

# The implications of the Obama administration's capitulation on contraceptives

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The capitulation Friday by the Obama administration to reactionary religious elements on the issue of contraceptives has far-reaching implications for the entire framework of democratic principles of religious freedom and the separation of church and state in the US.

The administration had let it be known on January 20 that, as part of its federal health care overhaul, all employers, including those with religious affiliations, would be required to provide access to contraceptives free of charge to female employees as part of their employee medical plans.

Catholic bishops, right-wing pundits and Republican presidential candidates and congressmen launched a campaign against the proposed rule. A barrage of statements employing the most provocative language, widely disseminated by the media, denounced the rule as an attack on "religious freedom" and part of a "war on religion." Prominent Democrats, including leading figures within the Obama administration such as Vice President Joseph Biden, pressured the White House to drop rule on the grounds that it would alienate Catholics in the upcoming election.

Mitt Romney, the leading contender for the Republican Party's presidential nomination, called the administration's January 20 announcement "an assault on religion, an assault on the conviction and the religious beliefs of members of our society." Romney and others asserted that religiously-affiliated employers should have the "freedom" to refuse, on the basis of their religious beliefs, to pay for contraceptives for their employees.

After nearly three weeks of criticism from the religious right, Obama appeared before television cameras to sound a general retreat (or "accommodation," as he put it), citing principles of "religious liberty." Instead of the religious employers being required to provide coverage for contraceptives, administration officials indicated, such coverage would instead be funded by insurance companies, along the lines of a similar rule in the state of Hawaii.

The administration's capitulation now calls into question laws in 28 states that require all employers, including religious ones, to provide coverage for contraceptives to their employees.

The new doctrine of "religious freedom" embraced by Obama represents, in fact, the opposite of religious freedom. It is an assault on the First Amendment to the US Constitution, which has historically been understood to require the separation of church

and state and to protect individuals from religious persecution.

## Separation of church and state

The First Amendment was ratified in 1791 in the aftermath of the American Revolution. The first of 10 amendments known collectively as the Bill of Rights, it begins by declaring: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

In 1802, Thomas Jefferson, the author of the Declaration of Independence, famously wrote: "Believing ... that religion is a matter which lies solely between Man and his God ... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."

Citing Jefferson's metaphor of a "wall of separation," Supreme Court Justice Hugo Black explained in 1947 that the First Amendment requires that "government must be neutral among religions and non-religion: it cannot promote, endorse, or fund religion or religious institutions."

While its observance has not been without exceptions, and while it has been substantially eroded in recent years, this basic principle has persisted for the past two centuries.

It is worth recalling a speech by then-presidential candidate John F. Kennedy, given on September 12, 1960, in which he responded to the criticism that his Catholic religion would unduly influence decisions he made as president. Kennedy, the first Catholic to be elected US president, declared: "I believe in an America where the separation of church and state is absolute ... where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source; where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials..."

In the same speech, Kennedy went on to state that the office of president "must neither be humbled by making it the instrument of

any one religious group, nor tarnished by arbitrarily withholding its occupancy from the members of any one religious group. I believe in a president whose religious views are his own private affair, neither imposed by him upon the nation, or imposed by the nation upon him as a condition to holding that office.”

Pursuant to the principle of separation of church and state, any president in US history, confronted with a campaign of the kind whipped up over the past three weeks, would have been entirely within his rights to request that all the zealots kindly keep their religious views to themselves.

One cannot help but contrast the language of Kennedy with the language of Obama last Friday. Responding to the campaign by the Catholic Church and the religious right, Obama said he shared their concern for “religious liberty,” and declared that “as a Christian, I cherish that right.” On that basis he sought to justify his decision to scrap the rule his administration had announced three weeks before.

It must be said that no president in a democracy has any business motivating a matter of public policy by referencing his or her religion. That is, in and of itself, an affront to the sensibilities of non-Christians, and is better suited to a theocracy.

Kennedy was in his time considered a centrist figure, representing the more conservative flank of the liberal wing of the Democratic Party. All the more significant, then, is the stark difference between Kennedy and Obama on the question of separation of church and state. The disparity provides yet another illustration of the dramatic shift to the right in American politics that has taken place over the last several decades.

### The First Amendment and “religious freedom”

The capitulation by the Obama administration calls into question not just the separation of church and state, but the entire legal framework of religious freedom in the US as it has persisted, in its basic features, over the past two centuries.

As the term “religious freedom” has been historically understood in the US legal system, there is absolutely no issue of religious freedom raised by the rule on contraceptives initially proposed by the administration.

The First Amendment, together with other provisions of the constitution as well as the federal civil rights laws of the 1960s, protects individuals from persecution on the basis of religion. The rule proposed by the Obama administration on January 20 would not have “respected an establishment of religion.” It would not have preferred one religion over another. It would not have discriminated against anyone on the basis of religion, nor would it have unfairly targeted a religious minority.

In fact, the rule as it was initially proposed already exempted churches—a major concession to the religious right. The rule would have affected only religiously-affiliated universities, schools, hospitals and charities.

Neither would it have forced anyone to use or not to use birth control, contrary to all the bluster of the Republican pundits. It

would merely have ensured that workers at certain religiously-affiliated workplaces received health coverage for contraceptives, an entirely legal form of health care. Those workers whose religious views prevented them from using contraceptives would have been entirely free to decline to use them.

In fact, if any issue of religious freedom was involved, it was raised by the refusal of employers to provide health care coverage for contraceptives in the first place. There is no justification for denying coverage for contraceptives except religious doctrine, and for millions of families struggling to make ends meet, the denial of coverage for medical care is the same as the denial of medical care itself.

The new Orwellian understanding of the First Amendment championed by the religious right—to which the Obama administration has now adapted itself—turns “religious freedom” upside down. Under the new doctrine, the First Amendment, instead of ensuring freedom from religious persecution, ensures the freedom to persecute and discriminate on the basis of religion.

The Obama administration’s capitulation takes on special significance in light of the Supreme Court’s decision on January 11 in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*. In that case, on the grounds of “freedom of religion” and the First Amendment, the Supreme Court granted religious institutions virtually unchallengeable autonomy in their treatment of their employees, permitting those institutions to escape compliance with federal civil rights laws.

The *Hosanna-Tabor* case is one among several recent Supreme Court cases expanding the prerogatives of corporations and employers. Meanwhile, the fundamental democratic rights of the population are being rolled back across the board.

Where does this newly discovered “religious freedom” end? Will the First Amendment now be understood to protect an employer who, for religious reasons, refuses to hire Muslims? Or Jews? If a CEO who is a Ku Klux Klan member decides that it is “against his religion” to provide health care coverage for blacks or women in his employ, will his refusal to do so be constitutionally protected?

In a political climate polluted with religious bigotry—as exhibited by the recent outburst of anti-Muslim hysteria in the media around the “Ground Zero Mosque”—the right-wing campaign for “religious freedom” should be taken very seriously.

In this context, the Obama administration’s capitulation sends a clear signal that any constituency that once existed in the political establishment for maintaining the separation of church and state and for preventing religious persecution is rapidly disappearing.



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