.10 (observing that "since 1970, polls of US Catholic women have consistently shown more than 60 percent reject that Vatican's teachings on artificial birth control."); Katherine Meyer, *Women and Men: Declining Commitment, Increased Autonomy and Interest in Decision-Making*, NATIONAL CATHOLIC REPORTER, Oct. 29, 1999 (noting that between 1987 and 1993, support for the Catholic Church's teaching on birth control has eroded among both women and men), *available at* http://natcath.org/NCR_Online/archives2/1999d/102999/102999n.htm; Leslie Woodcock Tentler, *A Bitter Pill: American Catholics and Contraception*, COMMONWEAL, Apr. 23, 2004, at 11-17 (discussing views of American Catholic laity on the Church's position on birth control). One commentator has suggested that while opposition to birth control is "the Pope's personal issue[, f]or the rest of the faithful, it ranks with the flat-earth theory." WILLIAM V. D'ANTONIO ET. AL., LAITY, AMERICAN AND CATHOLIC: TRANSFORMING THE CHURCH 49-50 (1996) (quoting Tim Unsworth).

95. The Directives require that Catholic health care services "adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel." NCCB Directives, *supra* note 43, no. 5. I understand from my discussions with several persons involved in Catholic health care administration that physicians hired by Catholic hospitals are required to indicate their agreement to abide by the directives in writing. *See* Rob Boston, *Emergency: How a City-Owned Hospital in Florida Wound Up Operating Under the*

they are expected to conduct themselves in a manner not inconsistent with core Catholic values.[96]

The Church's position on birth control is well-known. Employees who take employment with a Catholic employer do so with the understanding of the Church's position and with no expectation that the Catholic employer will act in a way inconsistent with its beliefs. And, of course, the Catholic employer is not forcing its employees to forego birth control; it is merely saying it will not participate in the employees' acquisition of it. Thus, the Catholic employer here is not attempting to impose its views on birth control on others. Rather, it is simply asking that it be free to maintain and act consistently with its religious beliefs.

I acknowledge that while the fact that employees are hired with an understanding of the consequences of working for a religious employer lessens the clash, it does not necessarily eliminate it. The question, however, is how one balances the two infringements in a situation where one freedom must give way to another. Given a choice between forcing a Catholic employer to act contrary to one of its basic moral beliefs by facilitating what it believes to be a grave sin and asking that non-Catholic employees seek alternative means of securing contraception, I would argue the better balance is in favor of permitting Catholic institutions to act consistently with their core values. The former involves intrusion into a deeply held religious belief; the latter simply makes it more expensive or inconvenient to obtain contraception.[97] Moreover, just as employees choose not to

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Catholic Bishops' Control – And What Americans United and Its Allies Are Doing About It, CHURCH & STATE, Oct. 2000, at 4; Janet Gallagher, *Religious Freedom, Reproductive Health Care, and Hospital Mergers*, 52 J. AM. MED. WOMEN'S ASS'N 65, 66 (1997); Lois Uttley, *Sorry, No Emergency Abortions; We're Part of the Catholic System*, Westchester Coalition for Legal Abortion, Inc., *at* http://www.wcla.org/98-summer/su98-17.html (last visited Feb. 19, 2004).

96. *See* Boston, *supra* note 95 (describing a Florida hospital's requirement that all employees abide by the "health-care regulations promulgated by the Catholic bishops"). Even those employees who are not required to sign such statements are typically instructed during employee orientations as to what the Directives require. The Directives make clear that all employees of Catholic health care institutions "must respect and uphold the religious mission of the institution and adhere to these Directives. They should maintain professional standards and promote the institution's commitment to human dignity and the common good." NCCB Directives, *supra* note 43, no. 9.

97. As this suggests, I am not arguing that an employer's beliefs should always trump employee interests. First, there may be some beliefs that are too peripheral to the employer to warrant protection in the case of interference with employee interests. Second, there may be some beliefs deeply held by the employer but so noxious to our society as a whole that they should not be protected. That is, I am not saying that we must permit Matthew Hale and his World Church of the Creator (recently renamed the "Creativity Movement") freedom to promote their belief that "what is good for the white race is the highest virtue and what is bad for the white race is the ultimate sin." *See* Molly McDonough, *White*

work for particular employers for any number of reasons, employees are free to avoid employment with Catholic entities if they are unwilling to accept the additional cost of contraception that is a consequence of the employer's compliance with a core position of the Catholic church.[98]

C. Beyond Contraceptive Coverage: The Slippery Slope Concern

Even those who do not agree with the position of the Catholic Church on birth control have reason to be troubled by state attempts to define religious organizations as narrowly as do the statutes discussed in this Article. If we deem it acceptable for the state to require a Catholic entity to act inconsistently with its moral convictions by providing birth control to its employees, further and potentially more serious incursions into an entity's practice of its religion are likely to follow.[99]

Supremacist Takes Law License Fight to DC, Law News Network, Feb. 11, 2000, *available at* http://www.rickross.com/reference/hale/hale29.html. But I am saying that when dealing with a core belief of a religious entity, particular care is required before deciding that belief should not be protected.

98. *See* Thomas C. Berg, *Religious Freedom in the Catacombs*, AMERICA, June 7–14, 2004, at 17, 19 (suggesting that "[i]f we value religious freedom, we should demand a strong reason to override it, to make Catholic Charities directly support a practice that the church officially views as a sin. A strong reason might exist if Catholic Charities were so dominant an employer that people had trouble finding jobs elsewhere. But no one has ever suggested this.").

In the California litigation, the court said that to say non-Catholic employees may work elsewhere is to deny the full choice of employment opportunities enjoyed by other employees. *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 109 Cal.Rptr.2d 176, 189 (Cal. 2001) (citing Smith v. Fair Employment Housing Com., 913 P.2d 909, 928 (Cal. 1996)). I do not dispute that there is some infringement on employee choice here. But here we are engaged in a balancing process and compared to the infringement on religion, this infringement is less burdensome. For example, one might very well strike a different balance when the question involves a hospital's provision of certain services to patients, given the inability of some patients to freely choose the hospitals they want for their health needs. *See, e.g.*, William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455 (2001) (arguing that "religious hospitals . . . should be free to refuse limited medical procedures only where patient choices of hospitals for their acute care needs are free.").

99. State statutes containing requirements that infringe on a religious entity's deeply-held beliefs will not necessarily be limited to right to life issues. California passed a statute last year prohibiting state agencies from contracting with any entity that does not provide benefits to domestic partners, with no conscience exception. CAL. PUB. CONT. CODE § 10295.3 (West 2004). From the point of view of burden on religion, this statute is much less problematic for a religious entity than the mandatory contraceptive coverage statute, since the entity can choose to forego state contracts. However, to the extent that the statute forces faith-based organizations in California to forego seeking state contract funding, the statute may result in a reduction or elimination of many needed service programs provided by such organizations. For a discussion of this concern, see Christopher Ramey, *Revealing the Inadequacy of AB17: How Dictating Morality Upon Faith-Based Organizations Will Wreak Havoc on California's Economy*, 26 T. JEFFERSON L. REV. 125 (2003). The

I earlier suggested that the Catholic Church's position on birth control is part and parcel of its commitment to the inviolability of life and that statutes mandating that religious employers provide prescription contraceptives blur the line between birth control and abortion. This raises the concern that such statutes are the first step toward even greater infringement on the Church and its core beliefs.

The possibility that this blurring of the line between contraception and abortion effectuated by mandatory contraceptive statutes represents only such a first step is suggested by the fact that a bill was recently introduced in the New York State legislature requiring that any insurance policies that offer maternity care coverage must also cover abortions.[100] If a mandatory prescription contraception coverage statute is acceptable, will the law be able to force Catholic employers to provide abortion coverage for its employees? It is hard to see how the two are distinguishable from the state's standpoint. To the extent that proponents of such a law attempt to argue that abortion constitutes a "vital" or "key" health care service,[101] the same analysis that allows a state to require contraception will presumably be used to argue that the religious employer must also provide abortion coverage.

Similarly, will the law be able to force Catholic hospitals to provide sterilization or abortion procedures to their patients?[102] The Catholic Bishops have been unequivocal in their opposition to any attempt to

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question has also been raised whether the statute would prohibit college students from using California educational grants to attend Catholic colleges. *See Legislative Alert- AB 17 (Kehoe) State Contracts: Acquisition of Goods and Services*, California Catholic Conference, *available at* http://www.cacatholic/org/h/al/al30603-ab17.html (June 2, 2003). Again, the issue is not whether one agrees with the Church's position on same-sex unions, but whether the state should exercise its power in a way that does not recognize deeply-held religious views. The consequences of its doing so are potentially quite severe.

100. *See* N.Y.A. 2611, 226th Sess. (2005), *available at* http://assembly.state.ny.us/leg/?bn=A01948&sh=t. This creates an even greater burden on a religious employer because in order not to cover abortions, they would have to not offer pregnancy coverage, which would clearly create a Title VII problem.

101. Those who support the provision of abortion services argue that abortion is part of basic health care. *See* Elena N. Cohen & Jill C. Morrison, *Hospital Mergers and the Threat to Women's Reproductive Health Services*, National Women's Law Center, at 2, 5, 6, *available at* http:/www.nwlc.org/pdf/mergerca.pdf (June 2001).

102. As one commentator observed, the same logic that supports requiring religious organizations to provide contraceptive coverage to its employees "could be extended to compel Catholic hospitals to perform sterilization or abortion procedures. Catholic Charities, long a provider of adoption services, may soon be required, contrary to church teaching, to place children with same-sex couples." *Uncharitable Interpretation*, COMMONWEAL, Mar. 26, 2004, at 5. Let me stress again, the issue is not whether or not one personally agrees with the position of the Catholic Church on these issues, but whether the state ought to force the religious entity to act inconsistently with its religious beliefs.

force their institutions to provide abortions.[103] Currently most states have conscience clauses that protect the right of health care providers and facilities to refuse to provide abortions on religious grounds.[104] However, the passage of mandatory prescription contraceptive coverage statutes and the application of those statutes to religious employers opens the door to pressures to eliminate those conscience clauses. Indeed, a federal bill was recently introduced that would require all federally-funded hospitals (with no exception for Catholic institutions) to offer emergency contraception, which can operate post-conception to inhibit implantation of an embryo,[105] to rape victims.[106]

In a slightly different vein, mandatory prescription contraception coverage statutes do not have a significant cost effect on the employer,[107] meaning that the state is not forcing the religious employer to incur additional costs to provide the required benefit. Can the state now force Catholic institutions to spend money on things contrary to their religious and moral beliefs?

These questions suggest that even those who do not agree with the position of the Catholic Church on birth control have reason to be troubled by the states' approaches here. These are real concerns for all

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103. *See* U.S. Catholic Bishops' Conference, *Resolution on Health Care Reform*, 23 ORIGINS 97, 101 (1993) (stating the belief that it "would be morally wrong and counterproductive" to force institutions to "pay for or participate in procedures that fundamentally violate basic moral principles," and expressing concern that Catholic institutions "may face increasing economic and regulatory pressures to compromise their moral principles and to participate in practices inconsistent with their commitment to human life"); Peter Steinfels, *Bishops Plot Stance if Health Plan Covers Abortion*, N.Y. TIMES, May 12, 1993, at A14 (discussing reaction of American Bishops to Clinton plan to include abortion as part of health care package).

104. *See* Rachel Benson Gold, *Special Analysis: Provider 'Conscience' Questions Re-Emerge in Wake of Managed Care's Expansion*, STATE REPRODUCTIVE HEALTH MONITOR 1 (1997).

105. *See supra* note 48.

106. *See* Putting Prevention First Act, S. 2336, 108th Cong. §501–502 (2004), Putting Prevention First Act, H.R. 4192, 108th Cong. §501–502 (2004). *See Rep. Rothman Unveils Legislation Requiring Federally Funded Hospitals to Offer Rape Victims Emergency Contraception*, State News Service, Apr. 21, 2004. The size of religious health care facilities and the number of mergers between secular and religious hospitals has made the issue of provision of abortion and contraceptive services by religious health care providers a subject of considerable interest. *See, e.g.*, Bucar, *supra* note 17; Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients Rights*, 51 STAN L. REV. 1703 (1999).

The proposed New York version of this statute would allow Catholic hospitals to refrain from providing emergency contraception to women who may already be pregnant. *See* Emergency Treatment of Rape Survivors Act, N.Y. PUB. HEALTH LAW § 2805-p (McKinney 2003).

107. *See supra* note 4.

religions. A state mandate that religious employers provide contraception coverage is a first step toward further and greater efforts by the state to interfere with a religion's ability to practice its faith. While that may not be a concern to those desiring to push society to even greater secularization,[108] all of those who value their faith and their religious self-determination will be worse off.[109]

IV. MANDATORY CONTRACEPTION COVERAGE FROM THE STANDPOINT OF THE SOCIETAL INTEREST

A. The Aims of Mandatory Contraception Coverage Are Debatable

The justification for federal or state mandatory prescription contraceptive coverage fall into two categories: claims that such mandatory coverage promotes equal treatment of women and claims that such coverage preserves public health. Although both propositions have been accepted by courts,[110] both are debatable.

1. Promoting Equal Treatment of Women

The claim that the failure to cover prescription contraception

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108. *See* Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 132 (2003) (observing that there are many who "would shape religious institutions, through the civil courts and the legislatures, to be clones of public institutions in all but the most trivial ways").

109. There have been moves in other countries that threaten religious practice in the name of secularism. For Example, France recently passed a law banning religious symbols in state schools. The ban includes Muslim headscarves, Jewish skullcaps, and large Christian crosses. *See Draft Law Approved for Religious Symbol Ban*, THE INDEPENDENT (London), Jan. 29, 2004, at 8. *See also Chirac Wants School Scarf Ban 'By Next Year,'* DAILY TELEGRAPH (Sydney), Dec. 19, 2003, at 51 (discussing President Jacques Chirac's support for law banning overt religious symbols from public schools). Three German states have passed laws banning Muslim teachers from wearing headscarves in public schools. *See* Tony Czuczka, *German State Bans Headscarves in Schools*, AP NEWSWIRES, April 1, 2004 (Baden-Wuettemberg); *Second German State Bans Muslim Headscarves in Public Schools*, AP NEWSWIRES, April 28, 2004 (Lower Saxony); *Third German State Bars Teachers From Wearing Head Scarves in Schools*, AP NEWSWIRES, June 23, 2004 (Saarland). While such statutes would not survive in the U.S. in the form in which they were enacted abroad, similar statutes phrased in a religiously neutral way could survive, making the threat to religious self-determination very real.

110. *See* Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 92–93 (Cal. 2004) (accepting equal protection of woman and promotion of public health argument); Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (denying an employer's motion to dismiss, stating that "as only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion" and accepting the contention that prescription contraceptives are basic health care for women); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001) (exclusion of contraceptives discriminates against female employees by not providing insurance coverage for a basic healthcare need).

discriminates against women is questionable. Several arguments have been advanced in support of this position, none of which are persuasive.

Professor Sylvia Law has argued that excluding contraceptives from insurance coverage disproportionately impacts women for two reasons.[111] The first argument is that "because all of the medically prescribed reversible methods of contraception must be obtained and used by women, they bear all of the physical risks and hassles that accompany obtaining and using reversible contraception."[112] The second is that "because employment-based insurance plans that ordinarily cover prescription drugs single out and exclude coverage for contraception, women bear a disproportionate share of the out-of-pocket financial costs of health care services."[113]

Regarding the first argument, it is certainly the case that women currently bear the physical risk and hassle of using prescription contraception, but it is not clear how that translates into an argument that employers must cover prescription contraceptives under their plan. Whether or not contraceptives are covered by insurance, women will still bear the physical risk and hassle.

Regarding the second argument, the fact that women bear more out-of-pocket health care costs than men is not solely caused by the failure of insurance plans to cover prescription contraceptives. Estimates showing that women have higher health plan costs than men consider not only the cost of prescription contraceptive coverage but the costs of unintended pregnancies.[114] Yet, no link (significant or insignificant) has been shown by Professor Law or anyone else between unintended pregnancies and the failure of plans to cover

111. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998). Professor Law also suggests that excluding contraceptives from insurance disproportionately impacts women because of unwanted pregnancies. However, she does not demonstrate that employers' failure to cover prescription contraceptives actually causes unwanted pregnancies. It is not enough to simply suggest that many unintended pregnancies occur among women who do not use birth control. *See id.* at 364. One must also demonstrate that unintended pregnancies occur among employed women whose employer provides prescription coverage (but not prescription contraceptive coverage) who did not use prescription contraceptives but who would have used them if their employer's plan covered them.

112. *Id.* at 374.

113. *Id.* Evidence before the California legislature as it considered the Women's Contraception Equity Act showed that "women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs." *Catholic Charities of Sacramento*, 85 P.3d at 74.

114. *Catholic Charities of Sacramento*, 85 P.3d at 74 (indicating that cost estimates include costs of unintended pregnancies, "including health risks, premature deliveries and increased neonatal care").

prescription contraceptives.[115] Moreover, without examining the totality of benefits provided by an employer's health plan to women versus men, it is impossible to demonstrate that the greater cost imposed by women results from differences in plan coverage rather than different levels of illness or other usage of medical services. I have seen no analysis of total plan coverage or of comparative illness or usage levels by anyone who has made a disproportionate impact argument.

A third argument that has been advanced is that the exclusion of contraceptives discriminates on the basis or sex or pregnancy[116] by excluding a benefit "uniquely designed for women."[117] However, it is a mistake to view a health plan's exclusion of prescription contraceptives in isolation. Were prescription contraceptives the only plan exclusion, a claim that the plan discriminated on the basis of sex or pregnancy would be understandable. However, all plans have exclusions of various types, made for any number of reasons. Although the shift to the provision of medical benefits through HMOs and other managed care providers has resulted in an increase in coverage for preventive services, such as well-baby care and adult physicals,[118] a managed care plan may exclude various services such as cosmetic surgery, human growth hormones, hearing aids and routine foot care.[119] Prescription contraceptives are merely one member of a class of items excluded.

Moreover, the failure of health plans to include prescription contraceptives applies to both sexes. Although prescription contraception is currently available only to women, that limited availability is only a matter of timing; research suggests that the availability of male prescription contraceptives is not many years

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115. *See supra* note 111 and *infra* text accompanying notes 125-129.

116. The district court opinion in *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) was based on the view that the exclusion of prescription contraceptives carved out benefits "uniquely designed for women." *Id.* 141 F. Supp. 2d at 1271. *See also* U.S. Equal Employment Opportunity Commission, Decisionon Coverage of Contraception, *available at* http://www.eeoc.gov/policy/docs/decision-contraception-html (Dec. 14, 2000) (finding that failure to cover prescription contraceptives discriminated on the basis of pregnancy or a related medical condition).

117. *Erickson* at 1271.

118. *See* Henry J. Kaiser Family Found., *Trends and Indicators in the Changing Health Care Marketplace, at* http://www.kff.org/insurance/7031/ti2004-4-2.cfm?RenderForPrint=1 (Mar. 26, 2004) (showing dramatic increase in coverage of preventive services).

119. All of these, for example, are excluded by BlueCross BlueShield of Tennessee. Personal Health Coverage, Exclusions from Coverage, *at* http:/www.bcbst.com/plans/indivplans/PHC/exclusions.shtm (last modified Jan. 6, 2003).

away.[120]

The arguments in this section suggest that there is no real claim that coverage of contraceptives is necessary to promote equal treatment of women. In reality, the genesis of this claim is the vociferous outcry that arose when health insurance plans began to cover Viagra after that drug was approved by the FDA.[121] While it may have rankled women to see Viagra covered when birth control was not, thus setting the stage for fights over contraceptive coverage, the situations are not analogous. However else it may be used, Viagra is designed to treat a medical disorder—infertility—and plans generally pay for the drug only when it is being used for that purpose.[122]

2. *Preserving Public Health*

Despite its widespread acceptance as a political matter, the claim that prescription contraception is a basic health care need is hardly self-evident. Two arguments have been made. First, it is argued that contraception is a basic health care need based on the fact that it is medically undesirable for a woman to have, over the course of her fertile years, 12 to 15 pregnancies, which is the estimated number of pregnancies she would have if she used no contraception during her child-bearing years.[123] Second, it is argued that adverse consequences

120. *See* Rachel Newcombe, *Male Pill on the Way?*, BUPA INVESTIGATIVE NEWS (BUPA London, England) (Oct. 13, 2003), *available at* http://www.bupa.co.uk/health_information/html/health_news/131003malepill.html (discussing study results of male pill); CNN News, *Your Health – Male Contraceptive Pill on the Horizon?* (Sept. 8, 2000), *available at* http://www.cnn.com/2000/HEALTH/09/08/your.health.male (male pill or implant could be available by 2005); BBC News, *'100% Success' for Male Pill Trial* (July 17, 2000), *available at* http://news.bbc.co.uk/1/hi/health/836436.stm (noting that male pill could be on market within five years); *Contraception: Research Making Progress in Quest for Male Version of Birth Control Pill*, DRUG WEEK, May 7, 2004, at 121, *available at* 2004 WL 534577 (discussing research relating to various forms of male contraception).

121. *See* Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing link between coverage of Viagra and fight for coverage of contraception coverage); *Insurers Criticized for Covering Viagra and Not the Pill*, BOSTON GLOBE, May 13, 1998, at A8.

122. *See* Amy Goldstein, *Viagra's Success Fuels Gender Bias Debate*, WASH. POST, May 20, 1998, at A1 (discussing link between arguments over birth control coverage and coverage of Viagra and noting that health plans typically pay for Viagra only where it is being used to address impotence and not to enhance sexual performance).

123. *See* Lee Korland, Note, *Sex Discrimination or a Hard Pill for Employers to Swallow: Examining the Denial of Contraceptive Benefits in the Wake of* Erickson v. Bartell Drug Co., 53 CASE W. RES. L. REV. 531, 535 (2002) (discussing need for birth control based on number of pregnancies that would occur during fertile years in the absence of contraception); Alan Guttmacher Inst., *Induced Abortion Worldwide*, FACTS IN BRIEF, 1999, *at* http://www.agi-usa.org/pubs/fb_0599.html#29 ("The average woman must use some form of effective contraception for at least 20 years if she wants to limit her

flow from unintended pregnancies.[124]

Even if one accepts the truth of both of the foregoing statements—each of which seem to be fairly self-evident—neither is a persuasive argument for why employers should be forced to provide coverage for prescription contraceptives. This is true for several reasons.

First, I have seen no evidence demonstrating that women who want to use prescription contraception coverage are unable to do so because their employer does not cover it.[125] More specifically, what must be demonstrated is that significant numbers of employed women whose employer provides prescription coverage that excludes contraceptive coverage are unable to obtain contraceptives because of the cost involved. Without such a demonstration, there is no link between forcing employers to provide contraception coverage and the public health benefits sought to be achieved.

In evaluating any evidence that might be produced on this point, it is necessary to keep in mind that plans have prescription co-pays. Given the cost of prescription contraception, the out-of-pocket expenses for an employee whose employer covered prescription contraceptives could still be somewhere between $60 and $228 per year.[126] Thus, in order to demonstrate any public health benefit, it must be shown that there are employed women who want to use

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family size to 2 children, 16 years if she wants 4 children.").

124. *See, e.g.*, Law, *supra* note 111, at 364-68 (discussing fact that unintended pregnancies result in increased infant mortality and morbidity and result in more abortions, as well as generating increased financial costs and limiting women's abilities to perform and contribute to society); *see also* Alan Guttmacher Inst., *Women and Societies Benefit When Childbearing is Planned*, ISSUES IN BRIEF, 2002, *at* http://www.agi-usa.org/pubs/ib_3-02.html (maternal mortality and morbidity is reduced when women avoid pregnancies occurring too early or too late in their lives or too close in succession; unintended pregnancies also result in greater induced and often unsafe abortions; women who control their fertility can achieve greater social and economic status).

125. Sylvia Law asserts that "one" reason women don't use birth control is the failure of their plans to cover prescription contraception, but has no support for that proposition except the mere fact that plans do not cover the contraceptives. *See* Law, *supra* note 111, at 364. I have seen one Guttmacher Report which found that coverage influences women's choice of method. *See* Adam Sonfield and Rachel Benson Gold, *New Study Documents Major Strides in Drive for Contraceptive Coverage*, GUTTMACHER REPORT ON PUB. POL'Y, June 2004, at 4–5. The same report indicated that some women who reported unwanted pregnancies had been unable to use contraception in the month in which they became pregnant because of financial concerns. *Id.* at 5–6. But absent a showing that such woman were employed and covered by a medical plan, mandatory prescription contraception coverage statute would have not changed that result.

126. *See* Ernest F. Lidge III, *An Employer's Exclusion of Coverage for Contraceptive Drugs is not Per Se Sex Discrimination*, 76 TEMPLE L. REV. 533, 568 (2003) (quoting from appellant brief in *Erickson)*. The typical cost of birth control pills is $20-$30 per month, meaning that the out of pocket cost for someone with no insurance coverage for contraceptives is in the range of $240-$360 per year. *See Insurers Criticized for Covering Viagra and Not the Pill*, BOSTON GLOBE, May 13, 1988, at A8.

prescription contraceptives and who cannot afford to do so in the absence of coverage but who could afford the prescription co-payment if coverage were provided.

Second, there are both non-artificial and non-prescription means available to allow sexual activity without resulting in pregnancy.[127] The fact that birth control pills may be more convenient a means of birth control than condoms or natural birth control[128] is insufficient proof for a claim that the pill should be considered basic health care. This is especially the case given the potential health risks that prescription contraceptives may pose to their users.[129]

Thus, one can accept the basic proposition that "sexual and reproductive health are integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"[130] without concluding that prescription contraceptives are part of basic health care that must be provided by employers.

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127. It appears that modern Natural Family Planning methods are much more effective than the old "rhythm" method. John D. Hagen Jr., *Humanae Vitae's Legacy*, COMMONWEAL, June 4, 2004, at 8.

128. An amicus brief filed on behalf of the American College of Obstetricians and Gynecologists and others in the New York litigation argues that choosing a contraceptive method is a "personal and private matter" and must suit "a particular woman's lifestyle." Brief of Amici Curiae American College of Obstetricians and Gynecologists, New York District et al. at 11, Catholic Charities of the Diocese of Albany v. Serio, No. 8229-02 (N.Y. Sup. Ct. Sept. 19, 2003).

129. For example, side effects of the pill include blood clots that can cause strokes, heart attacks, and pulmonary embolisms, nausea, and depression as well as increased risk of cancer. *See, e.g.*, National Cancer Institute, *Oral Contraceptives and Cancer Risk*, CANCER FACTS, Nov. 3, 2003, *available at* http://cis.nci.nih.gov/fact/3_13.htm (reporting results of a 2003 study finding that the risk of breast cancer is significantly higher for woman between the ages of 20 and 34 who had used oral contraceptives for at least six months); Jan P. Vandenbroucke et al., *Oral Contraceptives and the Risk of Venous Thrombosis*, 344 NEW ENG. J. MED. 1527 (2001); U.S. Food and Drug Administration, *Birth Control Guide*, *at* http://www.fda.gov/fdac/features/1997/babytabl.html (last updated Dec. 2003) (noting risks of oral contraceptive use); K.A. Rosenblatt, et. al., *Contraceptive Methods and Induced Abortions and their Association with the Risk of Colon Cancer in Shanghai, China*, 40 EUR. J. OF CANCER 590 (2004) (reporting result of study by researchers at University of Illinois finding increased risk of colon cancer in women who used oral contraceptives for over three years).

130. PAUL HUNT, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARDS OF PHYSICAL AND MENTAL HEALTH, REPORT OF THE SPECIAL RAPPORTEUR, at ¶9 U.N. Doc. E/CN.4/2004/49, U.N. Sales No. GE.04-10933 (E) 260204 (Feb. 16, 2004) (quoting U.N. Commission on Human Rights Resolution 2003/28, U.N. Commission on Human Rights, 59th Sess., Supp. No. 3, at 110–11 [preamble and ¶6], U.N. Doc. E/CN.4/2003/135 (2003)).

B. The Potential Response by Catholic Institutions to the Statutory Mandate Minimizes the Purported Societal Benefit

Religious employers can not provide prescription contraceptive coverage to their employees without participating in what the Catholic Church views as an intrinsic evil. Their inability to do so leaves them with three possible responses, none of which are desirable from a religious and/or a societal standpoint. This section explores the three options open to a religious employer wishing to avoid providing prescription contraceptives to their employees.

1. Discontinue Providing any Prescription Coverage to its Employees

Statutes mandating prescription contraception are not framed as direct mandates to employers. Rather, the statutes provide that *if* an employer offers its employees any prescription coverage, it must also offer coverage for FDA approved contraceptives. Thus, an employer wishing to avoid complying with the statutory mandate may avoid doing so by refusing to cover any prescription coverage to its employees. Indeed, it is this fact that leads those who support statutes with a narrow definition of religious employer to argue that the statute imposes no restriction on free exercise; both the lower court in New York and the California Supreme Court appeared to find this argument persuasive.[131] Thus, in considering whether the California statute burdened the religious beliefs of Catholic Charities, the California Supreme Court argued that Catholic Charities had the ability to avoid any conflict with its religious beliefs by not offering any coverage for prescription drugs to its employees.[132]

From the standpoint of the Catholic employer, this is not an appealing option. The position of the Catholic Church is that employers have a moral obligation to consider the well-being of employees and to pay them just wages and benefits.[133] On this ground, the Church has taken the position in litigation that it is

131. *See* Catholic Charities of the Diocese of Albany v. Serio, No. 8229-02 (N.Y. Sup. Ct. Sept. 19, 2003); Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 92 (Cal. 2004).

132. *Catholic Charities of Sacramento*, 85 P.3d at 92.

133. *See, e.g.*, Petitioner's Brief on the Merits at *2, Catholic Charities of Sacramento, Inc. v. Super. Ct., 2001 WL 1700664 (Cal. Ct. App. Nov. 13, 2001) (No. S099822). The California Supreme Court rejected the idea that Catholic Charities' "beliefs about the requirements of 'justice and charity' are necessarily equivalent to religious beliefs." *Catholic Charities of Sacramento*, 85 P.3d at 92.

obligated morally to provide health care benefits, including prescription coverage, to its employees.[134] However, when forced to confront the choice between participating in an intrinsically evil act and attempting to satisfy its obligation to pay just wages and benefits in another manner, some institutions may very well decide that ceasing to provide any prescription coverage is the lesser evil.

All employees of Catholic institutions would be worse off if this option is chosen. It will be little solace to a female employee of a Catholic employer to be told that she is being treated equally with male employees when equality can be achieved only by putting her in a much worse position than she was when she was theoretically being treated as less than equal.[135]

Another adverse consequence of a Catholic institution being forced to discontinue providing all prescription coverage to its employees is to make it less competitive with other employers. Generally, those working for Catholic health and other service agencies are not likely to receive a high salary, thus making benefits an important part of their compensation package. Therefore, a decision by a Catholic employer to discontinue providing any prescription coverage will make it less able to hire competent staff, resulting in a decline in the quality of care provided.

2. *Convert from Insured Plan to Self-Funded Plan*

As already discussed, legal mandates that private employers provide prescription contraception coverage take the form of state insurance law requirements that insurance plans that provide for any prescription coverage must also cover prescription contraceptive coverage. This form of state law mandate is dictated by the Employee Retirement Income Security Act of 1974 ("ERISA"),[136] the primary federal statute regulating employee benefit plans of private employers. Desiring to promote a uniform scheme for the regulation of employee benefit plans, ERISA contains a broad preemption provision, preempting any and all state laws that relate to an

134. *See* Petitioner's Brief on the Merits at *3, Catholic Charities of Sacramento, Inc. v. Super. Ct., 2001 WL 1700664.

135. As was once observed in a different context, "[i]t is, after all, difficult to understand the point of a notion of fairness if every person to whom one presumably seeks to be fair may be made worse off as a result." LOUIS KAPLOW AND STEVEN SHAVELL, FAIRNESS VERSUS WELFARE, xix (Harv. Univ. Press 2002).

136. 29 U.S.C. § 1001–1461 (2000).

employee benefit plan.[137] However, because Congress, in enacting ERISA, did not wish to interfere with state law's traditional function in regulating insurance, the statute excepts from the reach of its preemption provision state laws regulating insurance.[138]

Thus, states are prohibited by ERISA from directly mandating that employers provide certain benefits to their employees. However, by virtue of their ability to regulate insurance products, states have the ability to indirectly regulate employee benefit plans *to the extent* that such plans provide benefits through insurance. Therefore, employers who provide medical benefits to their employees through insurance plans are subject to the state law provisions mandating contraceptive coverage for all insurance plans that provide any prescription coverage. The Supreme Court has made clear that state insurance law provisions cannot be applied to employers who provide medical benefits through self-funded plans rather than through insured plans without violating ERISA's preemption provision.[139]

This suggests a second possibility for a religious employer who can not morally comply with a state law mandate to provide prescription contraception coverage: provide benefits through a self-funded plan rather than through ERISA. Although self-funding is not a viable option for very small employers, the size of many Church-affiliated entities is sufficiently large to make self-funding feasible.[140] Indeed, many of the larger Catholic healthcare systems are already self-insured, meaning they are beyond the reach of state insurance statutes.

This strategy, however, is not perfect. First, if federal legislation like EPICC is adopted, this option will no longer remain. ERISA, by its terms, does not preempt the operation of federal law, meaning that the federal government could require that all employers provide prescription contraceptive coverage, without regard to whether they provide benefits through insurance or via self-funding.

Second, some Church-affiliated entities may be providing benefits to their employees through "church plans."[141] Church plans are exempt from ERISA,[142] with the result that normally the preemption clause would not operate with respect to such plans,[143] meaning that

137. 29 U.S.C. § 1144(a) (2000).
138. 29 U.S.C. § 1144(b)(2)(A) (2000).
139. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 746–47 (1985).
140. *See supra* note 17.
141. 29 U.S.C. § 1002(33) (2000).
142. 29 U.S.C. § 1003(b)(2) (2000).
143. 29 U.S.C. § 1144(a) (2000) (providing that the statute preempts state laws that

these plans would ordinarily have to comply with state law. ERISA does, however, give church plans the option to elect, pursuant to section 410(d) of the Internal Revenue Code, to be covered by its requirements,[144] which would then make the preemption clause operational with respect to such plans. While the language of section 410(d) may suggest that such an election may be made only by pension plans, a district court in Maine recently held that an election may be made by plans providing medical and other non-pension benefits as well.[145] Thus, Church-affiliated entities providing benefits through church plans would need to make a section 410(d) election to avail themselves of this option for removing themselves from the reach of the statute.[146]

Converting from insured to self-funded does more than simply allow the Church employer to avoid compliance with the state law prescription contraceptive mandate. Two other consequences result. First, it also effectively removes the entity from any real regulation. Indeed, a desire to avoid regulation is often the motivation for large private employers to self-fund rather than operate insured plans. Second, it puts the Church employer at risk financially in the event of large claims on its plan. Neither of these consequences are beneficial from the point of view of the entity's employees.

3. *Discontinue Providing Social Service Benefits*

The final option for a Catholic employer morally unable to comply with state mandatory prescription contraceptive coverage statutes is to either cease operations completely or to provide social services on a drastically reduced scale—serving and employing only those persons of its own faith in private facilities. This is obviously a drastic step, one that could not be lightly taken given the Church's teachings and probably not the most likely to be adopted.[147] Still, since mandatory

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relate to employee benefit plans not excluded under the section that excludes church plans).

144. 29 U.S.C. § 1003(b)(2) (2000); I.R.C. §410(d) (2000).

145. *See* Catholic Charities of Maine, Inc. v. Portland, 304 F. Supp. 2d 77, 90 (D. Me. 2004).

146. If other courts did not follow the approach of the Maine district court, Church employers wishing to take advantage of the self-funded approach who currently operate church plans would need to convert those plans not just to self-funded plans but to self-funded ERISA plans. Still, that only adds a step to the equation, it does not take the option away.

147. The risk, however, is there. When Congress considered requiring that all hospitals receiving federal funds must provide all reproductive medical services, including abortions, the United States Catholic Conference threatened that such a move would be a "major political mistake." U.S. Catholic Bishops' Conference, *Resolution on Health Care*

contraceptive coverage statutes might have the effect of driving Catholic healthcare entities out of the market, either directly (by causing their withdrawal) or indirectly (by making them less competitive), it is at least worth noting that the consequences that might stem from such a withdrawal of a Catholic presence in areas such as health care, nursing homes and other social service entities are potentially quite severe.

First, in some areas, a Catholic entity may be the sole social service provider serving an area.[148] Due in part to the closure of non-Catholic hospitals in rural areas and in part to mergers between Catholic and non-Catholic hospitals, there are now 76 Catholic hospitals in 26 states that are "sole providers," that is, they are located in areas where no other hospitals are easily accessible.[149] If the Catholic provider disappears, an important safety net, particularly for the poor and uninsured, will disappear, and there seems to be no other entity ready or willing to take its place.

Second, even if there are secular alternatives, religion may enhance the capacity of social service organizations to better serve the needs of individuals and their families. Because religious institutions view it as their charge to treat the entirety of the person—spiritual as well as physical needs[150]—they may provide for faster and fuller recovery for their patients, as evidenced by the recent interest in holistic health and

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Reform, 23 ORIGINS 97 (1993); *see also* Peter Steinfels, *Bishops Plot Stance if Health Plan Covers Abortion*, N.Y. TIMES, May 12, 1993, at A14.

148. *See* Bucar, *supra* note 17, at 7 (observing that the effect of mergers between Catholic hospitals and non-Catholic hospitals is that in many economically depressed areas the Catholic health care facility is the only one available); Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J. L. & FEMINISM 135, 137–38 (2003) (observing that "[i]n many rural areas, a Catholic hospital is often the only health care facility for miles around"). As noted earlier, "[r]eligious health care facilities and networks form the largest category of nonprofit providers of health care in the United States [and] Roman Catholic institutions play an especially significant role. Catholic health care organizations combined control more than twice the market controlled by Columbia/HCA, the largest commercial health care entity." Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1703–04 (1999); *see also* William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 464 (2001) (observing that religiously affiliated hospitals are a significant component of the non-profit health care market).

149. *See* Bucar, *supra* note 17, at 14–15.

150. *See* Bishop Michael E. Putney, *Health Care and the Church's Mission*, HEALTH PROGRESS (Jan.–Feb. 2004), *available at* http://www.chausa.org/pubs/pubsart.asp?issue=hp0401&article=h ("Workers in Catholic health care recognize that patients have a spiritual dimension, not just physical, intellectual and emotional ones. Such workers treat people as if they have a relationship, not just with each other and with the practitioners of health care, but with God."); *see also* Bassett, *supra* note 148, at 493 (discussing faith-context of provision of health care).

the mind/body relationship.[151] In the provision of other social services, religious groups have also demonstrated significant success.[152]

The foregoing options suggest that mandatory contraceptive coverage statutes infringe on religious beliefs without necessarily achieving their statutory aim. They are based on the legislature's false assumption that religious employers will simply yield to the legislative mandate despite the damage to their religious beliefs. Although some religious employers will certainly choose to simply comply with the law,[153] others will adopt one of the alternative options discussed, none of which leads to desirable results.

IV. CONCLUSION

Whatever one's personal views of the Church's position on birth control, the failure of many states in their mandatory prescription contraception coverage laws to define the term "religious employer" sufficiently broadly to respect the deeply held belief of the Catholic faith regarding its mission is cause for concern. While it may be tempting to argue that if religious entities want to provide social services to the public they should be bound by general laws,[154] the

151. *See* Rich Barlow, *Pondering the Powers of Prayer*, BOSTON GLOBE, Aug. 9, 2003, at B2; Karen Mellen, *Nuns Heal Stressed, Suffering Through Touch; A Relaxed Mind More Open to Spirituality, Sisters Say*, CHI. TRIB., June 27, 2003, at 10; Karen S. Peterson, *Is All That Stress Killing You?*, USA TODAY, May 27, 2003, at D6; Sarah Treffinger, *Embarking on the Quiet Path; Many Faiths and Philosophies Seek the Insights of Meditation*, PLAIN DEALER, Aug. 10, 2003, at L1; Larry Dossey, *The Return of Prayer*, 3 ALTERNATIVE THERAPIES IN HEALTH AND MEDICINE 10 (1997), *available at* http://gratefulness.org/readings/Dossey_Prayer.htm.

152. *See* Peter Steinfels, *Religious Organizations Have Long Had a Role in Providing Social Services to the Needy. Does a New California Law Threaten It?*, N.Y. TIMES, Mar. 13, 2004, at A13 (discussing advantage of strong religious component in the provision of social services).

153. During the course of the California litigation, Catholic Charities was, under protest, providing contraceptive coverage to its employees. *See* Stephanie Strom, *Catholic Group is Told to Pay for Birth Control*, N.Y. TIMES, Mar. 2, 2004, at A14; *When a Catholic Institution is Told to Pay for Contraception*, ZENIT DAILY DISPATCH (ZE040324), Mar. 24, 2004, *available at* http://www.zenit.org/english/visualizza.phtml?sid=51187.

154. Clearly there are some general laws to which all institutions, Catholic or otherwise, should be held. An obvious example is laws that address the quality of service provided, such as licensing standards. However, it is one thing to say that Catholic institutions must meet certain standards of quality. It is quite another to refuse to recognize that they are not secular institutions and should not be forced to deliver social services as though they were secular institutions. I acknowledge that there may be a practical difficulty in determining which laws of general application may be applied to religious organizations and which may not. As I suggested earlier, this to some extent involves a balancing of the religious organization's interests against that of the state. *See supra* text accompanying notes 97-98. I would argue that such a balance would, for example, favor

statutes in question here create consequences that are undesirable from both the standpoint of religious organizations and of the public. They force religious institutions into choosing between violating their moral principles or acting in ways detrimental to their employees and those whom they serve.

It is true that mandatory prescription contraceptive statutes that contain no or only a narrow religious employer exclusion are likely to survive constitutional challenge given the Supreme Court's current view of the free exercise clause.[155] However, the fact that the state may have the power as a constitutional matter to act in such a manner says only there is no legal impediment to their doing so. The question herein addressed is the normative one: should the state exercise its power? Or should it instead seek to find an alternative way to achieve its goals, a way that respects the religious convictions of that state's citizens?

Clearly there are alternatives. One would be to redefine religious employer more broadly. This option may work so long as the broader exemption does not create the risk that any private (and not Church-affiliated) employer can simply claim a religions exemption at will. If such a broader definition cannot be successfully drafted, a second approach will need to be considered: finding a solution to the perceived need to provide prescription contraceptive coverage, by delivering such coverage outside of the employment context. The significant advantage of the second option is that it addresses the reality that many women do not have access to employer provided health care, either because they are not employed (and not covered as a beneficiary under a spouse's or parent's plan) or because their employer does not provide for health care coverage.[156] A non-employment based approach would do a better job of providing coverage to those most in need it, and offers a way of meeting the perceived health need without doing violence to respect

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requiring religious employers to comply with federal minimum wage laws, as the court determined they should in *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), but not with laws such as mandatory contraception coverage statutes that involve a serious infringement on religious beliefs.

155. *See supra* note 18 and accompanying text.

156. For this reason, a non-employment based approach to health care is obviously something worthy of consideration for more reasons than concern about contraceptive coverage. Almost 44 million Americans are without any health care coverage, either because they are unemployed or because their employer does not provide health care coverage as part of its compensation package. *See* Center on Budget and Policy Priorities, *Number of Americans Without Health Insurance Rose in 2002, available at* http://www.cbpp.org/9-30-03health.htm (Oct. 8, 2003) (reporting that the number of uninsured rose from 41.2 million in 2002 to 43.6 million in 2002).

for religion. Given the seriousness of this issue from the standpoint of the Catholic faith, to not consider approaches that would do a better job of meeting the state's interest than does mandating that employers provide contraceptive coverage demonstrates a serious lack of respect for religion.

Moreover, the concern here goes far beyond simply the question of how to achieve the state aim of providing contraception to women. The broader question is the effort by the state to interfere with religious self-determination. Whether or not one shares the views of the Catholic Church with respect to contraception, the state action here establishes a dangerous precedent that fails to respect the integrity of religious institutions, thus threatening religious autonomy.