VILLANOVA
LAW REVIEW

JOHN F. SCARPA CONFERENCE ON LAW, POLITICS, AND CULTURE
LIVING THE CATHOLIC FAITH IN PUBLIC LIFE

Charles J. Chaput, O.F.M. Cap.

Helen M. Alvaré

Patrick McKinley Brennan

Michael J. White

MARTIN LUTHER KING JR. LECTURE

Taunya Lovell Banks

VOLUME 58 2013 NUMBER 3
A priest I know does a lot of spiritual direction. Two of the men he was helping died suddenly this past year, one of a heart attack and one of a stroke. In both cases they were relatively young men and quite successful. In both cases they watched Fox News. And in both cases they had gotten into the nightly habit of shouting at President Obama whenever he came on the TV. In both cases, their wives believed—and they still believe—that politics killed their husbands.

Now that’s a true story. And it’s a good place to begin our time together today. Henri de Lubac, the great Jesuit theologian, once said that if heretics no longer horrify us, it’s not because we have more charity in our hearts.¹ We just find it a lot more satisfying to despise our political opponents. We’ve transferred our passion to politics.

My theme today is living the Catholic faith in public life, including our political life. But in talking about it, I need to make a few preliminary points.

Here’s my first point. It’s very simple. We’re mortal. We’re going to die. American culture spends a huge amount of energy ignoring death, delaying it, and distracting us from thinking about it. But our time in this world is very limited; science can’t fix the problem; and there’s no government bailout program. Life is precious. Time matters. So does the way we use

¹ Archibishop of Philadelphia. This Article was presented at the Seventh Annual John F. Scarpa Conference on Law, Politics, and Culture: Living the Catholic Faith in Public Life, held at Villanova University School of Law, on September 14, 2012.

it. And as all of the great saints understood, thinking a little about our death can have a wonderfully medicinal effect on human behavior.

The reason is obvious. If we believe in an afterlife where we’re held accountable for our actions, then that belief has very practical implications for our choices in this world. Obviously, some people don’t believe in God or an afterlife, and they need to act in a way that conforms to their convictions. But that doesn’t absolve us from following ours.

For Christians, the trinity of virtues we call faith, hope, and charity should shape everything we do, both privately and in our public lives. Faith in God gives us hope in eternal life. Hope casts out fear and enables us to love. And the love of God and other human persons—the virtue of charity—is the animating spirit of all authentically Christian political action. By love I don’t mean “love” in a sentimental or indulgent sense, the kind of empty love that offers “tolerance” as an alibi for inaction in the face of evil. I mean love in the Christian sense; love with a heart of courage, love determined to build justice in society and focused on the true good of the whole human person, body and soul.

Human progress means more than getting more stuff, more entitlements, and more personal license. Real progress always includes man’s spiritual nature. Real progress satisfies the human hunger for solidarity and communion. So when our leaders and their slogans tell us to move “forward,” we need to take a very hard look at the road we’re on, where “forward” leads, and whether it ennobles the human soul, or just aggravates our selfishness and appetite for things.

What all this means for our public life is this: Catholics can live quite peacefully with the separation of Church and state, so long as the arrangement translates into real religious freedom. But we can never accept a separation of our religious faith and moral convictions from our public ministries or our political engagement. It’s impossible. And even trying is evil because it forces us to live two different lives, worshiping God at home and in our churches; and worshiping the latest version of Caesar everywhere else. That turns our private convictions into lies we tell ourselves and each other.

Here’s my second point: Religious faith sincerely believed and humbly lived serves human dignity. It fosters virtue, not conflict. Therefore it can be vital in building a humane society. This should be too obvious to mention. But one of the key assumptions of the modern secular state—in effect, secularism’s creation myth—is that religion is naturally prone to violence because it’s irrational and divisive. Secular, non-religious authority, on the other hand, is allegedly rational and unitive. Therefore, the job of secular authority is peacemaking; in other words, to keep religious fanatics from killing each other and everybody else.

The problem with that line of thought is this: It’s an Enlightenment fantasy. Plenty of violence—terrible violence—has been done in the name of God by believers from every major religious tradition. We’re see-
ing some of it play out right now in the Middle East. I have no desire to excuse any of it.

But as scholars like Brad Gregory and William Cavanaugh have shown, based on the historical record, there’s no persuasive evidence that religious belief is any more prone to provoking violence than secular politics and ideologies. The murder regimes of the last century were overwhelmingly secular, atheist, and based on bizarre claims of being “scientific.” Cavanaugh notes that even in the so-called Wars of Religion in the Sixteenth Century, “For the main instigators of the carnage, doctrinal loyalties were at best secondary to their stake in the rise or defeat of the centralized State.” For Cavanaugh, the rise of the sovereign state was a cause, not the solution, of Europe’s religious wars.

What’s really going on in much of today’s hand-wringing about religious extremism and looming theocracy is a pretty straightforward push by America’s secular leadership classes to get religion out of the way. God is a competitor in forming the public will. So God needs to go.

Here’s my third point: Man is a moral and believing animal. Christian Smith, Notre Dame’s distinguished social research scholar, notes that all human beings seem to have a natural capacity for religious faith. That doesn’t imply that all people are “naturally religious,” if we mean by that an instinctive need to worship God in a Western sense. Some cultures—Japan is among them—seem to get along quite well without Western notions of religion. But all human beings, everywhere and always, have a need to believe something and behave according to a moral code that distinguishes right from wrong.

Why is that important? It’s important because any claim that atheists, agnostics, and a secularized intelligentsia are naturally more “rational” than religious believers is nonsense. There are no unbelievers. Smith puts it this way:

[All human beings are believers, not knowers who know with certitude. Everything we know is grounded on presupposed beliefs that cannot be verified with more fundamental proof or certainty that provides us assurance that they are true. That is just as true for atheists as for religious adherents. The quest for foundationalist certainty . . . is a distinctly modern project, one launched as a response to the instabilities and uncertainties of early-modern Europe. But that modern project has failed. There is no universal, rational foundation upon which indubitably certain


knowledge can be built. All human knowing is built on believing. That is the human condition.5

To put it another way, atheists just worship a smaller and less forgiving god at a different altar. And that means Christians should make no apologies—none at all—for engaging public issues respectfully but vigorously, guided by their faith as well as their reason.

That raises an obvious question: What would a proper Christian approach to politics look like? John Courtney Murray, the Jesuit scholar who spoke so forcefully about the dignity of American democracy and religious freedom, once wrote: “The Holy Spirit does not descend into the City of Man in the form of a dove; He comes only in the endlessly energetic spirit of justice and love that dwells in the man of the City, the layman.”6

Here’s what that means. Christianity is not mainly about politics. It’s about living and sharing the love of God. And Christian political engagement, when it happens, is never mainly the task of the clergy. That work belongs to lay believers who live most intensely in the world. Christian faith is not a set of ethics or doctrines. It’s not a group of theories about social and economic justice. All these things have their place. All of them can be important. But a Christian life begins in a relationship with Jesus Christ; and it bears fruit in the justice, mercy, and love we show to others because of that relationship.

Jesus said, “You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it. You shall love your neighbor as yourself. On these two commandments depend all the law and the prophets.”7

That’s the test of our faith. Without a passion for Jesus Christ in our hearts that reshapes our lives, Christianity is just a word game and a legend. Relationships have consequences. A married man will commit himself to certain actions and behaviors, no matter what the cost, out of the love he bears for his wife. Our relationship with God is the same. We need to prove our love by our actions, not just in our personal and family lives, but also in the public square. And that includes our social and business relations, as well as our politics.

Christians individually, and the Church as a believing community, engage the political order as an obligation of the Word of God. Human law teaches and forms, as well as regulates, and human politics is the exercise of power—which means that both law and politics have moral implica-


tions. Christians can’t ignore those implications and still remain faithful to their vocation as a light to the world and salt of the earth.\(^8\)

Robert Dodaro, the Augustinian priest and scholar—who’s spoken here at Villanova in the past—wrote a wonderful book a few years ago called *Christ and the Just Society in the Thought of Augustine*. In his book and elsewhere, Dodaro makes four key points about Augustine’s view of Christianity and politics.\(^9\)

*First*, Augustine never really offers a political theory, and there’s a reason. He doesn’t believe human beings can know or create perfect justice in this world. Our judgment is always flawed by our sinfulness. Therefore, the right starting point for any Christian politics is humility, modesty, and a very sober realism.

*Second*, no political order, no matter how seemingly good, can ever constitute a just society. Errors in moral judgment can’t be avoided. These errors grow in their complexity as they move from lower to higher levels of society and governance—which, by the way, shows the wisdom of the Catholic principle of subsidiarity. In practice, the Christian needs to be loyal to her nation and obedient to its legitimate rulers. But she also needs to cultivate a critical vigilance about both.

*Third*, despite these concerns, Christians still have a duty to take part in public life according to their God-given abilities, even when their faith brings them into conflict with public authority. We can’t simply ignore or withdraw from civic affairs. The reason is simple. The classic civic virtues named by Cicero—prudence, justice, fortitude, and temperance—can be renewed and elevated, to the benefit of all citizens, by the Christian virtues of faith, hope, and charity. Therefore, political engagement is a worthy Christian task, and public office is an honorable Christian vocation.

*Fourth*, in governing as best they can, while conforming their lives and their judgment to the content of the Gospel, Christian leaders in public life can accomplish real good. In other words, they can make a difference. Their success will always be limited and mixed. It will never be ideal. But with the help of God they can improve the moral quality of society, which makes the effort invaluable.

What Augustine believes about Christian leaders, we can extend to the vocation of all Christian citizens. The skills of the Christian citizen are finally very simple: a zeal for Jesus Christ and his Church; a conscience formed in humility, love for the truth, and rooted in Scripture and the believing community; the prudence to see which issues in public life are vital and foundational to human dignity, and which ones are not; and the

\(^8\) Id. at 5:14–16.

courage to work for what’s right. We don’t cultivate these skills alone. We develop them together as Christians, in prayer, on our knees, in the presence of Jesus Christ—and also in exchanges like our time together today.

As I was gathering my thoughts for today, I listed all the urgent issues that demand our attention as Catholics: poverty; unemployment; crippling federal deficits; immigration; abortion; our obligations to the elderly and the disabled; questions of war and peace; our national confusion about sexual identity and human nature, and the attacks on marriage and family life that flow from this confusion; the growing disconnection of our science and technology from real moral reflection; the erosion of freedom of conscience in our national health-care debates; and the quality of the schools that form our children.

The list is long. As I’ve said many times before and believe just as strongly today: Abortion is the foundational human rights issue of our lifetime. It can’t be ignored or alibied away. We need to do everything we can to support the dignity of women, especially women with broken families or under heavy emotional and financial stress. Our commitment needs to be real, and more than just words. But we can’t do it at the cost of more than fifty million legalized killings since Roe v. Wade.\(^{10}\) We can’t do it with corrupt verbal gymnastics that reduce an unborn child to a non-person and a thing. And we can’t claim to be concerned about “the poor” when we tolerate—and even fund—an abortion industry that kills the unborn children of poor people in disproportionate numbers, both here in the United States, and through government aid abroad.

Working to give women the kind of material help they need so they can choose against abortion and for the life of their child is a good thing; a vital and necessary thing. But it’s not sufficient; it’s not a substitute for laws that protect developing unborn life—laws that restrict and one day end permissive abortion. Again, law teaches and forms, as well as regulates. It’s a moral exercise. It always embodies someone’s idea of what we ought or ought not to do. Obviously we can’t illegalize every sin and evil act in society. But we can at least try to stop killing the innocent, which is what every abortion involves.

The abortion debate is important for another reason as well; one that’s less obvious but in a way just as troubling. The case for “reproductive rights” hinges on a politically pious and very American form of idolatry: the idolatry of choice, personal autonomy, and an assertion of the self at the expense of others. This is ruinous for human community.

Selfishness dressed up as individual freedom has always been part of American life. But now it infects the whole fabric of consumer society. American life is becoming a cycle of manufactured appetites, illusions, and licenses that turns people in on themselves and away from each other. As communities of common belief and action dissolve, the state fills in the

---

\(^{10}\) 410 U.S. 113 (1973).
void they leave. And that suits a lot of us just fine, because if the government takes responsibility for the poor, we don’t have to.

I’m using a broad brush here, obviously. In Catholic social thought, government has a legitimate role—sometimes a really crucial role—in addressing social problems that are too big and too serious to be handled by anyone else. But Jesus didn’t bless higher taxes, deficit spending, and more food stamps, any more than he endorsed the free market.

The way we lead our public lives needs to embody what the Catholic faith teaches—not what our personalized edition of Christianity feels comfortable with, but the real thing; the full package; what the Church actually holds to be true. In other words, we need to be Catholics first and political creatures second.

The more we transfer our passion for Jesus Christ to some political messiah or party platform, the more bitter we feel toward his Church when she speaks against the idols we set up in our own hearts. There’s no more damning moment in all of Scripture than John 19:15: “We have no king but Caesar.” The only king Christians have is Jesus Christ. The obligation to seek and serve the truth belongs to each of us personally. The duty to love and help our neighbor belongs to each of us personally. We can’t ignore or delegate away these personal duties to anyone else or any government agency.

More than 1,600 years ago, St. Basil the Great warned his wealthy fellow Christians that “The bread you possess belongs to the hungry. The clothing you store in boxes belongs to the naked.”11 St. John Chrysostom—whose feast we celebrated just yesterday—preached exactly the same message: “God does not want golden vessels but golden hearts,” and “for those who neglect their neighbor, a hell awaits with an inextinguishable fire in the company of the demons.”12 What was true then is true now. Hell is not a metaphor. Heaven is real. Jesus spoke about it many times and without any ambiguity. If we do not help the poor, we’ll go to hell. I’ll say it again: If we do not help the poor, we will go to hell.

And who are the poor? They’re the people we so often try to look away from—people who are homeless, or dying, or unemployed, or mentally disabled. They’re also the unborn child who has a right to God’s gift of life, and the single mother who looks to us for compassion and material support. Above all, they’re the persons in need that God presents to each of us not as a “policy issue,” but right here, right now, in our daily lives.

Thomas of Villanova, the great Augustinian saint for whom this university is named, is remembered for his skills as a scholar and reforming bishop. But even more important was his passion for serving the poor, his zeal for penetrating the entire world around him with the virtues of justice and Christian love. It’s a privilege to stand here and speak in his shadow.

11. BASIL, HOMILY ON AVARICE (n.d.).
12. JOHN CHRYSOSTOM, HOMILY 50 ON THE GOSPEL OF SAINT MATTHEW (n.d.).
Time matters. God will hold us accountable for the way we use it. Law and politics shape the course of a nation’s future. Very few vocations have more importance or more dignity when they’re lived with humility, honesty, and love.

But all of us who call ourselves Christians share the same vocation to love God first and above all things, and to love our neighbor as ourselves. We’re citizens of heaven first, but we have obligations here. We’re Catholics and Christians first. And if we live that way—zealously and selflessly in our public lives—our country will be the better for it; and God will use us to help make the world new.
NO COMPELLING INTEREST: THE “BIRTH CONTROL” MANDATE AND RELIGIOUS FREEDOM

HELEN M. ALVARE

I. INTRODUCTION

The free exercise of religion is ordinarily and immediately understood as part of the canon of “human rights.” One recent event, however, more than almost any other in recent memory, is challenging this understanding: a regulation issued by the U.S. Department of Health and Human Services (“HHS”), under the authority of the 2010 federal health care law (“ACA”), requiring religious institutions to provide their employees health insurance covering birth control, sterilization, and emergency contraception (“ECs”) with no co-pay. This regulation (“the Mandate”), is not imposed upon entities based on their status as federal grantees, but applies to all group health plans and health insurance issuers offering group or individual health insurance coverage.

What is the “story” the Mandate tells about the free exercise of religion? That the absolute maximum availability of birth control, sterilization, and drugs that can in some circumstances act to destroy a human embryo are somewhere near the heart of women’s equality and freedom. It also claims that the government is on the side of women, but that churches, particularly the Roman Catholic Church, are not. Legally, the Mandate has put the Catholic Church in the exemption-seeking business—the business of seeking not to comply with laws billed as advancing human rights for women. This is a position more than a little disagreeable to anyone pushed to take it.

The source of the Mandate is what HHS Secretary Kathleen Sebelius calls the “scientific” recommendations commissioned by the HHS from

* Associate Professor of Law, George Mason University School of Law. An earlier version of this Article was presented at the Seventh Annual John F. Scarpa Conference on Law, Politics, and Culture: Living the Catholic Faith in Public Life, held at Villanova University School of Law, on September 14, 2012. The author would like to thank Melanie Knapp, Dorinda Bordlee, Austin L. Hughes, Richard Doerflinger, Matt Franck, Gerard V. Bradley, Michael New and Michael Moreland, and the George Mason summer research grant program.


2. For a further discussion of the Mandate’s requirements, see infra notes 15–57.


the Institute of Medicine ("IOM"), a group of academics and scientists convened in order to provide advice to the federal government. The IOM's case for the Mandate, spelled out on just eight pages of its two hundred and thirty-five page report, is the same case commonly forwarded on behalf of contraception and ECs in the past, usually by the leading proponents of a birth control and EC solution to the U.S. problems of "unintended pregnancy" and teen pregnancy (typically, though not always, an overlapping phenomenon). On its face, it seems axiomatically true: contraception prevents pregnancy; unintended pregnancy is by definition unwanted by women; and greater usage of contraception should significantly reduce the unintended pregnancy problem. A fortiori, "free" contraception should increase usage of contraception in a way and to a degree that would cause unintended pregnancy rates to decline faster and more steeply.

It turns out, however, that this chain of reasoning does not work nearly as well as its proponents suggest when contraception is promoted on a social scale. Speaking quite generally, this is due both to the unique qualities of the sexual transaction, and to the way contraception affects the "marketplaces" for sex and marriage. In simple terms, contraception has the effect of lowering the "price" of sex, by separating sexual intercourse from the understanding that sex makes children who, in order to flourish, need their parents’ commitment to one another and to the children, over a long period of time. This effect, in turn, tends to increase the demand for sex outside of marriage, which leads to more nonmarital pregnancies and abortions. Consequently, over the long run, large-scale contraception programs are not generally associated with steady declines in unintended pregnancy, which, in any event, is a difficult concept to measure.

Further, it seems likely that a legal Mandate will fail to accomplish its goal of closing the small gap between the current availability and use of contraception, and universal use by women at risk of unintended pregnancy. This is so because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate, and are already amply supplied with free or low-cost contraception. It is also true because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it "free."

A possible way to overcome this thicket of obstacles to broader and more effective use of contraception—greatly stepped up usage of long-acting, reversible contraceptives ("LARCs")—poses its own risks and moral hazards, though it appears to constitute an important component of the strategy adopted by the Mandate and its supporters. But even if LARCs

5. For the IOM’s formal self-description, see infra note 15.
6. Stephanie J. Ventura, Ctrs. for Disease Control & Prevention, Changing Patterns of Nonmarital Childbearing in the United States (2009) (noting that about eighty-six percent of teen births are nonmarital; and rest take place within marriage).
could reduce “unintended pregnancy,” there is another difficulty with the Mandate’s goal to assist women’s health via reducing unintended pregnancies: research may show a correlation between unintended pregnancy and various health conditions in women, but it does not clearly indicate a causal relationship.

What are the legal consequences of there being only an attenuated relationship, if any, between the Mandate and women’s health? Most significantly, it eliminates the possibility that the government can show what the Religious Freedom Restoration Act of 1993 (“RFRA”) requires in order for the government to burden free exercise: a “compelling governmental interest” and the “least restrictive means” of furthering that interest. While this Article will not address the question of the “burden” on free exercise necessary to provoke a RFRA claim, it will examine whether the government can demonstrate a “compelling governmental interest” for the Mandate. It will pursue this question by means of a close analysis of the document providing the basis for the Mandate, a report issued by the IOM entitled Clinical Preventive Services for Women: Closing the Gaps (2011) [the “Report” or “the IOM Report”] as commissioned by HHS.

Section II of this Article will set forth the current requirements of the HHS Mandate—I refer to the “current” requirements because the Obama Administration has promised that it will alter its language during 2013, and was in fact under court order to do so. On February 1, 2013, the administration issued a proposed new rule, which has no effect upon the arguments advanced in this Article. The new rule affects how the government will accomplish providing birth control, sterilization and ECs to the employees of certain types of religious institutions, so as to overcome such institutions’ objections. But it does not rely upon different grounds for requiring health insurance policies generally to cover such drugs and devices. Section II will also discuss other, recent federal agency actions communicating equivalence between maximum access to contraception and women’s freedom and equality; in so doing, it will highlight further the

---

11. Id. at frontispiece (“This study was supported by Contract HHSP23337013T between the National Academy of Sciences and the U.S. Department of Health and Human Services.”).
theme emerging from the federal government that religion, particularly any religion opposing contraception, is the enemy of women’s freedom.

Even should the Obama Administration effectively change the Mandate during 2013, this Article’s review of the government’s proffered empirical basis for its vociferously held stance that women’s health and freedom requires free contraception, performs a useful service. The Administration’s willingness to push the Mandate aggressively—by defending it in court against many challenges, by making regular use of both presidential and HHS bully pulpits, by making the Mandate a centerpiece of the presidential reelection campaign—on the basis of so weak an empirical argument, should be studied. Also, federal and state lawmakers are continuously asserting that their advocacy for contraception is tantamount to a woman’s health and freedom agenda. They also continue to draw unfavorable comparisons with religions—especially the Catholic religion’s—refusal to facilitate access to contraception. Consequently, any long-term strategy in support of religious freedom ought to include attention to the empirical bases for the government’s claims about the causal relationship between contraception and women’s health.

Section III, the heart of this Article, will closely scrutinize the argument set forth in the IOM Report that free contraception, sterilization, and ECs are crucial for preserving women’s health. It will conclude that the IOM’s argument is poorly sourced, poorly reasoned, biased, and incomplete with respect to the questions of contraception and women’s health.

Section IV will engage in a “compelling governmental interest” analysis of the government’s case for free contraception, relying primarily on the Supreme Court’s most recent and thorough review and discussion of that standard respecting a law also claimed to find support in ultimately discredited empirical data. This is the “violent video games” case of Brown v. Entertainment Merchants Association.14

Section V offers some concluding reflections about the clash specifically between the “contraceptive project” embodied in the Mandate and other federal messages, and religious teachings about freedom for women in the arena of sex and marriage. The phrase “the contraceptive project,” includes not only the government’s plan to advance usage of contraception via a health insurance regulation; it also includes, as Section II of the Article will describe, an intention to advance the message that freedom and equality for women is achieved in substantial measure by enabling women—if they wish—to engage in sexual expression without forming lasting relationships, either with the sexual partner, or with a child. Section V will suggest that religious teachings opposed to the contraceptive project might realistically assist women to attain the health outcomes the government claims to support via the Mandate. This finding suggests that

a health care system in which religious witness is allowed to flourish better promotes women’s long-term health and freedom.

II. THE MANDATE AND OTHER FEDERAL ENDORSEMENTS OF THE CONTRACEPTIVE PROJECT

A. The HHS Mandate

The Mandate arose as a result of the “preventive services” provision of the ACA, which required group health plans and health insurance issuers offering group or individual health insurance coverage, to cover, without a co-pay, both evidence-based items or services that have a rating of A or B in the current recommendations of the United States Preventive Services Task Force (“USPSTF”) and, with respect to women, “such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources Services Administration.”15 HRSA is an agency of HHS. HHS thereafter commissioned the IOM to produce recommendations. The IOM, by its own description, was “established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. . . . [And] to be an adviser to the federal government.”16

The IOM issued the Report on preventive services for women on July 19, 2011, including the following recommendation which is the subject of this Article: “The committee recommends for consideration as a preventive service for women: the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”17 On August 1, 2011, solely on the strength of the IOM Report, HHS issued guidelines tracking the language of the Report, defining preventive services to include “[a]ll . . . [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”18 The rule contained a very narrow religious exemption protecting an organization if: 1) its purpose is the inculcation of religious values; 2) it employs “primarily” persons who share the organization’s religious tenets; 3) it serves “primarily” persons who share the or-

15. 42 U.S.C § 300gg–13(a)(4) (2006). Section 2713 of the ACA, Coverage of Preventive Health Services, provides that all “group health plan[s]” must cover “preventive care and screenings” for women without cost-sharing. Id.


17. Id. at 109–10.

ganization’s religious tenets; and 4) it qualifies under the IRS code as a church or religious order.\textsuperscript{19}

Because almost all religious universities, hospitals, schools, and social services make their services available to persons regardless of their faith, and often hire persons of diverse faiths or persons with no faith, they are not eligible for this exemption. Additionally, Catholic educational, social service, and health care institutions were particularly impacted because the Catholic faith, alone among religions, has maintained for two millennia a tradition against both contraception and abortion.\textsuperscript{20} Other religious institutions opposed only to abortion were affected by the Mandate’s inclusion of ECs and other contraceptives, which, according to the federal government and their manufacturers, can act at some times as an abortifacient, i.e., to destroy a human embryo.\textsuperscript{21} For religious employers who refuse to violate their consciences, the ACA imposed a fine that could amount to one hundred dollars per day per employee.\textsuperscript{22}

Religious organizations and citizens sent hundreds of thousands of comments to HHS, objecting to the Mandate upon both constitutional (First Amendment) and legislative (Religious Freedom Restoration Act) grounds. On February 12, 2012, however, the regulation was finalized without any substantive change. Instead, HHS extended by one year the deadline by which “[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan,” had to comply.\textsuperscript{23}

Shortly thereafter, in March 2012, HHS issued a rambling Advanced Notice of Proposed Rulemaking,\textsuperscript{24} which asserted that at some time in the undetermined future, HHS would try to devise a way to force religious institutions to provide contraception, sterilization and ECs to employees without enlisting the cooperation of the institutions—in other words to require employer-contracted insurance providers to “offer . . . coverage


\textsuperscript{21} For a further discussion of the potential post-fertilization mechanisms of action of the intrauterine device (“IUD”) and some of the ECs endorsed by the FDA under the heading of “contraception,” see infra notes 63–78.


\textsuperscript{23} Dep’t of Health & Human Servs., supra note 4; 77 Fed. Reg. at 8729.

that does not include coverage for contraceptive services" to certain religious institutions, but simultaneously, “provide to the participants and beneficiaries covered under the plan separate health insurance coverage consisting solely of coverage for contraceptive services . . .” without “charge to the organization, group health plan, or plan participants or beneficiaries.”

On February 1, 2013, the Administration issued a proposed rule offering an exemption to religious institutions meeting only the fourth of its previous four requirements (being a church, an association of churches, or a religious order). The government concluded that this reformulation would not “expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules.” The employees of other religious institutions—hospitals, social services, etc.—would be “automatically enrolled” to receive contraception, sterilization, and ECs without a co-pay via a separate insurance policy to be issued by the insurer chosen by the religious employer to provide general health insurance. As discussed in the Introduction, however, the government’s extended and aggressive posturing about a clash between religious freedom and women’s freedom merits consideration no matter the final shape of the regulation, or the litigation. One reason of course, is that the theme of “contraception as women’s freedom” seems to have staying power, such that religions will have to confront it regularly. This is indicated by particular features of the Mandate, by features of the government’s litigation strategy respecting the Mandate, and by the shape of the “women’s freedom” theme in the Obama reelection campaign and in several other federal regulations issued recently. Each will be addressed briefly below.

Beginning with the Obama presidential campaign, its main appeal to women was perhaps first famously sounded in a speech by campaign surrogate and Secretary of Health and Human Services, Kathleen Sebelius, at a fundraiser for the leading political arm of the abortion rights movement, NARAL Pro-Choice America. There she stated: “We’ve come a long way in women’s health over the last few decades, but we are in a war.” She was referring to Republicans’ efforts to defund the largest abortion pro-

25. Id. at 16505–06.
27. Id. at 8461. The text accompanying the proposed rule stated that the government had finally concluded after reflection that only the fourth requirement was logically necessary in order to limit the exemption to the religious institutions intended to be exempted all along.
28. Id. at 8463.
vider in the United States, Planned Parenthood, as well as their legislative proposals regarding federal funding for contraception and abortion generally. She equated these with “rolling back the last 50 years in progress women have made in comprehensive health care in America.”

Democratic Congresswomen picked up on the theme in the context of the first legislative hearing on the Mandate’s effects upon religious freedom, using the sound bite, “Where are the women?” They were referring to the all-male first panel of witnesses, taking no notice of two women on the second panel.

This theme was then carried into the presidential campaign through a postcard campaign targeted to women (“Vote like your lady parts depend on it . . . because they kinda do”), speeches at the Democratic National Convention, and a campaign speaking tour by an unmarried, non-Catholic law student, Sandra Fluke, claiming that her Catholic law school owed her a free, daily supply of birth control as a matter of human rights. She further claimed that the school had denied an anonymous classmate the birth control pill in order to treat a physical disorder (endometriosis) unrelated to birth control, despite Catholic theology permitting such treatment. Most revealing, perhaps, of the scope of the contraceptive project, was an Obama campaign television ad featuring an actress, Lena Dunham, from a show about the sex lives of unmarried women. Comparing voting for Obama to a first sexual experience, she closes with the suggestion that it is “super uncool to be out and about and someone says, ‘Did you . . . ’ and you say ‘No I wasn’t ready.’” She adds, “Before I was a girl, now I was a woman,” in both cases, comparing voting for President Obama to losing one’s virginity. These messages moved beyond the “women’s health” tone and content of the IOM Report, appearing to celebrate female sexual expression per se as the essential element of women’s freedom. Both Ms. Fluke and Ms. Dunham’s messages, sponsored

31. Id.
33. Dr. Allison Dabbs Garrett, the senior vice president for academic affairs at Oklahoma Christian University, and Dr. Laura Champion, the medical director at Calvin College Health Services, testified that the government mandate requiring religious institutions such as theirs to provide contraception, sterilization, and abortifacient drugs violated the First Amendment. See id. at 147–48.
and made nationally famous by the current Administration, are constitutive elements of the contraceptive project.

During his campaign, President Obama also associated himself frequently with the self-branded champion of women, and the premier promoter of a linkage between birth control, abortion, and women’s freedom: the Planned Parenthood Federation of America. Planned Parenthood donated 15 million dollars of campaign advertisements to the President’s re-election campaign. And the President continued strenuously to support both federal and state grants for Planned Parenthood, for hundreds of millions dollars annually, as well as to deploy his Administration’s Department of Justice to states where legislatures had re-directed their family planning funds away from local Planned Parenthoods, in favor of providers without an abortion connection. The Department of Justice threatened these states with the withdrawal of all federal Medicaid funding for all services for the poor. Very likely, President Obama’s close association with Planned Parenthood strengthened his campaign’s and his Administration’s publicity regarding their support for women. It also raised questions about the objectivity of the Mandate and the Report supporting it—both of which were mirror images of Planned Parenthood’s agenda, and that of its former research affiliate, the Guttmacher Institute, respecting contraception and religious objectors.

The Administration’s “theme” about the clash between religious freedom and women’s freedom is further displayed in the structure of the Mandate and in the federal government’s litigation strategy. First, the Mandate effectively allows only houses of worship and religious orders to buy health insurance consistent with their faith. If a religious institution comes into contact with persons who are not members of the same faith, however, either as employees or as “clients,” (students, patients, etc.), they must buy insurance covering services contradicting their faith. The impression given is that general audiences should be “shielded” from the religion’s opposition to contraception, a teaching which other Administration statements characterize again and again as unreasonable and even contrary to the basic human rights of women.


38. See, e.g., Karla Dial, Obama Administration Sues Arizona, CITIZENLINK (Oct. 5, 2012), http://www.citizenlink.com/2012/10/05/obama-administration-sues-arizona/.

The Administration’s litigation strategy against corporate plaintiffs also effectively seeks to shield persons (employees) outside a religion from the religious teachings held by their employers. In the religious freedom cases commenced by Hercules Industries, Inc. and other companies, the Obama Administration argued that for-profit, corporate, secular entities are barred from asserting free exercise claims—that there is no such thing as a constitutionally cognizable “conscience” where such entities are concerned.\(^{40}\)

B. Other Federal Regulations Pursuing the Narrative: Contraception

Equals Women’s Flourishing

The HHS Mandate is the leading, but not the only indicator of a larger “story” or theme about a clash between religious freedom and women’s freedom and the Administration’s choosing women’s side by facilitating access to contraception. Another indicator was the imposition of a new requirement for recipients of federal anti-trafficking grants under the Victims of Trafficking and Violence Protection Act of 2000.\(^{41}\) The text of the law does not demand that grantees provide access to contraception and abortion, but the Administration in 2011 imposed such a demand via agency grant-making guidelines.\(^{42}\) Thus, although beginning in 2005, HHS had selected the U.S. Conference of Catholic Bishops (“USCCB”) as the general contractor, and imposed no requirements related to contraception or abortion, in 2011, when the contract with the USCCB was about to expire, the Administration denied USCCB’s application. Although the Administration had praised the USCCB’s earlier work in public documents,\(^{43}\) groups with lower competence scores—groups deemed even “noncompetitive” by professional program staff—received federal money

---

\(^{40}\) See, e.g., Defendants’ Memorandum in Support of Their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition To Plaintiffs’ Motion for Preliminary Injunction, Newland v. Sebelius, No. 1:12-cv-01123 (D. Colo. July 13, 2012).


\(^{42}\) ADMIN. FOR CHILDREN & FAMILIES, DEP’T OF HEALTH & HUMAN SERVS., NATIONAL HUMAN TRAFFICKING VICTIM ASSISTANCE PROGRAM 6 (2011), available at http://www.acf.hhs.gov/grants/open/foa/view/HHS-2011-ACF-ORR-ZV-0148 (“Taking into consideration the particular health risks posed to victims of trafficking, preference will be given to grantees under this FOA that will offer all victims referral to medical providers who can provide or refer for provision of treatment for sexually transmitted infections, family planning services and the full range of legally permissible gynecological and obstetric care . . . .”).

\(^{43}\) See, e.g., Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, Am. Civil Liberties Union of Mass. v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012) (No. 09-10038). The government in this case praised USCCB as a contractor, saying: “Rather, HHS weighed USCCB’s overall proposal against religiously-neutral criteria and determined that USCCB provided the best proposal for assisting human trafficking victims at the best value.” Id. at 5–6. The government also wrote: “the primary effect of the contract has been the provision of a wide range of assistance to human trafficking victims on a nationwide scale.” Id. at 11.
instead of the USCCB. Another example of the narrative linking access to contraception and abortion with women’s freedom, is a more subtle shift in the regulations applicable to the funding for the President’s Emergency Program for AIDS Relief (“PEPFAR”). This Bush Administration program was begun in 2003 to provide HIV prevention and care. The original program barred grantees who performed abortion, even with separate funds. Contraception was a component of PEPFAR, but prior to 2009, religious providers had been permitted to apply for grants limited to abstinence or fidelity programs. Consequently, Catholic Relief Services (“CRS”—the largest private provider of charitable services in the United States—became a major PEPFAR grantee. Just days after President Obama assumed office in early 2009, however, he rescinded the rule limiting abortion providers’ participation in the PEPFAR program. Further, while he permitted grantees with religious or moral objections to contraception, the organization was required to notify U.S. officials of its objection prior to submitting its application.

Considering together these Obama Administration funding decisions with the structure of and litigation concerning the Mandate, and the President’s reelection campaign, it is easy to see the strong emergence of the theme that access to contraception, and in some cases abortion, is an essential and basic aspect of women’s health care and even overall flourishing. Other influential groups and organizations—e.g., the United Nations and leading medical organizations—recently made a similar claim. 

---


religious organizations, then, particularly the Catholic Church, which hope to preserve their free exercise rights, cannot avoid addressing the matter of the government’s claims regarding contraception. Seeking exemptions from laws imposing contraception mandates is of course, still possible, and a necessary part of any religious freedom strategy. But more will be needed in order to secure religious freedom—and, as my conclusion will suggest, perhaps women’s freedom too, over the long run.

The Supreme Court’s 1990 decision in Employment Division v. Smith suggests an additional reason why religions ought to address the government’s substantive claims regarding contraception and women’s health. In Smith, the Court held that states may burden the free exercise of religion so long as they employ “neutral laws of general applicability,” which bear a rational relationship to a legitimate state interest. This remains true even if the burden upon religion is heavy and even if a core religious principle is at stake. Consequently, respecting state laws, religions must “win” their freedom in legislatures, because courts are far less obligated than in pre-Smith times, to protect their free exercise. The situation could be less difficult in states with their own Religious Freedom Restoration Acts, or with a religion-protective interpretation of their state’s constitutional free exercise provision.

RFRA is more protective of free exercise as well, and has been applied to federal law by the Supreme Court. RFRA requires a federal law burdening free exercise to be supported by a “compelling governmental interest” realized by the “least restrictive means.” Especially in recent years, however, religions’ prospects even under RFRA have dimmed when the burden at issue involves women’s access to contraception. As sketched above, access to contraception or even abortion—promoted and enforced by the government, and subsidized even by unwilling private persons and organizations—is increasingly framed as a “human right” by federal and other authorities. This is intrinsically powerful terminology.

In response to such arguments, religions’ position on ECs and women’s freedom must be fully developed. There are, logically, two steps to such a project. The first is the most important, and can be dispositive: to assess, and to critique the government’s best case. Assuming, as this Article does, that the Mandate burdens religious freedom, the government must bear the burden of demonstrating a compelling state interest. The second step is to put forth the religious argument in terms appealing to all


51. Id. at 879.


persons of good will. Because the first step requires a (surprisingly) lengthy consideration, this Article focuses almost exclusively upon it. It shows that the government has fallen far short of demonstrating a compelling governmental interest in forcing religious persons and institutions to provide insurance covering contraception and ECs.

III. The IOM Report

The most important and direct argument the federal government has made on the link between contraception and ECs, and women’s health and flourishing is contained in the IOM Report furnishing, according to the federal government, nearly the entire basis for the Mandate. This is apparent from the virtually identical language of the IOM recommendation and the Mandate, from the public statements issued by Secretary Sebelius, and from the government’s nearly exclusive reliance upon the IOM Report in its briefs filed in defense of lawsuits challenging the Mandate. It should be noted here too, that HHS and the President understood in advance that this Report would be closely scrutinized given how much controversy swirled about the “preventive” services provision of the ACA when it was first introduced, largely on the grounds that skeptics predicted that it was a stalking horse for possible abortion and contraceptive mandates.

Upon close scrutiny, however, it turns out that the IOM Report is quite weak and cannot support the government’s claim to demonstrate a “compelling governmental interest.” It fails to show the required links between forcing employers to provide free contraception and ECs, and improving the health of women and girls.

The Administration claims the IOM Report demonstrates that employers must provide women and girls contraception and ECs with no co-pay, because free contraception will lead to increased and more effective usage of these drugs and devices to prevent “unintended pregnancies” among women currently experiencing these, which pregnancies cause va-

55. See, e.g., Defendants’ Memorandum in Support of Their Motion to Dismiss the First Amended Complaint and Amended Memorandum in Opposition To Plaintiffs’ Motion for Preliminary Injunction at 5–9, Newland v. Sebelius, No. 1:12-cv-01123 (D. Colo. July 13, 2012).
57. For the sake of length, this Article will occasionally use the term “free contraception and ECs,” although it is an outstanding question who will absorb the extra costs of contraception, if any, covered by an employer-sponsored health insurance plan.
rious bad outcomes for women during the pregnancy and afterwards including: domestic violence, drinking, smoking, and depression. To a far smaller degree, the Report suggests that preventing abortions is another positive outcome linked to free contraception, on the grounds that unintended pregnancy rates drive abortion rates. The IOM argument seems intuitive on its face, which is perhaps the reason that the Report’s asserted chain of causation, and the sources it relies upon, have not been closely scrutinized since it was issued in mid-2011. The following sections attempt to remedy this important oversight.

A. The Report Relies upon Claims About Children’s Health, Which, While Separately Important, Are Irrelevant to its Claims Regarding Women’s Health, as Well as Outside the Charge Given to the IOM By HHS

1. Not Relevant to the Charge

The IOM Report devotes a significant amount of early attention to the claims that children’s health is compromised by a lack of contraception leading to unintended pregnancy. The threats to children’s health addressed include: mothers’ delayed entry into prenatal care, preterm birth, low birth weight, and less breastfeeding. The Report also refers to outcomes for children when claiming that unintended pregnancy is associated with more smoking and alcohol consumption during pregnancy as “behaviors that present risks for the developing fetus.” Both sets of problems are linked to the necessity of providing women free contraception.

But there is of course an obvious logical problem with this portion of the Report’s chain of reasoning. Even if it were the case that the Report was directed to boosting children’s health, children’s health is not boosted by their being prevented from coming into being. It is boosted by health services encouraging mothers to seek prenatal care, breastfeed, and avoid smoking and drinking during pregnancy. But the USPSTF already requires, among other services which must be insured without cost-sharing, prenatal care counseling on tobacco and alcohol usage, breastfeeding, and other matters related to the health of both mother and child.

But perhaps more importantly, the material on children’s health is not at all related to the “charge” given the IOM by HHS. The charge states, rather: “The Institute of Medicine will convene an expert committee to review what preventive services are necessary for women’s health and well-being and should be considered in the development of comprehensive

59. Id.
guidelines for preventive services for women." The material on children’s health might have been folded into the charge in the IOM Report had it suggested that it was harmful to women’s health to take care of children with health problems associated with the claimed consequences of unintended pregnancy; but nowhere in the Report’s eight pages of treatment of contraception is such a subject broached. Though this is speculation, perhaps the government did not want to be associated with the argument that women ought generally to avoid taking care of sick children, for the sake of their own health. In any event, the material on children’s health does not give any weight to the government’s case about the necessity of free contraception for women’s health.

2. Causation Versus Correlation and Children’s Health

It is logically possible within the thesis of this Article to say nothing further about the Report’s treatment of children’s health. Yet, two further observations are helpful in order to grasp the Report’s overall lack of rigor.

First, the section of the Report considering children’s health does no more than suggest correlation (as opposed to causation) between unintended pregnancy and health outcomes for children. This is the same shortcoming the Report demonstrates on the very relevant matter of the link between unintended pregnancy and women’s health. Perhaps the most egregious example of the Report’s poor methods respecting the children’s material is its citing an utterly irrelevant source regarding a connection between unintended pregnancy and low birth weight; that source instead addresses an increased risk of cardiovascular disease in young women following gestational diabetes mellitus. The other three studies the IOM cites regarding children’s outcomes, in their actual texts, claim only to show an “association,” not causation, between shorter pregnancy intervals and low birth weight. The claims about smoking and drinking during pregnancy will be addressed below, in the event the IOM Report is also suggesting that these behaviors affect a mother’s health and are caused by unintended pregnancy. The cited stud-

61. IOM 2011 REPORT, supra note 10, at 2 (emphasis added) (quoting Office of Assistant Secretary for Planning and Evaluation (ASPE) of HHS, Statement of Task to Committee on Preventive Services for Women).

62. Id. at 102–11.


ies also do not indicate a causal relationship between unintended pregnancy and these behaviors.

Second, even were the Report’s claims about children’s health well-supported, its recommendation to increase access to drugs and devices that can sometimes act to destroy the life of a child prenatally contradicts its apparent concern with children’s flourishing during their prenatal existence. In other words, the IOM Report endorses women’s access to free ECs, which can, according to the FDA and their manufacturers’ statements, sometimes destroy prenatal life at the embryonic stage. Furthermore, and according to a scientist relied upon in the IOM Report: “[t]o make an informed choice, women must know that [ECs] . . . may at times inhibit implantation . . . .”

While groups advocating abortion and ECs regularly employ the term “pregnancy” to mean the time after which the human embryo has attached itself to the mother’s womb, according to many classic medical textbooks, though not all, genetically unique human life begins at the uniting of the male gamete with a female gamete (“fertilization”) to produce a single-celled zygote. At the very least, it must be said that a thorough review of medical dictionaries’ references to “conception” or “pregnancy” reveals no medical or scientific consensus in favor of implantation-based definitions of either term, and a more common acceptance of a “fertilization” based definition. Yet the Secretary of HHS has acknowledged that some of the drugs covered by the Mandate can act to prevent implantation, stating: “The Food and Drug Administration has a category [of drugs] that prevent fertilization and implantation. That’s really the scientific definition.” She added: “[t]hese covered prescription drugs are specifically those that are designed to prevent implantation.” The FDA approved package insert for Plan B reads: “Plan B may prevent a fertilized embryo from implanting in the uterus.”


66. See IOM 2011 REPORT, supra note 10, at 105 (citing Princeton University’s Dr. James Trussell).


70. Id.
egg from attaching to the womb (implantation)."71 Regarding Ella, another EC, the European equivalent to the FDA, the European Medicines Agency (EMEA), calls Ella “embryotoxic” at low doses in animals, and even cites numerous studies showing Ella causes abortions in animals.72

Although not a scientific source, a New York Times article claiming that post-coital drugs were not embryocidal has gained so much attention that it merits brief attention.73 The most complete response was written by Dr. Marie Hilliard,74 a bioethicist who demonstrates that the reporter relied heavily upon one study with a very small sample size and inconclusive results about post-fertilization effects, as well as a second study75 wherein the author was equally uncertain, concluding: “studies on the impact of LNG-EC on endometrial parameters involved in endometrial receptivity are not consistent, and current knowledge on cellular and molecular markers of endometrial receptivity in the human is insufficient to resolve this controversy.”76 Hilliard also points out that the reporter omitted to mention the most significant “study of studies” on the subject. This latter study clearly supports a post-ovulation effect.77 Respecting the accuracy of the New York Times reporter, Dr. Hilliard also highlights the author’s own admission that the FDA has refused—in the face of several requests by a Plan B manufacturer—to delete the reference to “implantation effects.”78

75. Gabriela Noé et al., Contraceptive Efficacy of Emergency Contraception with Levonorgestrel Given Before or After Ovulation, 81 CONTRACEPTION 414 (2010).
76. See Hilliard, supra note 74; see also P.G.L. Lalitkumar et al., Mifepristone, But Not Levonorgestrel, Inhibits Human Blastocyst Attachment to an In Vitro Endometrial Three-Dimensional Cell Culture Model, 22 HUMAN REPROD. 3031, 3031–37 (2007).
77. Rafael T. Mikolajczyk & Joseph B. Stanford, Levonorgestrel Emergency Contraception: A Joint Analysis of Effectiveness and Mechanism of Action, 88 FERTILITY AND STERILITY 565 (2007) (examining data from multiple clinical studies reporting wide discrepancy between LNG-EC effectiveness in preventing pregnancy—between fifty-eight percent and ninety-five percent—and its effectiveness in preventing ovulation—between eight percent and forty-nine percent). The authors conclude that this may be explained, in part, by mechanisms of action other than ovulation disruption, including post-fertilization mechanisms. Id.
78. Belluck, supra note 73.
Turning to the material in the Report addressing specifically women’s health, the Report’s conclusion—and the basis for the Mandate—is the claimed chain of causation between access to free contraception and women’s improved health as a consequence of preventing unintended pregnancy. Each link in this chain is addressed below.

1. The Claim that Access to Contraception Can Reduce Unintended Pregnancy at the Population Level Has Many Weak Links

a. Unintended Pregnancy: An Uncertain Measure

It should first be noted that scholars disagree over how to measure “unintended pregnancy.” The Report does not acknowledge this despite claims about rises and falls in the rate of unintended pregnancy, which constitute the heart of its argument. The notion of unintended pregnancy has been, according to a relevant white paper written by University of South Carolina Professor Austin L. Hughes,79 “poorly and inconsistently defined.”80 Professor Hughes’s paper, as well as an earlier report on unintended pregnancy by the IOM itself (“IOM 1995 Report”),81 note that the literature recognizes two main categories of “unintended pregnancy”: (1) unwanted (the mother did not want to become pregnant at all); and (2) mistimed (the mother was not seeking to become pregnant at that time). But different studies over time may assign to one or the other of these categories, or neither, other “situations,” that are far less defined. These might include disagreement between partners regarding wantedness or timing, or even indifference to pregnancy. Also, a woman’s opinion might shift over the course of the pregnancy. Further, “substantial literature addresses the difficulty of studying ‘unintended pregnancy’ through survey data because people’s memory and/or interpretation of their past attitudes can change over time.”82 Despite these many difficulties with measuring unintended pregnancy, the IOM Report: “relies entirely on questionnaire survey data, and for purposes of analysis the responses are divided into just two categories: intended and unintended.”83

A good example of the problems inherent in making simplistic claims regarding unintended pregnancies is the one and only study the IOM relies upon to claim that 49% of all pregnancies in the United States are

80. Id. at 13.
82. Hughes, supra note 79, at 3.
83. Id. at 2–3.
“unintended”—a study by Finer and Henshaw published in 2006. A review of the study by Professor Hughes concluded:

This study was based on survey responses of samples of women aged 15-44 in 1995 (10,847 women) and 2002 (7,643 women), conducted by the National Survey of Family Growth (NSFG; Finer and Henshaw 2006). In Finer and Henshaw’s (2006) analysis, all “unwanted” and “mistimed” pregnancies were grouped as “unintended.” Furthermore, Finer and Henshaw (2006) added an estimate of the number of abortions to the “unintended” category. Finer and Henshaw (2006) did not use the NSFG data themselves to estimate abortion rates (even though such data were included in the NSFG), because they believed abortions to be “underreported” in the NSFG. Rather, they attempted to estimate rates of abortion from other population data, then applied these estimates to the NSFG sample, adding the estimated numbers of abortions to the category “unintended pregnancy.” Such a process is perilous because the NSFG samples may not in fact have been comparable to the populations from which the abortion data were taken. Thus, the estimates provided by Finer and Henshaw (2006) and relied on by IOM (2011) regarding the rate of “unintended pregnancy” in the U.S. are based on a number of questionable assumptions and may be considerably inflated.

Adding a historical and evolutionary perspective, Professor Hughes adds that, by Finer and Henshaw’s definition, “essentially every member of the U.S. population over the age of 45 is the result of an ‘unintended pregnancy.’” Likewise all those born over all of human history prior to the 1960’s. If there are deleterious consequences to ‘unintended pregnancy,’ these should be demonstrated by data on populations born prior to the 1960’s, as well as on contemporary populations. He further observes:

Being able to “plan” a pregnancy with any degree of precision, as a result of reliable contraceptive methods, represents a novel phenomenon in human history, for which we are adapted neither at the biological nor at the cultural level. For this reason, it might be reasonable to hypothesize that truly intended pregnancies might have deleterious consequences arising from our lack of adaptation for such a phenomenon. However, no study to date appears to have addressed the latter hypothesis.

The elusiveness of the definition of unintended pregnancy is well known in the literature. The IOM was aware of this, referring to it in its

84. Id. (citing IOM 2011 Report, supra note 10, at 102).
85. Id. at 3.
86. Id.
87. Id. at 4 (citations omitted).
1995 report on unintended pregnancy. But in 2011 the IOM Report failed completely to acknowledge this important complexity.

b. Does Greater Access to Contraception Really Reduce Unintended Pregnancy?

Even if we accepted the IOM Report’s claims regarding how to define unintended pregnancy, it is not clear that the Report’s recommendation would lower rates of unintended pregnancy. The Report makes the straightforward cause-and-effect claim that “greater use of contraception within the population produces lower unintended pregnancy . . . rates nationally.”88 In fact, this is one of the centerpieces of the Report (along with its claim that unintended pregnancy diminishes women’s health).

Preliminarily, it should be noted that the Report and the Mandate are centrally about increasing “access” to contraception and ECs by making them free within the context of employer provided health insurance, and thereby seeking to reduce a claimed cause of illness in women, unintended pregnancy. This is precisely how Secretary Sebelius summarized the Mandate’s intention.89 Of course, this is all the government could do, short of coercive measures. It can give women access to contraception but it cannot force them to use it. Yet the Report does appear to claim to be able to affect women’s overall decision to use contraception given that its explicitly articulated argument is that increased “use”90 has in the past reduced unintended pregnancy; unless increased access translates into increased usage, it is difficult to see how increased access will achieve the government’s hoped-for results. This Article will therefore take a close look at whether the government has met its burden of establishing each of the following linkages: greater access with greater usage, greater usage with reduced unintended pregnancies, and reduced unintended pregnancies with women’s improved health.

A closer look at each reveals the Report’s fatal weaknesses. For it turns out that there are many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost. There is also the fact that due to both method and use failures, contraception usage does not guarantee the prevention of pregnancy. In fact, the Centers for Disease Control reports that more than 12 out of every 100 women using contraception will become pregnant in a given year, and that this figure essentially has not changed since 1995.91 There is also the fact that

88. IOM 2011 REPORT, supra note 10, at 105.
89. Press Release, Dep’t of Health & Human Servs., supra note 4 (“Today the department is announcing that the final rule on preventive health services will ensure that women with health insurance coverage will have access to the full range of the Institute of Medicine’s recommended preventive services, including all FDA-approved forms of contraception.”) (emphasis added).
90. IOM 2011 REPORT, supra note 10, at 105.
the Report, and the Mandate it supports, address employed women and the
dependent children of employed parents provided employer-sponsored health care, but
that studies on the incidence of unintended pregnancy univocally report
that unintended pregnancy is highly concentrated among low income wo-
men—who are already amply provided free or very low cost contraception
by federal and state governments.

The two studies on which the Report rests its entire claim are insuffi-
cient, separately or together, to overcome these oversights. Also, the Re-
port ignores substantial evidence contradicting or substantially
undermining its claims—including evidence available from the same
sources the Report relies upon throughout the section on contraception:
the Centers for Disease Control, the Guttmacher Institute, and a prior
IOM report about unintended pregnancy in the United States. The Re-
port also ignores well-known and acclaimed studies considering the way
that normalizing and facilitating access to birth control, and sometimes
abortion, changes the “sex and mating markets” so as to produce a higher
volume of nonmarital sexual encounters, pregnancies, births, and abor-
tions; this literature appears to have a great deal of explanatory power
respecting data from the last several decades. In short, the Report—the
basis for the Mandate—treats a complex subject simplistically. It fails in its
essential claim.

Turning now to the Report’s evidence for its claims regarding greater
access causing reduced rates of unintended pregnancy. As already noted,
it relies upon two studies, a 2010 report by Santelli and Melnikas, and
a study issued by the Guttmacher Institute. It should be noted immedi-
ately here that Dr. Santelli is a senior fellow of the Guttmacher Institute,
and a longtime supporter of large-scale birth control and abortion.
He is a dedicated opponent of abstinence programs. The
Guttmacher Institute is the former research affiliate of the nation’s largest
network of providers of abortion and contraception, Planned Parenthood.

(estimating 1-year typical-use failure rates for selective contraceptive methods in
United States).

92. See IOM 1995 REPORT, supra note 81.
93. IOM 2011 REPORT, supra note 10, at 105.
94. John S. Santelli & Andrea J. Melnikas, Teen Fertility in Transition: Recent and
95. HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., ABORTION IN WOMEN’S
pdf.
org/media/experts/santelli.html (last visited Feb. 17, 2013); see also Press Release,
Guttmacher Inst., Review Finds No Evidence to Support Funding of Rigid Absti-
nuence-Only Programs (Sept. 16, 2008), available at http://www.guttmacher.org/
media/pr/2008/09/16/ (advertising series of articles that identify major flaws in
abstinence-only education, including problems with accuracy, effectiveness and
ethics, all published in special edition of journal Sexuality Research and Social Policy,
guest edited by John S. Santelli and Leslie M. Kantor).
Regarding the two cited studies, the Report claims that the Santelli and Melnikas study associates increased contraceptive usage in teens over a ten-year period (early 1990s to early 2000s), with reductions in their pregnancy rates. The Guttmacher study considers unmarried women from 1982 to 2002; the Report claims it shows that increased contraceptive usage was associated with lowered unintended pregnancy and abortion rates. Obviously both studies on their face fail to prove the claim that greater use of contraception will produce lower rates nationally, i.e., within the population. Each has considered only a fraction of the population over a particular slice of the time during which contraception has been readily available. Neither is certainly generalizable to the entire population or to every period of time during which contraception and abortion have been available. Neither shows that increased access to contraception translated into increased usage, and thereby, lowered rates of unintended pregnancy.

Additionally, a 1995 IOM Report and a 2010 IOM Report seem at least to call into question the 2011 Report’s global statements about cause and effect over the last three decades, with global statements of their own which were ignored in the 2011 Report. For example, the 1995 report states that “unintended pregnancy” is a “health condition of women for which little progress in prevention has been made despite the availability of safe and effective preventive methods.” The 2010 Report states that: “The committee considers that there has been no major progress in prevention of unintended pregnancy in light of the lack of decrease in rates over time and in comparison with rates in other countries.”

I will now consider the two cited studies on their own merits—insofar as their own content address the conclusions of the Report or the Mandate—and then as they have been criticized or called into question by other empirical scholars. Looking first at the Santelli and Melnikas study, the Report cites it for the proposition that greater “use” of contraception “produces lower unintended pregnancy rates.” But when summarizing the study, the Report claims only that it demonstrates an “association” between rates of contraceptive use by adolescents from about the early 1990s to early 2000, and rates of unintended pregnancy. In short, the Report itself acknowledges that the source does not prove what the Report claims.

Even if the Report sought to rely upon Santelli and Melnikas for the narrower proposition that among the teen population, greater access to contraception reduced unintended pregnancy, the Santelli and Melnikas study is unavailing. In parts not referenced by the Report, the study acknowledged the possibility that increasing access to contraception can

97. IOM 1995 REPORT, supra note 81, at 104.
98. INST. OF MED., WOMEN’S HEALTH RESEARCH: PROGRESS, PITFALLS, AND PROMISE 143 (2010).
99. Santelli & Melnikas, supra note 94.
100. IOM 2011 REPORT, supra note 10, at 105.
101. Id.
have the effect of altering sexual behavior in a way that leads to a higher probability of pregnancy, stating that an "increase in teen sexual activity" "followed closely the introduction of modern contraception in the 1960s."\(^{102}\)

The Report also did not acknowledge that portion of Santelli and Melnikas in which the authors estimated that high school teens' abstinence from sexual activity contributed to at least 50% of the decline in teen pregnancy rates during the stated time period, with increased contraception usage contributing the other 50%\(^{103}\). nor did it reference the study's extended treatment of the many other factors that "may" have influenced rates of unintended pregnancy among teens, including the economy, changes in population composition, changes in family dynamics, social mores, the HIV/AIDS pandemic, or the media. Santelli and Melnikas concluded this discussion with the statement that they "do not attempt to resolve this debate" about the "causes and consequences of teen pregnancy."\(^{104}\) Yet the IOM Report treats this source precisely as if it has so resolved the debate.

Equally important, the Report failed to note that Santelli and Melnikas's conclusions are hotly disputed by other scholars who claim that greater abstinence and less frequent sexual activity were the most important factors driving the decline in teen pregnancies during the 1990s. In particular, a 2003 article in *Adolescent Health* concluded that: 67% of the reported decline in teen pregnancies from 1991-95 was due to increased abstinence and 35.3% was likely attributable both to increased contraceptive use, less frequent sexual activity, or both.\(^{105}\)

The Report, further, did not even mention the significant body of expert literature suggesting an even more fundamental shortcoming of studies like Santelli and Melnikas's: the body of research showing that while declines in teen pregnancies may occur after contraception is rendered more accessible to teens who were *already* sexually active but not using it, with respect to teens who were *not* sexually active, increased access to contraception is associated with the normalization of nonmarital sex and an increase in teen sexual behaviors leading to *more* teen pregnancies and abortions overall. One of the most important studies in this vein was published by Duke University Professor Peter Arcidiacono. His analysis of data from the 1997 National Longitudinal Survey of Youth suggested that while access to contraception decreases teen pregnancy in the short run, it increases teen pregnancy in the long run by encouraging sexual activity.\(^{106}\) As noted above, Santelli and Malnikas acknowledged this dynamic

\(^{102}\). *Id.* at 375.

\(^{103}\). *Id.* at 376.

\(^{104}\). Santelli & Melnikas, *supra* note 94, at 373, 377–78 (emphasis added).


\(^{106}\). Peter Arcidiacono et al., *Habit Persistence and Teen Sex: Could Increased Access to Contraception Have Unintended Consequences for Teen
once in their piece, but do not apply it to any period past the 1960s. Worse, they appear to endorse the normalizing of teen sexual experience which has been associated in the past with rising rates of unintended pregnancy. To wit, at the end of their paper they state that the United States “could learn much about reducing teen fertility by examining the success of Western European countries . . . For example, Dutch parents . . . are much more likely to normalize teen sexual activity and contraception use.”\footnote{Santelli & Melinkas, supra note 94, at 379–80 (emphasis added).}

The Report and the Mandate’s decision to include ECs also likely undercut their goal of reducing unintended pregnancy, especially among teens. ECs were hoped by many to be the “answer” to teens’ notoriously inconsistent or incorrect use of contraception. Yet not only have ECs failed to lower teen pregnancy rates according to every relevant study in myriad countries, but they are disturbingly and regularly associated with increases in teen pregnancy and abortion rates.\footnote{Jose Luis Dueñas et al., Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population during 1997–2007, 83 CONTRACEPTION 82 (2011) (showing that over ten year period, 63% increase in contraceptive use was accompanied by 108% increase in abortion rate); see also David Paton, The Economics of Family Planning and Underage Conceptions, 21 J. HEALTH ECON. 207 (2002) (indicating that results such as those obtained in Spain, are results that logic and economics would predict).} Teens even admitted to researchers in two studies conducted in 2000 and 2005 that they “had been more careless about birth control and more likely to have had unprotected sex” when ECs were easily available.\footnote{Roni Caryn Rabin, Teenagers and the Morning-After Pill, N.Y. TIMES (Dec. 3, 2012), http://well.blogs.nytimes.com/2012/12/03/teenagers-and-the-morning-after-pill/?ref=ronicarynrabin.}

EC is similarly ineffective at the population level. In a meta-analysis of twenty-three studies evaluating the effectiveness of Plan B, Princeton’s Dr. James Trussel, whose work was relied upon by the IOM report elsewhere,\footnote{IOM 2011 REPORT, supra note 10, at 108.} concluded that “no study has shown that increased access to [Plan B] reduces unintended pregnancy or abortion rates on a population level.”\footnote{Elizabeth G. Raymond, James Trussel & Chelsea B. Polis, Population Effect of Increased Access to Emergency Contraceptive Pills: A Systematic Review, 109 OBSTETRICS & GYNECOLOGY 181 (2007) (emphasis added).}

Finally, the Report never grapples with Santelli and Melnikas’s conclusion that unintended pregnancy is highest among a group which will not be affected by the Mandate: poor teenagers.\footnote{Santelli & Melinkas, supra note 94, at 373.} They consistently suffer the highest rates of teen pregnancy, but are covered by myriad govern-
ment programs offering them free contraception. A recent Congressional Research Service report on teen pregnancy prevention,113 explains why:

An October 2006 study by the National Campaign to Prevent Teen Pregnancy estimated that, in 2004, adolescent childbearing cost U.S. taxpayers about $9 billion per year: in child welfare benefits, $2.3 billion; in health care expenses, $1.9 billion; in spending on incarceration (for the sons of women who had children as adolescents), $2.1 billion; in lost tax revenue because of lower earnings of the mothers, fathers, and children (when they were adults), $6.3 billion; and in offsetting public assistance savings (younger teens receive less annually over a 15-year period than those who give birth at age 20–21), $3.6 billion.114

Consequently, Congress has created a wide variety of federal programs to address teen pregnancy. In 1970, it created the National Family Planning Program, known as Title X of the Public Health Service Act.115 In 2010, Title X–funded sites served more than five million patients, sixty-nine percent of whom were at or below the poverty level, via eighty-nine public and private grantees who in turn supported 4,389 individual service sites in all fifty states and the District of Columbia.116 Teenagers represented one in four contraceptive clients served by publicly funded family planning centers in 2006, when they served nearly two million women younger than age twenty.117 In fiscal year 2010, 317 million federal dollars were allocated for Title X family planning programs.118 Likewise, both Title XIX of the Social Security Act (Medicaid)119 and Title XX of the Social Security Act120 provide federal funds to states for use in supporting pregnancy prevention services among both adolescents and older patients. The federal Maternal and Child Health Block Grant also funds 610 school-based or...
“school-linked” health clinics. These clinics provide “family planning” advice and services to adolescents. In short, even the “association” between contraceptive access and unintended pregnancies among teenagers is called into question when the teens already receiving an extraordinary amount of free contraception account for the highest rates of teen pregnancy, according to one of two studies cited for the central proposition in the IOM Report.

Turning to the second study cited by the Report for the claimed connection between increased access to contraception and lower unintended pregnancy rates, a Guttmacher Institute report cited for the specific proposition that: “as the rate of contraceptive use by unmarried women increased in the United States between 1982 and 2002, rates of unintended pregnancy and abortion for unmarried women also declined.” On its face, the use of this report poses several problems.

First, this Guttmacher report considers unmarried women only, and only for a twenty-year period. It cannot be generalized to all women in a population, nor can it suffice to prove that rising contraceptive usage during all periods will cause declines in rates of unintended pregnancy and abortion.

Second, this Guttmacher source is contradicted by other data, not mentioned in the Report, but also produced by the Guttmacher Institute. For example, two Guttmacher journal studies show that while unintended pregnancy rates were about 54% in 1981, and declined to 44.7% in 1994, they increased by 2001 to 51%, and remained flat or edged higher through 2006. This period nearly overlaps with the period considered in the source cited in the Report, a period during which the cited source claims that women’s use of contraception increased from 80% to 86%.

Also, looking at an even longer stretch of time—the period from the 1970s to today—a period during which both a Guttmacher journal and the CDC report that the percentage of women who had “ever used” con-


123. BOONSTRA ET AL., supra note 95.

124. IOM 2011 REPORT, supra note 10, at 105.


127. IOM 2011 REPORT, supra note 10, at 105 (citing BOONSTRA ET AL., supra note 95, at 18).
traception rose from about 90% to 99%—unintended pregnancy rates in the U.S. population rose from 35.4%\textsuperscript{128} to approximately 49% today.\textsuperscript{129}

Additional studies cast doubt upon the Report’s reliance on just the one Guttmacher study for its claim of a causal connection between increased usage of contraception and lowered unintended pregnancy rates among unmarried women generally. One of these studies is a CDC report tracking the use of contraception from 1982 to 2008. It concluded that “[c]hanges in contraceptive method choice and use have not decreased the overall proportion of pregnancies that are unintended between 1995 and 2008.”\textsuperscript{130} Another study, a Guttmacher report on unintended pregnancy between 2001 and 2006, reached the same conclusion.\textsuperscript{131} It did so despite CDC data showing that more women in the years between 2002 and 2008 were accessing methods of contraception deemed “more effective” by the IOM, the CDC, and Guttmacher. To wit: between 2002 and 2008, women’s resort to ECs rose from 4% to 10%, to sterilization from 13% to 17%, to the pill from 15.6% to 17.3%, and to injectable contraceptives from 0% to 2%.\textsuperscript{132}

It should also be remembered that the rise in unintended pregnancy rates from 44.7% to 51% between 1994 and 2001—before they settled at the rate of approximately 49% from 2001 to 2006—occurred during a period of time when, as the Report acknowledges, twenty-eight states passed laws quite similar to the Mandate.\textsuperscript{133} These laws required a greater degree of private insurance coverage for contraception,\textsuperscript{134} with seventeen of the twenty-eight requiring further that insurance cover the associated outpatient visit costs.\textsuperscript{135} This is an important dynamic that the Report completely neglected to address.

\textsuperscript{128} Christopher Tietze, \textit{Unintended Pregnancies in the United States, 1970-1972}, 11 \textit{Fam. Plan. Persp.} 186, 186 n.8 (1979) (“A recent report estimates that in 1972, 35.4% percent of all U.S. pregnancies were ‘unwanted’ or ‘wanted later’, thus providing, from, an independent source, an estimate very close to the one used here.”).

\textsuperscript{129} Finer & Henshaw, \textit{supra} note 126.


\textsuperscript{132} Mosher & Jones, \textit{supra} note 91, at 5.

\textsuperscript{133} IOM 2011 Report, \textit{supra} note 10, at 108.


\textsuperscript{135} IOM 2011 Report, \textit{supra} note 10, at 108, (citing Guttmacher Inst., Insurance Coverage of Contraceptives (2011)).
There are four final points regarding the insufficiency of the IOM Report’s treatment of the link between access to contraception and rates of unintended pregnancy, three brief and one longer. First, there are many reasons why even if women have access to contraception, they do not use it. These are treated below, tracing the link between the Mandate’s assumption that increasing “access” by eliminating co-pays, will increase “usage.” The Report does not even touch upon these reasons.

Second, there are many, many factors affecting rates of unintended pregnancy that were not identified or taken into account by the Report. They are understandably difficult to isolate and measure. Their prevalence might easily vary among different age cohorts within the U.S. population. These might include poverty rates, increasing rates of cohabitation (linked to higher rates of unintended pregnancy), later age at first marriage, and declining taboos associated with nonmarital sex, pregnancy, and birth. Each of these factors might lead, for example, to indifference regarding pregnancy, mixed intentions, or competing intentions as between a father and an expectant mother. The IOM Report does not even allude to these, nor does it suggest that the two studies it relied upon to demonstrate a causal relationship between contraception and unintended pregnancy claimed to have controlled for the influence of these other factors.

Third, while there is a strategy that might work to produce lower rates of unintended pregnancies via increased access to contraception, it is not the same as the strategy advanced by the Report or the Mandate, and it raises as many questions and concerns as it answers. It involves providing free long-acting, reversible contraception to lower income women. It is a strategy endorsed by the IOM, which stated that “it is thought that the greater use of long-acting reversible contraceptive methods ... might help further reduce unintended pregnancy rates. Cost barriers to use of the most effective contraceptive methods are important ...” The American College of Obstetricians and Gynecologists has written that LARCs should be “first line” choices for young women.

This strategy was tested in a recent study the conclusions of which were widely publicized in 2011, and celebrated by Professor John Santelli.


author of one of the two articles cited by the IOM Committee, as conclusive evidence for the wisdom of the Report’s recommendations and the Mandate. The study involved recruiting women from the St. Louis area, a disproportionate percentage of whom were poor (37% public assistance), African American (50%), and less educated (35% with high school degree or less). They were encouraged to switch to longer acting contraceptive drugs and devices ("LARCs") for a three to ten year period. Researchers contacted the patients seven times over the first three years of use in order to monitor and encourage continued usage. After three years, rates of teen births and abortions declined significantly.

The study’s findings have been called into question—given its lack of a control group, its indirect and incomplete manner of measuring “effects,” and the possibility of a selection effect, i.e., the women and girls enrolled were more highly motivated to avoid a future pregnancy, many of them having been recruited from abortion clinics where they had recently undergone an abortion. Also, for several reasons, its strategy of encouraging women toward specific, and “more effective” methods of contraception, raises as many questions and concerns as it answers, both about women’s health and women’s freedom. First, women are often dissatisfied with what are considered the “more effective” methods of birth control urged by the researchers conducting this study. According to a CDC report, relied upon in the IOM Report, 30% of women “ever” using the pill discontinued it because they were “dissatisfied with it.” This is also true of 43% of women who ever used the Depo Provera injectable and 50% of women who ever used the contraceptive patch. A very low percentage of women, about 5%, have ever chosen to use the IUD. In the St. Louis study, only 5% of women had chosen LARCs prior to participation in this study; but researchers ultimately persuaded 75% of the women involved to take them up.

Second, this pattern raises some red flags related to the moral hazard of encouraging particularly less-privileged women to use LARCs. It should not be forgotten that only two decades ago, no fewer than seven states were seriously proposing offering Norplant—a surgically implanted hormonal contraceptive, lasting about five years—to women and girls, as a

140. Brian Alexander, Free Birth Control Cuts Abortion Rate Dramatically, Study Finds, NBC News (Oct. 4, 2012), http://vitals.nbcnews.com/_news/2012/10/04/14224132-free-birth-control-cuts-abortion-rate-dramatically-study-finds?lite ("What the study suggests to me," said John Santelli, professor at Columbia University’s Mailman School of Public Health, ‘is that it’s totally supportive of the president’s provisions on reproductive care and preventive services for women in the Affordable Care Act.").


**quid pro quo** for ordinary or increased welfare benefits. The vast majority of the targeted populations were African American.144 Also, once these young women are temporarily sterilized, with drugs and devices sometimes requiring surgical implantation and removal such that they "require less action by the women"145 for three to ten years, the government, and likely the affected women and girls, are more than likely to fall into the trap of believing that all relevant consequences of sex are being managed. The psychological or spiritual consequences of sex without marriage, or a lesser form of commitment, and the consequences for rates of sexually transmitted diseases, discussed below, will almost certainly be neglected.

Third, it appears that the longer acting contraceptive drugs and devices more often pose both increased health risks for women, treated below, and the potential to act to destroy already-formed embryos, as discussed above.

Fourth and finally—and requiring a bit more extensive consideration—there is a growing body of scholarship, treated below, indicating that the persistence or worsening of high rates of unintended pregnancy, abortion, and sexually transmitted diseases, and also our nation’s high rates of nonmarital births (the chief predictor of female poverty), are the “logical” result—in economic and psychological terms—of the new marketplace for sex and marriage made possible by increasingly available contraception (in some cases, combined with available abortion).

It is widely acknowledged that while contraception is often effective on an individual level to avoid conception, or birth, its effects on a social level might well be different. It was acknowledged by John Santelli, in his study cited favorably by the Report.146 It has been written about from sociological and historical perspectives.147 The twin rise in the availability of contraception and rates of nonmarital sexual encounters, pregnancies and births, was also predicted by its inventors and supporters, at the time when the “pill,” was introduced at a population-wide scale. Dr. Min-Chueh Chang, for example, one of the co-developers of the birth control pill, reflected: “I personally feel the pill has rather spoiled young people. It’s made them more permissive.”148 Dr. Alan Guttmacher, former director of the International Planned Parenthood Federation, further suggested that legal abortion would render contraception even less effective. “[W]hen an abortion is easily obtainable contraception is neither actively nor diligently used. . . . [I]f we had abortion on demand, there would be no

145. IOM 2011 REPORT, supra note 10, at 108.
146. See Santelli & Melnikas, supra note 94.
reward for the woman who practiced effective contraception.”¹⁴⁹ More recently, economists have taken on the question of the relationship between contraception (and sometimes abortion) and rates of nonmarital sex, pregnancy, and abortion. None of their material is referenced by the IOM Report. Yet it is a vast and respected literature which can only be treated in summary form here.

In perhaps the most well-known paper on this subject—An Analysis of Out-of-Wedlock Childbearing in the United States¹⁵⁰—Nobel prize-winning economist George A. Akerlof and his colleagues describe the path of women’s increased participation in nonmarital sexual relations as a result of “technical changes”: the increased availability and legalization of both contraception and abortion. The authors claim that, as compared with other explanations of nonmarital pregnancies and births—including but not limited to welfare theory or job theory—their “technology shock” hypothesis, combined with the declining stigma of a nonmarital birth—can better explain the magnitude and timing of changes in the numbers and rates of nonmarital pregnancies and births. They conclude that the current sex and mating market enabled by contraception and abortion operates to the disadvantage of women, and the relative advantage of men, due to a series of incentives structured by their availability. First, “[w]hen the cost of abortion is low, or contraceptives are readily available, potential male partners can easily obtain sexual satisfaction without making . . . promises [to marry in the event of pregnancy] and will thus be reluctant to commit to marriage.”¹⁵¹ Single women thus feel “pressed,” because if they do not participate in sex, they are at a classic “competitive disadvantage” because “[s]exual activity without commitment is increasingly expected in premarital relationships.”¹⁵² “If they ask for . . . a guarantee [of marriage in the event of pregnancy], they are afraid that their partners will seek other relationships.”¹⁵³ Even women who want children, reject contraception and abortion, and want a marriage guarantee as a condition for sex, have nonmarital sex anyway because it is the price of entering the mating market. Such a market is therefore likely to produce higher rates of sexual activity, nonmarital pregnancy, nonmarital births, and abortions all at the same time. This is indeed what has happened since the widespread legalization and availability of both contraception and abortion, despite predictions by pro-choice groups that widespread contraception would reduce all other named outcomes, and that legalized abortion would reduce nonmarital births.


¹⁵¹. Id. at 290.

¹⁵². Id. at 280.

¹⁵³. Id. at 290.
Economist Timothy Reichert brings additional insight to the question of the effects of contraception on the “mating market,” as he depicts women’s current situation as a case of what economists call the “prisoners’ dilemma.” A prisoners’ dilemma is any “social setting wherein all parties have a choice between cooperation and noncooperation, and . . . all parties would be better off if they choose cooperation,” but—like prisoners being held for questioning in separate chambers—none can “effectively coordinate and enforce cooperation, [so] all parties choose the best individual choice, which is non-cooperation.” As a result, everyone involved is worse off.

According to Reichert, the prisoners’ dilemma operates for women in the mating market as follows: first, contraception “lowers the costs of premarital and extramarital sexual activity below the level necessary for a separate sex market to form.” In other words, sex without the “cost,” of pregnancy becomes the norm, such that sexual partners do not even have to consider the possibility of marriage. To this point, Reichert’s analysis is quite similar to Akerlof, Yellen, and Katz’s. Next, however Reichert takes a new, albeit not contradictory, approach, and claims to explain yet another negative consequence of the current mating market—women’s marital unhappiness. He claims that more women than men begin populating what he calls the “marriage market” at a younger age because women generally want to have children sometime during their lives, but are biologically constrained to have them when they are younger. Women also know that stable marriage is better for children. By their early 30s, therefore, most women have entered the marriage market. Men have no similar, inbuilt impetus to leave the sex market and enter the marriage market. Thus, women have more “power” in the sex market, where they are relatively scarce, but face more competition in the marriage market, where they are competing with more women for fewer men. Reichert reasons that this translates into women more often striking “bad deals” at the margins in the marriage market, leading to a later desire for divorce. In fact, it is well-established today that women file for divorce approximately two times as often as men. Reichert suggests that women will eventually go along with attaching a lesser stigma to divorce, too, since they may want to exercise this option someday. This, in turn, leads to their entering marriage with less commitment, and with more concern to invest in income-producing skills in the event they need to support themselves and their children alone. Men respond rationally by doing the same.

In sum, according to Reichert, women are disadvantaged in the current mating market at least respecting their hopes to marry, to marry in time to have children, and to remain stably married. He further suggests that women are disadvantaged with respect to abortion because contracep-

---

155. Id. at 33.
156. Id. at 26.
tion leads to greater demand for abortion. Contraception promises to allow “women [to] rationally plan their human capital investments,” but if things go awry and threaten their investments, abortion appears necessary.

Considering this scholarship in the “women’s health” terms adopted by the IOM Report, at the very least it is possible, rationally, to conclude that the normalization of sex dissociated from commitment, marriage, or children might harm women over the long run. Sexual relationships without commitment, nonmarital pregnancies and births, abortion, and divorce are all associated with diminished mental, emotional, and sometimes physical outcomes for women. The Report’s failure even to consider these renders its conclusion about contraception and women’s health at best premature and simplistic, and at worst wrong.

c. Does Unintended Pregnancy Cause Harm to Women’s Health?

Even if it could be demonstrated that greater access to contraception, by eliminating co-pays, could reduce unintended pregnancy rates, there is little persuasive evidence that the health conditions the Report claims women suffer while unintentionally pregnant, or thereafter, are caused by the unintended pregnancy. Evidence indicates rather that causation might occur in the reverse order, or that both the unintended pregnancy and the health conditions—smoking, drinking, domestic violence, and depression—proceed from a third factor which is associated with both the claimed independent variable (unintended pregnancy) and claimed dependent variable (the health condition). In the case of unintended pregnancy, some literature suggests that the third factor might be “risk taking” or “poverty.” According to the analysis of the IOM Report by Professor Austin Hughes:

When a statistically significant association is reported between any two phenomena, it is important to be aware of the possible explanations for such an association. It is always possible that a statistically significant association might occur in a given data set by chance alone; thus, it is important that any study reporting a significant association be replicated on as many different populations as possible. Assuming that chance alone is not responsible for an observed association, there are three possible causal patterns that might account for it. Consider an association between two phenomena, A and B. It is possible that A causes B, or that B causes A. Furthermore, it is possible that there is a third phenomenon (C) that causes both A and B. Both IOM (1995) and IOM (2011) fail to provide a straightforward discussion of these logical alternatives.158

157. Id. at 30.
158. See Hughes, supra note 79, at 5.
Furthermore, in addition to the material set forth immediately above about the link between contraception and increased rates of unintended pregnancies, nonmarital births, abortion, and even divorce, there is additional evidence that greater use of contraception, including particularly the LARCs favored by the IOM Committee and its witnesses, can harm women’s health.

The material in this subsection considers the Report’s evidence, and what it omitted, concerning a relationship between unintended pregnancy, and women’s health. The Report claims that unintended pregnancy can cause the following harms to women’s health: excessive smoking and drinking during pregnancy, depression, and domestic violence. Immediately it should be noted that the IOM’s prior extensive report on unintended pregnancy acknowledged freely that “research is limited” regarding negative outcomes from unintended pregnancy. It also stated in the same report that studies regarding women’s health and unintended pregnancy are not able to demonstrate definitively “whether the effect is caused by or merely associated with unwanted pregnancy.” Yet the 2011 Report several times uses the language of “causality” or “the consequences” of unintended pregnancy, while failing to cite studies demonstrating causality.

Turning to the Report’s claim regarding domestic violence and depression as consequences of unwanted pregnancy, the Report cites the meta-analysis—a review of numerous papers treating a single topic—written by Gipson. But the Report fails to reveal that the Gipson study’s authors concluded there that, “[a]ssessing the relationship between pregnancy intention and its potential health consequences is fraught with a number of measurement and analytical concerns.” It also stated that “although longitudinal data may provide some inferences about the observed associations, causality is difficult if not impossible to show.” Regarding psychosocial health and unintended pregnancy, the authors state “In light of the paucity of studies ... and their limitations in terms of establishing causality, the existing research should only be considered to be suggestive of such an impact.”

159. IOM 2011 REPORT, supra note 10, at 103.
160. IOM 1995 REPORT, supra note 81, at 103.
161. Id. at 65. Although the Report insists that it is not important to sort this out, this is both irrational and not the legal standard required in connection with a compelling governmental interest.
162. IOM 2011 REPORT, supra note 10, at 103.
164. Gipson et al., supra note 163, at 19.
165. Id. at 20 (emphasis added).
166. Id. at 29.
The existing evidence on the impact of unintended pregnancy on child and parental health outcomes is mixed and is limited by an insufficient number of studies for some outcomes and by the aforementioned measurement and analytical concerns.\textsuperscript{167}

Echoing Professor Hughes, it further notes “[a]n additional concern . . . that both health outcomes and pregnancy intentions may be jointly determined by a single, often unobserved factor.”\textsuperscript{168}

On the question of women’s depression after a birth, Professor Hughes states that within the Gipson paper, the most relevant paper cited is a 1991 Australian study comparing rates of anxiety and depression immediately before, and up to six months after, a birth, between mothers whose pregnancies were described as “wanted” at the time of pregnancy and mothers whose pregnancies were described as “unwanted.”\textsuperscript{169} For mothers with no history of mental illness prior to pregnancy, 5.1% of mothers of “unwanted” infants experienced depression six months after birth, as compared with 2.6% of mothers of “wanted” infants. Causation could not clearly be established. Further, given the Australian study’s reliance on the categories of wanted/unwanted, it is not clear whether it included both “mistimed” and “unintended” pregnancies (the subject of the Report) in the “unwanted” category. Further, even though the rate of depression was nearly twice as high in the mothers with “unwanted” infants as in mothers with “wanted” infants, the rates of depression were actually quite low in both groups.\textsuperscript{170} In short, the 2011 Report did not offer any clear or significant causal relationship between depression and unintended pregnancy.

The 2011 Report also reads as if domestic violence is caused by unintended pregnancy, treating such violence in the paragraph about the “consequences of an unintended pregnancy for the mother.”\textsuperscript{171} It cites the IOM 1995 Report for this proposition although, as quoted immediately above, that report said that studies regarding women’s health and unintended pregnancy were not able to demonstrate definitively “whether the effect is caused by or merely associated with unwanted pregnancy.”\textsuperscript{172} Furthermore, the 2011 Report failed to divulge the literature showing that the causation may well be reversed: i.e., domestic abuse may be a causal factor for unintended pregnancy. Scientists have proposed the likelihood of this chain of causation due to the tendency of abusive relationships to create an environment in which the likelihood of unintended pregnancy

\begin{footnotesize}
\textsuperscript{167} Id. at 20.
\textsuperscript{168} Id.
\textsuperscript{169} See Hughes, supra note 79, at 8 (citing J.M. Najman et al., \textit{The Mental Health of Women 6 Months After They Give Birth to an Unwanted Baby: A Longitudinal Study}, 32 \textit{Soc. Sci. & Med.} 241 (1991)).
\textsuperscript{170} See id.
\textsuperscript{171} IOM 2011 REPORT, supra note 10, at 103.
\textsuperscript{172} IOM 1995 REPORT, supra note 81, at 65.
\end{footnotesize}
is increased—including in an article co-authored by Dr. Santelli, whose study on teen pregnancy is one of the two studies the Report cites for claiming a relationship between contraception access and rates of unintended pregnancy among teens.173

Regarding the claimed effects of unintended pregnancy on women’s smoking and drinking, the IOM’s 1995 Report had earlier admitted, respecting this alleged relationship, that these figures “drop significantly where studies control for other causes.”174 Furthermore, other studies indicate, quite plausibly, that causation regarding excess drinking and smoking may also be reversed, or that there is a third factor—a woman’s risk-taking preferences—which accounts both for her unintended pregnancy and her smoking and drinking habits.175 There is also the fact that virtually all mothers who smoke during pregnancy were smokers before getting pregnant.176

Given all of these possibilities—none seriously considered by the Report—the Report’s recommendation to increase access to contraception in order to prevent women’s smoking and drinking during pregnancy, whether these are directed toward the woman’s health, or the child’s, as discussed above, and to prevent depression and domestic violence, might easily be unavailing or ineffective. Also, and as already reported above, the preventive services recommended by the USPSTF, already required by the ACA to be provided without a co-pay, include counseling for pregnant women concerning smoking and drinking. And domestic violence prevention is a separately recommended preventive service for women within the 2011 IOM Report itself.177

The Report further failed to consider that increasing access to contraception—associated with a message of sexual expression as freedom, and the good of sexual expression outside of the context of a relational commitment, or parenting—might itself harm women’s health. This is undoubtedly quite contested territory, but there is relevant evidence of two types: first, about a possible relationship between large contraception programs and increasing rates of sexually transmitted infections (“STIs”); and second, about the effects of contraceptive drugs and devices on women’s

173. Jacquelyn C. Campbell et al., The Influence of Abuse on Pregnancy Intention, 5 WOMEN’S HEALTH ISSUES 214 (1995); Patricia M. Dietz et al., Unintended Pregnancy Among Adult Women Exposed to Abuse or Household Dysfunction During Their Childhood, 282 J. AM. MED. ASS’N 1359 (1999) (noting that this is co-authored by, among others, Dr. John S. Santelli).
174. IOM 1995 REPORT, supra note 81, at 68–69, 75.
176. Colman & Joyce, supra note 175, at 29-35.
177. IOM 2011 REPORT, supra note 10, at 117.
bodies and health. On the first matter, Professor Hughes has summarized that there exists:

[E]pidemiological evidence support[ing] the hypothesis that the widespread availability of contraception in the U.S. after the 1960’s was accompanied by an unprecedented epidemic in STIs. From 1966 to 1987, the number of genital human papilloma virus infections in the U.S. increased about sevenfold, and the number of genital herpes virus infections increased eleven fold in the same period. Gonorrhea and syphilis infections, which had decreased greatly by the 1950’s due to the availability of antibiotics, rebounded substantially after the 1960’s. At the present time, diseases caused by the sexually transmitted bacteria Chlamydia trachomatis and Neisseria gonorrhoeae are the most commonly reported notifiable diseases (i.e., diseases that must be reported by law) in the U.S. And of course a newly emerged STI, human immunodeficiency virus-1 (HIV-1), gained a foothold in the U.S. population during the same period.

Because STIs are spread almost entirely by sexual activity with multiple partners, the problems of determining cause and effect that usually plague studies of epidemiological associations do not arise in this case. The STI epidemic is itself *prima facie* evidence that contemporary U.S. society has seen a substantial increase in non-marital, multiple-partner sexual activity. There is abundant evidence that availability of contraception was accompanied by widespread changes in attitudes toward non-marital sexual activity in the U.S. population. Therefore, it is reasonable to conclude that the current STI burden on the U.S. population is at least in part a consequence of widespread access to contraception.178

Additional research has replicated this result: among women in a U.S. city who used an injectable contraceptive versus women who did not use a hormonal contraceptive,179 and among young women given increased pharmacy access to emergency contraception, 180 STI rates increased in both cases.

It has also been observed theoretically in a law and economics analysis, that it makes sense that lowering the price of sex increases the quantity demanded. Speaking first about the causal relationship between legaliz-


ing abortion and increased rates of certain STIs, two economics scholars write:

What is clear, however, is that the CDC and medical authorities in general have not . . . considered that changes in institutions can cause changes in the relative prices faced by individuals. Instead, the medical community tends to attribute the changes in STD rates to fluctuating social mores, changing demographics, and changing diagnosis patterns. As indicated by our results, ignoring the effects of changing incentives precludes an accurate understanding and modeling of this epidemiological phenomenon.181

Respecting the effects of an increased access to contraception, the authors then conclude that: “As an unplanned pregnancy is one of the costs of sexual activity, the effect of contraception availability is similar to the effect of abortion availability. If contraception is used . . . the expected costs decline, leading to an increase in the quantity of sex demanded.”182 STIs being, intrinsically, a measure of multiple-partner sexual activity,183 they are likely to increase with an increase in the quantity of non-monogamous sex in a population.

Nowhere does the IOM Report consider a potential relationship between its recommendation, and a potential for further “lowering the price of sex,” in a way that might result in higher rates of STIs.

Finally, the IOM does not consider in sufficient detail the potential negative health effects of contraception upon women.184 The Report says only that “for women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated,”185 and that there are “side effects” which are “generally considered minimal.”186 It adds an exception for “oral contraceptive users who smoke.”187 Several brief re-

182. Id. at 410.
183. See Hughes, supra note 79, at 12.
184. A brief filed in one of the cases against the Mandate takes up in detail the question of the threat to women’s health posed by some contraception. See Brief Amici Curiae of Women Speak for themselves, Bioethics Defense Fund, and Life Legal Defense Foundation in Support of Plaintiffs-Appellants, O’Brien v. Dep’t of Health & Human Servs., No. 12-3357 (8th Cir. 2012). It argues that “the Government entirely failed to consider the robust body of medical evidence indicating that hormonal contraceptives have biological properties that significantly increase women’s risk of breast, cervical, and liver cancer, stroke, and a host of other diseases including the acquisition and transmission of human immunodeficiency virus (HIV).” Id. at 3.
185. IOM 2011 REPORT, supra note 10, at 105.
186. Id.
187. Id.
sponses highlight the insufficiency of the Report’s treatment on this matter.

First, as of 2008, over 18% of American women smoke—i.e., approximately 21.1 million women. This is a large cohort of women who might both receive free hormonal contraception as a consequence of the Report and the Mandate, while being admittedly quite susceptible to harms from hormonal contraceptives.

Second, there is an irony within the Report relative to women’s health. While the Report states that women with particular health difficulties need to avoid becoming pregnant, and may have a greater need for contraception, it fails to note that these very women might be at the greatest risk from using especially the more highly recommended methods, LARCs. Among the diseases the Report highlights are included: pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome (a connective tissue disorder). Yet these are precisely the diseases for which leading, specialized medical associations recommend cheaper barrier or natural contraceptive methods, as distinguished from many of the more expensive hormonal methods the Report hopes to incentivize.

Third, the Report ignores a large and deep literature about the negative effects of particular contraceptives, especially LARCs. As summarized by Professor Hughes:

Although contraceptive methods prescribed in the U.S. are believed to be without harmful side-effects in most cases, there is a long history of discussion and controversy regarding the potential deleterious side-effects of certain contraceptives, especially [oral contraceptives]. To consider just one example, a recent meta-analysis found a small but significant association between increased breast-cancer risk and long-term [oral contraceptive] use. Not all studies have found such an association; and, as with

---


190. See, e.g., Patient Information: Marfan Syndrome, Heart Disease & Pregnancy, http://www.heartdiseaseandpregnancy.com/pat_mar_mom.html (last visited Feb. 20, 2013); ACHA Q and A: Birth Control for Women with Congenital Heart Disease, Heart Matters (2008), http://www.achaheart.org/Portals/0/pdf/Library%20Education/ACHA-Q-and-A-Birth-Control-for-Women-with-CHD.pdf (reporting that “barrier methods” are “safe for all users,” but that risks are greater regarding various of hormonal methods, especially pills containing estrogen, and certain IUDS); Pulmonary Hypertension Ass’n, Birth Control and Hormonal Therapy in PAH (2002), available at http://www.phassociation.org/document.doc?id=1684 (reporting that “[t]he two safest methods of birth control are 1) the barrier method, which may include condoms in men and/or a diaphragm with spermicide in women, and 2) a vasectomy in the male partner for a woman with PAH in a monogamous (one partner) relationship. . . . [N]early half of the specialists did not advocate using BCP for their patients, and some actively discouraged patients from doing so . . . ”).
any association study, this association does not necessarily imply a causal relationship. However, there are over 200,000 new breast cancer cases per year in the U.S., with a medical care cost per patient of $20,000-$100,000. If even a small fraction of these cases are due to [oral contraceptives], this would add substantially to the public health and economic costs of contraceptive use.191

Referring to the “long history of discussion and controversy” referenced by Professor Hughes, one should note that it is well known to the point of coverage in the New York Times that “taking a combination hormone birth control pill—which contains estrogen and a progestin hormone—can increase the risk of stroke and blood clots in the legs and lungs.”192 Further, various forms of birth control pills193 and IUDs,194 the latter with and without hormonal elements, have been the subject of myriad class action lawsuits in which leading pharmaceutical corporations have paid hundreds of millions of dollars to settle. The World Health Organization continues to list some hormonal contraceptives as a group 1 carcinogen.195 Leading cancer associations including the American Cancer Society196 and the International Agency for Research on Cancer (IARC)197 as well as the World Health Organization, and the National Cancer Institute refer especially to estrogen-progesterone oral contraceptives as “known carcinogens.”198

191. Hughes, supra note 79, at 12 (citations omitted).
Additionally, quite recently, a study also suggested strongly that injectable LARCs may double the risk of contracting and transmitting HIV,\textsuperscript{199} to the point that even the World Health Organization is considering “re-evaluating . . . clinical recommendations on contraceptive use.”\textsuperscript{200}

Finally, in a report concerning preventive health care for women which does indicate, albeit far too briefly, some of the negative health effects of contraception, it is curious to see a recommendation for contraception for women and girls only. In other words, it is at least surprising that there is no suggestion at all regarding placing any of the burden of contraception upon males. Male contraception is neither addressed nor recommended in the Report. Yet fifty-two years after the launch of the birth control pill, no pharmaceutical company has seen fit to develop hormonal or other birth control products for men for reasons having to do with the burdens and side-effects of contraceptive usage. In the words of \textit{Mother Jones Magazine}:

A male pill might have to be easier on the body than female contraceptives, too. Women have long complained of weight gain, moodiness, and other birth control side-effects . . . . A recent clinical trial for a male contraceptive delivered via injection (similar to Depo-Provera for women) was ended early despite promising early results due to participants’ complaints about side-effects such as depression, increased libido, and mood changes.

Diana Blithe, a program director at the National Institute for Child Health and Human Development, says that “The reality is we could get a product out there very quickly if companies would aggressively take on the process of making it happen,” she said. But until consumers really ask for that product, or until marketing studies show it would really sell, US companies really have little to gain by developing a male contraceptive. Since condoms are widely available, protect against STDs, and have very few if any side-effects, it may be a long wait.\textsuperscript{201}

This divergent treatment of men and women is simply “built in” to the Report, not questioned.

To conclude this section on the health consequences of contraceptives themselves, it should at least be noted that it is very curious that a government report on the subject of preventive care for women does not pay greater deference to important statements about the health risks to

\textsuperscript{199} Renee Heffron et al., \textit{Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study}, 12 LANCET 19 (2012).


women, particularly of hormonal contraception, articulated by the World Health Organization and USAID. This Article is not a scientific study, and does not make the claim that most contraceptives are intrinsically dangerous to most women. But it can assert, on the evidence available, that there are serious and ongoing disputes over the safety and the negative external consequences of widely available contraception, especially when this is paired with the notion that sex and procreation are not weighty or important matters—the latter notion being an element of the contraceptive project, as described earlier.

Rather than consider any of the relevant data, however, the Report devotes a total of six lines of text to risks of contraceptives. By contrast, it devotes hundreds of lines of text to contraception’s claimed powers of preventing the birth of unintended children, and an additional ten lines to the benefits of contraceptive “separate from the ability to plan one’s family and attain optimal birth spacing.” These latter benefits include its claimed potential for reducing endometrial and ovarian cancer—the second noted to be a more tenuous proposal—and treating “menstrual disorders, acne or hirsutism [hairiness] and pelvic pain.”

2. Abortion Rates and Women’s Health

While the Report does not squarely identify abortion as a problematic health outcome for women that contraception could prevent, it certainly suggests that avoiding abortion is a good outcome of increased contraceptive usage. Obviously, the thrust of the Report concerns the relationship between contraception and unintended pregnancy. But lowered abortion rates are nonetheless mentioned. Such an outcome is regularly mentioned by supporters of large-scale contraception programs such as the Guttmacher Institute and Planned Parenthood, even while the same groups regularly support unlimited access to legal abortion. It is understandably designed to attract the support of Americans opposed to legal abortion.

For the proposition that increased contraception usage lowers abortion rates, the Report cites a Guttmacher report entitled “Abortion in Women’s Lives,” the same study used to support the claim that more contraception usage drives down rates of unintended pregnancies. A later section amply documents that this latter claim is at least doubtful at the population level; this section raises similar doubts about the claim regarding abortion rates. Like the link with unintended pregnancy rates, the link between contraception and abortion rates seems intuitively true. Yet again, what might be true on an individual scale for a contraception user who is motivated to avoid pregnancy, turns out not to be true on a social

203. Id.
204. Id. at 103.
205. Id. at 105 (citing BOONSTRA ET AL., supra note 95).
scale. First, I will take a closer look at the Guttmacher source used, and then look at relevant evidence the Report did not consider.

Page 18 of the Guttmacher source cited in the Report claims that among unmarried women between 1982 and 2002 there was a 6% rise in the proportion of women using contraception and a decline in both unintended pregnancy rates and abortion rates—it acknowledges that married women’s abortion rates did not change significantly.\textsuperscript{206}

First, it should be noted that the Guttmacher report is a claim about unmarried women only, not about the population; the Report and the Mandate, however, are about all women of childbearing age at risk for unintended pregnancy.

Second, the Guttmacher source does not assert causation between contraceptive usage and abortion rates. Many factors affect abortion rates: the economy, mores, and changes in relationship and family structures, to name just a few. The cited Guttmacher study makes no effort to control for all of these factors. It simply says that contraceptive usage “accompanied” lower rates in unintended pregnancies and that the latter are a “key determinant” of abortion rates.\textsuperscript{207} Then, without further evidence it concludes: “Thus, the increase in contraceptive use contributed significantly to the decrease in abortion rates among unmarried women.”\textsuperscript{208}

Third, the Guttmacher report concerns one slice of time (1982-2002) over a long period of time during which both contraception and abortion have been legally available—1973 to today.

Fourth, on the page following the page relied upon by the IOM, the Guttmacher source states that: “[w]hen the desire for small families takes hold in a society, the initial result is often an increase in both contraceptive use and abortion. Over time, however, increasing levels of contraceptive use are accompanied by falling abortion rates.”\textsuperscript{209} The chart illustrating this claim, figure 3.3 on page 17, showed data from about 1983 to 2002. Beginning in 1983, it showed a rise in the percentage of unmarried women at risk of unintended pregnancy using contraceptives, and a corresponding decrease in unintended pregnancies per 1,000 unmarried women. But the chart omits reporting on the years 1970 to 1982; during these years, access to contraception was rising—especially due to the passage of the federal Title X program distributing large quantities of contraception—but abortion rates were climbing not falling. These rates climbed from about 14 per 1,000 women of childbearing age in 1973 to 24 per 1,000 in 1979—the rate increased all the way to 29 per 1,000 in 1980. It was only after this simultaneous rise in rates of contraception usage and abortion that abortion rates began to fall.

\textsuperscript{206} BOONSTRA ET AL., supra note 95, at 18.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 19.
Turning now to material concerning the relationship between contraception and abortion, which material is not considered in the Report. First, it should be noted that some of the drugs and devices covered by the Report and the Mandate act as embryocides, i.e., early abortifacients. It is not accurate to claim that a drug or device that causes an early abortion prevents abortion.

Second, at the level of the larger society, normalizing sex dissociated from commitment and from parenting, can lead to higher, not lower abortion rates, as people become simultaneously more willing to risk sex without a marital commitment, and less willing to tolerate the frustration of their intentions to avoid pregnancy. This explanation not only forms the basis for the law and economics’ analyses linking greater contraceptive access to higher abortion rates, but also helps explain two phenomena. First, using contraception is associated with a greater inclination to pursue abortion. For many years, it has been the case that women using contraception in the month they became pregnant are more likely to seek an abortion than women who were not using contraception at all. It is also the case, as demonstrated by the most recent St. Louis study in which women were strongly encouraged to use, and continue using, LARCs over a period of three to ten years, that use of LARCs was associated with lower numbers of abortions, but higher abortion ratios. In other words, ordinarily, one of four pregnancies is aborted in the United States, but in the St. Louis study, there was one abortion for every one live birth among a group of women encouraged in large numbers to use what they were told were the most effective contraceptives. Their intention to avoid childbirth may thereby have been strengthened, leading to a greater willingness to seek and undergo an abortion. Third, the Report presumes that the only study it cites about the linkage between contraception and abortion relies upon accurate data about abortion rates over time. But reported abortion rates are notably unreliable. The Centers for Disease Control has never made abortion reporting mandatory. Only forty-five states have consistently reported data to the CDC since 1999. Historically, its results undercounted abortion as compared with the results reported by the Guttmacher Institute, although even Guttmacher would have difficulty

210. For a further discussion, see supra notes 88–157 and accompanying text.
213. See Peipert et al., supra note 139, at 6.
215. Id. at 4.
getting reliable results from states which refrain from reporting at all, or which have only voluntary reporting. Several of these states have vast populations and are believed to have some of the highest rates of abortion in the nation. These include:\textsuperscript{216} California, Washington, D.C., New Jersey, and Maryland.\textsuperscript{217}

Even with the evidence of record, however, the Report is likely incorrect to conclude that “evidence exists” that “greater use of contraception within the population produces lower . . . abortion rates nationally.”\textsuperscript{218} Rates of contraception usage have not been associated consistently with lowered abortion rates. Even more importantly, abortion rates may decline for a time \textit{only after} there had previously taken place a twin rise in the availability of contraception and in the rates of abortion. Interestingly, the only countries the cited 2006 Guttmacher report discusses at length regarding a time series from \textit{before} the introduction of contraception to the present, are countries with what might be called an “amoral” resort to abortion: Hungary, Russia, and South Korea.\textsuperscript{219} In other words, there is evidence that in each of those countries, abortion was not regarded as a real moral dilemma, of the wrenching nature it is considered in the United States;\textsuperscript{220} it was rather the major form of “birth control” before true forms of contraception were introduced on a large scale. Not surprisingly, the introduction in those countries of contraception reduced the resort to abortion, although even in two out of three of those countries, contraceptive access was \textit{first} correlated with rising rates of abortion. The United States is different from these types of countries. Abortion was and is a significantly fraught moral issue, personally and politically. When contraception was introduced here, its major effect was not to replace abortion and drive abortion rates down, but first to drive up rates of nonmarital sexual intercourse, and associated nonmarital pregnancies and abortions, before, in some selected years, helping to reduce the abortion rate. Its future effects are by no means certain.

3. \textit{Will the Mandate, by Making Contraception and EC’s “Free,” Increase Effective Usage and Depress Unintended Pregnancy Rates?}

Even assuming that the Report employed a reliable measure of unintended pregnancy rates, \textit{and} showed a causal relationship between increased contraception usage and rates of unintended pregnancy, \textit{and} showed that unintended pregnancy is causally related to worse health outcomes for women, the Report has not shown that the government has a “compelling state interest” in forcing employers to offer “free” contracept-
tion and ECs, unless it demonstrates further that this last command increase the effective usage of contraception so as to lower unintended pregnancy rates among the population. This section will demonstrate that the Report fails to meet this challenge.

First, the Mandate, and the IOM Report on which it is based, is addressed to an audience—employed women and the daughters of the employed receiving health insurance from an employer—which is not responsible for the vast majority of unintended pregnancies in the United States. These occur among poorer Americans who are already amply provided free or very low cost contraception. Second, there is the fact that even among users of contraception, pregnancy occurs with great regularity. Third, there are many factors affecting women’s decisions regarding contraceptive usage. Cost is one of them, but it is not a large factor. Also, to the degree cost is important at all, it applies for the most part to women with lesser incomes, who, as stated above, are already amply supplied with free or low cost contraception by a myriad of federal and state programs.

On the first point, regarding the targeted audience: rates of unintended pregnancy are highest among groups the mandate will not affect—the poorest adolescents and women who are already served by myriad federal and state programs. The Report itself makes this observation; it notes that non-use of contraception is particularly likely among women who “have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group.”221 Many other private and public studies conclude similarly,222 as does the Finer and Henshaw study relied upon by the IOM Report on page 102. That study states the rate of unintended pregnancy for women below the poverty line is three times that of women above 200% of the poverty level.223 The rate among college graduates is 26 per 1,000 women, but for women who did not finish high school, 76 per 1,000 women.224 Another source trusted by the IOM Committee, the Guttmacher Institute, concludes in its January 2012 fact sheet on unintended pregnancy that the rate of unintended pregnancy among low income women is five times the rate of the highest income women.225

The Report already acknowledges that low income women are amply supplied with free or almost free contraception. Page 108 of the Report refers to contraceptive coverage as “standard practice for most federally funded insurance programs.”226 It cites its availability in community

221. IOM 2011 Report, supra note 10, at 102.
223. Finer & Henshaw, supra note 126, at 90.
224. Mosher & Jones, supra note 91.
health centers, family planning centers, and Medicaid. It goes further with respect to Medicaid, and points out that since 1972 it has “required coverage for family planning in all state programs and has exempted family planning services and supplies from cost-sharing requirements.”

It points out that twenty-six states also have their own Medicaid family programs for women who do not technically qualify for Medicaid. In congressional testimony, Secretary Sebelius has also added that contraception is available at many other places including “community health centers, public clinics, and hospitals with income based support.” An editorial in the New England Journal of Medicine estimates that community health centers may be serving as many as 40 million Americans (up from 20 million) in coming years. Additionally, of course, there are drug stores, large retail chains and Planned Parenthood, and other clinics receiving hundreds of millions of dollars of federal and state aid annually.

On the second point, contraception fails, even among regular users, with the CDC estimating that twelve percent of all women using contraception will become pregnant each year, and with contraceptive users constituting the majority of patients of abortion clinics. Even for women using LARCs, a Guttmacher Institute journal estimated “first year” failure rates of the condom at fourteen percent, with eight percent for the pill, and four percent for LARCs. Fourteen or twelve percent or four percent of users across a large population is still a large number of women experiencing an unintended pregnancy. These numbers indicate that even if the Mandate could narrow the gap between the eighty-nine percent of “at risk” women currently using contraception today, and one hundred percent, the result in terms of the total percentage of unintended pregnancies would be quite small. If one further considers that most women still will not choose LARCs, perhaps as many as ten percent of the new eleven percent of users would experience unintended pregnancy. And of course, any calculations about the overall effects of increased access to contraception should take into consideration the possibility that this might lead to more women and girls becoming sexually active.

Third, with the possible exception of its effect on the uptake of LARCS, as already discussed and critiqued, a Mandate making contraception “free” for employed women and the daughters of the employed, is not likely to close or even substantially narrow the small gap between the vast majority of such women currently using contraception effectively, and those who are not, because the latter have many reasons other than cost—

227. Id.
228. Id.
reasons not addressed at all by the Mandate—for avoiding some or all contraception usage. In order to pursue this claim, I will first treat the matter of the currently high rates of usage of contraception, then indicate that the group targeted by the Mandate is already using it at rates exceeding the national average, then consider the many reasons other than price why some women are not using contraception.

On the matter of current usage of contraception, the IOM acknowledges that usage rates are high. With regard to extant private insurance coverage, for example, the Report states that: “contraceptive coverage has become standard practice for most private insurance and federally funded insurance programs.”233 It adds that that “private employers have also expanded their coverage of contraceptives as part of the basic benefits packages of most policies.”234 It reports on a 2010 survey indicating that eighty-five percent of large employers and sixty-two percent of small employers already offer coverage of FDA-approved contraceptives.235 Further, according to the Guttmacher Institute, nine of ten employer-based insurance plans already cover the full range of prescription contraceptives.236 The Report continues, saying that about ninety-nine percent of women ages fifteen to forty-four who had ever had sexual intercourse with a male had used at least one contraceptive method.237 The Guttmacher Institute adds that among women seeking to avoid pregnancy eighty-nine percent are already practicing contraception.238

On the matter of contraceptive usage by the women targeted by the Mandate, the material immediately above indicates that employed women and the daughters of the employed already have a high level of access to contraception via their employer plans. Also women with more education and income generally use contraception at higher rates than the poor. This is a well-documented and persistent phenomenon.239 Finally, more affluent women not only use contraception more regularly, but they also tend to use what researchers call “more effective methods,” more often than their poorer sisters.240

233. IOM 2011 REPORT, supra note 10, at 108.
234. Id.
235. Id. at 109.
236. Contraceptive Use in the United States, supra note 145 (citing Adam Sonfield et al., U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 36 PERSP. ON SEXUAL AND REPROD. HEALTH 72 (2002)).
237. IOM 2011 REPORT, supra note 10, 103, (citing Mosher & Jones, supra note 91).
238. Contraceptive Use in the United States, supra note 143.
240. See, e.g., Tanya M. Phares et al., Effective Birth Control Use among Women at Risk for Unintended Pregnancy in Los Angeles, California, 22 WOMEN’S HEALTH ISSUES 351 (2012).
Regarding cost as a factor respecting usage, several indicators suggest that it is at most, a small factor. The Report does not cite a single source indicating otherwise. First, as a very general matter, it should be noted that contraception is used at higher rates by those who pay more for it, than among those who receive it free or at very low cost, indicating in a general way that cost is not a very significant factor. Second, myriad surveys of women and girls in the United States reveal that many other factors trump cost with regard to women’s decision not to use contraception. In fact a CDC report cited in the Report for the ninety-nine percent “ever use” figure, shows that, among the eleven percent of American women and girls at risk of unintended pregnancy who are not practicing contraception, lack of access is not a significant reason. Rather among the subset of women who experienced “unintended pregnancy,” leading reasons included: they did not think they could get pregnant (44%); they did not expect to have sex (14%); they “didn’t really mind” if they got pregnant (23%); or they were “worried about the side effects” of birth control methods (16%). The proportions of women citing other reasons were much smaller. In fact, of its list of “frequently cited reasons for nonuse” the CDC did not list financial reasons at all.

A 1996 study of adolescents listed as the “most frequently cited reasons for not using contraceptives prior to conception”: “I didn’t mind getting pregnant” (20%) and “I wanted to get pregnant” (17.5%), followed by “I was using birth control but it didn’t work (broke)” (12%), “I thought there was something wrong with me and I couldn’t get pregnant” (9%), and “I just didn’t get around to it” (9%). Again, cost was not mentioned as a factor. Finally, in Guttmacher and CDC reports on the rise in unintended pregnancies in the early 2000s among women in their 20s and 30s, unintended pregnancy rates among women ages twenty-five to twenty-nine rose from 66 to 71 per 1,000 women, and among ages thirty to thirty-four, from 38 to 44 per 1,000, the authors did not include the cost of birth control among the explanations. Rather they listed: more sexual activity, inconsistent use of birth control, ambivalence about getting pregnant, and worries about the “biological clock.” A CDC report on women’s choice of birth control methods also indicates that women are not for the most part leaving the more effective methods of contraception due to cost, but rather because of side effects they attribute to the method.

243. MOSHER & JONES, supra note 91, at 6.
244. Id. at 14.
Finally, Professor Austin Hughes points out that in a Guttmacher source the IOM Report overlooked, only 3.7% of the total sample of women who were seeking abortions listed financial reasons as the cause for their not using contraception. The authors of the study did not investigate further to determine what percentage of 3.7% of women could not objectively afford it, or how many were eligible for free or low cost contraception via one or more government programs.

Finally, regarding the relationship between income and contraceptive usage, long-term studies of contraception uptake among poorer populations worldwide indicate instead that cost and lack of access are not terribly important factors. The percentage of women reporting cost barriers as a reason for not using contraception ranged from a high of 4% to a low of 0.6%. Access barriers were reported by a high of 0.5% of women to a low of 0.3% of women, while health concerns or opposition to the use of contraception accounted for the largest share of reasons. Harvard University development economist Lant Pritchett writes that surveys of poorer women who “do not want a child and are not using contraception” about why they are not using it, include:

[A]nswers like that they dislike the side effects, that they are no longer fecund, that they are sexually inactive, that they have religious objections, that their husband is out of the country for a year. That is, many women give reasons suggesting they do not want contraception and only a few cite access or price as reasons for their “unmet need” status attributed to them.

He concluded: “The lesson that actual implementation of family planning programs has consistently found is that getting uptake is hard, not just slapping it out there.”

In light of all of this material, how does the Report make the case for a causal relationship between cost and effective usage of contraception so as to cause the rate of unintended pregnancies in the United States to decline? It devotes one paragraph on page 109—in the contraception section—to the question, and a few paragraphs earlier in the Report, where the Report is considering the general question of cost and access to health care, not contraception particularly. The page 109 reference states that cost-sharing requirements can result in less use of preventive and primary care services, particularly for low income populations, citing a 2003 Hudman

248. Jones et al., supra note 222, at 297–98 (detailing in Table 3 percentage of women obtaining abortions who had not been using contraceptive method in month of conception, by reported reasons for nonuse.)

249. WORLD BANK, UNMET NEED FOR CONTRACEPTION 1, 3–4 (2010).

and O’Malley article about cost-sharing and low income populations.\textsuperscript{251} This source is little help to the government’s case. First, as already discussed, neither the Report nor the Mandate is about health insurance for low income populations, but for employed women and the daughters of the employed. Consequently, an article about the effect of cost sharing on low income populations is not relevant. Looking more closely at Hudman and O’Malley, one further finds that this piece acknowledges that not all studies find a relationship between cost sharing and access to primary and preventive services.\textsuperscript{252} Finally, Hudman and O’Malley never make particular findings about contraception as a preventive service.

The second article cited on page 109 of the report is claimed to prove that “[e]ven small increments in cost sharing have been shown to reduce the use of preventive services, such as mammograms.”\textsuperscript{253} First, it should be noted that this article was specifically about mammograms only, not contraception, so it cannot provide any information or guidance about cost sharing and contraception. Second, the article studied only women using Medicare, and measured only “enrollees . . . between the ages of 65 and 69.” As 65 is a common retirement age, and an age at which women are generally infertile, this study considered few if any women affected by the Mandate.

The most relevant study cited by the Report in this section claims to demonstrate that eliminating co-pays increases women’s resort to LARCs versus other methods of contraception.\textsuperscript{254} This study does not claim to show that more women overall will resort to contraception usage when contraception is free, nor that more women will remain faithful to LARCs over more than a few years—despite women’s regular dissatisfaction with such methods\textsuperscript{255}—only that more will consider using LARCs over other methods. But if government enthusiastically supported an increased resort to LARCs, as already suggested above, this might well reduce unintended pregnancy rates over time. The physical, emotional, and moral hazards of such a strategy are not considered in the Report.

Also regarding the relationship between cost and access, an earlier section of the Report treats this question with respect to preventive health care generally, not with specific reference to contraceptives.\textsuperscript{256} First, it cites a Kaiser Family Foundation study for the claim that women are more

\begin{itemize}
\item \textsuperscript{252} Id. at 1–2.
\item \textsuperscript{253} Id. at 19 (citing Amal N. Trivedi et al., Effect of Cost Sharing on Screening Mammography in Medicare Health Plans, 358 NEW ENG. J. MED. 375 (2008)).
\item \textsuperscript{254} Id. at 109.
\item \textsuperscript{255} See supra note 232 and accompanying text.
\item \textsuperscript{256} IOM 2011 Report, supra note 10, at 19–20.
\end{itemize}
likely than men to report cost barriers to accessing medical care. But the study is inapposite; it asked men and women if they or a family member had delayed or forgone health care in the past year because of cost. Women reported, by a few percentage points more than men, that they or a family member (male or female) had done so. The Report also cites other studies claiming that women delay various preventive care treatments due to costs, but none consider contraception specifically.

C. Concluding Thoughts about the IOM Report

This Article has expended more space on the question of the relationship between mandatory “free” contraception and women’s health than did the IOM Report itself. This is indicative not only of the genuine complexity of the topic, and the inability to make simple cause and effect connections and predictions about it, but also of the possibility that the IOM did not so much conduct an investigation of the topic as they did draft a brief on behalf of a preordained position. The lone dissenter to the IOM Report—Dr. Anthony Lo Sasso—was likely accurate when he wrote:

The committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee’s composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy.

His conclusions are supported by the doubtful objectivity of the IOM process as indicated by the prior commitments of so many of the panel members and invited witnesses. These matters have been fully documented in a set of comments submitted to HHS in 2011, but a few highlights include the following: At least nine of the sixteen panel members had close ties with the nation’s largest provider of government-subsidized birth control, and the largest abortion provider, Planned Parenthood—serving as members or even chairs of boards of directors of various Planned Parenthood affiliates nationwide. They had recently donated over one hundred thousand dollars to that organization. Others founded or worked directly for other contraception and abortion advocacy groups. Invited witnesses included Planned Parenthood, the abor-

257. Id. at 19 ("Indeed, women are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families.").


260. Id. at 207.

tion advocacy groups the National Women's Law Center, and the Guttmacher Institute. There was no representative on the panel, or as a witness, from the leading private provider of health care to women in the United States: Catholic health care services.

In sum, the IOM Report did not prove any of the following: that it used a reliable and consistent measure of unintended pregnancy; that there is a relationship between contraceptive usage and unintended pregnancy or abortion rates; that unintended pregnancy causes poor health outcomes for women; that rates of contraceptive usage are driven by cost; or that increasing usage among the objects of the Report—employed women and the daughters of the employed—will affect rates of unintended pregnancy which are highest among women already provided with free or low-cost contraception from the government. The IOM Report also did not consider the several categories of well-developed literature bearing on the subject of the links between contraceptive usage and women’s health: physical side-effects of contraception; and the social changes effected by dissociating sex from commitment and from parenting.

IV. The Federal Government Has Not Satisfied the Compelling State Interest Test for Burdening the Free Exercise of Religion

The Religious Freedom Restoration Act forbids the federal government from substantially burdening the exercise of religion unless the burden: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. This obtains even if the “burden results from a rule of general applicability.” A compelling governmental interest analysis also applies to federal and state laws burdening free exercise which are not “neutral laws of general applicability,” according to the jurisprudence interpreting the First Amendment of the U.S. Constitution. This Article does not take up the matter of the Mandate’s substantial burden on free exercise, nor does it address the question of its “neutrality” or “general applicability.” It does, however, suggest that in whatever context—RFRA or the First Amendment—the federal government is required to show a “compelling governmental interest” in the Mandate, the government should fail, based upon its failure to demonstrate such an interest in the Report the government claims provides its evidentiary basis for the Mandate.

The government’s interest in the Mandate, as suggested by the Report, but also as specifically articulated by the Secretary of the responsible

264. Id. § 2000bb-1(a).
agency, HHS, is: to “increase access to contraceptives”\(^266\) in order to benefit women’s health. A recent U.S. Supreme Court decision engaged in an extended discussion of what a government must demonstrate in order to show that it possesses a “compelling interest” in promulgating a law. The case was the First Amendment free speech decision: Brown v. Entertainment Merchants Association.\(^267\) There, the Supreme Court struck down California’s law restricting minors’ access to violent video games on the grounds that the state had failed the compelling governmental interest analysis. The decision strongly indicates that the shallow, disputed, and incomplete argument on behalf of the Mandate will not satisfy a compelling state interest test.

The standard announced by the Court in Brown was as follows: the state must “specifically identify an ‘actual problem’ in need of solving,” and that the burden on the constitutional right is “actually necessary” to the solution.\(^268\) It may not make a merely “predictive judgment” about a direct causal link based upon competing studies.\(^269\) It may not rely upon “ambiguous proof.”\(^270\)

In Brown, California relied primarily upon the research of one Ph.D. “and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children.”\(^271\) The Court rejected these as proof of a compelling state interest due to the following defects: first, the state was required to “prove” that the thing it is regulating is the “cause” of the harm it is seeking to prevent.\(^272\) Evidence of “correlation” (versus “causation”) was insufficient. So, additionally, were studies with “significant, admitted flaws in methodology.”\(^273\) Further, even if causation could be shown, evidence that the “effects” are “small” and “indistinguishable” from effects produced by things not regulated, renders the legislation underinclusive—the Court used the expression “wildly underinclusive.”\(^274\) The Court continued: “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”\(^275\)

Further, if there is only a “modest gap” between the government’s ultimate goal and the current situation on the ground, “the government

\(^{266}\) Press Release, Dep’t of Health & Human Servs., supra note 4. (“This rule will provide women with greater access to contraception by requiring coverage and by prohibiting cost sharing.”).
\(^{267}\) 131 S. Ct. 2729 (2011).
\(^{268}\) Id. at 2738.
\(^{269}\) Id.
\(^{270}\) Id. at 2739.
\(^{271}\) Id.
\(^{272}\) Id.
\(^{273}\) Id.
\(^{274}\) Id. at 2740.
\(^{275}\) Id.
does not have a compelling interest in each marginal percentage point by which its goals are advanced.”276 This last observation referred to a potential twenty percent gap between the video industry’s practices regarding restraining minors’ access to violent video games, and the California law’s intention to require explicit parental or aunt or uncle approval.

Applying Brown’s summary of a “compelling governmental interest” analysis to the case at hand, it is not difficult to see how the federal government has failed, by a wide margin, to demonstrate such an interest with respect to the Mandate. There is, first, real empirical uncertainty about how to measure the “unintended pregnancy” the government wishes to prevent. Thus the state may not have identified an “actual problem” in need of solving.

Even, however, if the state had articulated a well-supported and consistent measure over time, of the meaning of unintended pregnancy, it did not show that the burden on religions’ free exercise is “actually necessary” to solving the problem of unintended pregnancy. Rather, the government relied upon an intuitive or “predictive judgment” of a direct causal link between no-cost contraception and reduced rates of unintended pregnancy, and upon unsupported claims regarding causal links between unintended pregnancy and women’s health outcomes. It seemed to rely upon the intuition that what is true on an individual scale—contraception can prevent a pregnancy—must be true on a social scale; but to do so it had to ignore a large and developed literature indicating that this has not been consistently true in the past, and that there are rational reasons—economic and psychological reasons, among others—why large scale contraceptive programs might produce different, even contrary results.

The government’s proffer falls far short of the Brown standard. Like California in the Brown case, HHS here rested its finding on a relatively few studies. It didn’t acknowledge let alone explore “competing studies”; its findings are a tiny drop in the ocean of the relevant literature and they are sometimes even strenuously contradicted by competing studies. This is exactly the kind of “ambiguous proof” the Brown Court rejected. Additionally, on the matter of “ambiguous proof,” versus “prov[ing]” that the thing it is regulating is the “cause” of the harm it is seeking to prevent, the Report gave evidence only of “correlation” versus “causation,” respecting the relationship between contraception and unintended pregnancy, and any relationships between unintended pregnancy and women’s health. This is, according to Brown, insufficient de jure.

Finally, respecting the Brown requirement that any “causal” effects are more than “small,” and not “indistinguishable” from effects produced by things which are not regulated—i.e., that the regulation is fatally underinclusive—it is easy to see from the evidence set forth above that laws addressing many unregulated things might have a greater effect upon women’s decisions to use contraception and use it effectively—or to avoid

276. Id. at 2741 n.9.
smoking, drinking, depression, and violence during and after a pregnancy—than a law reducing its cost to zero. These include: making contraception safer in order to address women’s fears about its safety; supporting research on male contraception; supporting fertility education, so more women and girls will know when they are likely to become pregnant (and in the case of the first three suggestions, assuming the government could overcome the objection that “unintended pregnancy” is not significantly related to women’s health); and stepping up preventive education for women—especially in their late adolescence and early twenties—concerning smoking, drinking, depression, and domestic violence, etc. Some of these proposals get at the causes of women’s health problems. Others answer the concerns raised by women and girls in interviews about why they are among the few who choose not to use contraception.

Regarding this “few,” it should also be noted that there is here, in the case of the Mandate, a far smaller gap than the twenty percent gap called too “modest” in the Brown opinion to justify sweeping regulations to attempt to close the gap to zero. In the words of the Brown Court: “Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.”277 As applied to the Mandate then, one might say that “even if contraceptive usage by women at risk of unintended pregnancy could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.” Yet, given that even one hundred percent contraception usage by “at risk women,” would leave between four and fourteen percent of users pregnant each year due to use or method failure, the gap between eighty-nine percent usage and one hundred percent usage may not really be amenable at all to government “help” or mandates. Only some sort of state-monitored sterilization or LARCs program pressing usage, not mere access to contraception—a program undoubtedly falling hardest on those who are poor and a minority, and at greatest risk for unintended pregnancy—would make more than a few percentage points difference at all. It would seem that Griswold v. Connecticut278 and Eisenstadt v. Baird279 would at the very least, forbid this type of governmental invasion of individuals’ and couples’ constitutionally delineated right to decide about contraception. More to the point, however, this is not what the Mandate does. The Mandate fails the Brown test. The government cannot demonstrate that increasing access to contraception will produce lowered rates of unintended pregnancy among the women affected by the Mandate, or that,

277. See id.
278. 381 U.S. 479 (1965).
even if it could, their health would thereby be improved. The Mandate fails the Brown test regarding a “compelling governmental interest.”

V. CONCLUDING THOUGHTS ON THE MANDATE, AND ON WOMEN AND RELIGIOUS FREEDOM

The practical effect of the HHS Mandate would be to render less visible the last and still visible objectors to the contraceptive project. These churches would be forced to sign on de facto if not theologically to the project. The Mandate would not only render their teachings more private—as they could no longer be shared in practice with employees or students, or clients, or patients—but it would de jure characterize their teachings as violations of women’s freedom and equality.

This is troubling on its face, as it denigrates in substance a long held teaching of a religion espoused by about one quarter of American citizens. But things might also be worse. It might turn out that the government’s efforts to advance women—by advancing the contraceptive project—harm women, in the various ways this Article suggests. This is possible because there is a rational and empirically supported possibility that women’s freedom—including freedom from unwanted pregnancies, addictions, violence, and depression—is better achieved when women and men practice the virtues and disciplines expressed in the Christian and other churches’ conscientious objection to the Mandate. This subject is too large to take up in an already lengthy Article. It should only be remarked here that the churches opposing the Mandate hold, and teach women and men to maintain, an understanding of the sacredness of sexual intercourse, and its intrinsic connection with the procreating of new, vulnerable, human life. These teachings are the natural precursors to fewer uncommitted sexual encounters, fewer unintended and nonmarital pregnancies, and fewer abortions. There is a great deal of evidence, in fact, indicating that women in particular benefit physically, mentally, and otherwise, from practicing the personal and religious disciplines flowing from these teachings. Consequently, there are good reasons to believe that their health will flourish in situations wherein the free exercise of religion is strongly protected. Not only do women, on average, practice their faiths more than men, but among practicing Catholics and Christians generally, data shows that there is less nonmarital sex (a chief indicator of unintended pregnancy), more marriage, less cohabitation (thus less domestic abuse), and less excess drinking and depression. Finally, across na-


tions, countries giving religious freedom a wider berth tend also to better respect women’s equality.282

All of this is in addition to the practical observation that women would lose a great deal of health care if religious health care institutions were forced to go out of business due to the Mandate. The Catholic health care system in the United States alone accounts for one in six hospital patients, one in eight hospitals, 19 million emergency room visits and 101 million outpatient visit.283 Studies show that this system provides “significantly better quality performance” than investor-owned systems and secular not-for-profit systems.284

Why then call it “women’s freedom” when religion—a source of support and conviction, not to mention healthy relationships and healthcare, for women—is shackled? At the very least, the religious voice, the religious project where sex and marriage and parenting are concerned, ought to be allowed to continue to shine its light. Religion’s thick, intuitive, and longstanding rationales for keeping in mind the links between sex and new life can help restore balance to our national discourse about sex and marriage and parenting. Not only women, but society itself, would be better off if the religious witness were allowed to live.


“RELIGIOUS FREEDOM,” THE INDIVIDUAL MANDATE, AND GIFTS: ON WHY THE CHURCH IS NOT A BOMB SHELTER

PATRICK MCKINLEY BRENNA**

I.

IN 2007, I published a paper bearing the formidable title, *The Decreasing Ontological Density of the State in Catholic Social Doctrine.* In more modest terms, the thesis of that mostly descriptive paper was that, over the course of the last century and the beginning of this one, much thinking in a Catholic idiom has *downgraded* the state. Many welcomed the possibility of such a downgrading, while others considered it ominous. I was on the fence, though inclined in the latter direction. Further reflection and study have confirmed me in the judgment that the downgraded state, a merely “instrumentalist” state—as it is sometimes called, without a trace of the pejorative—is untenable, for both natural and supernatural reasons.

Some background and context will help to set the stage for the current inquiry. The eminent twelfth-century English jurist John of Salisbury developed the image of the “body politic” to describe, in an unprecedented way, the relationship between civil society, the state, on the one hand, and ecclesiastical society, the Church, on the other. This image structured most Catholic thought on the topic of “Church and state” until recently. According to traditional Catholic thought, the state is nothing less (or other) than the *body* politic of which the Church is the *soul,* which together constitute a single unity of order. My earlier paper, echoing in part work by Russell Hittinger, undertook to demonstrate that recent Catholic thinking, including that of some of the more recent Popes, has

* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. An early version of this paper was presented at the Roman Forum in Gardone Riviera, Italy, in July 2012, and I am grateful for its warm reception there and especially for the questions and suggestions of John Rao, Brian McCall, Chris Ferrara, and Monsignor Barreira. This revised version of the paper was delivered at the Seventh Annual John F. Scarpa Conference on Law, Politics, and Culture at Villanova Law School, on September 14, 2012.


sought to shrink the substance, scope, and end of the state, or, in a word, to de-substantiate the state. I meant to sound something of a warning. To separate the soul from the body is, after all, the very definition of death. Which is why Blessed Pope Pius IX condemned so strenuously the proposition that “the Church ought to be separated from the State, and the State from the Church.”

In light of the foregoing, the issue I would like to pursue here, more than suggestively as I did in that earlier paper, is whether the downgraded state—the ontologically emaciated state—of recent coinage can bear the weighty office assigned to the state by permanently valid tenets of Catholic doctrine. The Catholic tradition of reflection on the state is not static, but it does include elements and permanently valid ideals that are not subject to revision, even if their application will vary by time and place. One of these is that the state is responsible, first, for the temporal common good, not merely for keeping the peace and preventing rampant violation of the harm principle, and, second, for collateral assistance to the Church in her distinct, superior, and ultimate mission of saving souls.

3. My title was a variation on part of a sentence by Russell Hittinger: “In twentieth-century Catholic thought, one detects a steady deterioration of any ontological density to the state.” Russell Hittinger, Introduction to Modern Catholicism, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 3, 22 (John Witte, Jr. & Frank Alexander eds., 2006). As Hittinger explains (approvingly):

On the part of the states, the solution would require not only jettisoning the idea that the modern state is a sanctum in the medieval sense of the term; it also pointed to the need for what the famous Catholic social theorist and politician Luigi Sturzo (1871–1959) termed a “rhythm of social duality.” Society is neither a creature of the state nor the church. It is not a ‘depersonalized whole’ capacitated to act only through the superstructure of ecclesiastical or civil administration.

Id. at 12 (footnote omitted).

4. POPE PIUS IX, SYLLABUS OF ERRORS No. 55 (1864).

5. As Alfredo Cardinal Ottaviani wrote, These principles [regarding Church and state] are firm and immovable. They were valid in the times of Innocent III and Boniface VIII. They are valid in the days of Leo XIII and of Pius XII, who has reaffirmed them in more than one of his documents.

I am certain that no one can prove that there has been any kind of change, in the matter of these principles, between the Summi pontificatus of Pius XII and the encyclicals of Pius XI, Divini Redemptoris against Communism, Mit brennender Sorge against Nazism, and Non abbiamo bisogno against the state monopoly of facism, on the one hand; and the earlier encyclicals of Leo XIII, Immortale Dei, Libertas, and Sapientiae christianae, on the other.

“The ultimate, profound, lapidary fundamental norms of society,” says the august Pontiff [Pius XII] in his Christmas radio-message of 1942, “cannot be damaged by the intervention of man’s genius. Men can deny them, ignore them, despise them, disobey them, but they can never abrogate them with juridical efficacy.”

My question is what the Catholic tradition teaches about how we ought to think about the state, and the contemporary fact of the so-called contraceptive mandate of the Patient Protection and Affordable Care Act makes this an opportune time to recall and recover aspects of the permanently valid ideal taught by the Church. I will argue that it is not enough for the Church to be exempted from this law, so as to preserve her internal freedom; the Church’s mission includes correcting and transforming the state and civil society for the common good, not just staying at liberty within herself. The latter is necessary but not sufficient.

II.

I should pause here to anticipate the response of some people who would look exclusively to political philosophy or to whatever else, but certainly not to Church doctrine, to learn what the nature of the state is, if they even believe that the state has a “nature” anymore. The Church and faithful Catholics must resist the fallacy behind this diversion away from doctrine, however, and for reasons that go to the heart of the matter. For the last two thousand years, before any particular state came into existence, the Church was already founded, and from the time of her founding, the Church has provided, among other things, a limit to the state. Because of the Church, the state cannot be all in all. As Pierre Manent has written, “the political development of Europe”—but not just of Europe—“is understandable only as the history of answers to problems posed by the Church.”6 To a world that once contained only one perfect society, the state, another perfect society, the Church, was added for the rest of time, and “the gates of hell shall not prevail against her.”7 Without reference to the Church’s self-understanding and correlative understanding of what is not the Church, the state cannot but risk usurping what is not its own and pursuing ends that are ultra vires. Needless to say, states have not generally leapt to embrace the other perfect society in her wholeness, viewing her instead as the “problem” Manent reported. And so the Church has worked out countless different relations with countless different states, some of them better for the Church’s mission than others. Concordats constitute one category of mutual accommodation that the Church has often pursued.

None of this is to say that the magisterium of the Church cannot err as it attempts prudently to determine how best to apply unchangeable elements of tradition in concrete historical circumstances. It is to say, however, that the nature of the state cannot now be accurately established without attention to the Church and what she says about who she is and, correlatively, about what everything else, including the state, can or cannot be. Before the inruption of the Church into salvation history, Greek

---

and Roman philosophers (and others) were free, indeed obliged, to speculate about the nature of the state without regard to what did not yet exist. After the founding of the Church at Pentecost, however, the nature of the state is radically altered, though you would hardly know as much from the decreasing ontological density of the state in some recent Catholic social thought. And this, inevitably, is the context in which we consider the problem of the state today.

The crux of the matter is the following: “If we ask a modern person who or what is sovereign, he or she would not say ‘reason,’ ‘the individual,’ or ‘science,’” let alone God, “but instead, without hesitation, ‘the state.”’ The modern mind says this not about the corpus mysticum that was the organic union of the Catholic Church and the Catholic state, not about the absolute regimes that followed historically, but, ironically, about the modern nation state that has given up all pretense to rule in the name of a higher power in order, instead, relentlessly to expand its jurisdiction so as to achieve its new and substitute end of being an almost infinitely pliable conduit for the self-assertion of endlessly revisable selves. The dangerous irony to be confronted here is that what some magisterial documents celebrate as a mere instrumentalist state—what Pope Pius XII in Summi Pontificatus referred to as “quasi instrumentum”—ought instead to be feared. Why? Because the instrument has morphed from being the servant of the common good, of the bonum honestum as the ancients called it, into being the roving and armed agent of inexorable majority will. Paradoxically, the ontologically emaciated, de-substantiated, instrumentalist state is not weak; it is awesomely powerful, indeed as is commonly said “sovereign,” in virtue of its not being inconvenienced or embarrassed by the restraints of higher law or, except by contingent concession, of other unities of order, let alone by that other and superior perfect society that is the Church.

What the world needs is to recover the ontologically dense state, and for this what is needed is a recovery of the deeper strands of Catholic social doctrine, specifically those concerning the state’s place within an order of higher law, and those concerning the rightful place of the Church over and within the state and of a plurality of social forms that deserve not only immunity from state power but freedom to fulfill what I shall refer to (following Pope Pius XI and later Catholic social doctrine) as their munera, their proper functions. All of this is, as Henri De Lubac—whom Pope Paul VI wished to create a Cardinal and whom Blessed Pope John Paul II did create a Cardinal, in each instance for his theological work—“no more than the Gospel requires.” It is a separate project to construct states in defiance of the Gospel.

9. POPE PIUS XII, SUMMI PONTIFICATUS ¶ 59 (1939).
III.

Lawyers like to work with examples, and here we can do no better than to consider the timely matter of the Patient Protection and Affordable Health Care Act recently upheld by the Supreme Court of the United States. By way of background, recall that President Barack Obama signed the Act into law in March of 2010. The Act requires, among other things, that most employers’ group health plans cover women’s “preventive care.” Congress did not define this term, and so it fell to the U.S. Department of Health and Human Services (HHS) to decide which “preventive services” to include in the mandate. A year after the statute was enacted, the HHS announced that “preventive services” include contraceptives, abortifacients, and sterilization. HHS also announced that some “religious employers” would be exempt from the requirement. According to the HHS, the exemption covers only those entities whose purpose is “the inculcation of religious values” and that hire and serve primarily people of the same religious faith. A parish or a seminary could meet this definition, but most religious charities, schools, and hospitals would not. Needless to say, the distinction between “religion,” which is exempt, and corporate works of charity undertaken by the Church, which are not exempt, does not reflect the Catholic understanding of what it is to be Church in the world, but that is to get ahead of the story.

In recently upholding the Act against numerous constitutional challenges, the Supreme Court did not answer, indeed it specifically reserved, the question of whether the individual mandate as construed by HHS would survive a challenge under the Free Exercise Clause of the U.S. Constitution. Such a challenge has already been lodged. On May 20, 2012, forty-three religious institutions filed lawsuits in federal courts across the United States, and many others have followed. The terms of many of these legal challenges track the rationale of the challenge pressed for months in the media, led by the United States Conference of Catholic Bishops (USCCB), among others, according to which such a requirement violates the “religious liberty” of the Church by forcing her, as a condition of doing the charitable work of God’s Church, to violate the moral law as taught by the Church.

The likely results of the lawsuits are hard to predict, above all for the reason that the U.S. Constitution has never been construed to protect the libertas Ecclesiae, strictly speaking, or even of the liberty of churches, generically speaking. It is true, nonetheless, that there are precedents that,

11. “Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring and dissenting).

12. “Notwithstanding all of the data points in the previous paragraph, it remains unclear and unsettled what exactly are the content and textual home in the
taken together, could provide the Court some basis for finding in favor of the Church. I will mention just two examples. In Boy Scouts of America v. Dale, decided in 2000, the Court upheld, in a 5-4 vote, the right of the Boy Scouts not to have to accept homosexual scoutmasters on the ground that to do so would violate the Scouts’ constitutionally protected freedom of expressive association based in the First Amendment guarantee of free speech. In a second and related vein, in January 2012, in Hosana-Tabor Lutheran Church & School v. EEOC, the Court held unanimously that the Establishment and Free Exercise Clauses of the First Amendment require the availability of an “affirmative defense” against suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. These and some other holdings present some filaments that could perhaps be woven together into an argument that Church agencies have a right to be left alone. And this is exactly the point to underscore: these are arguments for groups to be let alone.

The cultural and societal push in favor of such argument, to the limited extent there is such a push, sounds in terms of “pluralism,” that is, the desirability of a plurality of groups. But why, we might well ask, should such arguments prevail? Why is more better in this context? Or, more technically, why is such pluralism normative? Sometimes the answer is just assumed or assumed away, as a sort of a fortiori from the presumed hegemony of “diversity.” A more common but still crude account teaches that civil society is stabilized by power checking power, and this is an account with a familiar if dubious intellectual pedigree and aim. A third account, which lends some indirect support to the predicates—though not necessarily the aims—of the second, is that groups or, to speak more tech-
nically, associations, have an irreducible ontological reality that calls for acknowledgment, at least by realists.

To this third view the great nineteenth-century English jurist F.W. Maitland gave memorable voice:

“When” . . . “a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.”

. . . .

If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will “denature” the facts . . . . For the morality of common sense the group is a person, is right-and-duty bearing unit.17

On this account, when individuals, with the intention of stable order, engage in united action for a common purpose, the result is a new existent, a unity that transcends the aggregation of its parts. In other words, a group person or what St. Thomas refers to as a unity of order comes into existence.18 When this happens, Maitland notes, we are required to recognize “n + 1 persons.” To do otherwise would be, again, to “de-nature the facts.” It is conceded that groups are not ontologically basic in the order of substances or substantial unities. “They are basic, however, in constituting a unity that excels parts (members) which are also wholes (natural persons).”19 As a bearer of rights and responsibilities, an association, like a substantial unity, “can harm or be harmed in the moral sense of the term.”20

In its strongest form, then, pluralism of the sort I just have been summarizing is a plea not to de-nature the facts. Those who grant the facts, however, can counter that the state may have good and sufficient reason to require through law that associations conform to the extrinsic norms of positive law. The point is concessum as concerns a spectrum of associations

17. F.W. Maitland, State, Trust and Corporation 63, 68 (David Runciman & Magnus Ryan eds., 2003); see also David Runciman, Pluralism and the Personality of the State 89–123 (1997).
but not, however, with respect to the Church, which is not, in the relevant sense, just an “association.” When it comes to the Church, she has a divine right to exercise a direct jurisdiction with which the state may not interfere, at least not without the Church’s concession. To insist on this point is to risk being murdered in a cathedral, however, as T.S. Eliot recalled in 1935 writing of the consequences “the absence of a cathartic moment of a repentant state.”

So, for reasons of safety, I merely mention it and move on.

Returning to my main line of argument, we need to augment the analysis by introducing the technical term “civil society,” a protean but prodigious contributor to contemporary debate about the limits of government. In his book *Conditions of Liberty: Civil Society and Its Rivals*, political philosopher Ernest Gellner refers to the “ miracle of Civil Society,” which he defines as:

[T]hat set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society.

I will mention two problems with Gellner’s instrumentalist account of civil society. First, it would seem to allow defense of civil society principally on the ground that “useful goods, including liberty, are more efficiently produced and distributed by non-governmental agents.” Indeed, according to Gellner, civil society is the “social residue left when the state is subtracted.” The trouble with this defense of the non-state association is that it reduces the private sector to exactly—neither more nor less than—what it can do most efficiently and to what mutually checking powers are needed to check the power of the state. Harvard political scientist Nancy Rosenblum supplements this generic efficiency defense of civil society with the specific efficiency that a pluralism of private associations lets off the

---

21. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, supra note 3, at 17. As the late Harold Berman wrote,

The conflict between Becket and Henry was essentially a conflict over the scope of ecclesiastical jurisdiction; it was thus a paradigm of the Papal Revolution, which established throughout the West two types of competing political-legal authority, the spiritual and the secular. One effect of this dualism was to enhance the political-legal authority of kings in the secular sphere. Another effect was to create tensions at the boundaries of royal and papal jurisdictions. These tensions were resolved in different ways in different kingdoms. Their resolution in England was strongly influenced by circumstances of Becket’s martyrdom.

Berman, *supra* note 2, at 260.


steam of values that are illiberal and therefore inconsistent with the ideals of liberal democracy.\textsuperscript{25}

The second and related problem with a purely instrumentalist defense of civil society, also from a functionalist perspective, is that it provides no traction to resist government efforts on behalf of what Rosenblum and Yale Law dean Robert Post refer to disarmingly as “congruence.” They explain that:

The “logic of congruence” envisions civil society as reflecting common values and practices “all the way down.”

Congruence is often advocated with regard to the egalitarian norms of liberal democracy. The claim is that the internal lives of associations should mirror public norms of equality, nondiscrimination, due process, and so on. In the United States, for example, norms of equality and due process have been imposed on vast areas of social life, even on small, informal associations.\textsuperscript{26}

Rosenblum and Post were writing a decade ago, but note how perfectly the Obama Administration’s arguments for equal access to “preventive services” exemplify an application of the logic of congruence, one to which Gellner’s social residue provides no resistance. Rosenblum and Post perhaps counseled something of a cautious \textit{modus vivendi} between the aspirations of congruence and the particularist pluralism of civil society,\textsuperscript{27} but the unavailing quality of such articles of peace is now unmistakable.

The downgraded state that is ontologically thin becomes the powerful, imposing agent of the preferences of the majority. As Rosenblum and Post explain:

Advocates of congruence fear that the multiplication of intermediate institutions does not mediate but balkanizes public life. They are apprehensive that plural associations and groups amplify self-interest, encourage arrant interest-group politics, exaggerate cultural egocentrism, and defy government. What is needed, in their view, is a strong assertion of public values and policies designed to loosen the hold of particular affiliations, so that members will be empowered to look beyond their groups and to identify themselves as members of the larger political community. The “logic of congruence” envisions civil society as reflecting common values and practices “all the way down.”\textsuperscript{28}

\textsuperscript{25. See Russell Hittinger, Reasons for a Civil Society, in The First Grace, supra note 23, at 269.}
\textsuperscript{27. See id. at 17.}
\textsuperscript{28. See id. at 13.}
The ontologically thin state Rosenblum and Post defend turns out to be as potentially powerful as one can imagine, even as it masquerades under the unassuming mask of “congruence.”

IV.

It is fair to say that since the mid-nineteenth century, liberalism and Catholic social doctrine have been alike in their attentiveness to limits on the state. But whereas liberals valued civil society mainly for its instrumental—and, as we have seen, mostly illusory—ability to check the state, Catholic social doctrine has recognized and sought to multiply the intrinsic perfections of societies or associations. What “social residue” defenses of civil society, such as Gellner’s, systematically ignore (and implicitly deny) is the intrinsic value of such social forms as the family and the Church, including the manifold manifestations of the Church in schools, colleges, convents, monasteries, hospitals, and so forth. What they also ignore or wish to deny, therefore, is that such unities of order are bearers of irreducible authority. “Residue” is no repository of genuine authority, but valid associations are.29

The Catholic view comes into focus if we attend to the notion of the munus regale—that is, the particular function, mission, gift, or vocation that is ruling. Beginning with the pontificate of Pius XI, this notion of the munus regale in which humans participate—and it is a “participation,” for there is only one true King—has been applied beyond its earlier Christological and ecclesiological boundaries to the offices, rights, and duties of social institutions. Properly understood, the notion of munus regale preserves but corrects the liberal’s doctrine of social pluralism.30

The Latin word munus is best, if imperfectly, translated into English as “function.” What is lost in the translation that must be preserved is that the word connotes gift-giving. This is reflected in the English word munificent, from the Latin munificus, meaning generous or bountiful. The word community, communitas, derives from the sharing of gifts. The Magi gave munera to the Christ child. And Christians speak of the triplex munus Christi: priest, prophet, and king.31

In the encyclical Divini Redemptoris, for example, Pope Pius XI wrote as follows:

We have indicated how a sound prosperity is to be restored according to the true principles of a sane corporative system which respects the proper hierarchic structure of society; and how all the occupational groups should be fused into a harmonious unity

31. Id. at 389–90.
inspired by the principle of the common good. And the genuine and chief [munus] of public and civil authority consists precisely in the efficacious furthering of this harmony and coordination of all social forces.\(^{32}\)

Pope Pius XI’s immediate successor, Pope Pius XII, continued to develop and apply this ontology, as here in the encyclical *Summi Pontificatus*: “It is the noble prerogative and [munus] of the [civitas] to control, aid, and direct the private and individual activities of national life that they converge harmoniously towards the common good.”\(^{33}\)

The development and application of the *munera* has continued down to the present, and it is worth noting that Latin edition of the *Catechismus Catholicae Ecclesiae* uses the word *munus* at least 125 times, and the 1983 Code of Canon Law uses the term nearly 190 times.\(^{34}\) My present purpose, though, is not to chart the later development and application of the concept but to establish its meaning in the Pian encyclicals and to see what light it sheds on the current debate about the contraceptive mandate and what the Church has to say about it.

We do not know exactly who or what moved Pius XI to apply the sacral concept of *munera* to the juridical realm.\(^{35}\) We do know that beginning with Leo XIII’s encyclical *Annum Sacrum* in 1899, the popes delved more and more deeply into Christ and His ruling powers, and Pius XI in a series of six encyclicals—beginning with *Ubi Arcano* and *Quas Primas* and finishing with *Divini Redemptoris*—articulated the analogies between Christ’s unique *munus regale* and the *munera* of baptized Christians. Whereas in the Leonine period individuals and associations were said to bear *iura et officia*, with Pius XI they were frequently said to bear *munera*, which are in fact the source of the *iura*.\(^{36}\)

The idea of *munus* beautifully conjoins the Aristotelian notion of an *ergon* or function with the more biblical concept of vocation or mission.\(^{37}\) With this Pius got at something that was occluded in the conventional Thomism of the time. The key point is that at the time of Pius XI’s pontificate (1922-1939), the pressing question of social doctrine was not just whether man was a social animal naturally ordered to a common good in the state, but, more precisely, the status of societies and social roles other

\(^{32}\) *Pope Pius XI, Divini Redemptoris* ¶ 32 (1937)

\(^{33}\) *Summi Pontificatus*, supra note 9, ¶ 59.


\(^{35}\) Id. at 391. This development occurred in the context of a renewed recovered of a richer ecclesiology. *See*, e.g., *Pope Pius XII, Mystici Corporis* ¶ 61 (1943). Paragraph 61 of the encyclical especially reflects the ontology developed by Pius XI in terms of *munera*.


\(^{37}\) Id. at 392. For a discussion of the Aristotelian notion of an *ergon*, see 1 *Aristotle, Nicomachean Ethics*, 1097b25–1098a19.
than the state. It was these that the totalitarians stripped of their group personality. Therefore, as Russell Hittinger explains, “[I]t wasn’t enough just to repeat the standard formulae of commutative, distributive, and legal justice. Without social content, these formulae serve no useful purpose. In fact, arguments to the common good can prove counter-productive in the face of the modern state, which is more than happy to make common the entire range of goods—or, more to the point, of false goods. Think, for example, of the logic of “congruence” and equal access to “preventive services.” But this is to get ahead of the story again.

The point to emphasize first is that Pius wished to emphasize that rights are not derived from human nature considered in the abstract; instead, the right is settled and rights are then predicated on the basis of antecedent munera. We are accustomed in law to consider rights as immunities—im-munitas, etymologically, implies the absence of a munus. But this gets things backwards. Pius XI’s achievement was to establish that an adequate account of the social order cannot proceed in the first place from immunities or negative rights. We must begin with the munera that the immunities and rights in turn vindicate. The civil ruling authority discovers—he does not assign—munera that are assigned by creation and redemption, that is, by the natural law and by the divine or ecclesiastical law, respectively. Nor does the civil ruling authority assign a Catholic hospital its munus; this the Church does, and it is for the civil ruling authority to discover it.

Discovering is not all the civil ruling authority is to do, however. It must also facilitate or, perhaps better, harmonize the plural societies in their achievement of their assigned munera, and to do so is exactly to achieve social justice, that misunderstood term that just means, as Pius XI teaches in Divini Redemptoris, that the common good is to be realized through munera-bearing associations and institutions. The munus of the

38. Id. at 393.
39. Id.
40. I pursued a particular example of this work of “harmonizing” in Patrick McKinley Brennan, Harmonizing Plural Societies, supra note 19. For a general and helpfully technical treatment of the relationship between parts and wholes in a community as understood by Aquinas, see Michael Baur, Law and Natural Law, in THE OXFORD HANDBOOK OF AQUINAS 238, 238–44 (Brian Davies & Eleonore Stump eds., 2012).
41. Pope Pius XI wrote, Verum enim vero, praeter iustitiam, quam commutativam vocant, socialis etiam iustitia colenda est, quae quidem ipsa officia postulat, quibus neque artifices neque heri se subducere possunt. Atqui socialis iustitiae est id omne ab singulis exigere, quod ad commune bonum necessarium sit. Ut autem, ad quamlibet viventis corporis compagnum quod attinet, in universum consultum non est, nisi singulis membris ea omnia tribuantur, quibus eadem indigent ad suas partes explicandae; ita, ad communitatis constitutionem temperacionemque quod pertinet, totius societatis bono prospici non potest, nisi singulis membris, hominibus videlicet personae dignitate ornatis, illud omne impertinatur, quod iisdem opus sit, ad sociale munus cuiusque suum exercendum. Si igitur iustitiae sociali provisum fuerit,
Church is assigned by divine positive law, but most *munera* are assigned by the divine natural law. With respect to the latter point, as St. Thomas argues in his opusculum *Contra Impugnantes*, free associations are valuable and to be respected—and their works harmonized—because they make *communication* possible, by which Thomas means making something *common*, or, more precisely, one rational agent participating in the life of another and generating and sharing intelligibilities that would otherwise go unachieved. To quote Hittinger: “[T]o prevent free men and women from associating for the purpose of communicating gifts is contrary to the natural law. It is tantamount to denying to rational agents the perfection proper to their nature, and denying the commonweal goods it would not enjoy were it not for free associations”—and, I would add, the intrinsic perfections capable only within it.

And it is here that that other frequently misunderstood and abused principle of Catholic social doctrine, subsidiarity, enters, for it is derived from social justice. Subsidiarity is the principle that when aid or *subsidiwm* be given either by the parts to the whole or by the whole to the parts, the “manifold organicity” of the common good is to be respected and aided, not destroyed or absorbed. Properly understood, subsidiarity is not (as is commonly thought) a principle of devolution or smallness of scale; rather, it is a principle of non-absorption predicated on the facts, established by creation or redemption, that groups have irreducible *munera* to fulfill and gifts to give. Subsidiarity cannot create a social ontology; subsidiarity presupposes the existence of social forms, each having its own *esse* ex oeconomis rebus uberes enascentur actuosae navitatis fructus, qui in tranquillitatis ordine maturescent, Civitatisque vim firmitudinemque ostendent; quemadmodum humani corporis valetudo ex imperturbata, plena fructuosaque eius opera dignoscitur.

**DIVINI REDEMPTORIS, supra** note 32, ¶ 51 (1939). Christian employers and industrialists have a proper *munus*: "Quapropter vos peculiari modo compellamus, christiani heri officinarumque domini, quibus proprium est saepenumero tam difficile *munus*, quandoquidem illam errorum quasi hereditatem ab iniusto oeconomicae rerum regimine excepistis, quod in tot hominum aetates ruinose influxit: officiorum memores estote, quibus respondere debitis." *Id.* ¶ 50.

Catholic working men also have a "*munus*" to make the Church known in their places of work:

Patris heic animo alloqui carissimos Nobis catholicos opifices, vel adolescentem vel adulta etate, libet, qui ob strenue servatam fidem in tanta temporum iniquitate, honestem arduumque onus et *munus*, loco praemii, accepisse videantur. . . . Quod quidem *munus*, ad fodinas, ad officinas, ad armamentaria, quocumque denique opus initur, proferendum, cum incommoda quandoque postulet, meminerint catholicci idem operarii Christum Iesum cum operis exemplo, perpessionis quoque exemplum coniunxisse.

*Id.* ¶ 70.


43. *Id.* at 272.

proprium, its own munus to be done and given. These munera are participations in the munus regale of Christ the King, which means that they are measured and ruled by the measure and rule of Christ’s rational will for the community and its common good.

In sum, then, civil society is not accurately conceived as an arbitrary “plurality” or, worse, an undifferentiated and tractionless “residue.” What we confront, instead, are individuals with their respective munera and associations with their respective munera, all of them arrayed under and within the state and the Church, as the case may be, sometimes in an overlapping jurisdiction, each of which individual or member association bearing its own respective munus to be performed or given. The state’s munus is the temporal common good and, furthermore, collateral contribution to the achievement of the supernatural common good by, in part, harmonizing plural societies according to social justice and the derivative principle of subsidiarity. And the Church’s munus is to accomplish the divine will that all be saved, in part by ensouling the state. The result, then, is an ontologically dense state that is not vulnerable to arbitrary impositions by a willful civil society, because it is girded and powered from within, so to speak, by munera that must be discharged, by gifts that demand to be given, because they are participations in the munus of Christ, who rules from above.

V.

As I signaled at the outset, the commonly heard “Catholic” objection to the HHS mandate for “preventive services” is that the mandate “violates religious liberty.” Perhaps this is so, but I find the expression woefully vague and, to the extent it can be clarified, under-inclusive, so to speak, of the Catholic social doctrine I have just summarized. Here, for example, is the pivotal language in the USCCB’s much-discussed document, “Our First, Most Cherished Liberty:

The mandate of the Department of Health and Human Services has received wide attention and has been met with our vigorous and united opposition. In an unprecedented way, the federal government will both force religious institutions to facilitate and fund a product contrary to their own moral teaching and purport to define which religious institutions are “religious enough” to merit protection of their religious liberty. These features of the “preventive services” mandate amount to an unjust law. As Archbishop-designate William Lori of Baltimore, Chairman of the Ad Hoc Committee for Religious Liberty, testified to Congress: “This is not a matter of whether contraception may be prohibited by the government. This is not even a matter of whether contraception may be supported by the government. Instead, it is a matter of

45. 1 Timothy 2:4.
whether religious people and institutions may be forced by the government to provide coverage for contraception or sterilization, even if that violates their religious beliefs.46

I will begin with the last point. The document claims that the problem with the mandate is that “we,” the Catholic Church, are being forced to do something that we Catholics regard as immoral, or, as Timothy Cardinal Dolan, the Archbishop of New York and President of the USCCB, put the point elsewhere, something that violates “our standard of respecting . . . religious liberty.”47 With all due respect, this is a remarkably self-referential position. As Francis Cardinal George recently wrote, “Among the sayings of Jesus, there are about as many that start ‘Woe to you . . .’ as there are those that begin ‘Blessed are they . . .’” and Jesus did not limit their effects to “us.” It is a diversion to frame the issue concerning the mandate as exclusively, or even principally, as about what the Church is being forced to do. That is only the start of it. The problem with this law is not just that it forces us (“the Church”) to do what we regard as immoral; it is not just that it forces us and others to do what we and they regard as immoral. The problem is also and above all that it forces us and others to do what is immoral, regardless of who does or does not consider it to be immoral. It is not anyone’s disagreement with the required act that makes the required act objectionable; the final cause of the act itself is sufficient to make the act immoral.49 (The degree of individual culpability is, of course, another question—and one that is perhaps affected by the Bishops’ own disavowals and bashfulness).

The munera of both the Church and the state include the work of making the moral law effective in human living, yet in the face of the state’s acting in violation of the moral law, the Bishops overtly disowned—in the language I quoted and will quote in part again—their munus to exhort state and citizens to conform the positive law to the moral law: “This is not even a matter of whether contraception may be supported by the government.” I am afraid that the Bishops’ position boils down to a plea to be let alone. Cardinal Dolan is in accord: “That’s all it’s really about: religious freedom. It’s not about access to contraception, as much as our local newspaper—surprise!—insists it is. The Church is hardly trying to impose its views on society, but rather resisting the government’s


49. POPE PAUL VI, HUMANAE VITAE (1968).
attempt to force its view on us.”50 Cardinal Dolan continues: “Vast and unfettered access to chemical contraceptives and abortifacients—all easier to get, they tell me, than beer and cigarettes—will continue. If you think it’s still not enough, then subsidize them if you insist. Just don’t make us provide them and pay for them!”51 Needless to say, the Church cannot, as a practical matter, “impose” her views on society, so that’s a red herring. Surely, however, the Church can at least propose “her views,” especially through the episcopal *munus*, rather than just going inside and underground.

Returning from the specific point to the general, here again is Cardinal Dolan’s overall approach in action: “We just want to be left alone to live out the imperatives of our faith to serve, teach, heal, feed, and care for others.”52 Cardinal Dolan’s rhetorical (and theological?) starting point is too cramped. Self-marginalization or abnegation, verging perhaps on self-imposed exile, is exactly what an ecclesial society *with gifts to give* cannot do. If it is to be true to its *munera*, it will seek to correct and transform the culture as God commands and wishes us—*qua* Church—to do. The Church’s claim is not to be “left alone”: it is to *change the world*, including through the good deeds mentioned by Cardinal Dolan. At the risk of belaboring the obvious, the *munus regale* of the hierarchy is not confined to the sacristy and the *munus regale* of the laity is not confined to the home. As to the *munus* of the laity, the Second Vatican Council is quite emphatic that the laity’s role is “to impress the divine law on the earthly city.”53 To impress is not to remain passive. The Council also teaches that it does not fall to the laity “exclusively” to perform that work.54 Other than the laity are the clergy (including the hierarchy). There is no additional category of natural actors: the disjunction is exhaustive. (Religious, whether men or women, are not, as such, clergy). This teaching of the Second Vatican Council, about impressing the divine law on the earthly city, is impossible to square with the following: “Just don’t make us provide them and pay for them!”55 The rest of the world can go to hell—just don’t contaminate “us”56

51. Id.
53. POPE PAUL VI, *GAUDIUM ET SPES* ¶ 43 (1965); *see also* POPE PAUL VI, *LUMEN GENTIUM* ¶ 31 (1964).
54. *Gaudium et Spes*, supra note 53, ¶ 43 (“Laicis proprie, etsi non exclusive, sacellaria officia et navitates competent.”).
55. See Timothy M. Dolan, supra note 50 (emphasis added).
56. Some Catholic thinkers, including the Popes, before the mid-twentieth century saw this coming: “they feared that once the state was depicted instrumentalist terms, the other organs of society would inevitably follow suit. In other words, they feared that the liberal state, even in its most favorable depiction as an instrument rather than the substance of the common good, would produce atom-
What the argument exclusively from “religious freedom” neglects—or, rather, often intentionally suppresses—is the fact that the Church and her charities are entitled to freedom not just because of a brute right to be let alone, a right not to be interfered with, or, in other words, an immunity. Rights to be let alone are derivative, as we have seen, of the various associations’ respective particular munera, the works and functions they are charged to perform. The sufficient reason to let schools, adoption agencies, and all the rest, including hospitals, go about their work unhindered is that social justice and subsidiarity demand it. They demand it because the Church has entrusted her munus of charity to these particular associations which are capable, as Pope Benedict XVI stressed in the encyclical Deus Caritas Est, echoing Leo XIII in the encyclical Rerum Novarum, of delivering what the state could never do or even simulate,57 and all of that is no less than what Christ the King commands His Church to do. The reason the state is legally obligated, not merely obliged, to respect the Church’s governance of her member organs, including hospitals, is that, by divine law, the Church enjoys a real, direct, and final jurisdiction over herself and her members. But this does not mean that the Church is not also charged by divine law to correct and transform the world.

Some defend the exclusivity of the “just let us alone” argument on prudential grounds. I respect those who honestly defend such a position, despite its glaring incompleteness, and although I do indeed see some circumstance-specific (viz., late post-Modernity) merit to this line of argument, I am not persuaded, certainly not of its sufficiency. Does it not bespeak a much deeper and unacceptable abdication and resignation, in the face of a deadly political morality, of the munus regale? Regardless of the prudence vel non of that argument, though, there is, I must concede, some fairly prestigious precedent for such a defense. I refer to the Second Vatican Council’s Declaration on Religious Freedom, Dignitatis Humanae Par. 13, which states that the libertas Ecclesiae is “principium fundamentale” governing relations between the Church and government and the whole civil order. The teaching of Dignitatis is not infallible as a matter of Catholic theology, however, and I am afraid that on this point, at least, it is mistaken. As Marcel Lefebvre once explained:

Freedom is not the fundamental principle, nor a fundamental principle in the matter. The public law of the Church is founded on the State’s duty to recognize the social royalty of Our Lord Jesus Christ! The fundamental principle which governs the relations between Church and State is the “He must reign” of St. Paul: Oportet illum regnare (I Cor. 15:25)—the reign that ap-

57. POPE BENEDICT XVI, DEUS CARITAS EST ¶¶ 28b, 31 (2005); POPE LEO XIII, RERUM NOVARUM ¶ 30 (1891).
plies not only to the Church but must be foundation of the temporal city.\textsuperscript{58}

It is a permanently valid principle of Catholic social doctrine—because it is \textit{the one historical inevitability}—that Christ must reign. As the early Christians understood and taught, creation itself was for the sake of the Church,\textsuperscript{59} and the \textit{munus} of the Church is not merely the maintenance of some internal freedom for the benefit of the faithful already graced to be inside the bomb shelter; it is, as well, as it was \textit{in the first place}, to serve, among other functions, as the soul of the body politic, and thus to contribute to the achievement of the common goods, both natural and supernatural.

VI.

I will conclude by quoting the last paragraph of my “Decreasing Ontological Density” paper:

One can affirm that the Church is sacred in a way that the state, properly understood, is not, without having to deny that the state is possessed of a share of sacred ruling authority. If what authority for rule the state possesses is in no way sacred, however, then it can be no part of the divine ruling power. Do we humans have a self-possessed power to rule, a rival to the divine [rule]? If have we not received a law, then on what basis do we proceed to make law? In one of my favorite lines of all time, Justice Antonin Scalia opined that “God,” not man, “applies the natural law.” If that be true, what, then, do \textit{we} do? Inasmuch as a devoutly Catholic Justice of the Supreme Court of the United States has consigned us to a fate without benefit of the natural law, the question is not merely speculative.\textsuperscript{60}

The only adequate answer, I see more clearly than I did five years ago, is a proper cooperation between—not the separation of—Church and state. The Church was not founded to repose in a gilded cage but, instead, to save men’s souls and, to that end, to correct and transform this fallen creation. “Although the world knows it not, the most primordial law of ruling is service, which is always the signature of the divine. Not sovereignty as the moderns understand it, but rather a gift communicated for the good of another.”\textsuperscript{61}

\textsuperscript{58} Michael Davies, \textit{2 Apologia Pro Marcel Lefebvre} 122 (1983).
\textsuperscript{59} See \\textit{Catechism of the Catholic Church} ¶ 760 (1999).
\textsuperscript{60} Brennan, \textit{supra} note 1, at 279 (emphasis added) (footnote omitted).
\textsuperscript{61} Russell Hittinger, \textit{Social Pluralism and Subsidiarity in Catholic Social Doctrine}, \textit{in Christianity and Civil Society}, \textit{supra} note 30, at 19 (footnote omitted).
HOMO LABORANS: WORK IN MODERN CATHOLIC SOCIAL THOUGHT

MICHAEL J. WHITE*

If it is true that Aristotle is the master of them that know, he occasionally has very bad news to impart. An example is found in the eighth book of the Politics, where he asserts that:

[any occupation, art, or science, which makes the body or soul or mind of the freeman less fit for the practice or exercise of areté (excellence or virtue) is artisan-like; wherefore we call those arts mechanical which tend to deform the body, and likewise all paid employments, for they absorb and degrade the mind.]¹

And, earlier in the Politics, Aristotle remarked that “no man can practice virtue who is living the life of an artisan or hireling.”²

According to one Christian tradition, labor or work is a consequence of the fall—indeed, a sort of punishment. This is the doctrine of the heterodox fourteenth-century political philosopher, Marsilius of Padua; and it has consequences for his version of the Aristotelian conception of the state as constituted of the following parts or classes: “the agricultural, the artisan, the military, the financial, the priestly, and the judicial or deliberative.”³ Of these, the military, priestly, and judicial-deliberative together constitute the honorable class of citizens and are “parts of the state simpliciter.” The other divisions constitute the vulgāris class, and they are “parts only in the broad sense of the term (large), because they are offices necessary to the state.”⁴

In the Paris Notebooks of 1844, Karl Marx discusses the alienation of labor as a consequence of the capitalist economic system, which divides persons into two principal classes—those who own the means of production and distribution and those who must sell their labor as a consequence of not owning the means of production and distribution. Indeed, he regards the sale of labor as the root of its alienation. In answer to the question, “now what does the alienation of labor consist of?,” he replies at length:

* Professor of Law and Professor of Philosophy, Arizona State University. An earlier version of this Article was presented at the Seventh Annual John F. Scarpa Conference on Law, Politics, and Culture at Villanova Law School, on September 14, 2012.


2. Id. at 58.


4. Id.
Firstly, that labour is exterior to the worker, that is, it does not belong to his essence. Therefore, he does not confirm himself in his work, he denies himself, feels miserable instead of happy, deploys no free physical and intellectual energy, but mortifies his body and ruins his mind. Thus the worker only feels a stranger. He is at home when he is not working and when he works he is not at home. His labour is therefore not voluntary but compulsory, forced labour. It is therefore not the satisfaction of a need but only a means to satisfy needs outside itself. How alien it really is is very evident from the fact that when there is no physical or other compulsion, labour is avoided like the plague.5

“The result we arrive at,” concludes Marx:

[I]s that man (the worker) only feels himself freely active in his animal functions of eating, drinking, and procreating, at most also in his dwelling and dress [i.e., in what is now called “recreation”], and feels himself an animal in his human functions.

Eating, drinking, procreating, etc. are indeed truly human functions. But in the abstraction that separates them from the other round of human activity and makes them into final and exclusive activities they become animal.6

Unalienated labor, which Marx held can be achieved only through the advent of communism, is the expression of what Marx, using the terminology of Feuerbach, calls the species-being of man. In more classical terminology, this simply is the essence of man—his natural function or, in Greek, \textit{ergon}—the usual literal translation of which is “work.” As a trained classicist, Marx is perhaps indulging in a bit of a pun here: the function (\textit{ergon}) of humans is, or should be, their work (\textit{ergon}). It is, he says:

[I]n the working over of the objective world that man first really affirms himself as a species-being. This production [work] is his active species-life. Through it nature appears as his work and his reality. The object of work is therefore the objectification of the species-life of man; for he duplicates himself not only intellectually, in his mind, but also actively in reality and thus can look at his image in a world he has created.7

This conception of work as manifesting, at least in this mortal life, the very function and essence of human persons is eloquently expressed by Blessed Pope John Paul II in the introduction to his encyclical \textit{Laborem Exercens}:

6. \textit{Id}. at 89.
7. \textit{Id}. at 91.
Through work man must earn his daily bread and contribute to the continual advance of science and technology and, above all, to elevating unceasingly the cultural and moral level of society within which he lives in community with those who belong to the same family. . . . Man is made to be in the visible universe an image and likeness of God himself, and he is placed in it in order to subdue the earth. From the beginning therefore he is called to work. Work is one of the characteristics that distinguish man from the rest of creatures, whose activity for sustaining their lives cannot be called work. Only man is capable of work, and only man works, at the same time by work occupying his existence on earth. Thus work bears a particular mark of man and of humanity, the mark of a person operating within a community of persons. And this mark decides its interior characteristics; in a sense it constitutes its very nature.  

In classical economic theory, work is typically conceived instrumentally or, in Pope John Paul’s terms, objectively—that is, as a necessary ingredient, so to speak, in the production of wealth in the form of goods and services. As such, it itself becomes simply a commodity or form of capital which, like other ingredients of production—raw materials, tools, machinery, etc.—must be purchased or otherwise acquired in order for the production of goods and services to occur. According to this classical perspective, the worker regards work as something that he or she can sell or otherwise exchange for consumable goods or services—or perhaps exchange for other forms of capital, which in turn may be used as a means for supplementing his capacity for consumption. While not denying the importance of work in this objective or instrumental sense, John Paul emphasizes what he terms the subjective dimension of work—work as an expression of the essence or species-being of human persons. It is particularly when this subjective dimension of work is degraded that labor becomes, in Marx’s terminology, alienated.

Following Pope John Paul, I emphasize the subjective dimension of work in the following reflections. In particular, I shall maintain that it is primarily with respect to the subjective dimension of work that the Church’s counsel in the form of fundamental moral principles is particularly needed. I shall also maintain that, particularly in the contemporary political and economic environment, we would do well not to conflate two important distinctions: the distinction between working for a wage and being self-employed and the distinction between work that is regarded as a manifestation of our common human species-being and work that is not so regarded—i.e., work that is alienated.

According to the doctrine of natural law accepted by St. Thomas Aquinas, “all things are common.” As St. Thomas proceeds to emphasize,
this does not at all entail that private property is morally illicit. It merely means that the “division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law.”

Thomas’s principal reason for favoring the licitness and indeed, moral desirability, of private property pertain to its relation to the “objective” dimension of labor. With respect to human competence pertaining to the procuring and dispensing of external things, individual ownership is desirable because it encourages in persons greater care, industry, and order with respect to these processes. A second competence of human beings pertains to the use of external things. In this respect, Thomas says, “man ought to possess exterior things, not as his own [proprias], but as common [communes], so that, to wit, he is ready to communicate them to others in their need.”

It is customary to date the modern teaching of the Church with respect to labor to the 1891 encyclical of Pope Leo XIII, Rerum Novarum, although there are earlier nineteenth-century Catholic traditions that feed into that encyclical. Leo’s principal thesis is “that some opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class.” He connects this state of affairs very directly to the advent of Modernism in the eighteenth century and the rise of capitalism in the nineteenth:

[A]ncient workingmen’s guilds were abolished in the last century, and no other protective organization took their place. Public institutions and the laws set aside the ancient religion. Hence, by degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition. The mischief has been increased by rapacious usury, which, although more than once condemned by the Church, is nevertheless, under a different guise, but with like injustice, still practiced by covetous and grasping men. To this must be added that the hiring of labor and the conduct of trade are concentrated in the hands of comparatively few; so that a small number of very rich men have been able to lay upon the teeming masses of the laboring poor a yoke little better than that of slavery itself.

Two general themes seem to me to dominate Rerum Novarum. The major one is that distributive justice demands relief for the impoverished working class. While condemning the (Marxist) doctrine that “class is naturally hostile to class, and that the wealthy and the working men are intended by

10. Id.
11. See POPE LEO XIII, RERUM NOVARUM ¶ 3 (1891).
12. Id.
nature to live in mutual conflict,“13 and maintaining that “[r]ights must be religiously respected wherever they exist, and it is the duty of the public authority to prevent and to punish injury, and to protect every one in the possession of his own,”14 Pope Leo maintains that "when there is [the] question of defending the rights of individuals, the poor and badly off have a claim to especial consideration. The richer class have many ways of shielding themselves, and stand less in need of help from the State; whereas the mass of the poor have no resources of their own to fall back upon, and must chiefly depend upon the assistance of the State.”15

Consequently, Leo is sympathetic to political protection of various rights of members of the working class. This includes regulation of working hours, exploitation of women and children in the workplace, and sanitary and safety issues. With respect to wages, the Pope rejects the laissez-faire doctrine that “[w]ages, as we are told, are regulated by free consent, and therefore the employer, when he pays what was agreed upon, has done his part and seemingly is not called upon to do anything beyond.”16 Distinguishing a “personal” character of labor from its character as necessary for biological existence, he argues that there is a:

[D]ictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accepts harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice.17

However, Leo invokes the idea of subsidiarity to argue that the task of procuring distributive justice for members of the working class must fall, in large part, to various “private societies” and associations of working persons, “[t]he most important of [which] are workingmen’s unions, for these virtually include all the rest.”18 A basic rationale for subsidiarity is that associations’ subsidiary to—but properly enjoying a certain independence from—the state can attend in a more efficient way to all of the particular needs of its members. Such associations are envisioned by Leo as:

[H]elping each individual member to better his condition to the utmost in body, soul, and property. It is clear that they must pay special and chief attention to the duties of religion and morality, and that social betterment should have this chiefly in view; otherwise they would lose wholly their special character, and end by

13. Id. ¶ 19.
14. Id. ¶ 37.
15. Id.
16. Id. ¶ 43.
17. Id. ¶ 45.
18. Id. ¶ 49.
becoming little better than those societies which take no account whatever of religion. 19

It is altogether appropriate, in view of the exigencies of that time, that Pope Leo should have focused on the plight of the working class. This focus naturally led to an emphasis on the objective dimension of work—work as a form of capital from which may be earned that which is necessary for the material sustenance of human persons who work.

However, a secondary theme of Rerum Novarum pertains to the subjective dimension of work—its manifestation of human personhood. Here an agrarian model dominates Leo’s thinking. Leo traces the origins of all wealth, including capital, not to the soil or to land simpliciter, but to the work that renders the land fruitful:

[T]he earth, even though apportioned among private owners, ceases not thereby to minister to the needs of all, inasmuch as there is not one who does not sustain life from what the land produces. Those who do not possess the soil contribute their labor; hence, it may truly be said that all human subsistence is derived either from labor on one’s own land, or from some toil, some calling, which is paid for either in the produce of the land itself, or in that which is exchanged for what the land brings forth. 20

In opposition to the view that “it is right for private persons to have the use of the soil and its various fruits, but that it is unjust for any one to possess outright either the land on which he has built or the estate which he has brought under cultivation,” 21 the Pope asserts that:

[T]he soil which is tilled and cultivated with toil and skill utterly changes its condition; it was wild before, now it is fruitful; was barren, but now brings forth in abundance. That which has thus altered and improved the land becomes so truly a part of itself as to be in great measure indistinguishable and inseparable from it. Is it just that the fruit of a man’s own sweat and labor should be possessed and enjoyed by anyone else? As effects follow their cause, so is it just and right that the results of labor should belong to those who have bestowed their labor. 22

It is clear that Leo here has in mind principally what Pope John Paul would later term the subjective dimension of work:

[W]hen man thus turns the activity of his mind and strength of his body toward procuring the fruits of nature, by such act he

19. Id. ¶ 57.
20. Id. ¶ 8.
21. Id. ¶ 10.
22. Id.
makes his own that portion of nature’s field which he cultivates—that portion on which he leaves, as it were, the impress of his personality; and it cannot but be just that he should possess that portion as his very own, and have right to hold it without any one being justified in violating that right.\footnote{Id. ¶ 9.}

It is a function of human nature, according to Leo, that “[s]ocial and public life can only be maintained by means of various kinds of capacity for business and the playing of many parts; and each man, as a rule, chooses the part which suits his own peculiar domestic condition.”\footnote{Id. ¶ 17.} “As regards bodily labor,” he adds that “even had man never fallen from the state of innocence, he would not have remained wholly idle; but that which would then have been his free choice and his delight became afterwards compulsory, and the painful expiation for his disobedience.”\footnote{Id. ¶ 46.}

Deploring the concentration of capital, as the necessary means of both work and material sustenance, in the hands a few, Leo maintains that “[t]he first and most fundamental principle, therefore, if one would undertake to alleviate the condition of the masses, must be the inviolability of private property. This being established, we proceed to show where the remedy sought for must be found.”\footnote{Id. ¶ 47.} The remedy lies principally in widespread ownership: “[t]he law, therefore, should favor ownership, and its policy should be to induce as many as possible of the people to become owners.”\footnote{Id. ¶ 47.}

Leo’s agrarian model sees sharing in wealth-producing capital largely in terms of sharing in the ownership of land. “If working people can be encouraged to look forward to obtaining a share in the land,” he says, “the consequence will be that the gulf between vast wealth and sheer poverty will be bridged over, and the respective classes [i.e., of capitalist and of proletariat] will be brought nearer to one another.”\footnote{Id. ¶ 47.} Among the benefits of legal and political policies that encourage and enable workers to share in the ownership of land, according to the Pontiff, would be a mitigation of the socially disruptive emigrations of great masses of people experienced during the nineteenth century: “men would cling to the country in which they were born, for no one would exchange his country for a foreign land if his own afforded him the means of living a decent and happy life.”\footnote{Id. ¶ 47.}

\textit{Rerum Novarum} became, of course, the source of the economic movement of distributism (or distributivism), a movement particularly associated with English Catholic intellectuals in the early twentieth-century. The
idea of universal but individual ownership of capital was presented as a superior via media between a capitalism in which ownership of the means of production and distribution is concentrated in a relatively small class and a socialism or communism in which the state owns the principal means of production and distribution. The agrarian emphasis of Rerum Novarum was typically retained in distributism and is manifest in a slogan that was adopted, but not originated, by G. K. Chesterton: "three acres and a cow."

Having grown up on a livestock farm in the American Midwest, I can attest that this principle would not always yield self-sufficiency; in the desert Southwest where I now live, for example, it would produce a very badly undernourished cow. While distributism’s practicality, or lack thereof, has been much debated, my intention is not to enter the lists on that topic, nor to examine its serious theoretic content or even to engage the distributist movement’s very interesting history. Rather, I shall emphasize two points. The first is well made by Jay P. Corrin:

A significant dimension to Distributism was the centrality of its moral underpinnings. In fact, this is what separates Distributism from conventional economic theory. Whereas modern economic thinking assumes that the study of economy is an autonomous science, classical economic theory as well as Scholasticism—legacies out of which Distributism emerged—view economics as a subdivision of moral philosophy.30

At least since Rerum Novarum, the Catholic Church has emphasized the moral inadequacy of a conception of economics that presupposes, on the one hand, that human persons are simply consumers of material satisfactions and, on the other hand, that work is simply the production of goods and services that yield such satisfactions. Recognition that work, in what Pope John Paul termed its subjective dimension, has intrinsic value as an expression of human personhood is essential to any adequate economic theory. John Paul emphasizes that Catholics must bear witness to the normative dimension of economic matters, refusing to acquiesce in the proposition that economic science pertains to a sort of self-contained domain of social interaction that is subject to value-neutral “laws.” Such an assumption can lead to the belief—in fact, a rather widespread belief, I suspect—that any attempt at economic planning based on moral principles amounts to either impotent idealism or pernicious do-goodism.

The second point that I wish to emphasize actually is illustrated by a small incident in the history of distributism. The point is the danger of emphasizing some aspect of economic doctrine to the point that it becomes an ideological commitment that may obscure Catholic moral judgment. Prior to the British general strike of April 1926, a principal organ of

distributism, Chesterton’s *G. K.’s Weekly*, had supported the coal miners whose plight eventually led to the strike. However, in the words of Corrin:

Chesterton and the Distributists strongly disapproved of a key trade union bargaining demand, namely, its insistence on a minimum or living wage. Focusing on the issue of wages, they argued would only serve to perpetuate the vision of property between employer and employee. Wage bargaining rested on the premise that labor was a commodity, and by engaging in such discussions the trade unions simply perpetuated the worker’s alienation from the products of his labor and his dependency on a dominating class. Wages were part of the “bread and circuses” of the servile state, designed in large part to diffuse labor’s demand for the more important goal of ownership of the means of production.31

In contrast, Chesterton supported the proposal “to gear wages to the prosperity of the mines [because] [t]his appeared to be an opening for eventual joint business partnership, where remuneration for services would be linked to the industry’s profits.”32

It seems to me that Chesterton and his fellow distributists have here, in effect, committed themselves rather too strongly to the premise that work for wages is equivalent to alienated work. If, as in the late nineteenth and early twentieth century, most salaried workers were poorly paid wage-slates in factories and other sweat shops, there would certainly seem to be at least a strong empirical consilience between wage-earning and alienated-laboring. From a later historical period, however, it becomes apparent that the two distinctions that I mentioned earlier should be conceptually separated: the distinction between working for a wage and being self-employed and the distinction between work that is regarded as a manifestation of our common human species-being and work that is not so regarded—i.e., work that is alienated. Failure to mark this distinction easily leads to the distributist tenet that the principal economic ideal should be some form of self-employment for the largest possible number of persons. The additional assumption that the principal form of self-employment in any society must be agricultural yields the Chestertonian ideal of three acres and a cow.

Despite the comment of Aristotle with which I began, it appears that the labor of those who are self-employed can be as wanting as an expression of virtue, and as alienated as the labor of those who work for wages. In all too many instances the work of the small farmer has been unremitting and unremunerative drudgery—which is really no more a matter of the expression of the worker’s personhood than the work of the dishwasher earning the minimum wage, or less, in the squalid kitchen of a large New York City restaurant. And does the work of the self-employed

31. *Id.* at 163.
32. *Id.*
day-trader in stocks or, what amounts to much the same thing, that of the self-employed professional gambler, contribute more, in the words of John Paul II, “to elevating unceasingly the cultural and moral level of the society” than does the work of the salaried engineer at Intel? My point here is that the subjective dimension of work, the juncture where moral considerations often impinge on labor, seems to be rather radically context-dependent.

In the encyclical *Quadragesimo Anno*, commemorating the fortieth anniversary of *Rerum Novarum*, Pope Pius XI, while asserting that it is “an error to say that the economic and moral orders are so distinct from and alien to each other that the former depends in no way on the latter,” draws an important distinction between issues with respect to which the moral law impinges on economics and technical issues in economics:

Certainly the Church was not given the commission to guide men to an only fleeting and perishable happiness but to that which is eternal. Indeed “the Church holds that it is unlawful for her to mix without cause in these temporal concerns”; however, she can in no wise renounce the duty God entrusted to her to interpose her authority, not of course in matters of technique for which she is neither suitably equipped nor endowed by office, but in all things that are connected with the moral law.

Thus, fundamental to all teaching of the Church with respect to labor and economic matters is the placing of those matters within the hierarchical moral order of values. In the words of Pius XI:

[I]t is only the moral law which, just as it commands us to seek our supreme and last end in the whole scheme of our activity, so likewise commands us to seek directly in each kind of activity those purposes which we know that nature, or rather God the Author of nature, established for that kind of action, and in orderly relationship to subordinate such immediate purposes to our supreme and last end. If we faithfully observe this law, then it will follow that the particular purposes, both individual and social, that are sought in the economic field will fall in their proper place in the universal order of purposes, and we, in ascending through them, as it were by steps, shall attain the final end of all things, that is God, to Himself and to us, the supreme and inexhaustible Good.

So, in some sense, the first moral principle of Catholic teaching with respect to economic issues is that these issues cannot be considered, if they

34. *See* Pope Pius XI, *Quadragesimo Anno* ¶ 42 (1931).
35. *Id.* ¶ 41 (footnote omitted).
36. *Id.* ¶ 43.
are to be correctly and fully considered, from an entirely secular or value-neutral perspective. Like everything else, economics must be fitted into a larger hierarchy of value. There has been a gradual but steady realization in Church teaching of what seems to me to be a direct corollary of this principle: the priority of labor over capital. The primacy of labor does not entail that other forms of capital distinct from labor are unimportant in economic matters or that it is always immoral for a person to subsist on rent, profits, or interest. Rather, it is a recognition of two facts. The first is that other forms of capital typically require transformation by labor in order to become useful for producing consumable goods and services. This doctrine, enunciated by both Popes Leo XIII and Pius XI, is arguably the foundation for John Locke’s seventeenth-century labor-theory of property.

The second is a doctrine that finds expression not only in Church teaching but in Marxism. This is the doctrine that, while work can be considered a commodity necessary for the production of goods and services the consumption of which results in satisfactions for the consumer, this is an incomplete or distorted conception of work—a failure to recognize its subjective dimension. From the Catholic perspective, work primarily is—or ought to be—the very expression of our nature as human persons created in the image of a God who creates and redeems (i.e., who works). From the moral priority of persons over things John Paul II derives what he terms a “fundamental principle”: “the hierarchy of values and the profound meaning of work itself require that capital should be at the service of labour and not labour at the service of capital.”

A third fundamental Catholic moral doctrine pertaining to work is that, just as man is individually responsible and creative but also social, so human work has both an individual and a social dimension. With a view to this doctrine, Catholic teaching since Rerum Novarum has generally held, in the words of Pius XI, that the:

[T]win rocks of shipwreck must be carefully avoided. For, as one is wrecked upon, or comes close to, what is known as “individualism” by denying or minimizing the social and public character of the right of property, so by rejecting or minimizing the private and individual character of this same right, one inevitably runs into “collectivism” or at least closely approaches its tenets.

Although justice, commutative and distributive, is the central virtue pertaining to property and labor, Pope Pius emphasizes the fact that there are other relevant virtues, although the obligations that devolve from them may not in some or all circumstances be the proper matter for legal codification. Thus, he regards the “right of property [as] distinct from its use”

37. See, in particular, Laborem Exercens, supra note 8, ¶ 12.
38. Id. ¶ 23.
39. Quadragesimo Anno, supra note 34, ¶ 46.
as a proper matter of legal enforcement. But there are other moral duties of “owners to use their property only in a right way,” duties which prudence may perhaps dictate should not be made the object of legal enforcement. For example:

Expending larger incomes so that opportunity for gainful work may be abundant, provided, however, that this work is applied to producing really useful goods, ought to be considered, as We deduce from the principles of the Angelic Doctor, an outstanding exemplification of the virtue of munificence and one particularly suited to the needs of the times.

The public dimension of work requires, in the words of Leo XIII, quoted by Pius XI, that “[h]owever the earth may be apportioned among private owners, it does not cease to serve the common interests of all.” As a consequence, says Pius:

[The riches that economic-social developments constantly increase ought to be so distributed among individual persons and classes that the common advantage of all, which Leo XIII had praised, will be safeguarded; in other words, that the common good of all society will be kept inviolate. By this law of social justice, one class is forbidden to exclude the other from sharing in the benefits.

While noting that St. Paul passes judgment “on those who are unwilling to work, although they can and ought to,” the Pope emphasizes that “the Apostle in no wise teaches that labor is the sole title to a living or an income.” It might perhaps be inferred that some level of material sustenance can rightly be considered an individual entitlement deriving from the social character of work, in general—even for those persons who do not “earn” such a “living or income” by their own labor. It might perhaps also be inferred on the same basis that an individual entitlement to a “living or income”—at least up to some level of sustenance—is possessed by the person whose property ownership obviates his or her need to work for wages. But such inferences should not, I think, properly be regarded as logical entailments derived from the fundamental moral principle that work has a public as well as an individual dimension. Rather, they should be regarded as what St. Thomas would call determinationes of this principle, the correctness, or prudence, of which will depend on particular circumstances.

40. Id. ¶ 47.
41. Id.
42. Id. ¶ 51 (footnote omitted).
43. Id. ¶ 56; see also Rerum Novarum, supra note 11, ¶ 14.
44. Quadragesimo Anno, supra note 34, ¶ 57.
45. Id.
46. See Summa Theologica III*, supra note 9, at Q. 95, Art. 2.
Another Catholic principle pertaining to work, while perhaps not quite fundamental, does seem to be entailed—as what St. Thomas would call a *conclusio*—from other fundamental principles that we have discussed. This is the principle of a right, in the words of Pope John Paul, of “suitable employment for all who are capable of it.”

The opposite of a just and right situation in this field is unemployment, that is to say the lack of work for those who are capable of it. It can be a question of general unemployment or of unemployment in certain sectors of work. The role of agents included under the title of indirect employer is to act against unemployment, which in all cases is an evil, and which, when it reaches a certain level, can become a real social disaster.

The priority of work to capital and the subjective dimension of work as an expression of human personhood entail, within the context of the principle of distributive justice, that unemployment cannot properly be regarded as a natural economic phenomenon without moral significance. And the social dimension of work entails that unemployment and underemployment cannot be regarded as an issue that pertains only to individual direct employer and employee.

As John Paul makes clear, the moral dimension of work necessitates that the state, individuals, and other organizations cooperate with respect to:

> [O]verall planning with regard to the different kinds of work by which not only the economic life but also the cultural life of a given society is shaped; they must also give attention to organizing that work in a correct and rational way. In the final analysis this overall concern weighs on the shoulders of the State, but it cannot mean onesided centralization by the public authorities. Instead, what is in question is a just and rational *coordination*, within the framework of which the *initiative* of individuals, free groups and local work centres and complexes must be safeguarded, keeping in mind what has been said above with regard to the subject character of human labour.

Just as the principle of subsidiarity in Catholic political theory resists the concentration of supreme political authority in the nation-state, so this principle as applied to economic issues resists the sort of collectivization that would locate all authority for economic planning at the national political level. Indeed, the political principle of subsidiarity, together with the modern Catholic emphasis on the subjective dimension of work, has been

---

47. See id.
48. See *Laborem Exercens*, supra note 8, ¶ 18.
49. See id.
50. See id.
influential in modern “heterodox” economic theory such as that of E. F. Schumacher, whose 1973 book Small Is Beautiful: Economics as if People Mat-
ted popularized the ideas of de-centralized and human-scale technolo-
gies. But at this level of economic theory, there arise technical and
empirical issues about which experts can and do disagree. From the per-
spective of the Church, recognition of the necessity of a general moral
framework for discussing such issues is of paramount importance.

This point has been emphasized by Pope Emeritus Benedict XVI. As
Cardinal Ratzinger, he published a short article in the journal Communio
in which he developed the thesis that a point in common to both classical
capitalist or “liberal” economic theory and classical Marxism is that, al-
though they are premised on two different varieties of determinism, the
determinism of both “includes the renunciation of ethics as an indepen-
dent entity relevant to the economy.”51 Rejecting this idea, then-Cardinal
Ratzinger concludes that:

It is becoming an increasingly obvious fact of economic history
that the development of economic systems which concentrate on
the common good depends on a determinate ethical system,
which in turn can be born and sustained only by strong religious
convictions. Conversely, it has also become obvious that the de-
cline of such discipline can actually cause the laws of the market
to collapse. An economic policy that is ordered not only to the
good of the group—indeed, not only to the common good of a
determinate state—but to the common good of the family of
man demands a maximum of ethical discipline and thus a maxi-
mum of religious strength.52

In a lucid survey of “values economics” and modern Catholic theology, the
economic thought of Benedict has been summarized by Larry Catá Backer
as follows:

The search for the good is paramount: and religion serves as the
only true superior source of the values and morals through which
the good can be known. The execution of that good, of course,
can be left to the technically proficient, as can the development
of those processes, rules and alternatives. That is of less concern
to the Church.53

The final fundamental Catholic principle pertaining to work that I
shall discuss is one with respect to which the Church has particular compe-
tence at both the general and particular level. This is the principle that

51. Joseph Cardinal Ratzinger, Church and Economy: Responsibility for the Future
52. Id. at 204.
53. Larry Catá Backer, Values Economics, Theology and Legitimacy: Catholic Social
Thought and its Implications for Legal Regulatory Systems, in 5 Economics, Manage-
ment, and Financial Markets 17, 40 (2010).
work has a spiritual dimension. In the fifth and final general subdivision of *Laborem Exercens*, entitled “Elements for a Spirituality of Work,” John Paul II develops several themes centered on the premise that, through reflection on these spiritual elements, “the work of the individual human being may be given the meaning which it has in the eyes of God and by means of which work enters into the salvation process on a par with the other ordinary yet particularly important components of its texture.”54 Created in the image of God, man “received a mandate to subject to himself the earth and all that it contains, and to govern the world with justice and holiness; a mandate to relate himself and the totality of things to him who was to be acknowledged as the Lord and Creator of all.”55 The principal point is that work is a way of imitating God, “since God himself wished to present his own creative activity under the form of work and rest.”56 Furthermore:

Awareness that man’s work is a participation in God’s activity ought to permeate, as the [Second Vatican] Council teaches, even “the most ordinary everyday activities. For, while providing the substance of life for themselves and their families, men and women are performing their activities in a way which appropriately benefits society. They can justly consider that by their labour they are unfolding the Creator’s work, consulting the advantages of their brothers and sisters, and contributing by their personal industry to the realization in history of the divine plan.”57

In section 26 of *Laborem Exercens* (entitled “Christ, the Man of Work”), John Paul meditates on Christ’s work, not only during his public ministry, but during the much longer period of his hidden life at Nazareth. The gospel proclaimed by Our Lord is, John Paul says, a “gospel of work,” because:

[H]e who proclaimed it was himself a man of work, a craftsman like Joseph of Nazareth. And if we do not find in his words a special command to work . . . at the same time the eloquence of the life of Christ is unequivocal: he belongs to the “working world”, he has appreciation and respect for human work. It can indeed be said that he looks with love upon human work and the different forms that it takes, seeing in each one of these forms a particular facet of man’s likeness with God, the Creator and Father.58

But Christ, the man of work, was also a man of sorrows, pains, and fatigue; and in the final section of *Laborem Exercens*, John Paul considers “another aspect of human work, an essential dimension of it, that is profoundly imbued with the spirituality of the Gospel. All work, whether manual or intel-

54. See *Laborem Exercens*, supra note 8, ¶ 24.
55. Id. ¶ 25.
56. Id. ¶ 25.
57. Id. ¶ 25 (quoting Pope Paul VI, *Gaudium et Spes* ¶ 34 (1965)).
58. *Laborem Exercens*, supra note 8, ¶ 26 (footnote omitted).
lectual, is inevitably linked with toil."\(^{59}\) The Pope’s main theme in this last section is that the fatigue, disappointment, and even pain that frequently accompany the toil of work not only manifests man’s fallen nature but also presents an opportunity:

Sweat and toil, which work necessarily involves \(\text{in}\) the present condition of the human race, present the Christian and everyone who is called to follow Christ with the possibility of sharing lovingly in the work that Christ came to do. This work of salvation came about through suffering and death on a Cross. By enduring the toil of work in union with Christ crucified for us, man in a way collaborates with the Son of God for the redemption of humanity.\(^{60}\)

There can be no doubt that John Paul is here deeply influenced by the thought of St. Josemaría Escrivá, who began to develop a profound theology of work long before the Second Vatican Council. Calling work a “magnificent reality,” St. Josemaría teaches that:

\[\text{[I]}\text{t is an indispensable means which God has entrusted to us here on this earth. It is meant to fill our days and make us shar-
\text{ers in God’s creative power. It enables us to earn our living and,}
\text{at the same time, to reap “the fruits of eternal life” [John 4:36]}
\text{for “man is born to work as the birds are born to fly” [Job 5:7].}\(^{61}\)

Catholic moral theory involves the recognition that “alienated labor” is tied to a variety of economic issues which should be examined from a moral perspective. But St. Josemaría reminds us that there is an ineliminably supernatural dimension to the problem of alienated labor. While admitting that persons work for diverse reasons and many of them “regard their work as something that has to be done and cannot be avoided,” he replies that:

This is a stunted, selfish, and earthbound outlook, which neither you nor I can accept. For we have to remember and remind people around us that we are children of God, who have received the same invitation from our Father as the two brothers in the para-
ble: “Son, go and work in my vineyard” [Matthew 21:28]. . . . Occasionally we may rebel, like the elder of the two sons, who replied to his father, “I will not” [Matthew 21:29], but we will learn how to turn back repentant and will redouble our efforts to do our duty.\(^{62}\)

---

\(^{59}\) Id. ¶ 27.

\(^{60}\) Id. (footnote omitted).


\(^{62}\) Id. at 86.
2013]  

Martin Luther King, Jr. Lecture

THE UNFINISHED JOURNEY—EDUCATION, EQUALITY, AND MARTIN LUTHER KING, JR. REVISITED

TAUNYA LOVELL BANKS*

“[W]e must accept finite disappointment, but we must never lose . . . infinite hope.”1

I. INTRODUCTION

My life has been largely shaped by Brown v. Board of Education,2 the seminal United States Supreme Court decision. I was born and educated in Washington, D.C., the nation’s capital, and by congressional mandate,3 my first five years of schooling were spent in a racially segregated public school.4 Despite my limited experience in integrated schools, the Washington, D.C. chapter of the National Association for the Advancement of Colored People (NAACP) sent me and Susann Harris, a white public high school student, to Montgomery, Alabama in December 1959 to participate in the fourth anniversary celebration of the Montgomery bus boycott.5 There I met and spoke with Dr. Martin Luther King, Jr. He was thirty years old and about to garner greater fame following his forthcoming move to Atlanta. I was a fourteen-year-old black public high school student.

* Jacob A. France Professor of Equality Jurisprudence, Francis King Carey School of Law, University of Maryland. The author thanks Mildred Robinson for her helpful comments on an earlier version of this Essay, and Matthew Kent, class of 2013 for his research assistance. This Essay was delivered as the Rev. Dr. Martin Luther King, Jr. Memorial Lecture at Villanova University School of Law on January 22, 2013.

1. MARTIN LUTHER KING, JR., STRENGTH TO LOVE 91 (1963).
3. The District of Columbia, a federal enclave, was governed by a Southern-dominated Congress. Into the mid-1950s there were segregated public schools, housing, and recreational facilities. Blacks also were excluded from public accommodations (hotels, restaurants, and theaters) that catered to whites. William B. Harvey & Adia M. Harvey, A Bi-Generational Narrative on the Brown v. Board Decision, 56 NEGRO EDUC. REV. 43, 45 (2005).
4. The case the nation remembers is Brown v. Board of Education, but that case, grounded in the Equal Protection Clause of the Fourteenth Amendment, only applied to the states. For Washington residents, Bolling v. Sharpe, the companion case to Brown, which was based on the Due Process Clause of the Fifth Amendment, governed. Bolling v. Sharpe, 347 U.S. 497 (1954).

(471)
Susann and I were sent to Montgomery at Dr. King’s request to participate in an “integration workshop” to prepare black school children in that city for what Dr. King then believed was the imminent integration of the Alabama public schools. Neither the United States Supreme Court nor Dr. King foresaw the South’s massive resistance to Brown’s mandate. It took almost a decade after my visit for meaningful desegregation to occur in Montgomery. In the interim, the students I met during my trip continued to attend, and graduate from, segregated schools the Supreme Court had condemned as unequal.

Almost sixty years later, most commentators concede that the implementation of Brown was a failure. Over the years there has been retrenchment. Although today America’s schools are no longer segregated by law, a substantial percentage of school children are consigned to racially isolated schools. “Almost 40 percent of black and Hispanic students attend schools where more than 90 percent of students are nonwhite.” The grandchildren and great-grandchildren of Brown’s children are still waiting for the equal education promised my generation. We as a nation seem unwilling, or unable, to fully commit to the principle of racially integrated, equally resourced public schools.

6. Id.
7. By 1963 a wiser Dr. King had grown tired of the delay, placing some of the blame on the Supreme Court’s “all deliberate speed language” in Brown II. See Wendy B. Scott, Dr. King and Parents Involved: The Battle for Hearts and Minds, 32 N.Y.U. Rev. L. & Soc. Change 543, 549 (2008). Two years later he opined that after Brown “[s]chool segregation did not abate[,] but increased,” even in the North. Id. (first alteration in original) (citing Martin Luther King, Jr., Next Stop: The North (1965), reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 189 (James M. Washington, ed., 1991)).
11. See, e.g., Orfield et al., supra note 10; Siegel-Hawley & Frankenberg, supra note 10.
13. At least one commentator might disagree. Legal scholar Brandon Paradise argues that despite America’s difficulty in achieving “cross-racial mutual understanding and empathy,” that Americans are “more culturally prepared than
An educated society is important to the survival of a democracy. A good education feeds the soul and is necessary for America’s children to thrive. As the Court in Brown remarked: “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”

The America of the twenty-first century is dramatically different from the America that existed when Brown was decided, thus what constitutes a first class education today is slightly different. Today’s education must prepare America’s youth for the challenges they will face in the future. They must be prepared to engage the world on a firm foundation with empathy for, and understanding of, others. As I will explain, racial integration alone is insufficient—schools must receive adequate financial resources and be even more diverse socio-economically to adequately prepare America’s youth for the diverse world in which they will live and work. This point is explained in the next section of this Essay.

II. Education as a Route to Equality

Access to quality primary and secondary education is a continuing concern of Americans. Even though the United States Supreme Court does not consider education a fundamental right, every state constitution mandates, encourages, or at least authorizes a free public education.

While education remains a hallmark of first class American citizenship, there is no agreement about what constitutes a quality education.

As early as the mid-nineteenth century, some black Americans saw racially integrated schools as a measure of educational equality. In 1849, while the vast majority of black Americans remained enslaved, denied access to literacy, often by law, free black Bostonians sued to integrate that city’s public schools. Raising many of the same arguments as the petitioners in Brown, these black Boston parents saw integration as a way to ever to successfully pursue the diversity ideal of integration.” Brandon Paradise, Racially Transcendent Diversity, 50 U. LOUISVILLE L. REV. 415, 418–419 (2012).


16. It also is important to note that enslaved blacks were often prohibited by law from learning to read. See JANET DUTSMA CORNELIUS, WHEN I CAN READ MY TITLE CLEAR: LITERACY, SLAVERY AND RELIGION IN THE ANTEBELLUM SOUTH 32–33 (1991) (describing state laws banning Black literacy during pre-Civil War period).

17. Roberts v. City of Boston, 59 Mass. (5 Cush) 198 (1849). Although the lawsuit was unsuccessful and later used against black litigants by the United States Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896), the Boston Public Schools were desegregated shortly after the Roberts decision. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 90 (2004).
improve the quality of education their children received.  

In 1950, Thurgood Marshall, then General Counsel of the NAACP, decided, over the objections of some members of his legal team, to argue directly that racial segregation in public schools violates the Equal Protection Clause, rather than focus on equalizing per pupil expenditures and teachers’ salaries. After Brown, efforts to equalize all-black schools stopped as the focus became desegregation of public schools. Brown became a symbol of racial integration, not an equally resourced education. Educational equality was presumed if schools were integrated. Schools in jurisdictions where de jure segregation was mandated were considered integrated if segregated systems were dismantled. But desegregation of de jure racially segregated schools did not automatically result in integrated schools due to residential racial segregation patterns. Desegregated school systems were deemed in compliance even if most schools remained predominantly one race and resources remained unequal. Resources often were unequal even in predominately white schools located in less affluent areas because property taxes were the primary means states used to finance public schools. This point is explored in the next section of this Essay.

A. School Funding

The Supreme Court, when asked in 1973 to address inequality in local school funding that disproportionately impacted poor, and predominantly

18. Bell, supra note 17, at 88.
19. Id.
22. Some schools, especially in urban areas where residential segregation was prevalent, were de facto segregated by race and often class. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191 (1973) (describing system of de facto segregation implemented in Denver public school system); see also Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (noting “familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change”). In the South where residential segregation was not as prevalent during the Brown era, most whites fled the public schools for all-white private academies. Bell, supra note 17, at 109–12.
23. A classic example was the desegregation of the public schools in my hometown, Washington, D.C., detailed in a federal district court class action, Hobson v. Hansen, where lawyers for the named plaintiff, black civil rights activist Julius Hobson, argued successfully that poor children and most black students were denied an equal educational opportunity as a result of discriminatory practices by the local school board, including less experienced teachers and fewer resources and tracking programs. Hobson v. Hansen, 269 F. Supp. 401, 491 (D.D.C. 1967), aff’d sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).
Mexican-American children, refused. Instead, it held in San Antonio Independent School District v. Rodriguez\(^{24}\) that public education is not a fundamental right,\(^{25}\) effectively permitting educational inequality to continue. This decision seemed almost inevitable as it became clear that racial integration would be limited in scope. Disparities in educational resources persisted.

The Court’s decision in San Antonio Independent School District, however, triggered a wave of “fiscal equality” litigation in state courts premised on state constitutional provisions.\(^{26}\) This litigation raised more questions like what “equalizing funding” actually entails. The success of the fiscal equality cases was limited and depended on the wording of each state’s constitutional text. Most state constitutions require only minimum support for public education.\(^{27}\) Six others mandate higher levels of quality,\(^{28}\) but only four state constitutions characterize education as the highest or one of the most important duties of the state.\(^{29}\) Some state courts, narrowly reading these provisions, refused to find constitutional violations.\(^{30}\) Thus it is not surprising that state courts have been inconsistent in interpreting educational guarantees to require an equally resourced education.

State legislatures, in response to this litigation, looked for resources, in addition to property taxes, to address glaring expenditure disparities in

\(^{24}\) 411 U.S. 1 (1973).

\(^{25}\) Id. Although states can fund public schools unequally without violating the federal constitution, the Supreme Court has held that children cannot be denied access to public education provided to others by the state. Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964) (describing children in closed school district where other districts in state were open); see also Plyler v. Doe, 457 U.S. 202 (1982) (involving undocumented children).

\(^{26}\) For a discussion of this point, see Scott supra note 7, at 556–57; see generally, Eric A. Hanushek & Alfred A. Lindseth, Schoolhouses, Courthouses, and Statehouses: Solving the Funding-Achievement Puzzle in America’s Public Schools (2009) (arguing for performance based measures of achievement); see also Jeanne M. Powers, High-Stakes Accountability and Equity: Using Evidence from California’s Public Schools Accountability Act to Address the Issues in “Williams v. State of California”, 41 AM. EDUC. RES. J. 763 (2004) (arguing for more equal distribution of education funding by linking lack of school resources with lower student achievement test scores).


\(^{28}\) Thro, supra note 27, at 24.

\(^{29}\) Id. at 25.

school funding, including gaming revenue as well as retail and individual income taxes. According to legal scholar Mildred Robinson, while these new funding resources “provided increased funding for public education . . . [they also resulted in] unanticipated funding instability as state economies expand and contract in sync with the national economy.”31 She attributes the reduction in state support for public education to these changes in funding sources.32 Thus adequate funding of public education remains an issue today.

Fiscal litigation for educational equality in state courts is fraught with other problems. One of the more difficult issues is judicial deference to state legislatures. Only twenty state courts have found legislatively crafted public school system financing incompatible with state constitutional provisions.33 In other cases, state courts are hesitant to implement equal education requirements because of a lack of “judicially . . . manageable standards.”34 The primary focus in these battles is over resources and the money to pay for them. But equalizing funding for education alone is not enough for a quality public school education.

A recent report on education by the Council on Foreign Relations notes “that while the United States invests more in K-12 public education than many . . . developed countries, its students are ill prepared to compete with their global peers.”35 As the report notes, financial resources alone do not guarantee quality outcomes.36 I contend that the classroom environment is an important factor.

Scholars who write about education usually discuss school financing separately from the issue of school populations isolated by race, class, or both, not fully acknowledging the interconnectedness of these factors. As one commentator points out, “the fiscal . . . equity litigation . . . did not seek to directly challenge schools’ status as racially separate.”37 Further, economic diversity in and of itself was not seen as a positive factor in the classroom. When, for example, the Charlotte Mecklenburg School District instituted a policy of economic diversity in the classroom, their goal was a neutral way to achieve racial integration.38 Conflating race and

32. Id.
34. Id. at 357.
36. Id. at 68.
37. Scott, supra note 7, at 557.
class, the district assumed that most black children come from improvised homes and, by implication, white children did not.

B. An Integrated Classroom

While some school districts saw financial equality as a measure of educational equality, others continued to stress racial integration, concerned about racially isolated school populations. A few scholars argue that racial integration is more important in the primary and secondary grades than at the college level. The school board in Topeka, Kansas, understood this reality. Prior to Brown, Kansas permitted, but did not mandate, school districts to operate racially segregated schools. Topeka chose to operate segregated primary schools, but the high school was integrated. Legal scholar Brandon Paradise argues that because children become aware of race at an early age, they must have positive experiences and interactions with other racial and ethnic groups early in their education to counteract damaging stereotypes that persist in American society.

There is, however, no consensus on the Supreme Court about whether Brown mandates desegregation of contemporary racially isolated school populations because Brown only dealt with de jure segregation. Rather, in 2007 a narrowly divided Court in Parents Involved in Community Schools v. Seattle School District No. I announced that a voluntary effort to

39. See, e.g., Paradise, supra note 13, at 418.
42. In a footnote Paradise cites these sources in support of his claim that children become aware of race at an early age. Gary Orfield, Erica Frankenberg & Liliana M. Garces, Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in "Parents v. Seattle School District" and "Meredith v. Jefferson County", 40 URB. REV. 96, 103, 112 (2008) (summarizing empirical research on effect of school integration on racial attitudes and concluding school integration promotes cross-racial understanding); see also Brief Amicus Curiae of the Nat’l Educ. Ass’n et al. in Support of Respondents at 17, Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927085, at *17 (noting “contact that occurs during key periods of personal development—most importantly during a child’s formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed . . . Once the destructive ‘habit’ of ‘racial stereotyping’ is learned, it is difficult to break, making it ‘more difficult to teach racial tolerance to college-age students’ than to public elementary/secondary school students . . . ’” (quoting Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003))). This describes the testimony of social psychologist Dr. John Dovidio on early childhood interracial interaction and racial stereotyping. See generally Heidi McGlothlin, Melanie Killen & Christina Edmonds, European-American Children’s Intergroup Attitudes About Peer Relationships, 23 BRIT. J. DEV. PSYCHOL. 227, 243–47 (2005).
43. Scott, supra note 9, at 3.
44. 551 U.S. 701 (2007).
maintain racially integrated public schools is not a sufficiently compelling state interest under the Constitution.\textsuperscript{45} Strikingly, the plurality opinion “turned the focus of [its] analysis away from whether segregated schools still harmed students of color ‘because of race’ [saying] [i]nstead . . . that . . . voluntary efforts to desegregate harmed white students ‘because of race.’”\textsuperscript{46} This statement suggests that white children derive no value from attending racially and ethnically diverse primary and secondary schools.

There was no widespread outcry when 	extit{Parent Involved} was decided. The begrudging acceptance of the case by the country suggests that public school integration has lost its symbolic power.\textsuperscript{47} Yet four years earlier the same Court acknowledged in 	extit{Grutter v. Bollinger}\textsuperscript{48} the importance of a racially diverse educational environment in higher education.\textsuperscript{49} The connection between racial and class diversity as part of a quality public school education, and readiness for higher education, is underappreciated.

Students cannot compete on the college level without being adequately prepared during their K-12 years. The failure to close earlier gaps compelled reliance on increasingly vilified “affirmative action” efforts. Thus the Court in 	extit{Parents Involved}, without seeming conflict, can thwart

\textsuperscript{45} See, e.g., id.

\textsuperscript{46} MICA POLLOCK, BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS 2 (2008).


\textsuperscript{48} 539 U.S. 306 (2003).

\textsuperscript{49} Id. at 331 (achieving “critical mass” of unrepresented minority students is compelling state interest if means used are narrowly tailored). Justice O’Connor stated:

Major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation’s leaders . . . the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body.

\textit{Id.} at 308. Justice O’Connor, writing for the majority, referred to Justice Powell’s statement in 	extit{Bakke} that the “nation’s future depends upon leaders trained through wide exposure” to the “ideas and mores of students as diverse as this Nation.” \textit{Id.} at 307 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)). Justice Powell was himself quoting from an even earlier Court case. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (striking down loyalty oath required of state officials to screen for communist party members).
voluntary integration efforts in primary and secondary schools while simultaneously permitting such efforts by colleges and universities in Grutter.

The Council on Foreign Relations report on education also linked improving the quality of public education to national security. The report’s recommendations focused on developing a core curriculum, more performance based measures, and increased school choice for students. It did not, however, include racial and economic integration as a measure of quality education.

C. The Connection Between Funding and the Integrated Classroom

As mentioned previously, numerous studies show that public schools today are more segregated than ever along race and class lines. Predominantly one-race non-white schools also tend to be under resourced, especially in large urban areas where the school system has been abandoned by affluent and middle class families of all races. One of the reasons these families have abandoned urban schools is that parents, consciously or unconsciously, associate inferior education with racially and economically diverse student populations as well as lower property values. Brown may be partially at fault. I have always been troubled by the Court’s statement in Brown that de jure segregated schools only harmed black children. The Court in Brown, and more recently in Parents Involved, seems unwilling to concede that racial isolation of any race, especially during the early years of education, is harmful to the education of all American children because we live in a multi-racial democracy. The Court’s statements suggest that the benefit of racially integrated schools operates one way, reinforcing notions of white superiority.

Similarly, children from poor or affluent families educated in economic isolation are equally harmed, but for different reasons. Children from less affluent families are most often confined to subpar public schools and may have their opportunities limited as a result, while children from more affluent families who are not exposed early on to children from diverse economic backgrounds may fail to develop empathy for economically-less-advantaged individuals. As a result, privileged children,

51. See supra notes 10–11.
53. Brown, 347 U.S. at 494. The Court cited the findings of another segregation case with approval stating:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Id.
who are more likely to become members of the leadership class, may be less likely to push for educational policies that advance the broad range of American families if educated in isolation.

If we are failing to provide all of America’s children with quality primary education, it is unsurprising that there is a lack of racial and economic diversity in the nation’s colleges and universities. Our failure to properly educate children at the primary and secondary level has given rise to a continuing battle in the United States Supreme Court about efforts to insure a more racially diverse college and professional school population. Ironically, the systematic assault on attempts to diversify America’s college population became more public a year after the San Antonio Independent School District decision when Justice William Douglas, a progressive member of the Court, wrote a dissent in Defunis v. Odegaard questioning the use of race in law school admissions decisions. The rest of the Court in the Defunis case refused to rule on a challenge to the use of race in the college admissions process.

Douglas’ dissent was seen by some as an invitation to challenge race-based affirmative action efforts by colleges and universities. Five years later a deeply fractured Court in Regent of the University of California v. Bakke took on this question directly. In a plurality opinion Justice William Powell approved the consideration of race as one of many factors, including class, in the admissions process to create a more diverse university student body.

Twenty-five years later when the Court in Grutter agreed to reconsider the Bakke decision, a bare majority rationalized that taking race into account in the law school admissions process at the University of Michigan was needed to “remedy” a lack of diversity among the leadership class in colleges and universities. It was important, according to the Court, that America’s future leaders had experiences interacting with members of other races and ethnicities. Nevertheless, Justice O’Connor, writing for the Court, warned that these meager efforts to compensate for a lack of racially diverse students in higher education populations must be temporary, lasting no more than twenty-five years.

55. Id. at 320–21 (Douglas, J., dissenting).
56. Id. at 312–20 (majority opinion).
58. Id.
59. Id. at 271–72.
61. Id. at 332.
62. Id. at 342. Justice O’Connor wrote: [R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification
Ten years have passed since the Grutter decision. Modest efforts by Congress to improve public education, such as No Child Left Behind\textsuperscript{63} that focuses on performance, and Race to the Top\textsuperscript{64} that encourages use of charter schools and privatization, have been criticized as ineffective and addressing only parts of the problem.\textsuperscript{65} Further, the Supreme Court, responding to public pressure, in a series of decisions has severely handicapped the ability of local school boards to achieve or maintain desegregated schools.\textsuperscript{66} We must accept that the Supreme Court, often touted for its bravery in issuing the Brown decision, in hindsight has been as much an obstacle to educational equality as it has been a proponent. As legal scholar Wendy B. Scott notes: “the Court has never fully embraced the idea that equality requires structural changes in public education to end the adverse effects of racial subordination.”\textsuperscript{67}

Last October the United States Supreme Court heard oral arguments in Fisher v. University of Texas at Austin\textsuperscript{68} on the issue of whether the Equal Protection Clause of the Fourteenth Amendment permits a state university for racial preferences would offend this fundamental equal protection principle.

\ldots

The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

\textit{Id. at 342–43 (second alteration in original).}


\textsuperscript{67} Scott, supra note 9, at 15–16.

\textsuperscript{68} No. 11-345 (U.S. argued Oct. 10, 2012).
to use race in making undergraduate admissions decisions.\textsuperscript{69} Even if the \textit{Grutter} decision withstands the attack in the \textit{Fisher} case, unless more aggressive measures are taken to address the deficiencies of public education, we may have only fifteen years left before higher education, and a better life, maybe foreclosed for many Americans. Achieving educational equality, however, will not be easy.

According to education scholar Mica Pollock, instead of a public school system where there is “purposeful racial inequality . . . . [T]oday’s racially unequal educational opportunity is a result of . . . the nation’s failure to actively desegregate, and of the intersections between opportunity denials in health and housing as well as education [and the] ordinary actions and inactions by well-intentioned people.”\textsuperscript{70} A recent \textit{New York Times} article illustrates one aspect of the problem Professor Pollock describes. A New York City public school with a racially and economically diverse student body remains internally segregated as a result of its “gifted and talented” program that disproportionately favors students from more affluent, mainly white, families who enter school with more resources and better pre-school training than their less affluent, mainly non-white, classmates.\textsuperscript{71}

Persistent residential segregation along racial and class lines\textsuperscript{72} coupled with school assignments based primarily on geography,\textsuperscript{73} and schools, even within the same school district, that are unequally resourced,

\textsuperscript{69} The exact issue as stated by the Court is whether this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including \textit{Grutter v. Bollinger}, permit the University of Texas at Austin’s use of race in undergraduate admissions decisions. Transcript of Oral Argument at 3, \textit{Fisher v. University of Texas at Austin}, No. 11-345 (U.S. argued Oct. 10, 2012).

\textsuperscript{70} POLLOCK, supra note 46, at 11 (footnote omitted); see also Spatig-Amerikaner, supra note 12 (federal educational policy).


seem like intractable problems. Thus, achieving educational equality may seem like a pipe dream. But as Dr. King said: “there is a creative force in this universe . . . a power that is able to make a way out of no way and transform dark yesterdays into bright tomorrows.”

Thus the enormous task for the future is to develop multi-faceted strategies to insure quality education for all of America’s children.

III. Achieving King’s Dream

As a first step it is time to abandon Brown as a fatally flawed symbol of educational equality, and replace it with a new symbol. Access to education that is unequally funded, and that occurs in racially and economically isolated schools, does not result in the kind of education twenty-first century children need to become productive adults. Thus a reconstituted right to education should consist of several components: equal resourcing and funding of schools along with racially and economically diverse classrooms, especially in large urban and suburban areas.

Rather than re-litigate San Antonio Independent School District and devote many resources to recognition of a federal right to education, we need to focus on litigation efforts in the states because their constitutions all recognize this right. Thus, state constitutional guarantees can be a vehicle to achieve a more comprehensive vision of quality public education. The parameters of this right can be worked out in the states, the unit of government with the primary responsibility for public education. This effort should begin in those states that are already trying to more broadly interpret their education guarantee because they may be more receptive to a reconstituted right to education.

But as my foregoing remarks indicate, the complexity of the problem I have identified involves more than legal barriers. Harvard Law School Dean Martha Minow writes: “[s]chooling accentuates potential tensions between . . . conceptions of equality that are focused on individual opportunity, inclusion, and commonality and . . . conceptions of equality that are focused . . . on group rights, group autonomy, and multiculturalism.”

Too often American families are concerned only with the quality of education their child receives, not with the quality of education available for all of America’s children.

Bottom line: there is a direct connection between effective K-12 education and the ability to compete academically in college. Improving primary and secondary education is especially important as the United States Supreme Court withdraws its approval of affirmative action programs. But efforts that focus on improving fiscal equality may undermine the ability to


75. MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 171 (2010).
be attentive to integration, and vice versa. Even if schools become more racially and economically diverse, the educational outcomes will probably be different if the emphasis is on fiscal concerns over classroom demographics.

As our experience with *Brown* has taught us, law is an imperfect vehicle for bringing about massive social change. In 1963, Dr. King, in his often quoted *Letter from a Birmingham Jail*, wrote about the “interrelatedness of all communities and states.”76 The same year he wrote in his book *Strength to Love* that: “True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.”77 I contend that we as Americans have an *unenforceable obligation* to provide quality education for all of our children and not handicap some children so that others can become more competitive. We must do this by *public will*, not solely through law.

As I said earlier, our efforts to bring about educational equality should be multi-directional, and lawyers have a role to play. As part of this battle some lawyers and academics must recommit to convincing state courts to define more broadly their guarantees of a free public education. We must convince state courts that education is a fundamental right. Others must work with state legislatures to get them to commit, in words and funds, to the achievement of a twenty-first century notion of educational equality. More importantly, we *all* must work to get Americans throughout the nation to recommit to a strong public education system throughout the country.

IV. CONCLUSION

In less than a decade the man I met in Montgomery, Alabama had evolved into an internationally-recognized human rights advocate. He spoke out against the war in Vietnam, engendering criticism from both his supporters and detractors.78 Dr. King also was an early critic of apartheid in South Africa.79 At the time of his death in the spring of 1968 he was organizing a Poor People’s Campaign—a mass protest for economic as well as civil rights.80 Thus, at the end of his life Dr. King recognized the interconnectedness of various forms of subordination and oppression that included, but were not necessarily defined by, race.

In 1994 I celebrated the King Holiday in Honolulu, Hawaii, and witnessed the first celebration I thought truly represented Dr. King’s dream. This celebration bore little resemblance to the token ceremonies I wit-

---


79. *Id.* at 183.

80. *Id.* at xx.
nessed on the mainland. Those ceremonies treat the King birthday as a “black” holiday. In Honolulu the audience was large, and given that state’s multi-racial and multi-ethnic composition, diverse. There was singing by a black church choral group from the military base, music by the Royal Hawaiian Band and dancing by elderly Japanese-American women. Various groups representing other components of the Island’s community also participated. The Honolulu celebration seemed to capture Dr. King’s thoughts that “[a]n individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.”

This is why we must strive for equally resourced, racially and economically diverse public schools classrooms throughout America.

We are naïve, however, if we believe that achieving educational equality is a simple task capable of easy fixes. Looking backward it becomes apparent that, like governance in general, with public education “[t]here is no equilibrium. [Rather, t]here’s just a process of critique and mobilization and activism that dynamically inches you toward something better.”

In 1964, when he received the Nobel Peace Prize, Dr. King remarked that the honor was “a commission to go out and work even harder for the things in which we believe.” So, I urge each of you to consider your law degree a commission to go out and make educational equality and social justice a part of your life’s work. America needs many good leaders to survive this century as a true multi-racial democracy. Remember in the words of the hit song, *The Greatest Love of All*, popularized by Whitney Houston that: “children are our future. Teach them well and let them lead the way.”

---


486  VILLANOVA LAW REVIEW  [Vol. 58: p. 471