

Published on *National Catholic Reporter* (<https://www.ncronline.org>)

April 3, 2012 at 12:18pm

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## War no more -- or at least, peace with Obama

by Douglas W. Kmiec



People hold signs March 24 at a Tea Party Patriots rally on Capitol Hill in Washington calling for the repeal of the 2010 health care law championed by U.S. President Barack Obama. The Supreme Court began three days of oral arguments March 26 on challenges to various aspects of Obama's health care overhaul. (CNS photo/Jonathan Ernst, Reuters)

### COMMENTARY

When the president chose to not grant an exemption from the mandate that employer-provided insurance should include contraceptive coverage, some bishops called the decision an act of war on the church and religious freedom.

With due respect, I believe this overstated matters considerably. This is especially so, since the president responded promptly to begin discussions on how the ethical concerns of the church might be met more satisfactorily. In particular, the president proposed that no Catholic employer would be directly asked to supply contraceptive coverage; instead, that coverage would be provided by the employer's insurance company.

To a good many theologians, this worked well enough to avoid formal cooperation with evil, but left

unanswered how the problem could be avoided where a Catholic employer did not use a third-party insurer, but was self-insured. Discussions continue, with some now suggesting that it might be possible to create a public entity by implementing regulation to offer the contraceptive benefit in this self-insured context in a way that similarly separates a Catholic employer.

To date, the matter is unresolved. The president has gone a good distance to make certain the Catholic church and its auxiliaries are not the provider of contraceptive care. It is fair to ask whether our demanded exemption, built as it is on an ethical analysis of remotely cooperating with evil, is what we are called to defend given the entire context.

And the entirety of the context includes bringing 32 million people into the health care system. These men, women and children, prior to the Affordable Care Act, were left to rely on the happenstance of very expensive emergency room care. It is quite obvious by their campaign rhetoric that the president's political opponents view the religious freedom/contraceptive mandate issue as another chance to repeal universal health care. Should we?

Whatever one thinks of the bona fides of the dispute over religious freedom, it should not excuse us from addressing the claim of distributive justice. Said the Holy Father:

"It is necessary to work with greater commitment at all levels so that the right to health is rendered effective, favoring access to primary health care." Benedict continued: "Health justice should be among the priorities of governments and international institutions."

Formally, in three days of unprecedented argument, the redistribution issue was left unspoken -- unless, that is, you read between the lines of the Supreme Court seeming more befuddled than necessary in light of the last 60 years of case opinion. More than \$100 billion in health costs annually is imposed on the present system by the uninsured, and but for some obscuring footwork behind the high court lectern, that is a commercial problem of truly national scope. Nevertheless, the opponents of the law argued, and distressingly seemed at times to have a majority seriously listening, that a confessedly commercial decision (for example, I am young, healthy and would rather not buy health insurance I likely won't use personally) not to enter the marketplace cannot be regulated.

To not put too fine a point on it, this is nuts. All the advocates and justices concede Congress has the power to tax us and, if it had wanted to, could then supply medical care through a single-payer government provider with our tax money. If freedom and liberty survive having money subtracted from one's paycheck to support a benefit through a government monopoly, why exactly is freedom devastated when the government just requires us to buy insurance in a semi-competitive private marketplace so that the costs we cannot escape from imposing on the system are covered whenever they unwantedly and unexpectedly occur. That the mandate also results in more balanced risk pools and lower premiums is, as Justice Ruth Bader Ginsburg noted, just the nature of insurance.

When someone who can afford to purchase insurance instead decides to not obtain it, he or she is making a choice of economic significance for himself and others. For himself, the presently healthy self-insurer is exhibiting a preference for assuming risk while manifesting no empathy for other citizens whose costs increase by his remaining out of the insurance pool.

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Even if we cannot be certain of the outcome until June, when the court's opinion is expected, are we at

least assured -- seeing as how there is the small matter of a presidential election -- to get a definitive ruling then, one way or the other?

Unfortunately, not really. There are special rules for challenging taxes -- you have to pay first and seek refund later. That procedural nicety was not followed here, and thus, there is an escape exit for the justices to take in the event at least five cannot agree on a common outcome -- thumbs up or thumbs down. If Justice Anthony Kennedy remains ambivalent in the opinion-writing and the conservatives find him wavering from their side, which he surprisingly seemed to credit by his queries to the advocates, the rightward-leaning minds on the bench would likely prefer to end the legal skirmish by claiming lack of jurisdiction than by having the law emerge with a certified opinion of constitutional health.

Long ago, an American humorist, Peter Finley Dunne, was famously quoted as saying, "The Supreme Court follows the election returns." Why did four justices vote for review when the constitutional claims against the law are so thin? Maybe not election *returns* just yet, but an anticipated election *result* -- namely, the re-election of Barack Obama and the likelihood that the actuarial tables cannot be avoided and the composition of the court are likely to move from center-right to center-left. The health care law is thus one final chance for conservative jurists to pursue Ronald Reagan's view of government -- as a burden to get off people's backs -- rather than Obama's competing vision of government as a form of community pursuing the common good, including the care of the poor and the elderly.

Obama's dream is to be preferred -- not because his health plan is perfect, it is not -- but because it actually fits the constitutional allocation of power. The U.S. Constitution divides power to account for the defects of human nature, but it was never intended to indulge the pessimistic view that government could not be a source for good. The best Constitution, as James Madison said, is a reflection of human nature -- a nature that is surely better off, as Pope Benedict put it succinctly, where health care is a human right.

And the specific scope of the commerce power? The court needs a limiting principle? How about the one the founders gave us? As Daniel Webster explained, and our most revered Chief Justice, John Marshall, accepted: The rule of thumb is that federal commercial power is to apply where the general interests of the union would otherwise be jeopardized by conflicting state regulation, *but* state regulation is to be preferred where that is not true and states have the better vantage from which to address a public problem.

Webster's argument and Marshall's acceptance of it flows directly from the Virginia Resolution underlying the commerce power. The Sixth Virginia Resolution of 1787 (Virginia Resolution) provides:

[T]hat the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

What, then, "rescues" so-called Obamacare? None other than Justice Antonin Scalia's original understanding. Regrettably, as an originalist, Justice Scalia by his own admission is "faint-hearted" or inconsistent. It's not at all clear why Justice Scalia finds it easy to discover a non-Militia-related fundamental right to handguns but not follow his own deferential precedent on the commerce power, but surely, there is hope that the independently minded Justice Kennedy will not ignore threescore years of case support for Obamacare.

Yes, if originalism has any objective truth left within its four corners, Professor (now President) Obama should easily pass this constitutional examination. Of course, in a democracy, it is up to us to decide whether he is honored or vilified for his reaffirmation of the care of human life -- rich and poor alike. The

Catholic teaching that calls us to pursue distributive justice affirms the nobility of such effort, and so long as the president observes the sensitivities of religious freedom, as he has after a misstep now largely corrected, there is certainly no reason to think him unacceptable to the well-formed Catholic conscience, and many reasons to wish him success. I do.

Will our American bishops agree? Most observe the stricture that it is not the place of the church to endorse or disqualify candidates. This is important, for too great an alliance with even a highly popular candidate or party today is no assurance of continued popularity tomorrow. Moreover, our faith is hardly the pursuit of the popular. Blessed are those who are persecuted, after all, for their willingness to submit to Christ whether the present teaching of His church is wildly popular, or as in the case of contraception, not well understood or followed. In any event, when unpopularity or disfavor comes, a religion indulging in political alliances discovers that it has traded the greater for the lesser.

So what, then, is the American Catholic voter to make of President Obama's efforts at being responsive to the bishops on the adequacy of the contraception mandate? First, it is fair for the president to ask us to discern whether those remaining unsatisfied with the breadth of the offered exemption are doing so because of genuine coercion of practice contrary to church teaching or as a covert way to oppose distributive justice. Evaluation of the sufficiency of the exemption is also more helpfully informed not by assertions of what the Constitution demands in terms of exemption from generally applicable laws (and this is a debatable matter, with modern case developments being less favorable than many believe) than by Jesuit Fr. John Courtney Murray's advice to the late Cardinal Richard Cushing, who inquired in the 1960s whether the Catholic church should lead the effort to oppose repeal of laws that made contraception usage a criminal act in some states. Murray responded by drawing distinctions between law and morality and public and private morality. Murray wrote:

In our present case, the crucial issue is whether contraception is an issue of public morality or of private morality. The question is disputed among Catholics.

I think that the case for affirming contraception to be matter of private morality is sufficiently conclusive in our present circumstances. It is not merely that the practice is in fact widespread, or that so many people do not consider it to be wrong. The more decisive reason is that the practice, undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence, for which the norm of "generally accepted standards" is controlling.

Murray thus advised against leading the repeal effort under what he termed "valid and traditional" theories of law and jurisprudence. And his analysis of religious freedom comes from a perspective that reminds us that it is not the freedom to be Catholic that is guaranteed in the American Constitution -- it is the freedom to pursue religious belief and practice, of any faith, or none, as well. This is what the Vatican document *Dignitatis Humane* likewise affirms. As Murray puts it: "The concept of religious freedom is this: First, a man may not be coercively constrained to act against his conscience. Second, a man may not be coercively restrained from acting according to his conscience, unless the action involves a civil offense -- against the public peace, against public morality, or against the rights of others. But the practice of contraception involves no such civil offense. Therefore the principle of religious freedom should obtain. And laws in restraint of the practice are in restraint of that principle."

How were Catholics then to affirm the beauty of the teaching of total gift of the unitive and procreative

marital estate? By giving witness to it in their own lives. They likely will not know or understand the point of our teaching if the words we use to teach with are the words of war. This is not to deny the contentious nature and sensitivity of this subject, which is interrelated with practices such as sterilization as well as abortion. It is therefore important that the president not lessen the conscience clause protection that is available to Catholic health practitioners. Reciprocally, it is fair for the president in any further refinement of the corrected exemption to ask that we join him upon the common ground that the social justice teaching of the church and the president *do* share; namely, making health care as close to universal right as possible. It should also mean reluctance on the part of bishops to dash into court. Reasoned discussion in the political process is far better. According to Justice Scalia, the alternative is "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."

With respect, it is not engaging in the political process to seed the public discussion with bellicose terminology and promises of litigation. What can we all do now? Take a breath, say a prayer and, rather than deploying the language of war, how about we love our enemies, and maybe it would not be too much to ask American bishops to refrain from calling an American president an "enemy"?

[Douglas W. Kmiec is the former ambassador of the U.S. to Malta and is a professor of constitutional law at Pepperdine University.]

*Author's note: I would be very pleased if readers of this periodical take a good look at what I hope will become a healing spiritual resource for discussions like this; namely, a new book that I have titled: Lift Up Your Hearts -- A true story of loving your enemies; tragically, killing your friends and the life that remains. It has been extremely painful volume to write.*

*Why painful? First and foremost, because my personal confessor, Monsignor John V. Sheridan, died in a tragic car accident in which I was seriously injured and another sainted friend, Sr. Mary Campbell, also perished. The suffering is magnified by having been behind the wheel as the car took its fatal four-second slide off a California canyon road. Notwithstanding some of the truly dark moments giving impetus to the writing, there is to be found an abiding faith and optimism that in kindness we can in 2012 avoid doing harm to the church, further divide our nation and leave us ill-equipped to live a life to the full as the Gospel calls upon us to do. At the very least, Lift Up Your Hearts will remind all of a faith that rightly lifts up the work of Catholic hospitals, schools, parishes and homeless shelters and why these great works should not be seen to be at odds with the work of President Obama to extend health care to as many people as our resources permit.*

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