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The Affordable Care Act and Religious Freedom: The Next Battleground

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The Affordable Care Act and Religious Freedom: The Next Battleground

by

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I. Introduction

Millions of Americans anxiously awaited the much anticipated Supreme Court decision that could transform our health care system and dramatically change lives. On June 28, 2012, the United States Supreme Court spoke: the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) is constitutional.\(^1\) Chief Justice Roberts, joining the four liberal justices, upheld the ACA as a valid exercise of Congressional power under the Tax and Spend Clause.\(^2\) Although seven justices agreed that the Medicaid Expansion was coercive on the States, without a consensus to strike it completely, the provision was left in “limbo.”\(^3\) Now, participation in the Medicaid Expansion program, a “centerpiece of the ACA,”\(^4\) is voluntary.

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\(^1\) Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). Actually, the Court upheld the individual mandate that requires everyone who can afford to purchase insurance, actually do so, or suffer a penalty/tax. Without forcing millions of healthy Americans into the insurance market, the cost of the insurance industry reforms with the concomitant goal to keep premiums affordable would be impossible.

\(^2\) Id. at 2608.

\(^3\) Id.

\(^4\) In his dissent, Justice Scalia underscores the importance of the Medicaid expansion program to the ACA. He states:

The stated goal of the ACA is near-universal health care coverage. . . . for low-income individuals who are simply not able to obtain insurance, Congress expanded Medicaid, transforming it from a program covering only members of a limited list of vulnerable groups into a program that provides at least the requisite minimum level of coverage for the poor. This design was intended to provide at least a specified minimum level of coverage for all Americans, but the achievement of that goal obviously depends on participation by every single State. If any State—not to mention all of the 26 States that brought this suit—chose to decline the federal offer, there would be a gaping hole in the ACA’s coverage.

Id. at 2664-65. (Scalia J., dissenting) (citations omitted). Justice Scalia criticized the majority’s adoption of the government’s proposal of the states receiving the additional Medicaid funds if they expand eligibility, but keeping their pre-existing Medicaid funds if they do not. In Justice Scalia’s view,
upon the States. In the aftermath of the initial euphoria by proponents of the ACA and doomsday predictions by its opponents, Americans are left wondering what this all means in practical terms.

Despite the political rhetoric, without a crystal ball, it is almost impossible to predict with any accuracy exactly how the ACA will affect Americans’ pocketbooks or the quality and accessibility of care. What is certain is the continued debate regarding the effect of the Supreme Court’s decision on core American values: the largess of the federal government; states’ rights; and individual liberty versus social responsibility. In some spheres of the world, universal health

[T]he Government’s proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there.

Id. at 2667. (Scalia J., dissenting). But see Neil H. Buchanan, It does Not Matter whether Congress calls a Tax a Tax: Explaining the Dissenting Justices’ Misconceptions About the Taxing Power in the Affordable Care Act Case, July 5, 2012, http://verdict.justia.com/2012/07/05/it-does-not-matter-whether-congress-calls-a-tax-a-tax (criticizing the dissenting Justices’ view that “cross-state subsidization [of the expanded Medicaid program is] ‘destabilizing’ and ‘antagonizing’ to harmony within the Union” because “the very nature of federalism guarantees that all fiscal decisions will necessarily result in some states being ‘net winners’ and others being ‘net losers.’”).

Id. at 2608.

6 See, e.g., Adam Liptak, Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama, N.Y. TIMES June 28, 2012, http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all (“Outside the court, more than 1,000 people gathered — packing the sidewalk, playing music, chanting slogans — and a loud cheer went up as word spread that the law had been largely upheld. Chants of “Yes we can!” rang out.”).

7 See, e.g., Spin goes the healthcare ruling: A sampling of reaction to Thursday's Supreme Court decision on the Patient Protection and Affordable Care Act, drawn from emailed statements and website postings, L.A. TIMES, June 29, 2012, http://articles.latimes.com/2012/jun/29/opinion/la-oe-health-care-reaction-20120629 (“[The reaction of] Americans for Limited Government [was:] the U.S. Constitution died today. The underlying hope and belief that our nation's founding document protected individual freedoms from an ever encroaching government is a thing of the past based upon this ruling.”) (emphasis omitted).
care is considered a political and civil right, basic to human dignity, and a positive right that government should guarantee. In our fiercely individualistic view of freedom, the ACA strikes a chord in Americans’ consciousness about the role of government in mandating that those with “more,” settle for “less,” in order to provide for those “without.”

This article leaves those political and philosophical discussions for another day and focuses on the next theater of the ACA battleground, the Health and Human Services (HHS) Mandate which requires nonexempt employers/insurers to provide eligible women with coverage for contraceptives, sterilizations, and related patient education and counseling. For the most vocal objectors, nonexempt religious employers, this requirement provides a “Hobson’s Choice”: they must violate strongly held religious beliefs or suffer a penalty. Religious freedom has become a rallying cry for those who argue that government has gone too far with the HHS Mandate. The guarantees of religious freedom embodied in the First Amendment are over two centuries old; yet, the debate continues on where to draw the line when neutral, generally applicable government regulations infringe on those rights.

In focusing on the religious freedom issue presented by the HHS Mandate, imagine an alternate universe where our forefathers could travel through time and space to participate in this

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8 For example, article 35 of the charter of fundamental rights of the European Union states: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.” See 2000 J.O. (C 364).
9 It is unclear what the ACA will mean for health care quality, accessibility or options for those who can afford to pay for the very best.
11 See, e.g., Complaint at 16-96, Ave Maria University v. Sebelius, No. 2:12-CV-00088-UA-SPC (M.D. Fla. Feb. 21, 2012) (claiming that “the mandate forces [it] to choose among violating its religious beliefs, incurring substantial fines, or terminating its employee health insurance coverage.”) [hereinafter Ave Maria Complaint].
12 The First Amendment was adopted in 1791.
current public debate. While our Founding Fathers would probably be aghast at the size of the federal government, never imagining the amount and scope of regulation over our everyday lives, let’s assume for the moment that these great architects of American democracy would support or, at least, reluctantly accede\(^{13}\) to a national health care bill. Perhaps such hypothetical discussion would go as follows:

Thomas Jefferson:

The First Amendment was meant to create a wall of separation between Church and state.\(^ {14}\) However, this does not prevent civil government from regulating economic activity.\(^ {15}\) It seems to me that requiring health insurance providers to cover certain medical benefits has nothing to do with man’s natural rights to hold religious beliefs free from government interference. This is not about religious opinion. This is about providing health care to women.

James Madison:

But, Thomas, your words in the famous Danbury Baptist letter spoke about the inviolability of conscience to government interventions.\(^ {16}\) You talked about the ‘wall of eternal separation’\(^ {17}\) and how government should not take coercive

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\(^{13}\) Certainly, Anti-Federalists like Thomas Jefferson would decry the role of the federal government and argue that health care regulation is a state matter. See Gary L McDonnel, *Were the Anti-Federalists Right? Judicial Activism and the Problem of Consolidated Government*, 12 PUBLIUS 99-100, No. 3 (Oxford University Press 1982) (noting that the Anti-federalists “feared that the states, which they saw as politically essential to civil liberty, would gradually be absorbed by a remote national authority, so removed from the people that self-government in any meaningful sense would vanish; and in its place would come the administrative tyranny of ‘drones’ and ‘placemen.’”).


\(^{15}\) Id.

\(^{16}\) Id.


[t]he Danbury Baptist Letter was one of the centerpieces of the Library of Congress’s 1998 exhibit ‘Religion and the Founding of the American Republic.’ The library’s Manuscript Division holds Jefferson’s holograph draft of the letter, which, as experts know, was heavily edited by the president. Words, phrases, entire lines were inked out; a marginal note was added to explain a section that was circled for deletion. A few of Jefferson’s attempted obliterations can be puzzled out by the naked eye; scrutiny reveals that he originally wrote “wall of eternal separation.”
initiatives that conflict with the religious sphere. Isn’t this what the HHS Mandate does? In article 1 of my ‘Memorial and Remonstrance,’ I emphasized the point that in matters of religion, ‘no man’s right should be abridged by the institution of Civil Society.’

Thomas Jefferson:

I hate to admit this, but much of what I wrote in the Danbury Baptist letter was merely politics. The letter was an attempt to counter my political enemies who, as you know, constantly labeled me as an atheist. I have always believed and continue to believe that there is a difference between one’s religious opinion and one’s ‘conformance with social duties.’

A mandate requiring women to use or not use contraceptives would certainly violate religious freedom; but, a neutral law requiring health insurance providers to make contraceptives available to its insured individuals or employees does not invade the province of religious conscience.

George Washington:

In contrast to James’ concern that government may not act in a manner to penalize religion, I have always believed that ‘religious liberty must recognize the legitimate demands of good citizenship.’ Yes, ‘The conscientious scruples of all men should be treated with great delicacy & tenderness,’ but civil obligations, like fighting in a war or complying with the HHS Mandate, despite religious beliefs to the contrary, are demands of good citizenship. Every citizen must contribute to the demands of civil society.

James Madison:

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Id. (emphasis added).


19 Hutson, *supra* note 17, at 776-77. The author states that it was his responsibility, as the Curator of the Library of Congress’s 1998 exhibit “Religion and the Founding of the American Republic,” to offer some explanation of the blotted-out passages from the holograph draft of Jefferson’s letter which the FBI laboratory had helped recover. His conclusion was that the letter “was designed by the third president to respond to a malignant and persistent Federalist campaign of political defamation.” *Id.* at 777.

20 *Id.* at 781.


24 *Id.*
George, you can’t possibly equate contributing to the common defense with paying for health care services. You yourself said that when it comes to ‘the protection and the essential interests of the Nation,’ then perhaps the state’s interest trumps religious freedom. But, health care coverage is not an ‘essential’ interest of the Nation; and other means to pay for whatever medical services government deems necessary can be found – means that do not infringe on religious employers’ freedom of conscience.

George Washington:
If that be so, then the issue is whether or not the Government’s interest is essential enough to oblige religious employers to fulfill their good citizenship duties and submit to the law. It is my ‘wish and desire’ for the HHS Mandate to accommodate religious employers, but only if such accommodation is justified and permitted by our nation’s essential interests.

Roger Williams:
Well, I just have to disagree with any notion of balancing religious freedom and government interests. This country was founded on a notion of religious freedom and government should not interfere with one’s relationship with God. The power of government lies with the people; and if people, in this case religious employers, object to a government mandate that goes against their religious beliefs, then government must give way to the people’s right to religious freedom.

Of course, such a discussion is pure fantasy. However, the historical record on what the First Amendment guarantees meant in the hearts and minds of those who wrote the Constitution and the Bill of Rights is inconclusive as to their original intent. Not so unlike today, there was probably little consensus among our Founders on these issues. As to the current controversy

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25 Id.
26 Id. (“[I]t is my wish and desire that the laws may always be as extensively accommodated to [the conscientious scruples of all men] as a due regard to the protection and essential interests of the nation may justify and permit.”).
27 John M. Barry, God, Government and Roger Williams’ Big Idea, SMITHSONIAN, January 2012.
28 Id.
29 Id. Williams rejected the idea that God lent his authority to the government writing, “I infer that the sovereign, original, and foundation of civil power lies in the people,” and the governments they establish, “have no more power, no for no longer time, than the civil power or people consenting and agreeing shall betrust them with.”
30 Roger Williams, The Bloudy Tenent, of Persecution, for cause of Conscience, Discussed, in A Conference Betweene Truth and Peace (1867) (“[M]an hath no power to make laws that bind conscience . . . and constrain them to such worships which their own souls tell them they have no satisfaction or faith in.”).
over the HHS Mandate, there is strong disagreement over whether this is a neutral law of general applicability and/or a tax law, and what standard of scrutiny applies to the government’s justification for infringing on religious beliefs. Some fear the “slippery slope,” meaning that the HHS Mandate is part of the federal government’s mission to create a social agenda, institutionalized by legal rights, which is at odds with religious beliefs.

Within this context, the following article examines the HHS Mandate, the perspective of religious objectors, and its constitutional implications. Part II of this article will provide an overview of the ACA and the HHS Mandate. Part III will discuss the maelstrom created by the HHS Mandate, highlighting the religious groups’ perspective. The constitutional issues will be discussed in Part IV, including how the Supreme Court’s ACA decision might impact the First Amendment arguments raised in the pending lawsuits challenging the HHS Mandate. Finally, Part V will conclude that the HHS Mandate would not survive constitutional challenge because there are other means to provide these medical services that are more respectful of religious beliefs.

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31 See Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the right of free exercise does not relieve the individual of obligation to comply with a valid or neutral law of general applicability on ground that the law proscribes, or requires, conduct that is contrary to his religious practice, as long as the law does not violate other constitutional protections.); see also infra part IV.

32 See infra part IV.

33 President Obama’s Justice Department decided to stop defending lawsuits challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as a union only between a man and a woman. The reason for this decision is that the President and his Secretary of Justice, Eric Holder, believe that classifications based on sexual orientation should be subjected to a more heightened standard of scrutiny than rational basis, which makes any argument in defense of DOMA’s section 3 unreasonable, according to them. See Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, available at http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. Moreover, in an interview with ABC news on May 9, 2012, President Obama publicly announced his support for same sex marriage. See Josh Ernest, President Obama Supports Same-Sex Marriage, THE WHITE HOUSE BLOG (May 10, 2012, 7:31 PM), http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage.
II. The Affordable Care Act and the HHS Mandate

Passage of the ACA culminated decades of wrangling over spiraling health care costs and the growing numbers of Americans who are uninsured or uninsurable. Emotions ran high as the bill passed with no bipartisan support. Although voting “yea” or “nay,” only few legislators had actually read the 950-page bill. Those supporting the bill were targeted; they received death threats and angry constituents vandalized legislative offices. There were vitriolic remarks shouted from the House floor as members of Congress discussed various provisions. Even before President Obama signed the bill into law, States threatened lawsuits.

34See The Kaiser Family Foundation and Health Research & Educational Trust, Health Care Costs: A Primer, (May 2012), available at http://www.kff.org/insurance/upload/7670-03.pdf (“Health care accounts for a remarkably slice of the U.S. economic pie. Each year health related spending grows. . . . These cost increases have a significant effect on households, businesses, and federal, states, and local governments.”).

35Nearly 35% of adults—61 million—were either uninsured or underinsured in 2003. See Cathy Schoen, Michelle M. Doty, Sara Collins & Alyssa L. Holmgren, Insured But Not Protected: How Many Adults Are Underinsured?, HEALTH AFFAIRS, W5-289 (June 14, 2005), available at http://content.healthaffairs.org/content/early/2005/06/14/hlthaff.w5.289.citation (last visited July 20, 2012).


38See Sam Dolnick, Katherine Q. Seelye & Adam Nagourney, In Giffords’s District, a Long History of Tension, N.Y. TIMES, Jan. 10, 2011, http://www.nytimes.com/2011/01/11/us/11district.html?pagewanted=all (“Representative Gabrielle Giffords was distressed when the glass front door of her district office here was shattered by a kick or a pellet gun last March, an act of vandalism that took place hours after she joined Democrats in passing President Obama’s health care bill.”).

and Republicans vowed to repeal the ACA.41 However, all of this is past history, or is it? The Supreme Court’s decision brought a torrent of new threats to repeal the ACA.42

Nevertheless, some of the provisions of the ACA are already in effect.43 Others will become effective over the next year and a half.44 Full implementation depends on funding. How and when the ACA’s complicated funding scheme takes effect remains uncertain.45

For better or for worse, the ACA was Congress’ solution to cover 50 million uninsured Americans, spread the cost of $43 billion of uncompensated health care costs, and re-direct $90 billion of underwriting costs to lower premiums and more coverage, while maintaining profitability for insurance companies.46 The ACA provides a five-part remedy to what many

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42 See Robert Pear, Repeal of Health Care Law Approved, Again, by House, N.Y. TIMES, July 11, 2012, http://www.nytimes.com/2012/07/12/health/policy/house-votes-again-to-repeal-health-law.html (“Waging old battles with new zeal, the House passed a bill on Wednesday to repeal President Obama’s health care overhaul law less than two weeks after the Supreme Court upheld it as constitutional . . . [The bill] has no chance of approval in the Senate and would face a veto from Mr. Obama if it ever got to him.”).
43 Some of these provisions include: banning discrimination against children with pre-existing conditions, providing interim help to the high-risk pool, banning rescissions, beginning to close the Medicare par D donut hole, providing free preventive care under Medicare, keeping young people under 26 covered under their parents’ policies, helping early retirees, banning lifetime limits on coverage, banning restrictive annual limits on coverage, providing free preventive care under new private plans, establishing a new and independent appeals process. See Key Provisions of Health Reform that Take Effect Immediately, The White House, available at http://www.whitehouse.gov/healthreform/immediate-benefits (last visited July 18, 2012).
45 Sebelius, 132 S. Ct. at 2642-78 (Scalia J., dissenting).
46 42 U.S.C. § 18091 (“Congress makes the following findings: . . . (F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008 . . . (J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of
perceive as a broken health care system. These remedies include: (1) insurance industry reforms; (2) state-run health benefit exchanges, an affordable marketplace for individuals, families, and small employers to purchase health insurance, with incentives of tax credits and subsidies for insurance buyers and sellers to enter this market; (3) the individual Mandate that imposes a penalty (or tax) on individuals who can afford to purchase and maintain insurance coverage, but fail to do so; (4) penalties on nonexempt private employers who do not offer a qualified health plan to employees; and (5) state-run Medicaid expansion programs,\footnote{The Medicaid expansion has been invalidated by the Supreme Court’s holding in \textit{Sebelius}, and participation is now made voluntary on the states. \textit{Sebelius}, 132 S. Ct. at 2608.} providing more federal funds and increased eligibility.\footnote{See \textit{Florida v. United States Dep’t of Health & Human Servs.}, 648 F.3d 1235, 1246 (11th Cir. 2011). The ACA regulates lots of other aspects of the health care system. \textit{Eg.}, 42 U.S.C.A § 294j (2006) ("award[ing] grants to eligible entities or consortia . . . to carry out demonstration projects to develop and implement academic curricula that integrates quality improvement and patient safety in the clinical education of health professionals"); \textit{See also} 42 U.S.C.A § 280g–11 (2006) ("award[ing] grants to eligible entities to promote positive health behaviors and outcomes for populations in medically underserved communities through the use of community health workers.").}

One of the most popular industry reforms is a requirement that insurance companies guarantee coverage, meaning no person can be denied insurance because of a pre-existing condition.\footnote{42 U.S.C.A § 300gg–3 (2006) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.").} Further, insurance companies can no longer base coverage and premium amount on individualized criteria.\footnote{\textit{Id.} § 300gg.} Insurance companies providing plans in individual, small group markets, and exchanges can charge premiums based on four factors only: (1) whether an

\footnote{47 The Medicaid expansion has been invalidated by the Supreme Court’s holding in \textit{Sebelius}, and participation is now made voluntary on the states. \textit{Sebelius}, 132 S. Ct. at 2608.}

\footnote{48 See \textit{Florida v. United States Dep’t of Health & Human Servs.}, 648 F.3d 1235, 1246 (11th Cir. 2011). The ACA regulates lots of other aspects of the health care system. \textit{Eg.}, 42 U.S.C.A § 294j (2006) ("award[ing] grants to eligible entities or consortia . . . to carry out demonstration projects to develop and implement academic curricula that integrates quality improvement and patient safety in the clinical education of health professionals"); \textit{See also} 42 U.S.C.A § 280g–11 (2006) ("award[ing] grants to eligible entities to promote positive health behaviors and outcomes for populations in medically underserved communities through the use of community health workers.").}

\footnote{49 \textit{Id.} § 300gg.}
individual or family plan; (2) rating area; (3) age; and (4) tobacco use. Plans can no longer institute yearly or life-time caps on spending. A “medical loss ratio” is imposed on insurance companies, requiring that 80 – 85% of premium revenue is spent on patient care and only 20 – 15% on overhead costs, depending on whether the plan is offered in a small or large group market.

The ACA regulates three areas of health insurance including the markets, the plans, and the benefits. Critical to the HHS Mandate controversy is the essential benefits package that a plan must provide. Although the Act delegates authority to the Department of Health and Human Services to define these benefits with specificity, at a minimum, ten services must be covered including, but not limited to, hospitalization, emergency services, maternity and newborn care, prescription drugs and laboratory services. Included in this list of essential benefits is “preventative and wellness services,” which, as defined by HHS, includes contraceptives, sterilization, and related patient education and counseling. Additionally, the preventative and wellness services must be provided to an insured without deductibles, co-pays, or other cost-sharing expenses.

Failure to offer employees a plan that meets these statutory requirements will result in a penalty/tax on nonexempt employers. Dubbed the “HHS Mandate,” this requirement became

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51 Id. The premium rate charged cannot vary based on age by more than 3 to 1 for adults, and cannot vary based on tobacco use by more than 1.5 to 1. Id.
52 Id. § 300gg–11.
53 Id. § 300gg–18.
57 Id.
58 See 26 U.S.C.A. § 4980H(a) (2006). The statute provides:
effective on August 1, 2012. Nonexempt religious employers have a one year reprieve before the Mandate goes into effect.  

Shortly after the Department of Health and Human Services announced the specifics of the mandate, religious groups responded with overwhelming disapproval. The Administration attempted to assuage the fears of religious objectors with a compromise. The compromise promised no “pass through” costs to the objecting employers for the medical services that

(a) Large employers not offering health coverage. --If--
(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and
(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

Id.  
62 See FACT SHEET: Women’s Preventive Services and Religious Institutions, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, Feb. 10, 2012 (“The policy also ensures that if a woman works for a religious employer with objections to providing contraceptive services as part of its health plan, the religious employer will not be required to provide, pay for or refer for contraception coverage, but her insurance company will be required to directly offer her contraceptive care free of charge.”) [hereinafter Fact Sheet].
conflicted with religious beliefs. Recognizing this as a “distinction without a difference,” the objectors argued that, regardless of costs, the HHS Mandate infringed on their free exercise of religious beliefs.

III. The Perspective of Religious Objectors

The clash between the Catholic Church and the federal government over the HHS Mandate has undoubtedly been the most visible and vocal collision between Church and State since the 1973 U.S. Supreme Court’s holding in Roe v. Wade, where the Court ruled that prohibiting abortion was unconstitutional. The numerous lawsuits against the Obama administration allege that the HHS Mandate violates the religious freedom of all religious groups. From the onset, Catholics have been steadfast in their assertion that this is not purely a Catholic battle, not a battle about contraception; this battle is about protecting religious freedom for all Americans. Other religious leaders and conservatives have agreed. People of diverse

63 Id.
faiths have become political allies when it comes to opposition to the HHS Mandate.70 Even 
religious entities that do not object to the use of contraceptives oppose the HHS Mandate.71 
Leaders from the Dioceses, non-profit organizations, and educational institutions are taking 
action and engaging in scholarly discourse in response to the HHS Mandate.72 All stand united 

69 Id. Former Arkansas Governor Mike Huckabee stated in this matter, “We are all Catholics 
now.” Id. In fact, speakers in nationwide rallies have included leaders of different 
denominations, Catholic, Protestants, Jews and even one pagan high priest. Id. 
70 Christine M. Williams, HHS Mandate Latest in Line of Religious Crises, (U.S. Conf. Cath. 
Bishops, D.C.), http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-
71 Id. See also Philip Ryken & John Garvey, An Evangelical-Catholic Stand on Liberty, WALL 
St. J., July 19, 2012, at A15 (where Wheaton College, a Christian liberal arts college, and 
Catholic University have taken a stand to defend religious freedom by jointly filing a lawsuit 
against the Department of Health and Human Services even though they have differing beliefs 
regarding the use of contraceptives); See also Joseph Esposito, Not Just a Catholic Issue: HHS 
Mandate Sparks Broad Christian Opposition, HEADLINE BISTRO, June 29, 2012, 
Convention’s Dr. Richard Land, “It’s about religious freedom, not reproductive freedom. This is 
about conscience, not contraception. It’s about coercion, not Catholics.”). 
72 Id; Matthew Archbold, Dean of Catholic Law School Stands with Bishop in Opposition to 
HHS Mandate, CARDINAL NEWMAN SOC’Y, 
http://blog.cardinalnewmansociety.org/2012/05/30/dean-of-catholic-law-school-stands-with-
bishop-in-opposition-to-hhs-mandate/ (last visited Aug. 9, 2012) (Dean Diaz of Barry University 
School of Law uniting with Bishop Noonan of Orlando in opposing the HHS mandate and 
emphasizing the fundamental right of religious freedom over any health care issue including 
contraceptives); John Garvey, For the government, what counts as Catholic?, WASH. POST, May 
catholic/2012/05/25/gJQAcWFPqU_story.html (President Garvey of Catholic University 
commenting on the HHS mandate and the it’s implications in legal developments regarding 
separation of church and state); Joan Frawley Desmond, Ave Maria University Files Legal 
Challenge Against HHS Mandate, NAT’L CATH. REG., Feb. 21, 2012, 
http://www.ncregister.com/daily-news/ave-maria-university-files-legal-challenge-against-hhs-
mandate/ (President Towey of Ave Maria University recognizing the drastic shift in the role of 
faith based community initiatives between the Bush and Obama administrations); A Message 
from Father John Jenkins, C.S.C., President, University of Notre Dame, May 21, 2012, available 
at http://president.nd.edu/communications/a-message-from-father-jenkins-on-the-hhs-lawsuit/
emphasizing that “access to contraceptives” is not the issue; they fight to protect our most cherished liberty, Religious Freedom. Because this is an issue that threatens the sanctity of the First Amendment and also threatens one of the most basic tenets of the Catholic Church, Catholics are leading the charge against the Mandate.

In this battle, and it is nothing less than a battle, Catholic Bishops of the United States are rallying the faithful in what may be called the most massive campaign of civil disobedience since the Civil Rights Movement of the 1950s and early 1960s. The Church has stated, “the civil rights movement was an essentially religious movement, a call to awaken consciences.” In drawing the analogy between the Civil Rights Movement and this new call to action, the Bishops have done nothing less than call upon all Catholics to rise into a state of civil disobedience over the HHS Mandate. A coordinated campaign against the HHS Mandate has resulted in nationwide rallies defending religious freedom and protesting the fact that the Mandate requires Catholics to violate their own conscience simply to remain Catholic. In “Our First Most Cherished Liberty,” the Bishops have made a plea for “all the energies the Catholic community

(reiterating that Notre Dame’s lawsuit, like others against HHS, is not about access to contraceptives, but the freedom of religious organizations to literally practice what they preach).

73 See supra note 68.
75 Id.
77 Id. In a unified action across the nation, Catholics and other Christian and conservative religious groups are rallying together in a single movement of disobedience to the government, striking a similar stance that was taken following Roe v Wade. Jeffrey, supra note 74.
78 Id. See Kenny, supra note 66 (describing Fortnight for Freedom, beginning on June 21, 2012, with the feast of St. Thomas More and St. John Fisher, religious leaders dedicated this fourteen-day event to prayer, penance and re-dedication to the Lord, Jesus Christ.).
can muster” to pray for the safety of religious liberty.\textsuperscript{79} Perceived as direct coercion on people of faith, the HHS Mandate has been placed on a higher “platform” than \textit{Roe v. Wade}.\textsuperscript{80}

For the first time in the history of this great nation, born into a cradle of religious freedom and touted as one of religious liberty -- the federal government has the lawful right to compel religious institutions, which have not been exempted, to fund and facilitate coverage of pharmaceuticals or procedures that are the antithesis of their faith.\textsuperscript{81} What is more, in a “Catch 22” twist, not only does the federal government hold the power to decide who should be exempt


from this invasion, but it will have the full authority to classify which religious institutions are “sufficiently religious” to garner such an exemption. Religious groups must surrender themselves to further intrusion if they want to seek exemption under the Mandate, which is something they view as adding insult to injury. A religious institution will not know whether it is “religious enough” to meet the exemption standard unless it submits to an investigation by the very government that has imposed the Mandate upon it. In other words, in its view, to earn an exemption for being religious enough to be exempt, the Church has to turn on itself and become its own worst enemy, its own antithesis: It must become unreligious. A Catholic institution can only earn such an exemption by eliminating the majority of its services to non-Catholics. In a worst-case scenario the Catholic institution may even have to fire non-Catholic employees in order to secure the exemption. Under the Mandate, Bishop Dewane stated that prior to

82 Department of Justice, Peace and Human Development, Office of Domestic Social Development, Religious Liberty and the HHS Mandate (U.S. Conf. Cath. Bishops, D.C.), Feb. 2012, at 1-2, available at http://www.usccb.org/about/justice-peace-and-human-development/catholic-social-ministry-gathering/upload/Religious-liberty-and-HHS-backgrounder-2012.pdf (“Through this rule the government has decided what is … and is not … the “religious” mission of the Church … The mandate sets a terrible precedent of the federal government deciding what is religious.”) (hereinafter Religious liberty); A Message from Father Jenkins, supra note 72 (announcing Notre Dame University decision to file lawsuit against HHS mandate and expressing concern that “if we concede that the Government can decide which religious organizations are sufficiently religious to be awarded the freedom to follow the principles that define their mission, then we have begun to walk down a path that ultimately leads to the undermining of those institutions.”).


84 Id. See also Picarello, supra note 81, at 19.

85 Wiker, supra note 80 (stating that HHS Mandate is the “imperial state demanding that the Catholic Church must pick up the dagger and turn it against itself, and “act against its own moral law.”).


87 Dewane, supra note 83.
rendering services, Catholic organizations would no longer ask, “Are you hungry?” but will be forced to ask, “Are you Catholic?”

In the United States, the Catholic Church and other religious groups have enjoyed religious liberty under the law and have been free to practice their faith without interference or undue burden from the government. This is a right granted under the Constitution. Bishop Dewane of Florida describes the HHS Mandate as “identity theft” because it attempts to “strip religious institutions and individuals of their identity and also obligates them to act in defiance of their conscience.” Bishops Kevin Vann of Forth Worth and Kevin Farrell of Dallas stated, “(t)his decision is outrageous. It is an unprecedented and untenable abrogation of religious freedom in the United States.” Furthermore, several bishops have already stated their intentions, “We cannot -- we will not -- comply with this unjust law.” These bishops are relying on today’s cohort of Catholics to maintain the faithful stance of the church and protect their sacred rights granted by the very nation that is now taking them away.

88 Id. In fact, the exemption is “so narrow [even] Jesus would not qualify since he healed people who were not members of his religious community.” Id. The Church could not care for all those in need, but could only serve its Catholic brother’s keeper. For Catholic institutions, the days of being the Good Samaritan will cease because, after all, the stranger requiring assistance along the road may not be Catholic. Id.
90 U.S. Const. amend I.
91 Dewane, supra note 83.
93 Id; See also Jeffrey, supra note 74 (“An unjust law cannot be obeyed . . . Catholics, in solidarity with our fellow citizens, must have the courage not to obey them.”).
In light of this unworkable threshold, Catholics and other religious groups now feel compelled to fight a war they feel they did not start, a war they should not have to fight, especially not in a country where religious freedom is not only cherished but guaranteed under the Constitution.\(^95\) For Catholic institutions, the issue goes beyond a matter of policy; the people served through Catholic Charities, the students educated via Catholic schools, and the patients who receive valuable health services in the ministry’s hospitals will all suffer if such entities are closed down.\(^96\)

Across the nation, Bishops have expressed concern over the erosion of the daily practice of the Catholic faith as well as the Church’s ministries of charity and service.\(^97\) They have also clarified that providing health coverage to all Catholics is an important tenet of their faith, especially in light of the Catholic belief that all life is sacred from the moment of conception to http://standupforreligiousfreedom.org (calls for action and related news updates by the Nat’l Coal. to Stop the HHS Mandate).

\(^95\) Dewane, supra note 83 (“HHS Secretary Kathleen Sebelius has announced that the government is now “at war” with those who disagree with the HHS. We did not choose or desire such a war: but our government has unilaterally imposed war on all citizens who disagree with this Mandate, including Catholics who strive to help others.”); Desmond, supra note 72 (announcing Ave Maria University legal challenge against HHS Mandate as necessary in order “to exercise religious liberty rights guaranteed by our nation’s Constitution”); See also Most Rev. William E. Lori, Bishop of Bridgeport, U. S. Conf. Cath. Bishops, Testimony before the Judiciary Committee of the United States House of Representatives, Subcommittee on the Constitution ,Oct. 26, 2011, available at http://www.usccb.org/issues-and-action/religious-liberty/upload/lori-testimony-on-religious-freedom-2011-10-26.pdf (presenting Catholic concerns in the House in relation to the primacy of religious liberty as a human right).

\(^96\) Bauman, supra note 68 (Bishop Robert Lynch stated, “Some worry that we’ll have to face a decision between two ethically repugnant choices; subsidizing immoral services or no longer offering insurance coverage, a road none of us wants to travel.”).

death. However, they emphasize equally that mandating health care coverage, which is abhorrent to the dignity of life and the teaching of the Church, is deplorable. The ability to practice the Catholic faith and uphold the sacred teachings of life will be diminished, or even obliterated, if Catholic hospitals, universities, and institutions must make available life-destroying drugs. Catholics view this restriction on their ability to freely practice their faith and act according to their conscience as a clear issue of religious freedom.

While the Department of Health and Human Services labels some health services simply as “preventive,” the Church has a vastly different view. Surgical sterilization, drug-induced abortions, and anti-implantation devices are considered immoral by the Church because they directly prevent or terminate a pregnancy at the outset or serve to mutilate the human body. Bishop Bransfield expressed his concern: “To ask all Catholic institutions to provide for health insurance that pays for these direct interventions against the Gospel of Life is a direct affront to our consciences and our religious freedom. To require our institutions to pay for these services is, indeed, ‘un-American.’” Religious leaders, as well as concerned citizens, resent what they see as the administration’s apparent bullying: The Mandate will directly coerce people of faith and “this coercion is part and parcel of the administration’s ultimate goal,” said Fr. Marcel Picarello.

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99 Religious liberty, supra note 82, at 1.
100 Picarello, supra 81, at 9, 11-12.
102 Picarello, supra note 81, at 3-4.
104 Id.
Guarnizo of the Archdiocese of Washington at the recent D.C. rally. In a country already flooded with birth control, “one thing this anti-freedom of religion mandate is not about, is contraception,” according to this priest.

The President extended an olive branch on February 10, 2012 stating that the insurance providers would pick up the “contraception tab.” Religious leaders responded with condemnation and anger, not the conciliatory tone the administration conceivably expected. Catholic leaders rebuked the offer to mitigate by voicing substantial concerns. The Bishops worry about the trampling of religious rights and the HHS’ endeavor to define the “how” and the “who” of their ministry. Additionally, they expressed concern regarding the self-insured status of many of their religious entities. There was absolutely no relief to the self-insured, and hence no relief to many of the religious objectors.

105 Id.
106 Id.
108 Id.
110 Letter to Bishops, supra note 97, at 3-4.
111 Bishops Renew Call, supra note 107; See also Esposito, supra note 71 (where self-insured Baptist organizations plan to refuse to pay for abortifacients and self-insured Prison Fellowship Ministries express concerns about being driven out of business because they will face over $300,000 in fines from the federal government for refusing to pay for abortions in their health plan).
The quest endures: The goal is to gain concession from the administration regarding the religious freedom of all Americans as a fundamental and inalienable right.\textsuperscript{113} The Catholic Church and allied groups decried the administration’s attempt to minimize the significance of religious freedom by categorizing abortion inducing drugs and the like as a “woman’s health issue.”\textsuperscript{114} They strongly criticize the attempt to cloak the Mandate as a preventative health care measure as a way to circumvent an American’s right to religious freedom.\textsuperscript{115} The Catholic Church and other religious objectors to the HHS Mandate stand prepared to defend the right of religious liberty, against the government itself.\textsuperscript{116}

IV. HHS Mandate and the First Amendment

Turning from the fiery rhetoric and religious fervor engendered by the HHS Mandate is the less impassioned legal inquiry regarding the mandate’s constitutionality. As stated above, the ACA prescribes a list of medical benefits health plans must provide. Among those required services are women’s “preventive care and screenings” without cost to the insured.\textsuperscript{117} With statutory authority to define those services, the Department of HHS mandated that plans must provide “[a]ll Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”\textsuperscript{118} Included in the category of FDA-approved contraceptives are birth control pills, prescription IUDs, Plan B (the “morning-after pill”), and ulipristal (“ella” or the “week-after pill”).\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{113} Bishops Renew Call, supra note 107; Cardinal Dolan Voices Dismay at White House, supra note 109.
  \item \textsuperscript{114} Jeffrey, supra note 74.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Jeffrey, supra note 74.
  \item \textsuperscript{117} 42 U.S.C. § 300gg-13(a)(4) [hereinafter Contraception and Insurance Coverage].
  \item \textsuperscript{118} Women’s Preventive Services, supra note 59.
  \item \textsuperscript{119} Birth Control Guide, United States Department of Health and Human Servs., Food and Drug Administration, Office of Women’s Health, available at
\end{itemize}
Believing that life begins at conception, many religious employers contend that facilitating access to these contraceptives is tantamount to assisting in the destruction of life.120 Religious employers holding such beliefs are severely impacted by the HHS Mandate. They must violate their religious conscience or pay a penalty for failure to provide employees insurance coverage as mandated by the ACA.

Although the ACA provides an exemption for a narrow category of religious employers, larger organizations, that serve the public and employ persons of all faiths, do not qualify for the limited statutory exemption.121 These larger religious employers contend that the HHS Mandate violates their freedom of religious conscience, speech, and association as guaranteed by the First Amendment.

A. Pending Litigation

To date, there are twenty-four lawsuits filed in federal district courts throughout the country, challenging the constitutionality of the HHS Mandate. Many of the Plaintiffs in these lawsuits are religiously-affiliated colleges and universities.122 In one of the pending cases, several States have joined with others as Plaintiffs in the lawsuit.123

120 See Stormans Inc. v. Selecky, No. C07–5374 RBL, 2012 WL 566775, at **6-7 (W.D. Wash. Feb. 22, 2012) (attacking a Washington State statute requiring pharmacies to ‘stock and deliver’ FDA-approved medications; religious objectors alleged that a requirement to dispense contraceptives, particularly Plan B, the morning-after pill, was tantamount to forcing “active participation in the destruction of a human life.”).
121 To qualify for the exemption, a religious employer must meet four criteria: (1) serving the primary purpose of inculcating religious values; (2) employing employees who share the organization’s religious beliefs; (3) serving persons who share the same religious beliefs; and (4) qualifying as a nonprofit organization under the Internal Revenue Code of 1986. See 45 C.F.R. §147.130(a)(1)(iv)(B).
122 At least fifty-eight plaintiffs in twenty-four cases have filed lawsuits against the HHS Mandate. See HHS MANDATE INFORMATION CENTRAL, BECKETT FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Aug. 9, 2012); see also Bauman,
In response, the Government has filed a Motion to Dismiss on standing grounds.\textsuperscript{124} Pointing to the fact that Plaintiffs’ plans may be eligible for grandfather status and to the implementation of an enforcement safe harbor (protecting Plaintiffs and their insurers until at least January 1, 2014); the Government asserts that Plaintiffs have not sufficiently pled an imminent injury traceable to the challenged Mandate.\textsuperscript{125} Further, the Government contends that Plaintiffs’ claims are not yet ripe.\textsuperscript{126} The Government alleges that it has concrete plans to propose and amend the HHS Mandate, before January 1, 2014.\textsuperscript{127} According to the Government, it intends to further accommodate non-exempt, non-grandfathered religious organizations. Therefore, according to the government, Plaintiffs’ challenge of the HHS Mandate is not fit for judicial review.\textsuperscript{128}

Most likely, the District Court will deny the Government’s Motion to Dismiss. Like the ACA provision penalizing taxpayers for failure to purchase insurance, the HHS Mandate, under the terms of the Safe Harbor, will not apply to Plaintiffs until January 1, 2014.\textsuperscript{129} Therefore, the future date of enforcement does not defeat standing based on prudential considerations of

\textsuperscript{supra} note 68. On July 27, 2012, the U.S. District Court of Colorado granted Plaintiffs’ motion for preliminary injunction halting the HHS Mandate in the case of a Colorado-based company, Hercules Industries, whose owners are devout Catholic Christians. Newland v. Sebelius, No. 1:12CV1123JLK, 2012 WL 3069154, at*1 (D. Colo. July 17, 2012). On the other hand, some of the cases have been dismissed. See \textit{infra} note 123 and accompanying text.\textsuperscript{123} Nebraska v. Sebelius, 4:12-CV-03035 (D. Neb. Feb. 23, 2012). This case was dismissed because the court was not satisfied that the plaintiffs’ plans would not be grandfathered plans exempted from the HHS Mandate.\textsuperscript{124} See Defendants’ Motion to Dismiss and Memorandum in Support at 3, Ave Maria University v. Sebelius, No. 212-cv-00088-UA-SPC (M.D. Fla. May 16, 2012).\textsuperscript{125} \textit{Id.} at 3-4.\textsuperscript{126} \textit{Id.} at 4.\textsuperscript{127} \textit{Id.} (“Those intended changes . . . will establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt religious organizations’ objections to covering contraceptives services.”).\textsuperscript{128} \textit{Id.} \textsuperscript{129} See 77 Fed. Reg. 16501, 15504 (Mar. 21, 2012); see also \textit{Guidance, supra} note 60.
ripeness. Further, any future HHS proposal providing further accommodation to the nonexempt religious employers is merely aspirational. Without a concrete amendment accommodating the Plaintiffs’ objection to the HHS Mandate, the lawsuits are not rendered moot based on future promises.  

Unless and until the Plaintiffs’ objections to the HHS Mandate are remedied by expanding the religious exemption, or by some other accommodation, the affected religious employers will no doubt press their First Amendment claims all the way to the Supreme Court, if need be. Primarily, this controversy presents a conflict between religious conscience and the demands of civil society, a problem as old as the Republic itself. Supreme Court jurisprudence, analyzing when religious conscience must give way to neutral laws of general applicability, is confusing. Almost any general law could infringe on some individual’s religious belief. If government had to accommodate all religious claims of infringement by neutral laws, government activity would be severely curtailed, if not paralyzed.

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130 See U.S. v. Stevens, 130 S. Ct. 1577 (2010) (holding that a federal statute which criminalized the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, facially invalid under the First Amendment protection of speech). In response to the Government’s representations of prosecutorial restraint when the animal cruelty is not extreme, Chief Justice Roberts stated that “the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” Id. at 1591.

131 Normally, the Court would give great deference to the HHS in promulgating the policy as an administrative agency. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”). However, even if an administrative regulation “satisfies the Administrative Procedure Act’s “arbitrary [or] capricious” standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.” F.C.C. v. Fox Television stations, Inc., 566 U.S. 502, 516 (2009).

132 Letter from George Washington to The Society of Quakers, supra note 23.
The First Amendment requires government to be neutral when it comes to religious belief. Mandating that government neither favor a particular religious view (Establishment Clause) nor infringe on sincerely held religious beliefs (Free Exercise Clause) requires government “to walk a fine line” of neutrality. Thomas Jefferson’s “wall of eternal separation” is ideal in principle, but difficult in practice.

B. Free Exercise and Religious Freedom Reformation Act

1. Distinction between Religious Belief and Religious Practice

The earliest Supreme Court decisions addressing free exercise claims articulated a dichotomy between freedom to believe and freedom to act. In 1878, the Court upheld a federal law prohibiting polygamy. Although polygamy was a duty of the Mormon faith, the Court upheld the federal statute despite its infringement on the religious practice. Recognizing a distinction between mere opinion and action, the Court acknowledged the absolute freedom from government regulation of the former, but not the latter. As to mere opinion, the Court concluded that Congress had no legislative power to interfere with beliefs. “But, [Congress] was left free to reach actions which were in violation of social duties or subversive of good order.”

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133 Reynolds v. U.S., 98 U.S. 145 (1878) (challenging a federal law prohibiting polygamy as violating the Free Exercise Clause because the Mormon religion required its members to practice polygamy).
134 The Court in Reynolds stated:

[T]he members of the [Mormon] church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practice [sic] polygamy by such male members of said church, when circumstances would admit, would be punished, and the penalty for such failure and refusal would be damnation in the life to come.

Id. at 161 (internal quotation marks omitted).
135 Id. at 166.
136 Id. at 164.
Sixty years later, the Court reaffirmed its view of the Free Exercise Clause, as incorporating two aspects of religious freedom: (1) the freedom to believe and (2) the freedom to act.\textsuperscript{137} As in the polygamy case, the Court recognized that the freedom to believe is absolute; but, the freedom to act is not.\textsuperscript{138} The Court invalidated a licensing scheme for religious and charitable solicitations because an administrator had discretion to deny a permit based on a subjective determination that a cause was not religious.\textsuperscript{139} So much discretion has the potential to stifle minority views or unpopular speech/religion. Indeed, First Amendment principles are compromised when government may arbitrarily grant or deny a citizen’s freedom to speak and freely exercise religious beliefs.\textsuperscript{140}

In a case involving compulsory flag salute and pledge by public school children, the Court grappled with the issue of when government may infringe on First Amendment freedoms.\textsuperscript{141} Answering that question, the Court opined such regulation is permissible to prevent “grave and immediate danger” to the interests of others and to those interests which the “state may lawfully protect.”\textsuperscript{142} The Court determined that the children’s asserted freedom from compelled speech and the right to freely exercise their religious beliefs did not collide with

\begin{footnotes}
\item[137] Cantwell v. Connecticut, 310 U.S. 296 (1940).
\item[138] \textit{Id.} at 303-04 ("[T]he [First] Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.").
\item[139] \textit{Id.} at 311.
\item[140] See Freedman v. Maryland, 380 U.S. 51 (1965) (recognizing the need for procedural safeguards to reduce the dangers of prior restraint in granting licenses for films and other First Amendment protected activities).
\item[142] \textit{Id.} at 639.
\end{footnotes}
“rights asserted by any other individual.” Saluting and pledging the flag involves “affirmation of a belief” and an “attitude of mind,” which neither can be compelled nor suppressed.

In eloquent prose, Justice Jackson wrote: “[If] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or other matters of opinion or force citizens to confess by word or act of their faith therein.” It would take another twenty years before Free Exercise doctrine reached its zenith.

2. A Sea Change: Conduct is Protected by the Free Exercise Clause

Despite the early cases which made a distinction between religious belief and action, historians posit that the Free Exercise Clause was probably understood to protect both at the time of its adoption. By 1780, eleven of the thirteen states adopted constitutions, many of which included a bill of rights with an express provision protecting religious freedom. Since those who drafted and adopted the First Amendment were the same individuals who drafted their state constitutions, it is logical to assume that the term “free exercise of religion” was intended to have

143 Id. at 630.
144 Id. at 633.
145 Id. at 642.
146 Michael McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990) (“William Penn wrote in 1670 that ‘by liberty of conscience, we understand not only a meer Liberty of the Mind, in believing or disbelieving . . . but the exercise of ourselves in a visible way of worship.’”). The author also states:

Historian Thomas Curry recounts the 1651 flogging of Obediah Holmes, a Baptist, for holding a religious meeting in Lynn, Massachusetts: “To the familiar argument that he was sentenced not for conscience but for practice, Clark replied that there could be no such thing as freedom of conscience without freedom to act.”

Id. at 1451-52. The author concludes that it is unlikely the majority of Americans disagreed with this position by 1789. Id. at 1452. As to Jefferson’s advocacy for an action-belief distinction, given the history of the freedom of religious exercise in America, Jefferson’s position “was extraordinarily restrictive for his day.” Id. at 1452.
147 Id. at 1455.
the same meaning as the state provisions. The states included in the scope of the free exercise right both the freedom of conscience and the actions that flow from that conscience. While history does not necessarily dictate modern constitutional decision-making, it helps provide a beginning reference for judicial guidance.

It took almost a century for the Court to adopt the framers’ view, if historians are correct, that the Free Exercise Clause protects both belief and practice. In *Sherbert v. Verner*, the Court overruled the state’s denial of unemployment benefits to a claimant who refused to accept employment which required her to work on her day of Sabbath. “To condition the availability of benefits upon [the claimant’s] willingness to violate a cardinal principle of her religious faith effectively penalized the free exercise of her constitutional liberties.” The Court declined to apply a rational basis test to the state’s justification for its infringement on the claimant’s free exercise rights. Instead, the Court required the state to justify its denial of benefits to claimant by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”

In the following thirty years, the Court continued to apply strict scrutiny review and overruled denials of unemployment benefits when workers were discharged or unable to find

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148 Id. at 1456.
149 See, e.g., GA. CONST. of 1777, art. LVI, reprinted in I FEDERAL AND STATE CONSTITUTIONS COLONIAL ChARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 377, 383 (B. Poore 2d ed. 1878) (“All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.”).
151 Id. at 406.
152 Id. (citing Thomas v. Collins, 323 U.S. 516 (1945) (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.’”).
153 Id. at 403.
other employment based on religious beliefs and practices. However, it could be argued that the unemployment compensation cases are not “true” examples of neutral laws of general applicability requiring accommodations or exemptions for religious practices and beliefs. In fact, the Court in Sherbert couched its decision in terms of “neutrality,” recognizing that Sunday worshipers do not have to make the same choices as a religious person who celebrates the Sabbath Day on Saturday. Further, unemployment compensation review boards often make individualized assessments for granting exemptions from the general statutory requirements for receiving benefits; therefore, religious reasons could not be excluded from consideration for a possible exemption.

Almost a decade after Sherbert, the Court considered an exemption for the members of the Old Order Amish religion from Wisconsin’s compulsory school attendance statute. In Wisconsin v. Yoder, the Court reaffirmed its view that “religiously grounded conduct is [not] always outside the protection of the Free Exercise Clause.” Wisconsin’s compulsory education law required children to attend public or private school until the age of 16. Some Amish families refused to send their children to school beyond the age of 14. They argued

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155 Sherbert, 374 U.S. at 409.
156 In Bowen v. Roy, 476 U.S. 693 (1986), a plurality of the Court noted that “a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant’s unemployment.” See Employment Division v. Smith, 494 U.S. 872, 884 (1990) (discussing the Sherbert compelling interest test as limited to those cases. The unemployment compensation statute applied a “good cause” requirement for refusing available work and necessitated an individualized governmental assessment regarding the reasons for not accepting available employment).
158 Id. at 207.
159 Id.
that the “worldly influence” of secondary school was “in conflict with their beliefs.”

Although the statute was a neutral law of general applicability without any legislatively granted exemptions, the Court recognized that a law neutral “on its face, may in its application . . . unduly burden[] the free exercise of religion.” Applying strict scrutiny, the Court declined to accept the State’s argument that the compulsory education statute was necessary to serve the compelling interest of preparing teenagers “to be self-reliant and self-sufficient participants in society.”

The strict scrutiny standard applied in Sherbert and reaffirmed in Yoder was protective of free exercise claims in theory only. Despite the Court’s adoption of the compelling interest test, the Court did not always follow its precedent. In fact, after Yoder, outside of the unemployment compensation cases, the Court either declined to apply strict scrutiny or applied it in such a deferential way that no free exercise claim prevailed.

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160 Id. at 211.
161 Id. at 220.
162 Yoder, 406 U.S. at 221-22. The Court found no evidence in the record to support the State’s claim that “its system of compulsory education is so compelling that even the established religious practices of the Amish must give way.” Id. at 221. “Where fundamental claims of religious freedom are at stake,” the Court was unwilling to give deference to the legislature’s assertion that the regulation was necessary to serve the state’s compelling interest. Id.
163 See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass’n., 485 U.S. 439 (1988) (holding that the free exercise clause did not prohibit the government from permitting timber harvesting and road construction in an area of national forest that was traditionally used for religious purposes by members of three American Indian tribes in Northwestern California); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (holding that the free exercise clause did not prohibit the government from collecting sales and use taxes on distributions of religious materials); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that the free exercise clause did not prohibit application of air force regulation to prevent wearing of yarmulke by plaintiff while on duty and in uniform); O’Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (applying rational basis scrutiny to prisoners’ free exercise claims).
164 See, e.g., United States v. Lee, 455 U.S. 252 (1982) (holding that compulsory participation in the social security system interfered with the free exercise rights of the Amish, but their religious beliefs in conflict with payment of taxes afforded them no basis for resisting the tax imposed in employers to support the social security system); Bob Jones University v. United States, 461
3. The Demise of Strict Scrutiny

The Court reversed its free exercise doctrine in *Smith*. Upholding the denial of unemployment benefits to a claimant who was fired for using peyote for religious purposes, the Court narrowed the *Sherbert/Yoder* cases and applied a rational basis test.\textsuperscript{165} The Court rejected the compelling interest test as applied to neutral laws of general applicability and free exercise claims.\textsuperscript{166} Reasoning that an individual would “become a law unto himself,” if the obligation to obey a generally applicable criminal law, which incidentally infringes on religious beliefs, required the state to show a compelling government interest for such infringement.\textsuperscript{167}

The Court distinguished the application of the familiar compelling interest test to claims such as race discrimination or impermissible content-based speech restrictions from the requirement to obey generally applicable criminal laws regardless of religious beliefs.\textsuperscript{168} While the former cases involve individual rights for equal treatment and free speech, the Court emphasized that there is no “private right to ignore generally applicable laws.”\textsuperscript{169}

Adopting the view that exemptions to generally applicable laws based on free exercise are no longer required, the Court remedied some Justices’ concerns related to the *Sherbert/Yoder* analysis. Those concerns included: (1) requiring the government to evaluate the strength and

\textsuperscript{165} *Smith*, 494 U.S. at 890.
\textsuperscript{166} But see *Church of the Lukumi Babalu Ave. v. City of Hialeah*, 508 U.S. 520 (1993) (applying strict scrutiny to invalidate city’s ordinance outlawing killing of an animal when the primary purpose is not for food consumption. Although the ordinance was facially neutral toward religion, it was intended to keep out a Santeria church, a religious group which practices animal sacrifice. The ordinance basically targeted the Santeria religious practice, while permitting animal killing for various other reasons.).
\textsuperscript{167} *Smith*, 494 U.S. at 885.
\textsuperscript{168} Id. at 885-86.
\textsuperscript{169} Id. at 886.
sincerity of religious claims; (2) potentially providing religious claimants an unfair advantage; and (3) allowing courts to second-guess legislatures by applying “an essentially subjective balancing test.”


The Smith decision drew much criticism from a wide spectrum of religious and civil liberties groups. Such outcry galvanized Congress on both sides of the aisle. In response, Congress passed RFRA, which expressly rejected the holding of Smith and returned the compelling interest test as the applicable standard which government must satisfy when neutral laws burden religious exercise. The purpose and effect of RFRA was to re-instate the Sherbert/Yoder strict scrutiny analysis to all free exercise claims, “even if the burden results from a rule of general applicability.” Congress intended RFRA to have broad application to all Federal and State laws. In passing RFRA, Congress relied on its powers under section 5 of the Fourteenth Amendment.

Three years later, in City of Boerne v. Flores, the Court considered whether RFRA was “permissible enforcement legislation . . . protecting [ ] one of the liberties guaranteed by the

174 Id § 2000bb-1 (government must justify a burden on free exercise by demonstrating that such burden “(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).
175 City of Boerne v. Flores, 521 U.S. 507, 516 (“The Act's universal coverage is confirmed in § 2000bb–3(a), under which RFRA ‘applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].’”).
176 Id.
Fourteenth Amendment’s Due Process Clause . . . beyond what is necessary under Smith.”  
According to Congress, its decision “to dispense with proof of deliberate or overt discrimination and instead concentrate on the law’s effects” on free exercise rights was well within its section 5 power “to enact legislation designed to prevent as well as remedy constitutional violations.”

In what might be described as a separation of powers “power struggle,” the Court invalidated RFRA, at least as it applies to the states. Concluding that RFRA was not a remedial statute, the Court determined that Congress had exceeded its constitutional authority. By mandating that strict scrutiny be applied to free exercise claims, Congress prescribed a rule of substantive law that far exceeded its powers to remedy or prevent invidious discrimination under its Fourteenth Amendment, section 5 enforcement power.

While the Court acknowledged that each branch of government must determine the meaning of the Constitution “in the first instance,” this maxim applies only when the political branches are “act[ing] within the sphere of [their] power[s].” RFRA exceeded congressional authority and changed a judicial interpretation already issued in Smith. Therefore, the Court opined that in future cases its interpretation, not RFRA, would apply:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood

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177 Id. at 518.
178 Id.
179 Id. at 536. In 2000, however, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which applies the “substantial burden/compelling interest test” to land use regulations, such as zoning laws or landmark preservation issues, and to religious exercise claims of persons living in or confined to an institution, primarily prisons or mental institutions. See 42 U.S.C.A. § 2000cc (2006). Congress enacted RLUIPA pursuant to its commerce clause power (activities affecting interstate commerce) and tax and spend powers; see Cutter v. Wilkinson, 544 U.S. 709 (2005).
180 City of Boerne, 521 U.S. at 532.
181 Id.
182 Id. at 535-36.
183 Id. at 536.
that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; the provisions of the federal statute here invoked are beyond congressional authority, it is this Court’s precedent, not RFRA, which must control.\textsuperscript{184}

The force of *City of Boerne* to the vitality of RFRA is critical to the pending litigation challenging the HHS Mandate. The Plaintiffs contend that RFRA applies, requiring the government to satisfy strict scrutiny in its justification of the HHS Mandate’s burden on their free exercise of religious beliefs. It is unclear whether the holding in *City of Boerne* is limited to invalidating RFRA as it applies to state and local laws only. In other words, is *City of Boerne* a case about states’ rights and the limits of congressional authority under section 5 of the Fourteenth Amendment, or is it a case about separation of powers? In its decision, the Court said that RFRA violated the principles of separation of powers and that its precedents, not RFRA, would be applied in future cases.\textsuperscript{185}

The Supreme Court has not directly addressed this issue. However, the Court applied RFRA, without questioning its constitutionality, to a case factually similar to the *Smith* case.\textsuperscript{186} In both cases, claimants sought an exemption from enforcement of a neutral, generally applicable criminal law, to use a controlled substance for religious purposes.\textsuperscript{187} Contrary to its holding in *Smith* and its stated intentions in *City of Boerne*, the Court did apply the compelling interest test required by RFRA.\textsuperscript{188} In addition, every Circuit Court of Appeals addressing the question

\textsuperscript{184} *Id.*

\textsuperscript{185} *City of Boerne*, 521 U.S. at 536.


\textsuperscript{187} *Id.*; *Smith*, 494 U.S. at 872.

\textsuperscript{188} *Gonzalez*, 546 U.S. at 439 (“Applying [RFRA’s compelling interest] test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of *hoasca*.”).
whether RFRA survived *City of Boerne* as applied to the federal government and federal law answered in the affirmative, concluding that RFRA was properly enacted under the Necessary and Proper Clause.\(^{189}\)

As discussed below, RFRA would likely apply to the litigation challenging the HHS Mandate. RFRA’s application to the pending cases would require the government to establish that the HHS Mandate’s burden on free exercise is necessary to serve a compelling government interest and there is no alternative means, which is less restrictive of religious rights, to serve that interest. Conceding, for the moment, that the government’s interest in providing women free access to contraceptives and related health services is compelling,\(^{190}\) the government has already

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\(^{189}\) *See* Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006); O’Bryan v. Bureau of Prisons, 349 F. 3d 399 (7th Cir. 2003); Young v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir. 1998); Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950 (10 Cir. 2001).

\(^{190}\) The interests served by the HHS Mandate are to promote the health and wellness of women during their child-bearing years and to equalize the costs of wellness care between men and women in the same age group. *See* Defendant’s Motion to Dismiss, *supra* note 124, at 4-5. It is estimated that women’s wellness care costs are as much as 68% higher than men, especially during the woman’s child-bearing years. *See, e.g.*, Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 462 (N.Y. 2006); *see also* Catholic Charities of Sacramento, Inc. v. Superior Ct., 85 P.3d 67, 74 (Cal. 2204). The health benefits of contraceptives have been described as having “fewer abortions and unplanned pregnancies.” *Serio*, 859 N.E.2d at 462. Better access to contraceptives is argued to reduce “[s]uch conditions as diabetes, hypertension, arthritis and coronary artery disease [which] can be aggravated by pregnancy.” *Id.* Another benefit is to reduce low birth weight and developmental problems in children born from unintended pregnancies who are at risk of these problems. *Id.* However, these health benefits are not undisputable. Medical studies indicate that contraceptives are also associated with considerable health risks, especially for women with certain traits or living in particular geographic areas. Press Release No. 167, World Health Org. Int’l Agency for Research on Cancer, Iarc Monographs Programme Finds Combined Estrogen-Progestogen Contraceptives And Menopausal Therapy Are Carcinogenic To Humans (July 25, 2005), *available at* http://www.iarc.fr/en/media-centre/pr/2005/pr167.html; *Accord* Vincent Cogliano et al., *Carcinogenicity of combined oestrogen-progestagen contraceptives and menopausal treatment*, 6 THE LANCET ONCOLOGY 552, 552-553 (2005) (reviewing global medical study results by World Health Org. that classify contraceptives as carcinogenic agents and analyze associated risks and benefits by region.) The FDA issues warnings about contraceptives and the risk of blood clots. *U.S. Food and Drug Administration, FDA Drug Safety Communication: Safety*
suggested less restrictive means of serving that interest. In its Motion to Dismiss and supporting memorandum, the government suggested further accommodations for the nonexempt religious employers. One of those suggestions would permit these employers to provide employee health insurance plans without coverage for the objectionable services and incentivize insurance companies to provide women separate low cost insurance for those services.\textsuperscript{191}

C. If RFRA does not Apply: Other Paths to Strict Scrutiny

1. HHS Mandate Violates Freedom of Speech: A “Hybrid” Case

In the cases challenging the HHS Mandate, the Plaintiffs have alleged violations of rights, other than religious freedom, also guaranteed by the First Amendment. Those rights include freedom of speech and association.\textsuperscript{192} No doubt, the Plaintiffs raise these alternative claims to satisfy the characterization of a “hybrid” case discussed in \textit{Employment Division v. Smith}.\textsuperscript{193} In $Smith$, the Court did not overrule the Sherbert/Yoder cases, which endorsed an application of strict scrutiny to free exercise claims involving neutral laws of general applicability.\textsuperscript{194} While adopting a new rule of rational-basis scrutiny and rejecting the compelling interest test applied in Sherbert/Yoder, the Court narrowed its interpretation of those


\textsuperscript{191} Defendant’s Motion to Dismiss, \textit{supra} note 124, at 10-11.

\textsuperscript{192} See Ave Maria Complaint, \textit{supra} note 11, at 24-25.

\textsuperscript{193} Smith, 494 U.S. at 882.

\textsuperscript{194} Sherbert dealt with unemployment compensation benefits and it can be argued, see infra Part IV, B, that the unemployment cases did not involve generally applicable laws because the statute allowed for individualized assessments of whether a claimant was validly denied benefits because of “misconduct.” However, Yoder involved a neutral, generally applicable compulsory school attendance statute.
cases. The Court re-characterized the *Sherbert* decision as requiring government neutrality toward religion when a statute allows individualized considerations for exemptions other than religion. As to the *Yoder* line of cases, the Court re-defined these as “hybrid” cases, involving other constitutional protections, such as freedom of speech, in addition to the Free Exercise Clause.

To the extent that a nonexempt religious employer must either provide an employee health insurance plan which covers services contrary to religious belief or pay a penalty, Plaintiffs argue that the HHS Mandate violates their right not to speak, a freedom guaranteed under the Free Speech Clause. Although the government has accommodated the nonexempt

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195 Smith, 494 U.S. at 884 (“As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of “religious hardship” without compelling reason.”); *see also* *Everson* v. Board of Education, 330 U.S. 1, 18 (1947) (holding that city could treat religious schools the same as public and other private schools for purposes of a reimbursement program for parents whose children used public transportation without violating the Establishment Clause because the state must be “neutral in its relations with groups of religious believers and non-believers”).

196 It is unclear whether the “hybrid” case theory is valid. *See* Catholic Charities of Sacramento, Inc., 85 P.3d at 88 (The Supreme Court “has not, since the decision in Smith, determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim.”); *see also* *Lukumi*, 508 U.S. at 567 (Souter, J., concurring) (criticizing hybrid cases alluded to in Smith as “ultimately untenable”). No court has actually applied the hybrid-rights exception. *See* Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply a hybrids-rights exception as “completely illogical”). Several cases have criticized the application of the hybrids-rights exception as a means of Plaintiffs escaping the rational basis test adopted in Smith by merely adding to a free exercise claim “an utterly meritless claim of the violation of another alleged fundamental right.” Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999); *see also* Civil Liberty for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003). Only if the other constitutional violation is “colorable” will courts consider the hybrid theory as triggering strict scrutiny in a free exercise claim. *See* Swanson v. Guthrie Ind. School Dist., 135 F.3d 694, 700 (10th Cir. 1998); Axson-Flynn v. Johnson, 356 F.3d 1277, 1295-96 (10th Cir. 2004).

197 *See* Ave Maria Complaint, supra note 11, at 24. *But see*, e.g., *Serio*, 859 N.E.2d at 465 (upholding New York’s Women’s Health and Wellness Act, which requires employer-provided health insurance plans to cover contraceptives, if the plan covers other prescription drugs, despite the challengers’ claim that the Act compels speech and interferes with freedom of association
religious employers by requiring no pass through of costs for the objected to services, it remains unclear how the government could enforce this. Nevertheless, whether objecting employers incur costs or merely facilitate access to the services, they maintain it violates their free speech rights not to endorse or associate with a message at odds with their moral conscience.

The Free Speech Clause protects both the right to speak and the right not to speak. While the Mandate does not involve actual speech, communication of ideas can be expressed through conduct. The HHS Mandate represents the government’s message that women’s health services of the kind required are important. Further, the idea that contraceptives provide health benefits furthers the government’s belief that they are “life affirming” instead of “life defying.” Clearly, this view of contraceptives is totally at odds with the beliefs of religious objectors.

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which was found to be meritless); Catholic Charities of Sacramento, 85 P.3d at 88-89 (upholding California’s Women’s Contraception Equity Act despite the challengers’ raising free speech violations in an attempt to characterize the case as a “hybrid” case, which was found to be without merit).

198 See Fact Sheet, supra note 62; see also Grace-Marie Turner, Another Failed ‘Accommodation,’ NAT’L REV., March 17, 2012, available at http://www.nationalreview.com/corner/293753/another-failed-accommodation-grace-marie-turner (pointing out that the accommodation “was widely derided as a shell game because the insurers would simply pass the costs along indirectly to religious organizations through higher premiums. And it left no escape for self-insured religious organizations that pay health costs directly for their employees.”).

199 See Contraception and Insurance Coverage, supra note 64.

200 Barnette, 319 U.S. at 624 (compelling public school children to salute and pledge the flag violated the First Amendment).

201 United States v. O’Brien, 391 U.S. 367 (1968) (upholding the defendant’s conviction for burning his selective service registration certificate); See also, Texas v. Johnson, 491 U.S. 397, 404 (1989) (“the First Amendment [comes] into play . . . [if an] intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”).

202 The California Supreme Court found that “[e]vidence before the Legislature showed that women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in large part to the cost of prescription contraceptives and the various costs of unintended pregnancies, including health risks, premature deliveries and
To require nonexempt religious employers to carry insurance satisfying the HHS Mandate is compelling those employers to adopt the government’s message about contraceptives. It is no less coercive of an opinion that “invades the sphere of intellect and spirit” than compelling school children to salute the flag\textsuperscript{203} or requiring drivers to have license plates with the state motto, “Live Free or Die.”\textsuperscript{204} In determining whether a required license plate with a message at odds with religious belief violates the right not to speak, the Court said: “the test is whether the individual is forced ‘to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.’”\textsuperscript{205}

In addition to free speech rights, there is an argument that the HHS Mandate infringes on the nonexempt religious employers’ right of association. To qualify for the narrow exemption, allowing some religious employers to provide insurance coverage without contraceptive services and not incur a penalty, would require selective hiring and limiting services to those who share the same religious beliefs.\textsuperscript{206} For government to provide objecting employers the choice to increased neonatal care.” \textit{Catholic Charities of Sacramento}, 85 P.3d at 74. However, studies have shown that the percentage of unintended pregnancies that end in abortion is higher when the pregnancy occurs during use of a contraceptive. \textit{See Facts on Induced Abortion in the United States, GUTTMACHER INSTITUTE}, May 2012, \textit{available at} http://www.guttmacher.org/pubs/fb_induced_abortion.html. \textit{See also supra} note 120 and accompanying text (voicing conviction that contraceptives are destructive to life).

\textsuperscript{203} \textit{Barnette}, 319 U.S. at 624.


\textsuperscript{205} \textit{Id.} at 721.

\textsuperscript{206} 45 C.F.R. \textsection 147.130(a)(iv)(B). The religious employer, exempt from the HHS Mandate, is defined as:

\begin{itemize}
  \item an organization that meets all of the following criteria:
  \item (1) The inculcation of religious values is the purpose of the organization.
  \item (2) The organization primarily employs persons who share the religious tenets of the organization.
  \item (3) The organization serves primarily persons who share the religious tenets of the organization.
\end{itemize}
comply with the narrow exemption in order to freely exercise their religious beliefs or suffer a penalty implicates associational rights.

Professor Tribe best describes compelled speech and association cases in the following way:

“[Individuals have] a right not to be used or commandeered to do the state’s ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the state’s message, with one’s voice or body or resources, or one’s personal possessions, through the composition of the associations one joins or forms . . .”207

Cases involving compelled speech208 or a violation of associational rights209 trigger strict scrutiny. Additionally, “hybrid” cases such as Yoder, which involve violations of the Free Exercise Clause plus another constitutionally protected right, have not been stripped of strict scrutiny analysis by the Smith decision, although no court has ever adopted the Smith dicta regarding hybrid cases.210

2. Government Neutrality: Accommodation or Endorsement

The conflicting decisions in Sherbert and Smith reflect differing perspectives on the requirement that government remain “neutral” as to religion. The Establishment Clause, requiring no government established religion, has not been interpreted uniformly. “Neutrality” is central to the understanding of the Establishment Clause; however, the Free Exercise Clause, if demanding accommodations to or exemptions from neutral laws, can be in conflict with the idea

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

208 Wooley, 430 U.S. at 705.
210 See supra note 196.
of neutrality. It is not always clear whether a government policy of “neutrality” toward religion means neutral in form or by its impact.\textsuperscript{211}

The \textit{Sherbert} decision could be viewed as either one of “accommodation” for the claimant who celebrated a Saturday Sabbath Day\textsuperscript{212} or one of equal treatment, recognizing that a Sunday Sabbath Day worshipper did not suffer the same dilemma of working on a religious day of rest or foregoing benefits.\textsuperscript{213} The former perspective of “accommodation” would, according to Justice Harlan, give Sherbert “special treatment on account of religion.”\textsuperscript{214}

For Justice Harlan, the Religion Clauses require “formal neutrality,” that is religious accommodations or exemptions are neither legislatively required nor constitutionally mandated.\textsuperscript{215} According to formal neutrality, providing religious exemptions from neutral laws of general applicability is inconsistent with the no establishment principle, as it allows government to favor religion over secularism. This was the view that prevailed in \textit{Smith}. Formal neutrality would protect overt religious discrimination, but provide little protection for other free exercise claims.\textsuperscript{216}

Contrary to the “religion blind” view is the “substantive neutrality” view which judges neutrality based on the law’s impact.\textsuperscript{217} This “effects-based” perspective focuses on whether even a neutral law of general applicability encourages or penalizes religious belief or

\begin{thebibliography}{99}
\item[\textsuperscript{212}]\textit{Sherbert}, 374 U.S. at 422 (1963) (Harlan, J., dissenting).
\item[\textsuperscript{213}]\textit{Id.} at 410 (citing \textit{Everson}, 330 U.S. at 16, as requiring neutrality toward religious and nonreligious reasons for exemptions).
\item[\textsuperscript{214}]\textit{Id.} at 422.
\item[\textsuperscript{215}]\textit{Id.} at 422-23.
\item[\textsuperscript{216}]See \textit{Church of the Lukumi Babalu Ave. v. City of Hialeah}, 508 U.S. 520 (1993).
\item[\textsuperscript{217}]See Laycock, \textit{supra} note 211, at 1004 (Substantive neutrality “requires judgments about the relative significance of various encouragements and discouragements to religion.”).
\end{thebibliography}
practices.\textsuperscript{218} This was the prevailing view in \textit{Sherbert}. Denying the claimant benefits because she refused to work on her designated Sabbath Day subjected her to a “Hobson’s Choice”\textsuperscript{219} not required of Sunday Sabbath Day worshippers.\textsuperscript{220} According to the Court, a policy of religious neutrality required the government to give equal treatment on two accounts: (1) treating secular and religious reasons for valid exemptions equally; and (2) treating Saturday Sabbath Day worshipers the same as Sunday Sabbath Day worshipers.\textsuperscript{221} Substantive equality does not violate the Establishment Clause; it merely equalizes the effects of a neutral law so that religious practices are not unfairly impacted.

On its face, the HHS Mandate is neutral toward religion.\textsuperscript{222} A formal neutrality approach would disregard any negative impact the Mandate has on nonexempt religious employers. However, the HHS Mandate already allows many exemptions; some of the exemptions extend to grandfathered plans as well as to small employers.\textsuperscript{223} Further, the ACA provides a “hardship” exemption to escape the penalty provisions imposed on individuals.\textsuperscript{224} Qualifying for this exemption is based on an individualized assessment by the Secretary of Health and Human

\begin{thebibliography}{9}
\bibitem{218} Id.
\bibitem{219} \textit{Sherbert}, 374 U.S. at 404 (“The ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”).
\bibitem{220} Id. at 406.
\bibitem{221} Id.
\bibitem{222} The Mandate allows a religious exemption for small religious employers, perhaps, negating the view that the Mandate is a neutral law of general applicability. However, it could hardly be argued that the Mandate was intended to target religious practice like in \textit{Church of Lukumi Babalu Ave}.
\bibitem{224} See 42 U.S.C. § 5000A(e)(5). The individual Mandate is the “shared responsibility provision” requiring insurance coverage for those, with a sufficient income and who are not covered by an employer plan, to purchase insurance or suffer a penalty. Although the employer penalty is distinct from the individual Mandate, it is inherently connected to the “shared responsibility provision” and the ACA scheme as a whole.
\end{thebibliography}
Services as to whether the person has “suffered a hardship with respect to the capability to obtain coverage.” Principles of substantive neutrality would require the government to expand the pool of “valid” exemptions to the nonexempt religious employers. Neither should the Government discriminate between religious and secular reasons for exemptions nor between large and small religious employers. To make distinctions between large and small religious employers is tantamount to a government policy favoring the exempt religious employers’ claims as more “worthy” than those of the nonexempt larger religious employers.

Further, the HHS Mandate is not merely a “passive” restraint on the nonexempt religious employers’ religious beliefs. It penalizes those employers by imposing a tax or penalty for noncompliance. In Sherbert, the right to freely exercise the claimant’s religious belief threatened the loss of a benefit. The HHS Mandate is even more onerous, it subjects the nonexempt religious employers to a penalty/tax for exercising their freedom of conscience.


Shortly after the Court’s decision in Smith, the Court considered whether a facially religion-neutral ordinance prohibiting animal killings was in fact targeting a specific religious practice. In Church of the Lukumi Babalu Ave. v. City of Hialeah, the Court recognized that “the Free Exercise Clause protects against governmental hostility which is masked as well as overt,” and the impact of the ordinance can be evidence of its intended purpose to target a religious practice. There were so many exceptions to the animal killing ordinance that its

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225 Id.
226 But see Serio, 859 N.E.2d at 529 (2006) (granting exemptions to some religious organizations and not to others on the basis of their activities does not violate the Establishment Clause; such distinctions do not discriminate based on religious denomination).
228 Church of the Lukumi Babalu Ave, 508 U.S. at 520.
229 Id. at 534-35.
effect was to prohibit the ritual of animal sacrifices practiced by the Santeria church. Further, the ordinance was a “veiled” attempt to keep that church from locating in the City of Hialeah. As such, the neutrality and general applicability of the ordinance were pierced; and the Court applied strict scrutiny. Since the governmental interests “in protecting the public health and preventing animal cruelty” could be met in ways other than banning the Santeria religious practice, the Court held that the ordinance violated the Free Exercise Clause.

Despite the many exemptions to the HHS Mandate, unlike the ordinance in *Church of the Lukumi Babalu Ave*, it is difficult to argue that the Mandate is a masked or overt attack on religious practice. Rather, if there are individualized assessments for granting exemptions, then the *Sherbert* analysis, which survived *Smith*, would apply requiring the government to satisfy strict scrutiny in its justification of the Mandate. Where there is a scheme of individualized assessments for permissible exemptions, a facially neutral law is no longer generally applicable; and the rational basis test announced in *Smith* would not apply.

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230 *Id.* at 537.
231 *Id.* at 535. The Court referred to the ordinance as “religious gerrymandering.”
232 *Id.* at 546 (concluding that the city of Hialeah did not establish that its interests in enacting the ordinances were compelling, and that even if it had, the ordinances were “not drawn in narrow terms to accomplish those interests.”).
233 *Church of the Lukumi Babalu Ave*, 508 U.S. at 546.
234 See supra note 121 (narrow religious exemption); see also supra note 123 (exemption for grandfathered plans).
235 Providing a narrow religious exemption does not alter the neutral purpose of the HHS Mandate. The characterization of a legislative regulation as neutral and generally applicable is measured by its purpose, not by granting a religious exemption. See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) (“It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their mission.”); see also Serio, 859 N.E.2d at 522 (the neutral purpose of the Women’s Health and Wellness Act to improve women’s health and to equalize the costs of preventative health care between men and women of child-baring years was not altered by the statute’s narrow exemption for religious employers).
Alternatively, the Plaintiffs, challenging the HHS Mandate, rely on the Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.* In *Hosanna-Tabor,* the Court recognized a ministerial exception for religious employers to neutral, generally applicable employment discrimination laws. The ministerial exception, however, is narrow. It prevents the courts’ entanglement in church business related to hiring and firing religious leaders. The Court stated that “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”

The HHS Mandate already exempts small religious employers, which primarily promote religious doctrine, hire and serve people of a similar faith, and are tax exempt nonprofit organizations. It is doubtful that the ministerial exception recognized in *Hosanna-Tabor* would require a larger religious exemption to the HHS Mandate. The ministerial exception is meant to keep the courts out of “church” business. However, as religious employers expand their mission to provide the larger community with secular services, such as education, social services, and medical care, it is less likely that neutral employment regulations would be seen as entanglement in “church-related” business. In fact, the ministerial exception would not

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237 Id. at 706.
238 Id. (recognizing that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”).
239 Id. at 703.
241 The ministerial exception recognized in *Hosanna-Tabor* recognizes a long-standing legal principle that courts would not interfere with internal church governance. See, e.g., Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976) (articulating a rule adopted almost a century earlier that civil courts would not decide matters of religious faith and doctrine). However, insurance regulations, applied to “nonprofit public benefit corporation[s]” do not
insulate a larger religious employer from liability under general employment discrimination laws, if it discriminated against employees providing secular services unrelated to teaching or promoting religious doctrine.\textsuperscript{242}

Free Exercise jurisprudence has evolved over time, providing more or less protection depending on the Court’s analysis. For reasons stated below,\textsuperscript{243} if the HHS challenge reached the Supreme Court, the Court would most likely apply RFRA. An application of RFRA would require the government to satisfy strict scrutiny. The HHS Mandate’s substantial burden on freedom of conscience must be necessary to serve a compelling government interest and must be the least restrictive means on free exercise rights. Because the health benefits of contraceptives are inconclusive,\textsuperscript{244} providing such services does not serve a compelling government interest. Even if the required medical services were to serve a compelling government interest, the Government has already suggested ways less restrictive of religious rights to serve the governmental interest.

Further, even if RFRA did not apply to the HHS Mandate challenge, it is likely that the Court would require an expansion of the religious exemption to the nonexempt religious employers. First, health insurance coverage for contraceptives and related services does not implicate criminal laws\textsuperscript{245} or actions “in violation of social duties or subversive of good

\footnotesize{interfere with internal church governance. See Catholic Charities of Sacramento, 85 P.3d at 77 (concluding that the Women’s Contraception Equity Act “implicates the relationship between a nonprofit public benefit corporation and its employees” and does not interfere with internal church matters).}
\footnotesize{\textsuperscript{242} Hosanna-Tabor, 132 S. Ct. at 706-08 (applying a totality of the circumstances test in determining whether an employee of a religious organization would qualify as a “minister” providing the religious employer an affirmative defense to an employment discrimination claim brought by the employee).}
\footnotesize{\textsuperscript{243} See Conclusion.}
\footnotesize{\textsuperscript{244} See supra note 190.}
\footnotesize{\textsuperscript{245} Smith, 494 U.S. at 872.}
order.”\textsuperscript{246} The HHS Mandate is already riddled with exceptions, so denying a religious exemption based on the size of the employer is arbitrary and contrary to the Religion Clauses’ requirement of government neutrality. Instead, such denial furthers a government policy favoring secular exemptions over religious ones and some religious exemptions over others.\textsuperscript{247}

Expanding the religious exemption would not pose a “grave and imminent danger” to the protected rights of others.\textsuperscript{248} Although supporters of the HHS Mandate argue that women have a constitutional right to contraceptives,\textsuperscript{249} this does not include a constitutional right to receive such medical services free of charge at the behest of private employers, through mandated insurance coverage. The constitutional right associated with contraceptives is the right to be free from government interference in the personal, intimate decisions concerning the use of contraceptives.\textsuperscript{250} Even the Supreme Court’s recent decision upholding the individual Mandate of the ACA does not convert a statutory right to insurance into a constitutional right. There is no constitutional right to health care in general or to contraceptive services, specifically.

\textbf{D. Tax or Penalty – Implications of ACA Decision}

\textsuperscript{246} Reynolds, 98 U.S. at 145.  
\textsuperscript{247} But see supra note 226 and accompanying text.  
\textsuperscript{248} Barnette, 319 U.S. at 639 (stressing that freedom of worship is “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.”).  
\textsuperscript{249} Proponents cite to Serio, 859 N.E.2d at 459-150 and Catholic Charities of Sacramento, 85 P.3d at 67, for their contention that the HHS Mandate is constitutional and does not violate the Free Exercise Clause. However, the statutes at issue in those cases are distinguishable from the HHS Mandate. Both cases involved similar state statutes requiring employers’ insurance plans to include coverage for contraceptives if the plans covered prescription medications. The state statutes did not require coverage for contraceptives. Further, the state cases did not apply RFRA; therefore, the applicable standard of scrutiny was not strict scrutiny. \textit{See} 158 CONG. REC. E1370-71 (2012), \textit{available at} http://www.gpo.gov/fdsys/pkg/CREC-2012-08-01/pdf/CREC-2012-08-01.pdf (letter from Leslie Griffin and law professors to President and Congressional members arguing that mandating contraceptive coverage by religious employers does not infringe on religious liberty rights.).  
\textsuperscript{250} See Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a substantive due process right to make personal choices about contraceptive uses).
The recent Supreme Court decision, upholding the ACA’s individual requirement to purchase insurance or suffer a penalty/tax, elicited mixed reactions.\footnote{See supra notes 6-7 and accompanying text.} Focusing on Chief Justice Roberts’ opinion, some questioned the legitimacy of the Court in re-defining the constitutional power which Congress expressly invoked to enact the ACA\footnote{Sebelius, 132 S. Ct. at 2608 (holding that the ACA Mandate was not a valid exercise of Congress’s commerce clause power, but was valid under its enumerated power to “lay and collect [t]axes”).} and the stated consequence for noncompliance.\footnote{Id. at 2595 (Although the statutory language used the term penalty, for purposes of constitutional authority, the individual Mandate falls under Congress’s tax and spend power. “[M]agic words or labels should not disable an otherwise constitutional levy.”) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992)).} That decision, characterizing the penalty provision as a tax despite statutory language to the contrary, may bolster an argument that the HHS Mandate is also a tax. Proponents will argue that Supreme Court precedent requires application of a general tax law despite religious objections. However, the case upholding the social security tax as applied to employers with religious objections is distinguishable from the HHS Mandate.

Other than taxes on real and personal property, the Free Exercise Clause usually does not require an exemption from a general tax law.\footnote{Walz v. Tax Com’n, 397 U.S. 664 (1970) (upholding state tax exemption for “real or personal property used exclusively for religious, educational, or charitable purposes.”). But see Jimmy Swaggart Ministries v. Board of Equal., 493 U.S. 378 (1990) (no violation of the Free Exercise Clause by requiring a sales and use tax on the sale of religious materials by a religious organization); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (no sales tax exemption for books teaching religious faith).} In United States v. Lee, the Court ruled against a member of the Old Order Amish, who sought a refund of social security taxes he paid for his employees.\footnote{United States v. Lee, 455 U.S. 252 (1982).} Although the social security statute allowed an exemption for “‘self-employed’ religious believers, including Amish,” the exemption “did not cover employment of other Amish
Applying a version of strict scrutiny, the Court held that mandating the tax was “indispensable to the fiscal vitality of the social security system.” Concerned about the floodgates of tax objectors, the Court recognized that the tax system would be severely impaired if anyone who objected on how tax dollars were spent could raise a free exercise claim and receive a tax exemption.

Since there are already several exemptions to the HHS Mandate and further accommodations promised, it is doubtful that an expansion of the religious exemption would harm the “fiscal vitality” of the ACA, generally, or the HHS Mandate specifically. The ACA’s overall “fiscal vitality” is already in jeopardy based on the Court’s ruling regarding the Medicaid Expansion program and the states’ indecision about whether to accept expanded Medicaid funds and/or create state-run exchanges.

Further, an analysis of the recent Supreme Court decision regarding the ACA strongly suggests that the penalty for noncompliance with the HHS Mandate could not and would not be characterized as a tax. In explaining that the individual Mandate is not a tax for purposes of the

256 Id. at 261.
257 Id. at 257 (“Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”) (citations omitted).
258 Id. at 258.
259 Id. at 260 (“The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”).
260 See Defendant’s Motion to Dismiss, supra note 124, at 10-11 (“By [August 1, 2013, the government] expect[s] significant changes to the preventive services coverage regulations will have altered the landscape with respect to religious accommodations under the regulations by providing further relief to organizations such as [Ave Maria University].”).
261 See supra note 47; see also Robert Pear, Court’s Ruling May Blunt Reach of the Health Law, N.Y. TIMES, JULY 24, 2012, http://www.nytimes.com/2012/07/25/health/policy/3-million-more-may-lack-insurance-due-to-ruling-study-says.html?emc=eta1 (stating that according to the Congressional budget office report on the effects of the ACA Supreme Court ruling, “[t]he federal government will subsidize coverage for most people buying insurance through the exchanges, and the per-person cost to the government will be higher than if they were in Medicaid.”).
Anti-Injunction Act but is a tax for purposes of constitutional authority. Chief Justice Roberts’ logic takes twists and turns. If the Anti-Injunction Act applied, then the case would not be ripe to review the constitutional issues. Relying on statutory construction, Chief Justice Roberts held that the penalty provision was not a tax for purposes of the Anti-Injunction Act because Congress did not expressly state that the relevant tax code provision applied.

Although Congress’s label of the penalty was not significant for deciding the application of the Anti-Injunction Act, the Court opined “that Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply as describing it as one or the other.” A few pages later in his opinion, Roberts seemed to contradict himself: “[T]he shared responsibility payment [a/k/a penalty provision] may for constitutional purposes be considered a tax.” This is where the Chief Justice’s logic becomes suspect. In adopting the government’s

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262 Sebelius, 132 S. Ct. at 2582-84 (determining that the case was ripe for review and the Anti-Injunction Act did not apply; “The Anti-Injunction Act provides that ‘no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any purpose . . .’” (citing 26 U.S.C. §7421(a)). The Anti-Injunction Act does not allow a challenge to a tax not yet paid. The Court addressed the issue whether the Anti-Injunction Act prohibited the Court from considering the constitutionality of the individual mandate until 2014, when the penalty provision becomes effective. Only the Fourth Circuit Court of Appeals ruled that the Anti-Injunction Act applied to the penalty provision, making the constitutional challenge not ripe for review. See Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (2011).

263 Sebelius, 132 S. Ct. at 2601 (determining that the penalty provision functions like a tax and is a permissible exercise of Congress’s power to “lay and collect Taxes”).

264 Id. at 2582.

265 Id. at 2583 (stating that “the best evidence of Congress’s intent [to apply the Anti-Injunction Act to the individual Mandate penalty provision] is the statutory text”).

266 Id.

267 Id. at 2597 (discussing cases in which the Court held that what Congress had labeled a tax was really a penalty). Apparently, Chief Justice Roberts thinks that, in deciding the constitutionality of congressional action, if the Court can go one way (tax to penalty), it can go the other way (penalty to tax).
argument that the penalty is a tax for constitutional purposes, he seemed to condone what he 
previously said Congress could not do.  

A close read of Chief Justice Roberts’ opinion suggests that he is making a very specific 
distinction between a statutory label of “tax” or “penalty” versus a constitutional determination 
whether a statutory label of “penalty” could be deemed a “tax” to save the ACA from 
constitutional attack. In holding that the individual Mandate is a proper exercise of 
congressional authority under the Tax and Spend Clause, Chief Justice Roberts emphasized the 
duty of the Court to construe a statute in a way that upholds its constitutionality. “[T]he rule is 
settled that as between two possible interpretations of a statute, by one of which it would be 
unconstitutional and by the other valid, our plain duty is to adopt that which will save the 
Act.”

In response, Justice Scalia was particularly troubled with the extent to which the Chief 
Justice would try and “save” the ACA individual Mandate. “[T]o say that the Individual 
Mandate merely imposes a tax is not to interpret the statute but to rewrite it.” Emphasizing 
that there is no precedent to hold that a penalty can be a penalty for one purpose and a tax for 
another purpose, Justice Scalia stated that “[t]he two are mutually exclusive.”

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268 Sebelius, 132 S. Ct. at 2597 (one of the least persuasive reasons given by Roberts for his 
holding relates to his distinction between a tax and a penalty imposed as punishment for an 
unlawful act or omission; Roberts stated: “While the individual Mandate clearly aims to induce 
the purchase of health insurance, it need not be read to declare that failing to do so in 
unlawful.”). Justice Scalia responds: “But we have never held - never – that a penalty imposed 
for violation of the law was so trivial as to be in effect a tax.” Id. at 2651. A violation of a statute 
is usually considered unlawful, even if the penalty is merely a civil fine.  
269 Id. at 2593 (quoting Justice Holmes in Blodgett v. Holden, 275 U.S. 142, 148 (1927) 
(concurring opinion)).  
270 Id. at 2655 (Scalia, J., dissenting).  
271 Id. at 2651 (Scalia, J., dissenting) (discussing the government’s contention that the penalty 
provision is a “tax” for constitutional purposes, he says there is no legal basis for the proposition 
that “[a] penalty for constitutional purposes [ ] is also a tax for constitutional purposes.”).
The rather convoluted logic which defines the individual Mandate both as a penalty and a tax, depending on the legal context, can make even legal heads spin. Chief Justice Roberts’ opinion is the source of much discussion among pundits, scholars, and people who do not speak “legalese.” Despite his decision, Chief Justice Roberts’ opinion can be strong support for the conclusion that the HHS Mandate violates the Free Exercise Clause and is not constitutionally valid as applied to the nonexempt religious employers.

Since the consequence for noncompliance with the HHS Mandate is a penalty, it cannot be relabeled a tax for purposes of the Free Exercise Clause. Like the “shared responsibility provision,” the taxing power may be the “legs” on which Congress stands for authority to act; but, in defense of its constitutional infirmity, the HHS Mandate is not a tax. Even under Chief Justice Roberts reasoning, the ability of government to argue a statutorily termed penalty is a tax is limited to “recitals of power which [Congress] undertakes to exercise.”

V. Conclusion

It is unlikely that Chief Justice Roberts will step out of his “jurisprudence comfort zone” to once again join the so-called liberals if the Free Exercise challenge to the HHS Mandate reaches the Supreme Court. Since Chief Justice Roberts wrote the opinion which applied RFRA to a free exercise claim post City of Boerne, there is no reason to doubt that he would do so again if and when the HHS challenge reached the Supreme Court. It is evident from Chief Justice Roberts’ ACA opinion that he favors upholding an act of Congress if at all possible. Exercising legal logic “gymnastics” to uphold the Individual Mandate, he would most certainly

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272 See id. at 2598.
273 Gonzales, 126 S. Ct. at 1121 (applying RFRA to a claim that application of the Controlled Substances Act to a plant which is used to make a sacramental tea violated the Free Exercise Clause).
uphold an application of RFRA to the HHS Mandate, which is an agency rule, not the prescriptions of Congress.

For the reasons previously stated, strict scrutiny would be the death knell of the HHS Mandate. The governmental interests to promote the health of women of child bearing age and equalize costs of wellness care for this group may be justified under state police powers. But, without those broad powers to regulate for the health, safety and welfare of citizens, the interests served by the HHS Mandate are not sufficiently compelling to justify infringement on religious freedom. Further, the Department of HHS has already conceded that there are means, less restrictive of free exercise rights, to meet the governmental interests served by the HHS Mandate.

While the Constitution does not always require accommodation or exemptions for religious purposes when neutral laws of general applicability burden free exercise, the application of strict scrutiny to such claims will ensure meaningful judicial review. Litigation is an effective way to garner public attention and support.274 “Many well-known examples of political accommodation were preceded by lengthy, well-publicized free exercise litigation.”275 It is no surprise that the religious communities objecting to the HHS Mandate have mobilized forces. In a presidential election year, efforts to educate and encourage high voter turnout are powerful weapons in the political battle over the HHS Mandate and Free Exercise.

275 Id.; See also, Eisgruber, Christopher L. & Sager, Lawrence Gene, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1304 (1994) (“[After Lying,] the political process responded to interests the judiciary had not protected, and the Bureau of Land Management relocated the road. [After Lee,] Congress accommodated churches that had religious objections to participating in the social security system. [After Goldman,] Congress granted relief, and [after Smith], Oregon legislated an exemption to its law.”).
When the Court in *Smith* abandoned the strict scrutiny standard, Justice O'Connor expressed her strong disapproval of the change. “[T]he compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a “luxury” is to denigrate ‘[t]he very purpose of a Bill of Rights.’”276 Whether a judicial accommodation or a political one, nonexempt religious employers are entitled to the same freedom of conscience as those covered under the narrow religious exemption to the HHS Mandate. The burden placed on the free exercise of religion by the HHS Mandate is contrary to “the country the Framers of our Constitution envisioned.”277

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277 *Sebelius*, 132 S. Ct. at 2589 (opining that the Framers never intended Congress to have such broad powers under the Commerce Clause to mandate the purchase of insurance). The same can be said of the Free Exercise Clause and the HHS Mandate.