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Catholic concerns on healthcare rules carry 'less influence'

by Michael Sean Winters

Distinctly Catholic

In an effort to understand the legal and intellectual context on the Obama administration's new rules regarding conscience protections for healthcare workers, I reached out to Professor Timothy Lytton of the Albany Law School.

Lytton, who focuses on torts, administrative law, conflict resolution, and jurisprudence is also the author of *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse*.

Following is my interview with Lytton, which was conducted via e-mail as the professor is currently in Israel.

MSW: Why are some liberals so seemingly unconcerned about conscience protections? Have they forgotten their Locke? Milton? Jefferson?

Lytton: The issue of conscience protections is complicated for liberals because it involves a clash of competing individual liberties. On the one hand, liberals are of course concerned about coercion of healthcare providers by healthcare institutions and administrators, as evidenced by the fact that the Obama administration preserved substantial conscience protections in its new regulations. On the other hand, liberals are concerned about the denial of healthcare services to individuals.

While access to healthcare services is not a negative liberty like freedom from coercion, it is an important

positive liberty that is especially salient and prominent on the liberal agenda (and has been since the progressive era). Liberals have consistently tried to frame affordable healthcare as a right. And given the extensive government subsidy to healthcare today, healthcare could be viewed as a public service, which carries with it duties to provide care. All of this makes the issue of conscience protections difficult for liberals to address as a simple matter of individual rights against majority preferences.

Does the state's licensing power trump First Amendment rights?

As a general matter, constitutional rights are never absolute, and they may be sacrificed in the face of compelling government interests pursued narrowly so as to minimize the restriction of individual rights. Sometimes, they may be sacrificed for even less compelling government interests, depending on the right in question. So constitutional rights are always balanced against government interests. One would need to consider the weight of the government interests at stake in licensing and the traditional weight given to the right of conscience in this context.

How are the regulations requiring, for example, Catholic hospitals to dispense emergency contraception different from the Civil Rights Acts requiring public establishments not to discriminate based on race?

I believe that the Civil Rights Act applies not only to "public establishments" but also to "public accommodations." That could include private businesses that offer services to the public. Hospitals have a much more public profile than many of the private establishments that are governed by the civil rights laws. That might make the case for compelling hospitals to provide services even stronger than the case for private businesses to provide services to the public in a nondiscriminatory manner.

What, if anything, does your research on sex abuse claims shed on this issue of conscience regulations?

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The Catholic Church in America has traditionally been a very strong and widely respected voice for liberal concerns, such as labor rights, access to healthcare, nuclear arms control, and economic justice. The bishops' pastoral letters in the 1980s and 1990s were highly influential documents. The sex abuse scandal has significantly diminished respect for the Church's views and had undermined the bishops' influence in public discourse. For that reason, the Church's concerns about conscience are likely to attract less attention and carry less influence in the public debate. The scandal, which appears to be ongoing, has seriously undermined the Catholic Church's moral authority and marginalized the bishops in public affairs. While state Catholic Conferences still have considerable lobbying strength, the public's views of the bishops on issues such as conscience protections have largely been clouded by headlines of sex abuse scandals within the church.

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