Written by **Jack Kenny** on March 27, 2014

Is Religious Freedom the Issue With the Contraceptive Mandate?

The First Amendment of the Constitution of the United States is a mighty defense against tyranny, and the first of the five freedoms named therein (Quick: Can you name them all?) is the free exercise of religion, which accompanies the prohibition on an establishment of religion by Congress. Since Article I of the Constitution places all legislative powers in a Congress of the United States, the ban was understood to prohibit an establishment of religion by the federal government period, before a substantial power of lawmaking was taken over by the justices of the Supreme Court.

Still, it is at least debatable that the optimum strategy for opposing the contraceptive mandate under ObamaCare is to claim it violates the religious freedom of the employer. That certainly is the strategy of the U.S. Conference of Catholic Bishops, which, after decades of lobbying for Caesar to please give us a national healthcare program, discovered that the one we finally got includes (surprise!) a requirement that all employer-based health insurance programs include coverage of contraceptive products and services, including abortion-inducing drugs, with no deductible or co-pay. Other employers, including Hobby Lobby and Conestoga Wood Specialties Corp., claim that while their businesses are for-profit corporations, the mandate also violates the religious freedom of conscience of the owners, who are evangelical Christians and Mennonites, respectively. The companies' objections were argued Tuesday at the U.S. Supreme Court.

Indeed, the program, as it now stands, offends the First Amendment in myriad ways. To begin with, it gives the government the power to decide which organizations qualify as, for the purposes of receiving an exemption from the mandate, religious institutions. The Amish apparently qualify, given their voluntary isolation from secular society and people of other faiths. But Catholic or other religious-affiliated schools and hospitals do not quality, since they both hire and serve people of other faiths and thus their internal policy decisions do not all flow from their adherence to the doctrines of their respective churches. Thus, the government policy is said to protect employees of other faiths or no faith from being limited in their healthcare decisions by a restrictive policy based on someone else's religion. But this sets a dangerous precedent in that it empowers the government to determine what is or is not a religious institution, a practice that might reasonably be considered a government establishment of an overarching religious authority in violation of the First Amendment's establishment clause.

The root problem is in the collectivist notion of national healthcare in the first place. The premise is that given a universal right to health, to the extent that the patient's constitution and the resources of modern medicine allow, it is up to the national government to provide healthcare insurance for all, especially for those who can least afford it. Hospitals are generally in favor of such a requirement because, though most are officially charitable organizations, their need to provide uncompensated care

is reduced, if not eliminated, by a government program that requires people to pay for health insurance and subsidizes those who can't afford a policy. Some small businesses might welcome the program since it provides the option of getting out of health insurance altogether and letting employees get their coverage from one of the government's health insurance exchanges. It also provides an inducement for small business to reduce their number of full-time employees to get out from under the ObamaCare requirement that businesses with over 50 full-time employees offer health insurance. Unfortunately, that leads to fewer full-time jobs and more unemployed or part-time workers who need full-time jobs. Not a good development for the health and wealth of the nation.

People who have no job would likely prefer to have a job with no health insurance than have no job and no health insurance. More to the point, most would be pleased to have both a job and health insurance, even if that insurance did not cover the things provided for in the contraceptive mandate. Some of the arguments offered in defense of the mandate run from the weak to the pathetic. Suppose, goes one hypothetical, a Jehovah's Witness or Christian Science employer objected to health insurance that covers blood transfusions. But the contraceptives do not involve a do-or-die emergency situation. One might think that, absent a government program, diaphragms and birth control pills would be rarer than hens' teeth. Opinion polls have shown for a long time that many, perhaps most, women of childbearing age have been availing themselves of such amenities for years, even decades. Most women of a certain age and intelligence can readily find them. What the ObamaCare mandate represents is the iron fist of compulsion attempting to enforce contraception as a societal good and making all who believe otherwise to bend the knee to Baal.

The courts, to be sure, have been more open to arguments about religious freedom than legal briefs demonstrating that, high court decisions to the contrary notwithstanding, the authority of Congress to control (the actual term is "regulate") interstate commerce is not really the Eighth Wonder of the World, broader than the Grand Canyon and Gobi Desert combined. There is no delegation to Congress in the U.S. Constitution of authority to institute a program of national health insurance, let alone dictate to employers and underwriters what private employee health plans must cover.

Some will argue that the Supreme Court upheld the constitutionality of the ObamaCare program (the Patient Protection and Affordable Care Act) in its June 2012 decision. But the justices upheld the individual mandate, imposing fines for uncovered individuals who do not purchase healthcare plans, by declaring it to be a tax, despite language in the legislation saying it is not, rather than an exercise of the congressional power to regulate interstate commerce.

As for personal liberty, the argument of Planned Parenthood and the Obama administration is that employees should not be restricted in their reproductive choices by the religious scruples of their employers. But the freedom to practice contraception does not, to a reasonable person, imply a responsibility of others to provide it for them. Were that the case, the Congress might require employers to honor the First Amendment's freedom of the press guarantee by providing their employees with journalism courses free of charge.

Interestingly, neither contraception nor the right of access to it are mentioned anywhere in the Constitution. They became constitutional issues by a Supreme Court ruling (*Griswold v. Connecticut*) that the freedom to contracept is covered by a fundamental right to privacy. But if it's wholly a matter of privacy, why must there be a public program, supported by taxpayers' dollars, to provide for it?

Employers are legally persons, too, at least until the Supreme Court rules otherwise. They also have rights, including the right to religious freedom. More to the point they have the right to be left alone

from unauthorized, unconstitutional government mandates. That's why we have a Constitution in the first place.

(The five freedoms incorporated in the First Amendment are: freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government for redress of grievances.)