***Notre Dame v. Sebelius***

1. Some background facts:
   1. Note that this case was decided by the 7th Circuit Court of Appeals. You can listen to oral argument [here](http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.13-3853_02_12_2014.mp3).

* + 1. Is this a federal court or a state court? What’s the difference?
    2. What is a Court of Appeals? How does it differ from a District Court? From the Supreme Court?
  1. The opinion of the court was written by [Richard Posner](http://en.wikipedia.org/wiki/Richard_Posner), perhaps the greatest appellate judge of our time.
  2. Note that this case only arises because according to the law, “the university is a nonprofit corporate ‘person’”. Should corporations be considered persons, with a range of free exercise and free speech rights?
  3. What is the difference drawn on p. 1 between providers of health insurance and companies that administer self-insured employer health plans? What is the relevance of that difference to the case at hand? (See p. 3)
  4. Why do you think male contraceptives are not covered by the Affordable Care Act? Should they be if women’s are covered? Why or why not?
  5. What health concerns motivate the inclusion of contraceptive coverage in the act? Are the statistics on unintended pregnancy and termination surprising?
  6. The Religious Freedom Restoration Act:
     1. Does the Religious Freedom Restoration Act, as described on p. 4, exemplify the Lockean or Accommodationist approach to toleration?
     2. What do the clauses numbered (1) and (2) on p. 4 mean?

1. The chronology:
   1. Which institutions were exempted from the contraception mandate when the Affordable Care Act was first adopted?
   2. How did Notre Dame gain access to exempt status?
   3. What must Notre Dame do to claim that status?
      1. Is it unfair to the insurance companies and their stockholders that they must bear the costs of providing contraceptives which Notre Dame will not furnish in virtue of its exempt status? Why or why not?
   4. Notre Dame’s legal action:
      1. When did Notre Dame file its second lawsuit? When did it file for a preliminary injunction? What is the difference?
      2. What question is the circuit court is being asked to decide? Explain the issues this question turns on.
      3. In your own words, explain the paragraph running from p. 9 through p. 10. Now explain Posner’s argument in the last full paragraph on p. 12. Note that Posner claims not to know what Notre Dame wants the court to do. But is it so unclear? (see p. 31)
2. The arguments and the issues
   1. Why does Posner move to the merits of Notre Dame’s case, despite what he said in the sentence beginning “So the question before us” on p. 8?
   2. Explain Notre Dame’s “trigger” argument.
      1. Posner has a number of responses to the trigger argument:
         1. Explain the two responses in the two paragraphs on p. 15.
         2. Explain the “single payer” argument on pp. 16-17.
         3. Explain the Quaker analogy on pp. 17-18. Is the analogy a good one?
         4. Explain the argument running on pp. 18-19, including the distinction between a warning and a trigger.
      2. Do you find the trigger argument successful? Why or why not?
   3. Explain Notre Dame’s “conduit argument” and Posner’s response, as discussed on p. 19.
   4. Both the trigger and conduit arguments are supposed to show that what Notre Dame is required to do to claim its exemption constitute substantial burdens on its free exercise of religion (see p. 13). To know whether the arguments work, we need to know what makes an activity burdensome and what makes a burden substantial.
      1. Can an activity that can be completed in five minutes and at minimal financial cost be substantially burdensome?
      2. At p. 38 of the dissent, Judge Flaum writes:

Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith. Notre Dame tells us that Catholic doctrine prohibits the action that the government requires it to take. So long as that belief is sincerely held, I believe we should defer to Notre Dame’s understanding.

* + - 1. Is he right about this, or is he being too accommodating of individual conscience?
      2. NOTE that at her pp. 104-5, Nussbaum says “the person’s own interpretation of religion is what counts for conscience. Would she agree with Judge Flaum?
      3. To help us think about whether there is some standard by which to judge the deliverances of conscience, consider a passage from p. 42 of the dissent in which one deliverance of the University’s conscience is described: “a form that, in Notre Dame’s view, endorses the provision of contraceptives to its students and employees.” Is it credible to view the submission of the form as endorsement? Why or why not?
  1. What is the “novelty” Posner finds in Notre Dame’s arguments (see p. 20)?
  2. Notre Dame has two non-RFRA arguments:
     1. What is the establishment clause argument, and what is Posner’s response?
     2. What is the free speech argument, and what is Posner’s response?

1. What is your own considered view of Notre Dame’s position?