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Catholic claims stretch the first amendment

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ELLIS WEST

The Obama administration recently issued a regulation requiring all employers except religious organizations to include contraceptives in their employees' health insurance. The Catholic Church and various politicians have accused the administration of violating the church's religious freedom. Although the administration has modified its original regulation, it continues to be attacked for "waging war" on religious freedom.



GREGORIO BORGIA
THE ASSOCIATED PRESS

Archbishop of New York Timothy Dolan has vowed legislative and court challenges to President Barack Obama's compromise on exempting religiously affiliated employers from paying directly for birth control for their workers. The cardinal-designate, who heads the U.S. Conference of Catholic Bishops, has said that while Obama's compromise proposal initially sparked glimmers of hope, it ended up being a "hill of beans."

Does the requirement actually violate religious freedom? The answer depends on the meaning of religious freedom, and persons understand that term differently. But if the question is whether the regulation violates the religious freedom guaranteed in the First Amendment, the answer is clear. It does not.

There are two ways a government could be said to violate a person or group's religious freedom. The first would be by passing a law whose primary purpose or effect is religious in nature — i.e., one that discriminates for or against a particular religion, belief or persons because of their religion. The regulation being attacked is not this kind of law. Its primary purpose and effect are the protection of human health.

The second way a government could be said to violate someone's religious freedom would be by passing a law whose primary purpose and effect are secular in nature. It could be said to violate religious freedom only if some persons or groups, because of their religious consciences, do not want the law applied to them. Do the religion clauses of the First Amendment mean groups have

a right to be exempt from obeying valid laws everyone else has to obey, provided they have religious reasons?

As originally understood, the First Amendment does not guarantee such a right. Its wording alone ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .") indicates what it was intended to prohibit: certain kinds of laws. At the time of the ratification of the Constitution, both its proponents and opponents agreed that the national government should have no jurisdiction over religion, i.e., should pass no laws dealing primarily or directly with religious beliefs and practices, and the religion clauses were added to the Constitution to make that clear. No one suggested then that they were also intended to prevent laws that the government could pass from being applied to persons or groups who did not want to obey them for reasons of conscience.

Indeed, long before the adoption of the First Amendment, the leading champions of religious freedom had argued that religious freedom did not entail a right to be excused from obeying valid secular laws for religious reasons. Roger Williams, who founded Rhode Island as a citadel of religious freedom, wrote that "the civil state" should ensure "uniformity of civil obedience from all sorts" even if an exemption was sought "upon the very account of Religion and Conscience." In his opinion, the idea that religious freedom gave persons the right to do whatever God tells them to do would, if widely accepted, threaten the existence of organized political society.

Similarly, John Locke wrote that "the Private Judgment of any Person concerning a Law enacted in Political Matters, for the public Good, does not take away the Obligation of that Law, nor deserve a Dispensation." Why not? Because such an exemption would violate the rule of law.

In late 18th century America, the followers of Williams (the Baptists) and Locke (Jefferson, Madison, Washington) adhered to their position. The only group at that time who believed that religious liberty entails a right to religion-based exemptions from valid secular laws was the Quakers, who argued that it gave them a right not to serve in the military. However, their attempt to amend the constitution of Pennsylvania to reflect their understanding of religious liberty was decisively defeated.

Later, when the Supreme Court began interpreting the religion clauses, it adhered to their original meaning. In a series of cases starting in 1878, it refused to grant religion-based exemptions from valid, secular laws, including ones prohibiting polygamy and requiring college students to take military science courses. Then in 1963, the court forsook the original meaning of the religion clauses and held that under certain circumstances people do have a right to religion-based exemptions. In the great majority of cases that followed, however, it denied exemptions. Not surprisingly, in 1990 it re-instated the doctrine that religious freedom does not entail a right to religion-based exemptions from valid, secular laws — a doctrine to which it still adheres today.

Then in 1993, because of pressure from religious organizations, Congress expressed its disagreement with the Supreme Court's interpretation of the religion clauses and passed the Religious Freedom Restoration Act, which created a statutory right to religion-based exemptions.

But it refused to grant exemptions to anyone who sought them. Rather, RFRA said that exemptions should be given only to those who could show that applying a law to them would "substantially" burden the exercise of their religion and, even then, only if the government could not show a "compelling" reason for applying the law to them.

The religious freedom guaranteed by RFRA is vague and likely to be applied by judges in a most arbitrary and inconsistent manner. It is anyone's guess as to who will be able to obtain exemptions on the basis of this law. For example, does the regulation pertaining to contraceptives "substantially" burden the Catholic Church's religious freedom, and does the government have a "compelling" reason for the regulation?

This leads to the crucial question. Which kind of religious freedom should Americans want: the kind that is guaranteed by the First Amendment and adheres to the principle of equality under the law — or the kind guaranteed by RFRA, which allows some religious persons to be excused from obeying laws that everyone else has to obey? This issue cries out for resolution.