

## Senate rejects change to contraception rule

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(RNS photo via istockphoto.com)

The Senate on Thursday defeated a Republican-led bid to insert a broad religious exemption into a federal mandate that requires most employers and health insurance companies to provide free contraception coverage.

The largely party-line vote was 51-48 in favor of tabling an amendment that Sen. Roy Blunt, R-Mo., had offered to a federal transportation bill.

Blunt and other Republicans had argued that the measure would protect the religious liberty of institutions such as Catholic charities and hospitals that object to contraception on moral grounds.

"It's not just the Catholic church," Sen. Orrin Hatch, R-Utah, said during the floor debate on Thursday. "It's a moral and religious issue that should not be interfered with by the federal government."

In February, the Obama administration proposed a revision whereby insurers, not religious institutions, could provide contraception services to employees.

But Catholic and evangelical leaders dismissed the revision as an "accounting gimmick," and said it would not help large institutions, such as universities, that are self-insured.

Democrats portrayed the Blunt amendment as an attack on women's rights and a Pandora's box that would have allowed any employer or insurer to use moral scruples as an excuse to limit coverage.

"We have never had a conscience clause for insurance companies," said Sen. Barbara Boxer, D-Calif. "If we want to give them a chance to say 'no,' a lot of them have no consciences and they'll take it."

After the amendment's defeat, the U.S. Catholic Bishops Conference said it will pursue legislation in the House, where Republicans are in the majority.

"We will not rest until the protection of conscience rights is restored and the First Amendment is returned to its place of respect in the Bill of Rights," said Bishop William Lori of Bridgeport, Conn., chair of the bishops'

religious liberty committee.

Two experts in constitutional law told [NCR in February](#) [1] that a House of Representatives bill similar to the Blunt amendment, the Respect for Rights of Conscience Act, would allow for too wide of an exemption in coverage for religious groups, perhaps allowing employers to deny coverage of routine procedures such as blood transfusions and vaccines.

Robert Hockett of Cornell University Law School in Ithaca, N.Y., said that bill's "moral conviction" exemption was so broadly worded as to potentially allow "all sorts of nonsense," an issue that had been specifically addressed by the U.S. Supreme Court in 1990.

Citing the court's decision that year in *Employment Division v. Smith* -- which held that although states have the power to accommodate otherwise illegal acts for religious purposes, they are not required to -- Hockett referenced Justice Antonin Scalia's majority opinion in that case, which warned of allowing "every citizen to become a law unto himself."

Hockett said that if the reasoning of the House of Representatives' bill were applied to other areas of jurisprudence in which exceptions from the rule of law might be claimed in the name of the rights of "conscience," federal laws might be forced to recognize people who form a "religion of one or two" that holds its members to be "religiously required to drive at 90 miles an hour, to rob banks, to pollute the environment, or engage in identity theft."

"One also wonders how the sponsors of this bill intend to reconcile it with the "anti-Shariah law" bills that so many of them seem likewise to favor," Hockett said.

"There's no way you can have the rule of law if you give this kind of plenary exemption power to everybody who claims a right to special treatment on the basis of conscience to do whatever they want," he said.

Another constitutional law professor said that by extending to all for-profit employers and any objection they may have to any procedure, that bill was "pressing the objection to the mandate the furthest that it can go," allowing the "range of objections to be pretty large."

Thomas Berg of the University of St. Thomas School of Law in Minneapolis suggested that with respect to most for-profit employers, the bishops may need to highlight in their objections to the mandate their concerns that some of the services covered could be considered abortifacients, or substances that induce abortion.

Berg said that while the U.S. legal system has a "less clear tradition" for allowing for-profit employers to object to contraception coverage, "we do have a tradition of allowing even for-profit employers and taxpayers to be protected from supporting abortion."

Examples of that tradition, he said, could be found in laws that prevent government funding of abortions and protect doctors and nurses who object to abortions on grounds of conscience or religious beliefs from having to perform them.

While Berg said he wanted to make clear that such a voicing of concerns "wouldn't solve all of the religious liberty issues" for religious organizations, including some that are for-profit, he did say that for most commercial employers it would allow the conversation to begin to take place in an area "where it does fit within our traditions to accommodate people very broadly because of the seriousness of the question."

[Daniel Burke with RNS and NCR staff writer Joshua J. McElwee contributed to this report.]

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