From accommodation to conscription?

The Obama health care mandate in context

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Abstract

The context for understanding President Barack Obama's mandate that all employers, including religious ones, must provide free contraception and sterilization to their employees is historical. The United States Constitutional system values the accommodation of religious practices, in contrast to Revolutionary France, which attempted to conscript religious groups and clergy to advance government programs. For much of its history, the United States has pursued this policy of accommodation, but recently, increasing government power has created conflicts with religious practice leading to the mandate and similar government incursions. These appear to represent a shift to the French Revolution's policy of conscription.

Keywords Religious liberty, free exercise, United States, minority religions, contraception mandate, discrimination laws, government power, same-sex unions.

In 2010, Congress passed the signature legislative initiative of President Barack Obama's administration, the Patient Protection and Affordable Care Act. The measure was intended to dramatically alter the system of health care in the United States, moving it from a system of largely private insurance (much of it provided by employers) to a system of significant government control. The aim was to ensure that far more people would be provided with health insurance and medical care. The law did not require abandonment of the private welfare system. In fact, that system would be expanded by government directives to insurance companies to cover more services and to employers to offer health coverage, with corresponding financial penalties for failure to do so.

The most unsettling part of the legislation comes from the legislation and subsequent administrative rules that have created a mandate for all employers to provide coverage of a variety of health-related services including, most controversially, con-

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traceptives (and drugs that could be characterized as abortifacients) and sterilization. This coverage must be provided at no cost to the employee. In addition to the fiscal considerations, the mandate has sparked significant outrage because of its application. The law exempts only churches from the requirement to pay for coverage, not religious organizations (such as religious schools, hospitals, ministries, etc.) or people of faith who own or operate businesses.

Although conflicts between the actions of religious organizations or religious believers and government actions are not a new phenomenon in the United States, the contraceptive mandate is novel because it requires individuals and organizations to affirmatively pay for services that are in every way repugnant to the beliefs of the person or group.

Understanding this dramatic, even radical, shift in the relationship between the power of the state and religious practice requires context. The context is provided by the historical experience of religious liberty in the United States. That experience reflects a commitment to robust accommodation of diverse religious beliefs and practices that has only recently begun to weaken. There is an important historical counterexample, however; a nation that understands the relative role of the government and religion very differently from the U.S. The mandate is very consistent with this other nation's view of religious freedom.

The United States' War for Independence from England (1776-1781) and subsequent institution of a written Constitution (1787) and the French Revolution (1789-1799) are roughly contemporaneous and invite comparison.

Historical and cultural differences between the two nations are great, of course, and these differences manifest themselves in various ways in the subsequent experience of each country. One significant difference is the contrasting treatment of religion and religious freedom in the two nations.

1. Religious liberty in the founding of the United States

The United States has long prided itself on its solicitude for religious freedom. This stems from the colonial experience of America before independence in which some of the colonies were founded by religious dissenters who had come to the colonies to escape persecution for their religious practice. Some of the earliest State constitutions contained explicit protections of religious freedom.[2] The Virginia Declaration of Rights is illustrative. Section 16 provided:

[2] See *The Founders' Constitution,* vol. 5. 1987. Philip B. Kurland & Ralph Lerner (eds.) 70-71 which contains relevant excerpts from the early constitutions or Declarations of Rights of Virginia, Delaware, Maryland, New Jersey, North Carolina and Pennsylvania all enacted in 1776.

> that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.[3]

The First Amendment to the United States Constitution, first in placement and priority, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] This provision first prevents Congress from establishing a national religion and then prevents Congress from interfering with religious practice by citizens. Similar guarantees are contained in State constitutions, whether enacted prior to or subsequent to, the national Constitution.

The first president of the United States, George Washington, wrote a letter to the Hebrew Congregation in Newport, Rhode Island in 1790 that in the new United States

> [a]ll possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.[5]

Notwithstanding the absence of an established church, religious belief and practice were understood to be central to the lives of citizens of the United States. In 1830, Alexis de Tocqueville noted: "Religion, which, among Americans, never mixes directly in the government of society, should therefore be considered as the first of their political institutions; for if it does not give them a taste for freedom, it singularly facilitates their use of it."[6]

2. Religion and the French Revolution

The experience of France during the same general time period is starkly different. In 1789, the revolutionary National Assembly approved a Declaration of the Rights of Man which speaks of religious opinions rather than religious exercise and subor-

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[3] Ibid. 70.

[4] U.S. Constitution, amendment I.

[5] *The Papers of George Washington,* Reply to the Hebrew Congregation, Newport, Rhode Island, 17 August 1790 at http://gwpapers.virginia.edu/documents/hebrew/reply.html.

[6] Alexis de Tocqueville, *Democracy in America* 280 (translated by Harvey C. Mansfield & Delba Winthrop, 2000).

dinates this interest to the priorities of government. Section 10 states: "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law."[7]

That same year, the National Assembly enacted legislation placing "all Church property 'at the disposition of the nation'" and the next year decreed the closing of monasteries, which were to be sold to prop up the finances of the nation.[8] In fact, the government set out to reorganize the church itself, enacting the Civil Constitution of the Clergy, which realigned Catholic dioceses with the new government administrative units and demanded the total loyalty of believers to the new state:

> No church or parish of France nor any French citizen may acknowledge upon any occasion, or upon any pretext whatsoever, the authority of an ordinary bishop or of an archbishop whose see shall be under the supremacy of a foreign power, nor that of his representatives residing in France or elsewhere . . .

Clergy were to be elected, and their salaries were determined by legislation.[9] A few months later on November 27, 1790, the National Assembly mandated an oath of loyalty to be taken by all clergy, publicly, to the Civil Constitution of the Clergy.[10] Thus, while the new United States was committed, at least in principle, to tolerance of religious practice, the new French republic had conscripted the clergy as forced servants of the State.

3. The practice of religious liberty in the United States

With regard to the practice of religious toleration, the period from the adoption of the Constitution until well into the twentieth century could be characterized as an era of accommodation. When the Constitution was ratified, a few States still had established churches, but these were abandoned in the early decades of the nineteenth century.[11] To be sure, there was still serious persecution of religious minorities, some even sponsored by the government. In 1838, the governor of Missouri issued an order that members of The Church of Jesus Christ of Latter-day Saints be driven from the State.[12] Because until 1890 some church members practiced

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[7] The Avalon Project Documents in Law, History and Diplomacy, "Declaration of the Rights of Man –1789" at http://avalon.law.yale.edu/18th_century/rightsof.asp.

[8] Gemma Betros, The French Revolution and the Catholic Church. *History Review* 68:16-21 (December 2010), 17.

[9] Hanover Historical Texts Project, "The Civil Constitution of the Clergy 1790" at http://history.hanover.edu/courses/excerpts/111civil.html.

[10] Betros op cit.,18.

[11] James H. Hutson, Religion and the New Republic: Faith in the Founding of America (2000).

[12] William G. Hartley, Missouri's 1838 Extermination Order and the Mormons' forced removal to Illinois

polygamy in an area that was a territory of the United States, there were significant conflicts between the national government and the church.[13] In fact, an important U.S. Supreme Court case arose out of these disputes. It was a test case in which the church sought to have the Court rule that the right of free exercise of religion should shield members who practice polygamy from criminal prosecution.[14] The Court ruled that notwithstanding the religious motivation of the practice, Congress could prohibit it since no one else could marry more than one spouse. In other words, a religious belief did not provide an exemption from an otherwise general law. The practice of polygamy, of course, was quite rare and so dramatically contrary to cultural mores and the nearly unanimous practice of religious believers in the United States, that the resolution of this conflict did not significantly impact the general trend towards accommodation of free exercise.

In the early twentieth century, anti-Catholic sentiment, often tied to nativism, led some States to promote legislation that disadvantaged Catholics, often in the education context. In fact, thirty-seven States have constitutional provisions barring any public money being used for "sectarian" schools. The history of these amendments make clear they were intended to disadvantage parochial schools because of fears over the potential influence of the Catholic Church.[15]

The State of Oregon went further, enacting by referendum in 1922 a law that provided:

> Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense.[16]

This law would make a parent's choice to send a child to a Catholic school (or any other private school for that matter) a crime and with penalties for each day the child is out of public school. The U.S. Supreme Court invalidated the law but did not address the religious liberty claims involved. Instead, the Court said:

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2. *Mormon Historical Studies* 5 (Spring 2001).

13 Jessie L. Embry, 1994. Polygamy in *Utah History Encyclopedia* at www.media.utah.edu/UHE/p/POLYGAMY.html.

14 Reynolds v. United States, 98 U.S. 145 (1879).

15 See Kyle Duncan, 2003. Secularism's laws: State Blaine amendments and religious persecution 72. *Fordham Law Review* 493.

16 Pierce v. Society of Sisters, 268 U.S. 510, 530 note 1 (1925).

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[17]

Perhaps the Court believed this holding covered religious freedom claims since the implicit claim in the Court's holding is that the State lacks power to pursue illegitimate ends and curbing religious freedom would clearly be illegitimate. Whatever the rationale, the effect of the Court's holding was to vindicate the ability of religious parents to send their children to parochial schools.

In the 1930s and 1940s, the Jehovah's Witness sect was involved in a number of legal disputes that contributed to the developing of legal rules favoring religious accommodation.[18] A key case involved a challenge to a law that required anyone soliciting for religious or charitable reasons to get a license from the State and which required a State official to determine whether a particular purpose is sufficiently religious.[19] This case made clear that States, not just the national government, were prohibited from infringing free exercise. The Court attempted to describe the rights and its limits, saying the Constitution

> embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.[20]

The Court's decision, however, made clear that there were significant limits on what the government could do.

This principle was further established a few years later. The Court heard a case challenging a West Virginia Board of Education decision which allowed schools to expel students who refused to salute the flag, a practice which conflicted with the

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[17] Id. 535.

[18] See Melvin I. Urofsky 2002. *Religious Freedom: Rights and Liberties Under the Law* 127-140.

[19] Cantwell v. Connecticut, 31 U.S. 296, 301-302 (1940).

[20] Id. 304-305.

beliefs of Jehovah's Witnesses.[21] The case was brought by schoolchildren who had been expelled for refusing to salute the flag. The controversy was heightened, of course, by the fact that the United States was involved in World War II and refusal to show patriotism was thus considered perhaps more dangerous than it might have been during peacetime. In invalidating the law, the Court made a famous statement: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22] Interestingly, the decision reversed an earlier Supreme Court decision from three years before.[23]

Perhaps the high point in the legal protection of the Constitutional right to free exercise came in 1963 in a period during which the Supreme Court was accepting increasingly expansive interpretations of individual rights guaranteed in the Constitution. The 1963 case involved a woman fired from her job for refusing to work on Saturday for religious reasons (she was a member of the Seventh-day Adventist church).[24] She eventually sought unemployment benefits which were denied because the benefits were only available to those willing to accept available work and the State considered her reason for refusing to work invalid. The Court ruled that the South Carolina Employment Security Commission was wrong to have denied the claim because doing so created a burden on free exercise of religion without demonstrating any "compelling State interest" that the policy was necessary to protect. In regard to the first part of its analysis, the Court said, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[25]

This rule, reflecting the strongest articulation of the policy of accommodation of religious exercise from the Court, remained in place for the next few decades. In 1972, the Court cited the Sherbert case, for the proposition that:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. [26]

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[21] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[22] Id. 642.
[23] Minersville School District v. Gobitis, 310 U.S. 586 (1940).
[24] Sherbert v. Verner, 374 U.S. 398 (1963).
[25] Id. 406.
[26] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

In that case, the Court said the State of Wisconsin could not require Amish children to attend school after the eighth grade because doing so conflicted with the religious beliefs of the Amish.

4. An era of growing conflict

At the same time the era of accommodation was at its zenith and finding increasingly important formal recognition a number of other developments were converging to introduce a very different era, one of growing conflict.

One important element in this change has been described in this journal by Stephen Baskerville; it is the unprecedented expansion of the power of the government in the United States.[27] Where once enormous swaths of everyday life would take place with no or minimal contacts with official State regulation, there are now countless areas of life in which an individual's daily choices might invoke government scrutiny. Job schedules, employment, customer or membership lists, etcetera, are all part of daily life of organizations, including religious organizations, and these areas are all regulated by a variety of laws.

Not all of these areas are likely to create any conflict with religious liberty, but some are. Here, another two-part development is important. The first part is the dramatic cultural change in attitudes and practices regarding sexual morality that took place in the United States since the Second World War (though, of course, its roots are deeper). The second part consists of parallel legal changes meant to enshrine or advance these changes in sexual morality. As Nicholas Kerton-Johnson has described in this journal, important Western elites have begun to prioritize "rights" with much greater emphasis given to the protection of those founded in radical personal autonomy to the denigration of more traditional rights, such as freedom of speech or religious liberty.[28] Many are familiar, such as the creation of no-fault divorce in which the courts are required to take the side of the person who wants to break up the marriage and ameliorate the consequences of the decision to end a marriage. Other changes, such as in public welfare programs, promoted cohabitation and out-of-wedlock births. Perhaps most important has been the recent change in anti-discrimination laws so that they extend beyond the traditional categories of race and sex to "sexual orientation" or "gender identity." The effect of this change is to make suspect the doctrinal beliefs of the majority of religions which hold that the only appropriate context for sexual relations is within a marriage between a husband and wife. The United States, like other nations, is now debating a related

[27] Stephen Baskerville, 2011. The sexual agenda and religious freedom: Challenges in the Western World 4 *IJRF* 91.

[28] See Nicholas Kerton-Johnson, 2011. Governing the faithful: A discussion of religious freedom and liberal democracies with particular focus on the United Kingdom 4 *IJRF* 77.

change – the proposal that marriage be redefined to include same-sex couples. This change is, in many ways, the culmination of the sexual revolution since it transforms that most fundamental social institution in the U.S., marriage, into a government program for conferring approval on adult sexual choices. The redefinition of marriage, combined with the inclusion of new groups or activities in discrimination laws, drastically increases the opportunities for religious liberty conflicts. This is true because people of faith, churches, and other religious organizations act on their beliefs about marriage and sexuality. When they do so in situations involving legal oversight such as employment benefits or the provision of social services, they run up against the new legal principle that maintaining traditional standards of morality is a form of illegal "discrimination."

Another two-part development relates to another portion of the First Amendment. That provision not only protects free exercise of religion but prevents Congress (and more recently, the States) from creating an established church. This would seem to be a relatively insignificant provision since no State has had an established church since the early 1800s. The provision has, however, been interpreted in a much more expansive way. In 1971, the U.S. Supreme Court struck down a Pennsylvania law that allowed the government to reimburse private, including religious, schools for the salaries of teachers and other materials used in teaching secular subjects.[29] In doing so, the Court said a law or policy must have a secular purpose, not advance religion, and not entangle government and religion. This subjective test allowed the courts to examine government policies far short of endorsing a particular church or using tax money to pay clergy salary or church expenses. The Court has also become involved in disputes over such matters as whether public prayers can be offered in schools (whether teacher or student-led) or whether creches or other religious monuments may be displayed on publicly owned property.[30] This has led to the forced retreat of much religious expression from the public square. It could be argued that the Court's reading of the Establishment Clause creates a de facto right of nonbelievers not to be confronted by any religious activity with which they might be offended. The second part of this development is cultural – the increasing assertiveness of atheists and others who believe there is no appropriate place for religious expression or activity other than in churches or the privacy of a home (though even this latter has been questioned such as in the recent story of a man facing prosecution for hosting a Bible study in his home[31]).

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[29] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[30] See Engel v. Vitale, 370 U.S. 421 (1962); Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

[31] See J.J. Hensley, Phoenix preacher jailed in zoning dispute. *Tuscon Citizen*, July 11, 2012 at tucsonci-

The final element involves the Free Exercise Clause. In 1990, the U.S. Supreme Court abandoned the protective test it had identified in *Sherbert* and instead said the Clause would be satisfied if a law applied neutrally to all citizens.[32] In the 1990 case, the plaintiff had challenged the denial of unemployment compensation to a man who had been fired for using the drug peyote as part of a Native American Church ceremony. This is similar to the test developed in the polygamy cases so it might be argued that this change in legal standards was not particularly consequential. How many churches practice polygamy or use banned substances in their rituals? This question ignores the context discussed here. With a very broad range of practices and policies now subject to government regulation, the neutrality test was no longer as protective as it might have been in the late nineteenth century. Also, with core aspects of religious teaching (about marriage and family) potentially invoking government scrutiny and a negative attitude about religion ascendant among important government policy-makers the range of conflicts has become very significant.

5. From accommodation to conscription?

In a very short time, the era of conflict seems to have transformed into something more menacing. A series of legal developments related to new government ideologies of family diversity and radical sexual autonomy now threaten to scuttle the longstanding aspiration and emerging practice of accommodation of religious exercise. One important action, in particular, seems to endorse a replacement of the United States' approach to religious liberty with the French Revolutionary approach.

This action is the much-discussed "Obamacare mandate." The Patient Protection and Affordable Care Act requires employers to provide health insurance coverage for their employees that covers all services and products required by government regulations which include contraception and sterilization.[33] Insurance companies are required to offer these same services, without charge, so an employer will either pay directly for contraception and related services or indirectly by paying for insurance coverage that provides them.[34] If the employer is large enough (50 employees) it must pay significant fines for failure to provide health insurance coverage.[35]

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tizen.com/arizona-news/2012/07/11/phoenix-preacher-jailed-in-zoning-dispute/.

[32] Employment Division v. Smith, 494 U.S. 872 (1990).

[33] 76 Fed. Reg. 46621 (Aug. 3 2011).

[34] See Department of Health and Human Services, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012), at www.hhs.gov/news/press/2012pres/01/20120120a.html .

[35] The annual penalty is $2,000 annually per employee. See "P.P.A.C.A. Employer Mandate Penalties: Calculations" National Federation of Independent Business, at www.nfib.com/research-foundation/cribsheets/employer-mandate.

One of the most striking features of the debate over the impact of the mandate on religious liberty is the paucity of defenses of the mandate from a religious freedom perspective. In other words, there has been little or no effort by the mandate's supporters to demonstrate that the mandate does not threaten religious liberty. These supporters seem to believe it is adequate that churches, and only churches, are exempt. The clear implication is that the sexual "rights" advanced by access to contraception are of a higher priority than the rights of believers to live in accordance with their faith.

The mandate's importance is magnified by a growing number of other looming threats to religious practice. Again, these tend to involve matters of family and sexuality. For instance, since the U.S. Supreme Court decided that States could no longer regulate abortion,[36] federal law has long protected the ability of individuals with religious and moral objections to the practice to decline to participate in abortions. For twenty-five years the Hyde amendments prevented taxpayers from having to subsidize abortions.[37] The Church Amendment has ensured that no entity receiving federal funds may coerce an individual to participate in an abortion if doing so would be inconsistent with their beliefs.[38]

These protections are being severely limited, however. In 2008, the Department of Health and Human Services adopted rules to enforce longstanding federal law that prevents employees from being forced to assist with an abortion "contrary to his religious beliefs or moral convictions."[39] The Obama Administration reversed this policy, removing the enforcement provision.[40] In regards to taxpayer funding, the new Health Care law requires all individuals to purchase insurance or be fined and allows insurance plans to participate in State exchanges which allow them access to federal money even if they cover abortions. Those who enroll in these plans have to pay a premium set aside for abortions but the law prevents the plans from advertising the fact that they will require an abortion premium.[41]

Various States have seen similar disputes over conscientious objection. The State of California in 1999 mandated all employers to offer contraceptive coverage to their employees, and this law was upheld by the California Supreme Court,

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[36] Roe v. Wade, 410 U.S. 113 (1973).

[37] *No Taxpayer Funding for Abortion Act*, House Report 112-38 (March 17, 2011) at www.gpo.gov/fdsys/pkg/CRPT-112hrpt38/pdf/CRPT-112hrpt38-pt1.pdf.

[38] Pub. L. No. 93-45, §401 codified at 42 U.S.C. §300a-7 at www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf.

[39] 73 Fed. Reg. 245 (Dec. 19, 2008).

[40] 76 Fed. Reg. 36 (Feb. 23, 2011).

[41] Kathleen Gilbert, Obama Health Care rule final: $1 Abortion surcharge from premium payers. *LifeSite News*, March 13, 2012 at www.lifesitenews.com/news/obama-health-care-rule-final-1-abortion-surcharge-from-every-premium-payer/.

which rejected religious liberty claims by Catholic Charities.[42] Five States require pharmacists or pharmacies to offer "emergency contraception" regardless of their religious convictions.[43]

The legal recognition of same-sex unions has created a much larger set of conflicts. For example, many religious organizations provide what are called "social services" and feel a mandate to do so derived from their faith. This, however, has led to conflicts with government authority when governments extend legal status to same-sex unions and expect social services providers to treat same-sex unions as equivalent to marriages between a husband and wife. Thus, the Catholic Archdiocese of Washington, D.C. ceased its foster care placement program because it would have been required to approve same-sex couples for placement.[44] Illinois Catholic Charities and two other religious adoption agencies are no longer eligible to partner with the State in providing adoption and foster care placements after the State created a civil union law.[45] Similarly, Massachusetts Catholic Charities was forced to end its adoption placement program when the legislature refused to exempt it from State law requiring adoption agencies to place children with same-sex couples.[46] In an earlier instance, as a condition of access to city housing and community redevelopment funds, a religious charity in Maine was required to extend employee spousal benefit programs to registered same-sex couples.[47]

Religious organizations have other interactions with government power that raise conflicts. A chief example is the Methodist Ocean Grove Camp Meeting Association in New Jersey which is being sued by the State for discrimination and has lost part of its tax exemption because it declined to allow its property to be used for a

[42] Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67 (2004).

[43] Guttmacher Institute, *State policies in brief: Emergency contraception* (March 1, 2012) at www.guttmacher.org/statecenter/spibs/spib_EC.pdf ; Stormans Inc. v. Selecky, Case No. C07-5374, slip op. (W. D. Wash. 2012) at www.becketfund.org/wp-content/uploads/2012/02/Stormans-Opinion-from-Judge-revised.pdf; Morr-Fitz, Inc. v. Blagojevich, No. 05CH495 (Ill. Cir. 2011) at http://media.aclj.org/pdf/judgerienziruling_20110405.pdf.

[44] See Michelle Boorstein, Citing Same-Sex Marriage Bill, Washington Archdiocese ends foster-care program. *Washington Post, Feb*. 17, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html; Emily Esfahani Smith, Washington, gay marriage and the Catholic Church. *Wall Street Journal*, Jan. 9, 2010, http://online.wsj.com/article/SB10001424052748703478704574612451567822852.html.

[45] Manya A. Brachear, Rockford Catholic Charities ending foster care. *Chicago Tribune*, May 26, 2011 at www.chicagotribune.com/news/local/breaking/chibrknews-rockford-catholic-charities-ending-foster-care-adoptions-20110526,0,4532788.story?track=rss.

[46] Daniel Avila, 2007. Same-sex adoption in Massachusetts, the Catholic Church, and the food of the children: The story behind the controversy and the case for conscientious refusals 27. *Children's Legal Rights* J. 1.

[47] Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004).

civil union ceremony.[48] Similarly, the Archdiocese of Washington, D.C. was forced to change its health coverage for employees so as to avoid discrimination claims for not offering benefits to employees' same-sex partners.[49] In 2001, the New York Court of Appeals ruled that Yeshiva University's married student housing policy violated the New York City Human Rights Law because it limited residence to medical students, their spouses and children.[50]

It is not only religious organizations that experience such conflicts; consider, for instance, public officials who want to act in accordance with their faith. Thus, after the courts redefined marriage in Massachusetts, State officials announced that, "Justices of the Peace who refuse to perform gay weddings will be asked to resign and could face formal discrimination charges if they don't."[51] Similarly, after the Iowa Supreme Court mandated same-sex marriage, the Attorney General told county recorders that they must issue marriage licenses to same-sex couples, threatening to "explore legal actions to enforce and implement the Court's ruling."[52] Finally, New York's Nassau County District Attorney threatened clerks who decline to participate in the administration of same-sex marriages with criminal prosecution.[53]

Believers also engage in private business that is sometimes regulated by government. So, the California Supreme Court decided a doctor could not claim a religious exemption to the civil rights law after he referred a woman in a same-sex couple to another doctor for artificial insemination because of his religious concerns about participating in the procedure.[54] A wedding photographer was successfully sued for declining to photograph a same-sex commitment ceremony and fined nearly $7,000 by the New Mexico Human Rights Commission.[55]

There is even the possibility of such conflicts in private life. Parents of young elementary school students in Massachusetts objected to curriculum and classroom discussion meant to inculcate in the children the idea that there are no differences between the marriages of husbands and wives and those involving same-sex cou-

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[48] OGCMA v. Vespa-Papaleo, D.N.J. Case No. 3:07-cv-03802 (U.S. Dist. Ct., N.J.).

[49] William Wan, Same-sex marriage leads Catholic Charities to adjust benefits. *Washington Post*, March 2, 2010 at www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html.

[50] Levin v. Yeshiva University, 96 N.Y.2d 484 (2001).

[51] Katie Zezima, Obey Same-sex Marriage Law, officials told, New York Times, April 26, 2004, at A15.

[52] *Statement of Iowa Attorney General Tom Miller – County recorders must comply with Supreme Court's Varnum decision,* April 21, 2009 at www.state.ia.us/government/ag/latest_news/releases/apr_2009/Marrige_Stmnt.html.

[53] Celeste Katz, Nassau DA Kathleen Rice to clerks: Don't even think about refusing gay marriage licenses. *NY Daily News*, July 8, 2011 at www.nydailynews.com/blogs/dailypolitics/2011/07/nassau-da-kathleen-rice-to-clerks-dont-even-think-about-refusing-gay-marriage-.

[54] North Coast Women's Care Medical Group v. San Diego Superior Court, 189 P.3d 959 (Cal. 2008).

[55] Elane Photography v. Willock, Docket No. 30,203 (N.M. App. 2012).

ples, but the courts ruled public schools "have an interest in promoting tolerance, including for the children (and parents) of gay marriages."[56]

As noted earlier, the French National Assembly during the revolutionary era had conscripted clergy as functionaries of the State. The health care mandates and similar legal requirements on religious groups and believers stop short of direct application to churches, as churches, but the Administration has refused to limit its application to accommodate religious organizations and religious believers. This ameliorates but does not in any way erase the problem. The analogy to the Civil Constitution of the clergy and similar laws is not exact but the similarities are ominous.

Most striking is that the U.S. legal system seems to have abandoned the principle of free exercise for a new approach allowing the government to enact whatever policies it chooses irrespective of impact on religious people and groups. This is the policy of the Declaration of the Rights of Man: "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law."

We seem to be adopting a policy which says you can believe what you want but can't act on it in the public square. Could it be that religious liberty is being confined to the walls of people's hearts or the walls of churches?

6. Conclusion

So, is the United States undergoing a fundamental transformation in its respect for religious exercise? The Obama mandate, retreat from conscience protections, and conflicts over marriage redefinition suggest the answer may be yes. Where the government begins to override religious practice in order to advance a contested ideological position about family or sexuality, and in the process requires religious people and organizations to do things that contravene their doctrines and practices in order to advance State ends, it looks like conscription.

In the late 1780s, the United States ratified a principle that has characterized the U.S. and put it on a path quite different from the one France would travel. That principle – that government would not infringe the free exercise of religion – has been a hallmark of the common culture in the USA.

The strong resistance to these new expansive government claims suggests that there is hope for retrenchment and a return to the rule of accommodation. Such a return would be consistent with the aspirations of the Constitution's drafters and of the nation itself. It would be a ratification of the best hopes of the American people and of the struggles of the nation to be true to its principles in respecting the rights of all to live consistent with their religious beliefs.

[56] Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).