TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 29 | Number 3 Article 16

October 2013

Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate

Michael Barone, Jr.

Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate

Cover Page Footnote

29-3

DELEGATION AND THE DESTRUCTION OF AMERICAN LIBERTIES: THE AFFORDABLE CARE ACT AND THE CONTRACEPTION MANDATE

Michael Barone, Jr.[*]

I. INTRODUCTION

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[1] This conviction, penned by James Madison under the pseudonym of Publius, served to remind the delegates of the Constitutional Convention of the dangers that could arise from the government that was being created.[2] Among the numerous principles espoused by Madison, John Jay, and Alexander Hamilton in their pro-Federalist pamphlets, the theory of separation of powers in government was often alluded to as a necessary principle that would help preserve the freedom and liberty secured by the Revolution. Yet today, more than two centuries after these statesmen penned such ardent support for the document that is the foundation of American government, there still exists disagreement over the proper role and reach of the three branches,[3] as

[*] J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; B.A. 2011 in Political Science, College of the Holy Cross. I would like to thank Professor Thomas Schweitzer for taking the time to discuss with me the finer aspects of religious freedom and the First Amendment and advice on the direction of this paper; Jonathan Vecchi and Meaghan Howard for their guidance, editing, and support; to my parents for providing me the opportunity to learn; and my family and friends for listening to me drone on about free exercise and delegation for a year. In particular, I would like to extend extra thanks and appreciation to my parents for their continued support and for making my pursuit of higher education possible.

[1] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961).

[2] *Id.*

[3] *See* INS v. Chadha, 462 U.S. 919 (1983) (regarding the constitutionality of the legislative veto in regard to regulation creation by agencies); *see also* Clinton v. City of New York,

well as concern for the fate of certain liberties[4] that Madison cared to keep from beneath the heel of tyrants.

In 2010, Congress passed the Patient Protection and Affordable Care Act ("PPACA")[5] in an attempt to make health care more affordable and easier to obtain for the majority of Americans without insurance.[6] With such a monumental law, totaling over 900 pages, came the creation and addition of numerous regulatory policies,[7] as well as several constitutional challenges to Congress's authority to enact certain aspects of such a legislative behemoth, most notably in the recently decided *National Federation of Independent Business v. Sebelius*.[8] Accompanying such sweeping legislation was the concern regarding the role of the federal government in the market, the home, the workplace, and even in religion.

Part II of this Comment will address the effect of certain aspects of the PPACA on regulation, as well as the creation and substance of Title 45, Section 147.130 of the Code of Federal Regulations regarding coverage of preventative services.[9] Part III will examine the history of Congressional delegation to the Executive branch throughout the twentieth century, as well as the history of the First Amendment and the evolution of free exercise claims throughout that period. The various tests established during the last century will be discussed for both topics. Part IV will discuss current jurisprudence in the realm of delegation and free exercise claims. Part V will criticize the modern interpretation of Congressional delegation and endorse the modern approach to free exercise claims and will conclude with an argument that Title 45, Section 147.130 is unconstitutional on the grounds of improper legislative delegation and viola-

524 U.S. 417 (1998) (regarding the extent of the executive power to veto and the constitutionality of the Line Item Veto Act).

[4] The Supreme Court averaged approximately eight First Amendment cases a term between 2000 and 2010, excluding the 2007-2008 term, for which information was unavailable. *Supreme Court Cases*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/supreme-court-cases (last visited May 19, 2013).

[5] Patient Protection and Affordable Care Act [hereinafter PPACA], Pub. L. No. 111-148, 124 Stat. 119 (2010).

[6] See Barack H. Obama, U.S. President, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009) (transcript available at www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care).

[7] *See* PPACA, *supra* note 5.

[8] 132 S. Ct. 2566 (2012).

[9] 45 C.F.R. § 147.130 (2011).

tion of the Free Exercise Clause.

II. THE PPACA AND THE HHS MANDATE

The concepts that underlie the PPACA, though it would not assume that title until later, were first encouraged by President Obama during his remarks to a joint session of Congress in 2009.[10] In his speech to Congress regarding the state of health care in the nation, President Obama explained the regular failure of each president of the preceding century to overhaul and reform the health care industry in America.[11] President Obama made his intentions quite clear when he explained, "[o]ur collective failure to meet this challenge—year after year, decade after decade—has led us to the breaking point . . . . We are the only democracy—the only advanced democracy on Earth—the only wealthy nation—that allows such hardship for millions of its people."[12]

The problems facing the American people were clear to the President. These issues, that affected many Americans, included higher premium costs with less coverage, denial of insurance for pre-existing conditions, and financial burdens placed on taxpayers in order to support government programs such as Medicaid and Medicare, among others.[13] In order to address these issues, the President illustrated the goals he hoped to achieve, as well as his plan to accomplish those goals.[14] For those with health insurance, the President wanted to ensure that the plan would work better for the consumer, meaning that the insurance companies would not be able to drop subscribers who developed chronic illnesses, nor could companies deny one service because of any "arbitrary cap."[15] For those without insurance, the plan would offer "quality, affordable choices" by way of a new insurance exchange.[16] Lastly, the President wanted to hold the insurance companies accountable and stem the rising price of health

---

[10] Obama, s*upra* note 6.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* (explaining that his plan will "provide more security and stability to those who have health insurance. It will provide insurance for those who don't. And it will slow the growth of health care costs for our families, our business, and our government").

[15] Obama, *supra* note 6.

[16] *Id.*

care.[17]

In working with Congress to enact the PPACA, President Obama was able to, for the most part, achieve these goals. For some, the PPACA was a blessing—it allowed them to obtain more affordable health care or, for some citizens with pre-existing conditions, it provided an opportunity for coverage which had not existed for decades.[18] However, some provisions of the bill gave rise to regulations that reignited the debate concerning the role of government and the private religious beliefs of citizens.[19]

Within the first several pages of the PPACA was Title I, Section 1001(5), enacted as Title 42, Section 300gg-13(a)(4). In relevant part, subsection (a)(4) reads:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—with respect to women, such additional preventative care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[20]

Utilizing this language, the Department of Health and Human Services created what has now become known as the Health and Human Services Contraception Mandate ("HHS Mandate").[21] Under the HHS Mandate, contraceptive services are now included under the umbrella of preventative care for women.[22] At the same time, the Mandate granted an exemption to religious institutions.[23] Despite this exemption, religious groups and individuals across the country found this exemption too greatly truncated in comparison to other

---

[17] *Id.*

[18] PPACA, *supra* note 5.

[19] Editorial, *A New Battle Over Contraception*, N.Y. TIMES (Nov. 5, 2011), http://www.nytimes.com/2011/11/06/opinion/sunday/a-new-battle-over-contraception.html [hereinafter *A New Battle*].

[20] 42 U.S.C. § 300gg-13(a)(4) (2006).

[21] 45 C.F.R. § 147.130 (2011).

[22] *Women's Preventative Services: Required Health Plan Coverage Guidelines* [hereinafter HRSA Guidelines], HEALTH RESOURCES AND SERVICES ADMINISTRATION, http://www.hrsa.gov/womensguidelines/ (last visited Mar. 4, 2013).

[23] 45 C.F.R. § 147.130 (2011).

comparable federal laws and regulations.[24]

At the time of this Comment's writing, there have been several iterations of the HHS Mandate, the most recent[25] being offered as a compromise in an effort to quell the furor caused by the strict wording of the previously adopted final rule.[26] First introduced in July of 2010, it was suggested that 45 CFR Subtitle A add section 147.130(a)(1)(iv) to match the proposed language of "coverage of preventive health services" [27] as was enacted by the PPACA.[28] Originally, there was no exemption to the coverage mandate.[29] In an effort to accommodate religious institutions with objections to contraceptive coverage, the agency promulgated the original exemption language in August 2011.[30] The exemption defines a religious employer as one that: "(1) has the inculcation of religious values as its purpose; (2) primarily *employs* persons who share its religious tenets; (3) primarily *serves* persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code."[31]

After a flurry of disapproval, the exemption was adopted as a

---

[24] *A New Battle*, *supra* note 19. *Compare* 45 C.F.R. § 147.130 (setting forth requirements dictating what is a religious employer), *with* Americans with Disabilities Act, 42 U.S.C. § 12187 (2006) (exempting "religious organizations or entities controlled by religious organizations, including places of worship") and Civil Rights Act of 1991, 42 U.S.C. § 2000e-1(a) (2006) ("This subchapter [on equal opportunity employment] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

[25] Coverage of Certain Preventable Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.130) [hereinafter Coverage of Certain Preventable Services].

[26] Group Health Plans and Health Insurance Issuers Relating to the Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725 (Feb. 15, 2012) [hereinafter Group Health Plans I].

[27] Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,759 (July 19, 2010) [hereinafter Interim Final Rules for Group Health Plans].

[28] 42 U.S.C. § 300gg-13.

[29] *See* Preventative Services under the Patient Protection and Affordable Care Act, *supra* note 27, at 41, 759.

[30] Group Health Plans and Health Insurance Issuers Relating to the Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46621, 46,626 (Aug. 3, 2011) [hereinafter Group Health Plans II].

[31] *Id.*

final rule and a "safe harbor" period was implemented.[32] This "safe harbor" period temporarily stayed the enforcement of the contraceptive coverage mandate for non-exempted, non-profit organizations while the department determined a means to accommodate such groups.[33] In February 2012, the adoption of the final rule on mandated coverage of contraception was announced.[34] The Final Rule announcement explained that statistics, public comments on the matter, and the wording of the PPACA overwhelmingly supported the narrow exemption proposed by the amendment in August 2011.[35] In February 2013, another amendment was proposed that would greatly expand the exemption and allow for exemption of specific institutions currently not covered by the exemption.[36]

III. DELEGATION, FREEDOM OF RELIGION, AND FREE EXERCISE

The nature of government, the role of the individual branches in our tripartite system of government, and the interpretation of the Constitution have all experienced transformations since the founding of the United States.[37] Even more so, this past century has seen significant advances in technology, great cultural movements, and changes in interpersonal relations. This Section will provide insight into the changes that have occurred in the realm of Congressional delegation and the First Amendment's guarantee regarding freedom of religion.

A. The Nondelegation Doctrine in the Twentieth Century

Following the Preamble, the very first words of the Constitution of the United States read: "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."[38] Though a seemingly

---

[32] Group Health Plans I, *supra* note 26, at 8727.

[33] *Id.* at 8727-28.

[34] *Id.* at 8730.

[35] *Id.* at 8726-27.

[36] Coverage of Certain Preventable Services, *supra* note 25.

[37] *The Court and Constitutional Interpretation*, U.S. SUPREME COURT, http://www.supremecourt.gov/about/constitutional.aspx (last visited Mar. 4, 2013).

[38] U.S. CONST. art. I, § 1.

innocuous prescription, this section of the Constitution, also known as the Nondelegation Clause,[39] has spawned a doctrine of proscription that has a legacy dating back more than a century, most cogently recognized in the 1892 decision of *Marshall Field & Co. v. Clark*.[40]

More than 120 years ago, the Supreme Court explained that it was universally recognized that the legislative power of the Congress could not be delegated to the Executive branch without compromising the integrity of the tripartite system of government established by the Constitution.[41] In an attempt to better illustrate the limitations of Article I, Section 1, the Court referenced two particular State Supreme Court decisions from Ohio and Pennsylvania.[42] Drawing upon the language of *Rail Road Co. v. Commissioners*,[43] Justice Harlan explained that there was a marked difference between the "delegation of power to make the law . . . and conferring authority or discretion as to its execution."[44] In *Rail Road Co. v. Commissioners*, the Ohio Supreme Court explained the difference between legislative and executive discretion, noting that the power to make law involves discretion as to what the law shall command or prohibit and the authority to execute the law involves the discretion to implement and exercise the law.[45] In an attempt to further distinguish the delegation of power to make law and the grant of discretion to implement law, the Court borrowed language from Pennsylvania's *Locke's Appeal*.[46] It was held in *Locke* that "[t]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."[47] In finding the Pennsylvania Supreme Court's distinction applicable to the controversy before it in 1892, the *Marshall Field* Court reiterated an understanding that although Congress may not delegate its authority to create laws, it is

---

[39] *The Recent Controversy over the Non Delegation Doctrine*, ENVTL. LAW & PROP. RTS PRACTICE GROUP NEWSLETTER (Fed. Soc., D.C.) Oct. 1, 1999.

[40] 143 U.S. 649 (1892).

[41] *Id.* at 692.

[42] *Id.* at 693-94.

[43] The Cincinnati, Wilmington and Zanesville, Rail Road Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77 (1852).

[44] *Field*, 143 U.S. at 693-94 (citing *Rail Road Co.*, 1 Ohio St. 77).

[45] *Rail Road Co.*, 1 Ohio St. at 88.

[46] 72 Pa. 491 (1873).

[47] *Id.* at 498.

very much able to delegate the authority to create implementation strategy and standards.[48]

The issue was next handled in earnest approximately thirty-five years later in the case of *J.W. Hampton, Jr. & Co. v. United States*.[49] In this decision, regarding Congress's ability to grant the Executive branch authority to alter tariff rates, the Court cited not only *Field v. Clark*, but also *Rail Road Co. v. Commissioners*.[50] As in the aforementioned cases, the Court in *J.W. Hampton* was faced with the issue of whether vesting the Executive branch with the authority to determine details of execution and penalty of a duly passed Congressional law was valid under Article I, Section 1 and Article I, Section 8 of the Constitution,[51] each of which respectively granted all legislative power[52] and further governing powers to the Congress. [53] Drawing upon the earlier Supreme Court decision of *Interstate Commerce Commission v. Goodrich Transit Co.*,[54] the Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[55] This holding later became the standard rule for cases in which the Court had to determine whether Congress

---

[48] *Field*, 143 U.S. at 694.

[49] 276 U.S. 394 (1928).

[50] *Id.* at 407, 410.

[51] *Id.* at 404.

[52] U.S. CONST. art. I, § 1 (vesting all legislative powers "in a Congress of the United States, which shall consist of a Senate and House of Representatives").

[53] U.S. CONST. art. I, § 8 (granting Congress the power to "lay and collect Taxes, . . . borrow money on credit of the United States, . . . regulate Commerce with foreign Nations, . . . establish an [sic] uniform Rule of Naturalization, . . . coin Money, . . . provide for the Punishment of counterfeiting, . . . establish Post Offices, . . . promote the Progress of Science and useful Arts, . . . define and punish Piracies and Felonies committed on the high seas, . . . raise and support Armies, . . . provide and maintain a Navy, . . . make Rules for the government and Regulation of land and naval Forces, . . . provide for calling forth the Militia to execute the Laws of the Union, . . . provide for organizing, arming, and disciplining, the militia, . . . exercise exclusive legislation in all Cases whatsoever, over such District, . . . make all Laws which shall be necessary and proper").

[54] 224 U.S. 194 (1912). "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress." *Id.* at 214.

[55] *J.W. Hampton*, 276 U.S. at 409.

had delegated legislative authority or discretion of implementation.[56]

During the New Deal era of the 1930s, the Court once again wrote several opinions regarding propriety of delegation to the Executive branch in cases such as *Panama Refining Co. v. Ryan*[57] ("*Hot Oil*") and *A.L.A. Schechter Poultry Corp. v. United States*,[58] both dealing with the National Industrial Recovery Act ("NIRA").[59] In the *Hot Oil* case, the Court rejected Title 1, Section 9(c) of NIRA, which authorized the president to prohibit the transportation of petroleum[60] on the basis that the section gave him the authority to make policy and enforce such policy at his discretion.[61] Further, the Court found that none of the provisions surrounding Section 9(c) provided any limitation on the discretion granted to the president, thus vesting him with legislative authority.[62] In his dissent, Justice Cardozo explained that he found the delegation of power to the president not to be unlimited, but rather to be "canalized within banks that keep it from overflowing."[63] He explained that both *Field* and *J.W. Hampton* established a standard with "elasticity for adjustment," different from what he perceived to be the majority's application of the standard with "pedantic rigor."[64]

In *Schechter*, the Court similarly held that the "Live Poultry Code" created under the authority of Section three of NIRA was unconstitutional on the ground that it essentially granted the president the authority to codify "codes of fair competition" into law.[65] The

---

[56] *See* Panama Refining Co. v. Ryan (*Hot Oil*), 293 U.S. 388 (1935); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[57] 293 U.S. 388 (1935).

[58] 295 U.S. 495 (1935).

[59] Act of June 16, 1933, ch. 90, 48 Stat. 195, 195-211, *repealed by* Ex. Ord. No. 7252, Dec. 21, 1935.

[60] Title I, Section 9(c) of the National Industrial Recovery Act reads:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.

Hot Oil, 293 U.S. at 406.

[61] *Hot Oil*, 293 U.S. at 416.

[62] *Id.* at 420.

[63] *Id.* at 440 (Cardozo, J., dissenting).

[64] *Id.*

[65] *Schechter*, 295 U.S. at 521-22, 529.

Court held that Section three "sets up no standards, aside from the statement of the general aims of rehabilitation, correction and explanation described in section one."[66] The decision was joined by Justice Cardozo, who commented, "[T]his code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant if I may borrow my own words in an earlier opinion."[67] In other words, as far as Justice Cardozo was concerned, the language granting the president the discretion in the Live Poultry Code was much broader and less confining than the language found in the grant of discretion provided in *Hot Oil*. In so holding, the Court in *Hot Oil* and *Schechter* deemed the intelligible principle of the legislation to be lacking in specificity.[68]

A decade later, the Court held in *American Power & Light Co. v. SEC*[69] that as long as "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority,"[70] a delegation to the Executive will be a constitutional delegation of discretion and not of legislative authority.[71] Despite *Hot Oil*, *Schechter*, and affirmation of the *J.W. Hampton* rule in *American Power*, the Court began to adopt a more lenient approach to applying the "intelligible principle" test, very rarely, if ever, finding delegations to be unconstitutional.[72] As Justice Scalia explained in the 2001 *Whitman v. American Trucking Association*[73] case, "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.' "[74] Justice Scalia's point

---

[66] *Id.* at 541.

[67] *Id.* at 551 (Cardozo, J., concurring) (referencing *Hot Oil*).

[68] *Hot Oil*, 293 U.S. 388 (holding 8-1, Justice Cardozo dissenting); *Schechter*, 295 U.S. 495 (holding unanimously, Justice Cardozo concurring).

[69] Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[70] *Id.* at 105.

[71] *Id.*

[72] The Court has a long history of allowing Congress to grant Executive agencies broad discretion in determining if Congress's vague standards have been met. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 426 (1994) ("fair and equitable"); Lichter v. United States, 334 U.S. 742, 785-786 (1948) ("excessive profits"); *Am. Power*, 329 U.S. at 105 ("unfair and inequitable"); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 691, 600 (1944) ("just and reasonable"); Nat'l Broad. Co., v. United States, 319 U.S. 190, 225-26 (1943) ("as public interest, convenience, or necessity [require]").

[73] 531 U.S. 457 (2001).

[74] *Id.* at 474-75 (quoting Scalia's dissent in Mistretta v. United States, 488 U.S. 361, 416 (1989)).

is further illustrated by a list of decisions in *Mistretta v. United States*[75] indicating that in the 1940s alone, just a few scant years after the NIRA decisions, the Supreme Court had approved such broad delegations of authority.[76]

B. Freedom of Religion Under the First Amendment

According to some scholars, religious freedom was not just the impetus for religious sects to leave Europe for the New World to establish enclaves[77] but it was also, in the view of James Madison and Thomas Jefferson, "a central feature of the reformed and republican government."[78] Religious freedom in the seventeenth century was very different from today. During the age of exploration, toleration was the extent of religious freedom, compared to the broader, more modern concept of free exercise.[79]

To best understand how the colonies came to be founded upon religious lines,[80] it is important to understand the history and politics of Europe during the preceding centuries and, in particular, England. Often credited as the catalyst for increased religious persecution in England, King Henry VIII seized control of the English Church in an effort to annul his marriage following the Pope's disapproval.[81] With this seizure came a joining of the ecclesiastic influence of the church and the political influence of the monarchy. As the joint head of these two powerful influences, Henry VIII utilized persecution and repression of other faiths as means of achieving political ends.[82] Ed-

---

[75] 488 U.S. 361, 416 (1989).

[76] *See* cases cited *supra* note 72.

[77] JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 50 (1998).

[78] WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 29 (1986).

[79] *Id.* at 4.

[80] NOONAN, JR., *supra* note 77, at 50. ("New Plymouth was founded by Separatists from the Church of England who were committed to a church composed of the born-again. Massachusetts Bay Colony was founded by Christians seeking a purer church than the Church of England.").

[81] T. Daniel Shumate, *Introduction*, *in* THE FIRST AMENDMENT: THE LEGACY OF GEORGE MASON 9, 14 (T. Daniel Shumate ed., 1985).

[82] *Id.* at 15. *See also* G. M. TREVELYAN, ILLUSTRATED HISTORY OF ENGLAND 298-99 (Illustrated Ed. 1966). "Henry VIII burnt Protestants, while hanging and beheading Catholic opponents of an anti-clerical revolution. And this policy, which appears so strange to-day [sic], then met with much popular approval in England." *Id.*

ward VI, Henry's successor, oversaw the slow shift of the Church of England towards Protestantism with a favoritism placed upon the Protestants.[83] Edward's successor and sister, Mary, favored the Catholics, a practice that threatened the stability of the nation.[84] During the reign of Elizabeth, the sister of Edward VI and Mary, tensions were tight in England with rising Anti-Catholicism caused mainly by the threat of the Armada and the attempt to overthrow Elizabeth by Catholic Spain.[85] Following Elizabeth was a line of monarchs insisting they "ruled with absolute power by divine right."[86] By the time the reign of Charles began in 1625, friction among the various Christian factions within England was widespread.[87] Only a few decades later the Anglican Church was dissolved and Calvinist Oliver Cromwell led the charge against Roman Catholics in Ireland.[88]

Considering the political and religious quagmire that was seventeenth century England, it should come as little surprise that as English holdings in the United States grew, each religion found its home in one colony or another.[89] While the concentration of specific religious groups in certain colonies served the purpose of freedom of religion sought by many of the former English folk, the modern concept of religious freedom would not even begin to be considered until the drafting of the United States Constitution. However, one of the

---

[83] TREVELYAN, *supra* note 82, at 312. As a young king, ascending to the throne at the age of nine, Edward conducted his rule by counsel of advisors, including his uncles of mixed religions. *Id.* Hugh Latimer, a major figure in the emerging Protestant movement, played a large role in Edward's religious life and influenced his rule of England. *Id.* at 313.

[84] *Id.* at 320-21. Mary's favoritism of Catholics went beyond disfavor but resembled more of a fanaticism when she "revived the heresy laws allowing the spiritual courts and the Privy Council to burn alive believing Protestants at their pleasure." *Id.* at 320. In less than four years, the Queen had burnt more than 400 men and women alive. TREVELYAN, *supra* note 82, at 321. In response to Mary's zealous policies, "Protestant zeal" surfaced among the commoners. *Id.*

[85] Shumate, *supra* note 81, at 16. During the time of her reign, Elizabeth did her best to rectify the situation, reinstating Protestantism as the State Church and keeping persecution of Catholics to a minimum. TREVELYAN, *supra* note 82, at 321 n.1. With the threat of the Armada of Catholic Spain looming, Elizabeth was even successful at maintaining the loyalty of moderate Catholics alongside the Protestants. *Id.* at 353.

[86] Shumate, *supra* note 81, at 16.

[87] *Id.*

[88] *Id.* at 17-18.

[89] *Id.* at 33 (explaining that Anglicans were in the south and New York; Puritans controlled New England with the exception of Rhode Island, which was controlled partly by Roger Williams and partly by the Baptists; the Quakers in early Pennsylvania and West Jersey; the Catholics in Maryland; and the Presbyterians made a stronghold in Pennsylvania).

earliest attempts at legally protecting religious freedom arose during the drafting of the Virginia Convention.[90] Introduced by George Mason in 1776, the Virginia Declaration of Rights is considered to be the "grandfather of *all* the bills of rights."[91] Under Mason's initial draft, "[r]eligion was to be 'governed only by Reason and Conviction, not by Force or Violence; and therefore . . . all Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience.' "[92] For some members of the convention, such as young James Madison, toleration alone was insufficient to protect the religious rights of the citizens.[93]

While attending the College of New Jersey (now Princeton), Madison was exposed to the teachings and arguments of the "Whiggish prerevolutionary atmosphere" that found the term "toleration" to be troublesome.[94] The students of the College of New Jersey regularly argued, and were bolstered by the agreement of College President John Witherspoon, that toleration was a concept of condescension in that it implied "some institution or belief [to be] in a superior position from which to do the tolerating."[95] Madison's adoption of this opinion is clear, for shortly after Mason presented his draft of the Virginia Declaration of Rights, Madison successfully suggested expanding the "fullest Toleration in the Exercise of Religion"[96] to be an "unqualified freedom of conscience."[97]

Modern discourses on freedom of religion focus primarily on the concern of free exercise, with the first half of the clause relegated to the occasional conversation of whether a law by Congress favors one religion over another, since the establishment of a state religion is expressly and unambiguously prohibited by the First Amendment.[98] Although a foreign concept to modern Americans, the establishment of State or Federal religions was endorsed by many statesmen during

---

[90] Robert Rutland, *George Mason and the Origins of the First Amendment*, *in* THE FIRST AMENDMENT: THE LEGACY OF GEORGE MASON 81, 91 (T. Daniel Shumate ed., 1985).

[91] *Id.* at 90.

[92] *Id.* at 91.

[93] MILLER, *supra* note 78, at 29.

[94] *Id.* at 4.

[95] *Id.*

[96] Rutland, *supra* note 90, at 91.

[97] *See* MILLER, *supra* note 78 (discussing Madison's disdain for "mere toleration").

[98] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

the colonial and revolutionary periods.[99] For such a reason, the original draft proposed by Madison reading, "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal right of conscience be in any manner, or under any pretext infringed," drew criticism.[100] Several drafts of the First Amendment went through committees which vigorously debated the non-establishment clause, with particular concern raised by a delegate from Rhode Island regarding a minister's ability to sue in state court.[101] However, most troubling to many delegates was the implication that the non-establishment clause would apply to the states and prohibit the states from providing financial aid and assistance to the favorite religious body in their borders.[102] Despite the severe trimming of Madison's Amendment, the Congress eventually passed the bill with the final language reading, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[103]

C. Free Exercise and the Court

Starting with the early Twentieth Century, the Supreme Court saw a boom in the number of cases seeking review of the constitutionality of legislation that allegedly infringed upon the Free Exercise Clause of the First Amendment.[104] Below are the facts and analyses of two seminal cases regarding the contemporary interpretation of the Free Exercise Clause. These two cases created separate rules that courts were to apply when dealing with these constitutional issues.

i. The Sherbert *Test*

Appellant Sherbert, a Seventh-day Adventist, was released

---

[99] NOONAN, JR., *supra* note 77, at 82 (regarding the First Congress which "petitioned the president to set a day of thanksgiving to God; created chaplaincies; and made grants of public property for the support of religion").

[100] *Id.* at 79.

[101] *Id.* at 80. "Ban of an establishment, however, drew criticism. Suppose, said Mr. Huntington of Rhode Island, that a minister brought suit in federal court for his salary, the amendment might lead to denial of his suit, for 'a support of ministers might be construed [as] a religious establishment.' " *Id.*

[102] *Id.*

[103] U.S. CONST. amend. I.

[104] *See infra* Parts III.C.i. & ii.

from employment by her employer after refusing to work on Saturdays.[105] Thus, she was terminated for refusing to work on her day of Sabbath.[106] The addition of a sixth workday, at the time, was a new development at the textile-mill that employed Sherbert.[107] Due to her "conscientious scruples" regarding Saturday labor, Sherbert had no luck obtaining work in other mills that had also implemented a six day work-week policy.[108] As a result, Sherbert applied for compensation benefits from the state under the South Carolina Unemployment Compensation Act.[109]

Upon review of her application, the Employment Security Commission found Sherbert to be ineligible to collect benefits because she disqualified herself in refusing work that required Saturday labor.[110] The Commission found that Sherbert had "fail[ed], without good cause, to accept 'suitable work when offered . . . by the employment office or the employer[,]' "[111] therefore disqualifying her under the South Carolina Unemployment Compensation Act.[112] At trial, Sherbert argued that the disqualification section of the South Carolina Unemployment Compensation Act[113] ran afoul of her religious freedom under the Free Exercise Clause of the First Amendment.[114] However, the Commission's ruling was sustained in the local Court of Common Pleas and affirmed by the South Carolina Supreme Court.[115] The South Carolina Supreme Court held that the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dic-

---

[105] Sherbert v. Verner, 374 U.S. 398, 399 (1963).

[106] *Id.*

[107] *Id.* at 399 n.1.

[108] *Id.* at 399.

[109] *Id.* at 399-400; S. C. Code, Tit. 68, §§ 68-114(3)(a) (current version at S.C. CODE ANN. § 41-35-120(5)(a)(i)(B)).

[110] *Sherbert*, 374 U.S. at 401.

[111] *Id.*; *see* S. C. Code, Tit. 68, §§ 68-114(3) (current version at S.C. CODE ANN. § 41-35-120(5)(a)(i)(B)).

[112] *Sherbert*, 374 U.S. at 401; S. C. Code, Tit. 68, §§ 68-114(3)(a) (current version at S.C. CODE ANN. § 41-35-120(5)(a)(i)(B)).

[113] S. C. Code, Tit. 68, §§ 68-114 (current version at S.C. CODE ANN. § 41-35-120).

[114] *Sherbert*, 374 U.S. at 401; U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . ").

[115] *Sherbert*, 374 U.S. at 401.

tate of her conscience."[116] On appeal, the Supreme Court of the United States granted certiorari.[117]

In its opinion, the Court examined whether the South Carolina Unemployment Compensation Act burdened a worker's freedom to practice religion when accepting work would directly affect an individual's ability to observe his or her religion.[118] In short, the Court sought to determine if South Carolina's statute was unconstitutional because it failed to account for religious individuals who could not work due to religious obligations. The Court proceeded to illustrate that most of the previous decisions regarding infringement of an individual's free exercise had often been easily determined.[119] However, there were some instances in which the government infringed on free exercise rights in the name of "public safety, peace or order."[120]

The Court stated that in order for legislation or regulation to survive Constitutional challenge under the Free Exercise Clause, the statute must either place no burden upon one's constitutional right to freely exercise religion,[121] or, in the event that the legislation does indeed infringe upon constitutional rights, any burden must be justified by a "compelling state interest."[122] In his concurring opinion, Justice Douglas deftly noted that the result reached by the Court should not necessarily focus upon the degree to which the infringement burdened the individual, but whether there was an infringement at all.[123] According to Justice Douglas, the First Amendment was meant to keep government out of that area of privacy, not to provide the government with a range of how far it could intrude.[124]

---

[116] *Id*. (citing 240 S.C. 286, 303-04).

[117] *Id.* at 401-02.

[118] *Id*. at 406.

[119] *Id*. at 402 (explaining that previous cases held that the "[g]overnment may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views") (internal citations omitted).

[120] *Sherbert*, 374 U.S. at 403 ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order . . . . " (citing Braunfeld v. Brown, 366 U.S. 599, 603)).

[121] *Id.*

[122] *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[123] *Id.* at 412 (Douglas, J., concurring).

[124] *Id.*

In order to determine whether the disqualification sections of the South Carolina Unemployment Compensation Act would survive constitutional challenge, the Court first addressed whether the South Carolina statute disqualifying Sherbert from collecting unemployment proved to be a burden on her free exercise of religion.[125] To answer this, the Court referred to an earlier decision in which it held that any law that has the purpose or effect of impeding one's observance of religion, or discriminates among religions either directly or indirectly, is to be deemed burdensome.[126] According to *Braunfeld v. Brown*,[127] such a law would be "constitutionally invalid."[128] In describing the ruling of South Carolina's Supreme Court, the *Sherbert* Court explained that the State forces individuals to choose between either accepting work and forfeiting religious observance or forfeiting work in order to observe a religious precept.[129] Accordingly, the *Sherbert* Court found that such a policy forcing such a decision penalizes individuals who choose to follow the precepts of their religion, thus infringing upon free exercise of their religious rights.[130]

After determining that a burden upon free exercise did exist, the Court next addressed whether such an imposition was justified by a compelling state interest.[131] According to precedent, "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[132] As such, only paramount interests of the state were legitimate enough to permit placing a burden on the ability to practice one's religion.

As justification, the State claimed that the possibility of fraudulent claims effectively diluting the compensation fund and hindering Saturday scheduling for employers was a paramount interest for South Carolina.[133] The Court rejected this argument, adding that even if this was a legitimate excuse, it would still be the State's re-

---

125 *Sherbert*, 374 U.S. at 403.

126 *Id.* at 404 (quoting *Braunfeld*).

127 366 U.S. 599, 607 (1961).

128 *Sherbert*, 374 U.S. at 404.

129 *Id.*

130 *Id.* at 406.

131 *Id.* In *Braunfield*, the Court held that a compelling state interest would justify the state's encroachment into an individual's free exercise of religion. *Braunfeld*, 366 U.S. at 607.

132 *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

133 *Id.*

sponsibility to demonstrate that this policy was the least restrictive form of regulation to prevent such abuses.[134] Since South Carolina lacked a "countervailing factor,"[135] such as the "strong state interest in providing one uniform day of rest for all workers" [136] as articulated in *Braunfeld*, the Court found that the State's justification for making Sherbert's religion a basis for ineligibility was not a compelling State interest.[137] The Court thus determined that in order for a statute to survive constitutional challenge, the State must prove that the statute does not burden free exercise and if it does, the statute is the least restrictive means of serving a paramount state interest. These elements subsequently became known as the *Sherbert* test.[138]

In his conclusion, Justice Brennan explained that the Court was holding that South Carolina could not enforce the ineligibility statute against an individual whose religious convictions prevented him from working on a day of rest without violating the Constitution.[139] The Court's intention in issuing such a narrow holding was to prevent the decision from being read to dictate any particular scheme upon which states were to build benefit programs.[140] Although the Court's holding was not supposed to be seen as tinkering with the structure of any welfare/benefit program, its decision achieved its goal of reaffirming that states are prohibited from infringing upon individuals' rights to religious exercise in determining eligibility for such programs, unless such an infringement could be justified by a

---

[134] *Id.* at 407. "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." (internal citations omitted). The Court also took note of several decisions from the Supreme Courts of North Carolina, Michigan, and Ohio, which had previously "granted benefits to person who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work." *See id.* at 407 n.7.

[135] *Id.* at 408.

[136] *Sherbert*, 374 U.S. at 408.

[137] *See id.* at 409.

[138] Am. Friends Serv. Comm. v. United States, 368 F. Supp. 1176, 1183-84 (jurisd.1973) (explaining that "[t]he *Sherbert* test set forth above and as applied to this case requires a showing by the government that a decision protecting the religious activity in question would be likely to result in placing a substantial burden on the ability of the Internal Revenue Service to collect the tax revenues to which it is entitled").

[139] *Sherbert*, 374 U.S. at 410.

[140] *Id.*

compelling state interest.[141]

ii. The Smith *Test*

Alfred Smith and Galen Black worked together at a private drug rehabilitation organization in Oregon.[142] The two were subsequently fired from their positions with the rehabilitation organization for ingesting peyote.[143] The peyote the pair ingested was used in a sacramental manner during a Native American Church ceremony.[144] Both Smith and Black were members of the Native American Church.[145] Upon being fired, respondents sought unemployment compensation from the Employment Division of Oregon, which determined that the two were "ineligible for benefits because they had been discharged for work-related 'misconduct.' "[146]

Under Oregon state law, the intentional possession of a controlled substance, as defined by federal law[147] and modified by Oregon state law,[148] is prohibited unless a doctor prescribes such a substance.[149] Because Oregon classified peyote as a Schedule I drug,[150] possession of such drug is a Class B felony.[151] Furthermore, the Oregon Supreme Court only a few years earlier held that its state statute

---

[141] *Id.*

[142] Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

[143] *Id.* Peyote is defined as "any of several cacti related to or resembling mescal." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 991 (2d ed. 2000). Also called MESCAL BUTTON . . . one of the dried tops of the mescal cactus, containing the hallucinogen mescalin." *Id.* at 831.

[144] *Smith*, 494 U.S. at 874.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 874; *see* Federal Controlled Substances Act, 21 U.S.C. §§ 811, 812 (2006).

[148] *Smith*, 494 U.S. at 874; *see* Ore. Rev. Stat. § 475.005(6) (1987) (defining "controlled substance").

[149] *Smith*, 494 U.S. at 874; *see* Ore. Rev. Stat. § 475.992(4) (1987) (current version at § 475.752(3) (2011)). In relevant part, the statute reads, "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice . . . ." Ore. Rev. Stat. § 475.752(3).

[150] *Smith*, 494 U.S. at 874; *see* Ore. Admin. Rule 855-080-0021(3) (1988).

[151] *Smith*, 494 U.S. at 874; *see* Ore. Rev. Stat. § 475.992(4)(a) (current version at § 475.752(3)(a) (2011)). In relevant part, the statute reads: "Any person who violates this subsection with respect to: (a) A controlled substance in Schedule I, is guilty of a Class B felony, except as otherwise provided in ORS 475.864." Ore. Rev. Stat. § 475.752(3)(a).

does not exempt sacramental use of drugs.[152] After remand from the Supreme Court of the United States,[153] Oregon's highest court found the prohibition to be invalid, determining that the State "could not deny unemployment benefits to respondents for having engaged in that [religious] practice [of ingesting peyote]."[154] The Employment Division appealed and the Supreme Court granted certiorari once again to consider whether Oregon's prohibition of peyote ingestion for religious use was permissible under the Free Exercise Clause.[155]

In the majority opinion, penned by Justice Scalia, the Court started by attempting to define free exercise of religion. According to Scalia, free exercise of religion is a freedom of conscience to believe and profess whatever religious doctrine or creed one desires.[156] Furthermore, free exercise is not confined strictly to belief and profession of faith, but also extends to the fulfillment of the prescriptions and proper adherence to the proscriptions of religions.[157] The Court concluded its definition of free exercise claiming that a state would certainly be burdening one's right to free exercise if the legal prohibition against certain acts applied only when performed for a religious purpose or only when related to a religious belief.[158] Thus, the Court maintained that requiring adherence to generally applicable laws which may contradict a religious prescription or proscription does not necessarily prohibit free exercise of religion.[159]

---

[152] *Smith*, 494 U.S. at 876 (quoting 307 Ore. 68, 72-73 (1988)).

[153] Emp't Div., Dept. of Human Res. of Oregon v. Smith (*Smith I*), 485 U.S. 660 (1988). In *Smith I*, the Court acknowledged that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment benefits to person who engage in that conduct." *Id.* at 670. Since Oregon's courts had yet to determine whether the state prohibition on peyote ingestion also applied to religious and sacramental purposes, the Court determined that it would not be "appropriate . . . to decide whether the practice is protected by the Federal Constitution." *Id*. at 673. Accordingly, the case was remanded for further proceedings to determine the status of religious consumption of peyote. *Id.* at 674.

[154] *Smith*, 494 U.S. at 876.

[155] *Id*. ("This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.").

[156] *Id*. at 877.

[157] *Id*.

[158] *Id.* at 877-78.

[159] *Smith*, 494 U.S. at 878.

Appealing to precedent, the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[160] Furthermore, it would seem that the only instances in which the Court found a neutral, generally applicable law inapplicable to religious behavior was when a "hybrid situation" was present—meaning that the law in question affected not only the Free Exercise Clause but another constitutional protection, such as freedom of speech or print.[161] In the instant case, the Court found that no such hybrid situation was present.[162]

Upon deciding that the only issue before the Court was that of free exercise of religion, the Court explained that not only had the *Sherbert* test been less popular in application leading up to the instant case, but that it was generally inapplicable as it pertained to the present case.[163] According to the Court's previous decision in *Bowen v. Roy*,[164] the "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."[165] Thus, in cases lacking individual exemptions, the *Sherbert* test is not to be used.

What is made clear from *Smith* is that the Court distinguishes among neutral, generally applicable laws and laws that have individual exemptions. Following this distinction, it is important to recognize the implications of one of the Court's later statements: "[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[166]

---

[160] *Id*. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[161] *Id.* at 881-82 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion/speech); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (religion/speech); Follett v. McCormick, 321 U.S. 573 (1944) (religion/speech); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (religion / rights of parents); Wisconsin v. Yoder, 406 U.S. 205 (1972) (religion / rights of parents)).

[162] *Id.* at 882.

[163] *Id.* at 885.

[164] 476 U.S. 693 (1986).

[165] *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. at 708).

[166] *Id.* at 888. In essence, what the Court is claiming here is that in the interest of judicial efficiency, all regulations will be presumed to be constitutionally valid in terms of protection of rights.

IV. THE CURRENT STATE OF THE LAW

A. Intelligible Principles and the New Millennium

Beginning in the 1980s, the approach of some Justices regarding delegation evolved. For example, in the *Whitman v. American Trucking Association*[167] decision, Justice Thomas filed a concurring opinion in which he questioned the wisdom of the Intelligible Principle Doctrine.[168]

The Court held in *Whitman* that although Congress set forth a broad delegation standard for the Environmental Protection Agency, it still served as an intelligible principle when compared to some of the other standards the Court had previously accepted.[169] In his concurrence, Justice Thomas mentioned that despite the fact that the argument before the Court was one regarding the constitutionality of the delegation, the parties briefed with "barely a nod to the text of the Constitution."[170] He further remarked that if anything, the concept of intelligible principle further complicates very simple Constitutional language: "*All* legislative Powers herein granted shall be vested in a Congress."[171]

In ending his concurrence, Justice Thomas stated very clearly that if the proper case were to present itself he would be willing to reexamine whether the Court has strayed too far from the original intent and understanding of separation of powers. As of this Comment's writing, there is little evidence to suggest that such a case has arisen.

B. The Religious Freedom Restoration Act and the States

In direct response to the Supreme Court's decision in *Smith*,

---

[167] *Whitman*, 531 U.S. 457. Under Congressional legislation, the Environmental Protection Agency was delegated authority to determine air quality standards necessary to protect the public health. *Id.* The American Trucking Association claimed this was a delegation of legislative authority. *Id.*

[168] *Id.* at 486-87.

[169] *See* cases cited *supra* note 72.

[170] *Whitman*, 531 U.S. at 487.

[171] *Id.* (quoting U.S. Const., Art. 1, § 1).

Congress enacted the Religious Freedom Restoration Act ("RFRA").[172] RFRA's Congressional findings explained that in *Smith*, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."[173] In dismissing the test set forth in *Smith* as unworkable, compared to the workable compelling interest test established in earlier federal decisions, Congress clearly rejected the *Smith* test and opted to codify the test established in *Sherbert* to best provide individuals with claims and defenses when their religious exercise is substantially burdened by a governmental body.[174]

The test established by RFRA is actually stricter than the *Sherbert* test. RFRA adds an additional element requiring the government to prove that the burden placed upon an individual's free exercise of religion was the least restrictive means of serving that compelling governmental interest; thus, the government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[175] The statute also clarifies the definition of "government," using the term to encompass "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity . . . ."[176]

Despite RFRA's overwhelming support in Congress,[177] in the 1997 decision of *City of Boerne v. Flores*,[178] the Supreme Court held

---

[172] Religious Freedom and Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

[173] 42 U.S.C. § 2000bb(a)(4).

[174] 42 U.S.C. § 2000bb(a)(5); 42 U.S.C. § 2000bb(b).

[175] 42 U.S.C. § 2000bb-1. *Compare* 42 U.S.C. § 2000bb-1 (requiring that the State illustrate that there was no burden on a person's exercise of religion, or in the event of a burden, that such a burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest), *with Sherbert*, 374 U.S. at 403 (requiring that the State illustrate that there was no infringement on an individual's constitutional rights of free exercise or, in the event of a burden, the State must illustrate that such infringement is justified by a "compelling state interest").

[176] 42 U.S.C. § 2000bb-2(1).

[177] Bill Summary and Status, Religious Freedom Restoration Act (H.R.1308) (listing major actions: passed the House by voice vote on 10/27/1993; passed the Senate by Yea-Nay Vote of 97-3 on 10/27/1993).

[178] 521 U.S. 507 (1997).

RFRA unconstitutional as it applied to the states.[179] In *Boerne*, the Archbishop of San Antonio gave a local parish permission to expand its church's structure.[180] When the parish applied to the City of Boerne for a building permit, the City denied the application, citing an ordinance that required the Historic Landmark Commission to approve any construction in the historic district in which the church was located.[181] The Archbishop commenced proceedings against the City of Boerne, primarily relying upon RFRA.[182]

The Supreme Court affirmed the Circuit Court's decision finding RFRA unconstitutional as it applies to the states, explaining that the heavy litigation resulting from the Act, coupled with the limiting effect that the Act had on the states' police powers placed excessive burdens upon the states.[183] Furthermore, the Court explained that the imposition of the least restrictive means requirement, which was not part of any pre-*Smith* test, placed an additional burden on the states.[184] The Court further indicated that the legislation was far broader than necessary or appropriate in order to serve its purpose of preventing and remedying violations of the Free Exercise Clause.[185] Accordingly, the Court determined that despite Congress's broad powers under the Enforcement Clause of the Fourteenth Amendment,[186] RFRA violated the very idea of federalism and federal-state balance, and was thus unconstitutional as it applied to the states.[187]

Despite the *Flores* decision, the Court has maintained that RFRA is constitutional when applied to federal laws.[188] In the case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[189] the Supreme Court found that although the appellees utilized *Hoasca*,[190] a substance prohibited under the Controlled Substance

---

[179] *Id.* at 536.

[180] *Id.* at 512.

[181] *Id.*

[182] *Id.*

[183] *Flores*, 521 U.S. at 535-36.

[184] *Id.* at 535.

[185] *Id.*

[186] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[187] *Flores*, 521 U.S. at 536.

[188] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[189] 546 U.S. 418 (2006) [hereinafter *O Centro*].

[190] Ayahuasca is defined as "a woody South American vine, *Banisteriopis caapi*, of the mapighia family, having bark that is the source of harmine, a hallucinogenic alkaloid used by

Act,[191] in their religious ceremonies, the Government failed to provide a compelling governmental interest in the barring of the sacramental use of *Hoasca*, and therefore, violated the free exercise rights of the church.[192] Although the Court recognized that it had previously ruled RFRA to be unconstitutional when applied to the states,[193] as well as the past difficulty in applying the test,[194] the Court still illustrated deference to Congress's judgment in enacting RFRA, thus maintaining the validity and constitutionality of the Act.[195]

Although RFRA may be difficult and onerous for courts to apply, the Act is valid law and serves as a supererogatory, yet legislatively desired, constitutional protection. As noted above, in 2006 the Supreme Court upheld the requirement that the federal government must demonstrate that a particular action, regulation, or statute has not substantially burdened an individual's free exercise of religion, or in the event that it has, did so in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest.[196]

V. A COMMENT ON THE CURRENT STATE OF AFFAIRS

A. Advocacy for the Reapplication of the Nondelegation Doctrine

Article I, Section 1 of the Constitution is far from ambiguous. It is not difficult to understand what the Framers intended when they wrote that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[197] There is but one way a reader could, and should, interpret that sentence, and that is that all legislative powers and responsibilities are conferred on Congress.

Indians of the Amazon bain." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 95 (2d ed. 2000).

191 *O Centro*, 546 U.S. at 423.

192 *Id.* at 439.

193 *Id.* at 424 n.1.

194 *Id.* at 439.

195 *Id.*

196 *See O Centro*, 546 U.S. at 429.

197 U.S. CONST. art I, § 1.

Among the numerous essays Madison wrote under the name of Publius, he often referenced a particularly important feature of the then newly proposed bicameral legislature system—the election system. In Federalist 37, Madison explained the virtue of having those who were elected being dependent on those that elected them.[198] He stated that because the power is derived from the people, the short duration of the elected official's term forces continued dependence.[199] He further explained that the liberties of the people are best protected by frequent elections of representatives,[200] reflecting on the maxim that "the greater the power is, the shorter ought to be its duration . . . ."[201]

In electing a Congress, the people choose representatives that they believe will best represent them in the creation of laws and the funding of programs.[202] When that Congress abdicates its power to legislate to a body of bureaucrats, the security provided by its having individuals maintain positions at the will of the people is lost.[203] There is an inherent danger in granting the power to legislate to the Executive. Delegation of legislative authority to the very same body that possesses the authority to enforce the product of the legislative authority amounts to a concentration of power the Founders intended to avoid. Many argue that some decisions are best made by a smaller group of individuals who have a significantly higher level of proficiency and expertise in a given area.[204] While this is true, without legislative oversight of the final regulatory product, the decision making process is inherently undemocratic.

The House of Representatives is elected by the citizens of given districts every two years,[205] the Senate by citizens of the states every six years,[206] and the president by the citizens of the nation eve-

---

198 THE FEDERALIST NO. 37, at 223 (James Madison) (Clinton Rossiter ed., 1961).

199 *Id.*

200 THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

201 *Id.* at 327

202 *See* THE FEDERALIST NO. 51, at 320-22 (James Madison) (Clinton Rossiter ed., 1961).

203 *Id.* at 319 (explaining that "[a] dependence on the people is, not doubt, the primary control on the government").

204 Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 292, 319 (explaining that "because of their expertise and accountability, agencies are particularly well designed for making various kinds of policy decisions").

205 U.S. CONST. art. I, § 2, cl. 1.

206 U.S. CONST. amend. XVII.

ry four years.[207] Furthermore, the Congress is made up of a total of 535 elected officials, with 435 in the House and 100 in the Senate.[208] Vested with all legislative powers, only those 535 people have the constitutionally granted power to make law.[209]

The Executive branch includes the President, an elected official, and all the federal agencies, which, under the concept of legislative delegation, have essentially developed the power to legislate.[210] As of 2011, the federal agencies employed approximately 1,372,000 civilians.[211] Furthermore, as the president is only one individual limited to two terms and elected every four years, as opposed to 435 representatives elected every two years, it can be argued that political recourse is substantially less available. Such delegation is the epitome of an undemocratic practice. In handing off legislative decisions and responsibilities, the Congress allows unelected bureaucrats, who are not directly responsible to the citizens, to make decisions that could otherwise have disastrous political ramifications for those actually elected to make such decisions.

Although American citizens regularly go to the polls in order to elect the 535 individuals who are supposed to make the laws for this country, there are instead nearly 1.4 million unelected individuals who could potentially legislate as long as Congress delegates to them the power to do so in the form of an intelligible principle.[212] In his concurrence in *Whitman*, Justice Thomas stated that there are cases in which an intelligible principle may be present but "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' "[213] Justice Thomas further noted that since neither of the parties in *Whitman* examined the Constitution in their respective pleadings nor requested that the Court reconsider its decisions on delegation of legislative power, the Court was right in

---

[207] U.S. CONST. art. II, § 1, cl. 1.

[208] *Members of Congress Questions and Answers*, THE CENTER ON CONGRESS AT INDIANA U., http://congress.indiana.edu/members-congress-questions-and-answers#why100 (last visited Mar. 4, 2013).

[209] U.S. CONST. art. I, § 1.

[210] *See* cases cited *supra* note 72.

[211] *Executive Branch Civilian Employment Since 1940*, U.S. OFFICE OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ (last visited Mar. 4, 2013).

[212] *J.W. Hampton*, 276 U.S. at 409.

[213] *Whitman*, 531 U.S. at 487.

not addressing the issue, although he explained that he would be willing to address whether the Court had strayed from the original intentions of separation of powers at another time.[214]

The path of deference that the Court followed in allowing the legislature to abdicate a degree of its legislative authority to the executive agencies is one fraught with danger. In a government composed of three branches with their own respective roles of writing the laws, enforcing the laws, and interpreting the laws, the Court has allowed a perilous relationship to be formed between the writers and the enforcers. Though this is not an instance in which Montesquieu would say that the legislature and the executive are "united in the same person, or body of magistrates,"[215] the delegation allowed by the Court through its liberal interpretation of the "intelligible principle" doctrine does run afoul of Madison's interpretation of Montesquieu's logic. According to Madison, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law . . . ."[216] Although the American political structure does not literally allow the entirety of executive power to rest in the President, as it would in a dictator or king, the departments and agencies act as extensions of his will.[217] The decisions of the departments and agencies are reflections of the goals and agenda of each presidential administration, and as such, they essentially provide for the maintenance of "the whole executive power" by the president.[218]

As such, the time has come to do precisely what Justice Thomas mentions in the *Whitman* case—engage in a frank discussion of modern delegation jurisprudence and how far it has strayed from the language of the Constitution. This is not as much an issue of debate regarding the legacy of the Constitution as a "living" or "dead" document,[219] but rather an issue of genuine concern regarding the legitimacy of the tripartite government structure and the role of the executive agencies.

---

[214] *Id.*

[215] THE FEDERALIST NO. 47, at 299 (James Madison) (Clinton Rossiter ed., 1961).

[216] *Id.* at 299-300.

[217] *See* Shuren, *supra* note 204, at 295-96.

[218] THE FEDERALIST, *supra* note 215, at 299; *see* Shuren, *supra* note 204, at 195-96.

[219] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976).

B. Superiority of RFRA and the *Sherbert* Test

The *Sherbert* test is a superior test to the *Smith* test when it comes to protecting an individual's religious freedoms. Congress agreed in 1993 when it enacted RFRA.[220] Finding the holding of *Smith* to be far too narrow, Congress codified the *Sherbert* test, with the addition of a least restrictive means test.[221] It is evident that RFRA was created to address, not only the narrow holding of *Smith*, but also the very disturbing final lines of Justice Scalia's opinion.

At the end of his opinion, Scalia recognized that leaving the determination of the accommodation of exemption for religious exercise to the political process would likely place less widely practiced religions at a disadvantage.[222] Scalia found this not only to be an "unavoidable consequence of democratic governments," but also to be more desirable than a system in which "each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[223] Though she concurred in the judgment, Justice O'Connor recognized in her concurring opinion that for the majority opinion to apply as written, the First Amendment could only be read to apply in the extreme situations in which the State directly targets a particular religious practice.[224] This result, O'Connor explained, was lacking in precedent and demeaned the very notion of the First Amendment's free exercise protections.[225] Furthermore, Justice O'Connor explained that, in her opinion, the very reason the First Amendment was enacted was to protect the religious freedom and free exercise of religions which were *not* in the majority.[226] Scalia's opinion clearly deems this protection to be burdensome on the Court and the legal system.[227]

Justice O'Connor's concerns regarding relegation of religious minorities to an inferior position have merit.[228] The majority's explanation that this disadvantage would be but a mere unavoidable

---

220 42 U.S.C. § 2000bb-1.
221 *Id.* at §§ 2000bb(a)(4), 2000bb-1(b)(2).
222 *Smith*, 494 U.S. at 890.
223 *Id.* at 890.
224 *Id.* at 894 (O'Connor, J., concurring).
225 *Id.* at 894-96.
226 *Id.* at 902.
227 *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).
228 *See supra* Section III-B.

consequence of democracy is, in particular, why the First Amendment was added to the Bill of Rights.[229] The protections encompassed in the First Amendment authored by Madison were also supported by the ideas of Thomas Jefferson, who advocated for the abolishment of the old British restrictions still on the books in Virginia.[230] For a modern Court to allow religious minorities to be placed in a position of disadvantage flies in the face of what the First Amendment stands for.

In *Smith*, the Court held that when a generally applicable, religion-neutral law burdens particular religious practices, the Government does not need to justify the burden with a compelling governmental interest.[231] The Court explained that this approach was justified in precedent in that the Court had adopted a similar standard regarding generally applicable laws.[232] With the passage of RFRA, Congress made legislators more accountable for legislation that burdened the fundamental right of free exercise. Over the past century, the Court has affirmed time and again that free exercise is indeed a fundamental right.[233] As a fundamental right, free exercise is guaranteed a higher standard of scrutiny than other liberties when determining whether the liberty has been burdened.[234] In instances where minority groups could be subject to the will of the majority if it were not for the protection guaranteed in the Constitution, a test requiring a

---

[229] *Id.*

[230] *See* MILLER, *supra* note 78, at 9 (explaining Jefferson's list of particular restrictions including the capital offense of heresy, the imprisonment of individuals denying the divinity of scripture and the existence of the Trinity, as well as denial of certain rights to minority religions such as government positions for Catholics or removal of children from Unitarian homes as the parents/homes were "declared unfit").

[231] *Smith*, 494 U.S. at 886 n.3.

[232] *Id.* (explaining that in Washington v. Davis, 426 U.S. 229 (1976), the Court held that "race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause;" and that the Court held that "generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment," in Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969)).

[233] *See* Johnson v. Robison, 415 U.S. 361, 375 n.14 ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (explaining that the Bill of Rights was intended to withdraw one's "right to life, liberty, and property, to free speech, a free press, freedom to worship and assembly, and other fundamental rights . . . " from the "vicissitudes of political controversy").

[234] *See* 42 U.S.C. § 2000bb(a).

more searching level of scrutiny is certainly justifiable.[235]

Not only has the Court embraced the necessity of a more exacting scrutiny when it comes to alleged violations of the fundamental right of free exercise, but it has also come to reject the "slippery-slope" argument for exemptions from generally applicable laws for free exercise reasons.[236] In *O Centro*, the Court discussed that the *Sherbert* precedent indicated a rejection of the government's "slippery-slope" argument as it applied to free exercise.[237] Under *Sherbert*, and more recently *Cutter v. Wilkinson*,[238] the Court determined that case-by-case considerations were feasible when determining religious exemptions for a generally applicable rule.[239]

C. Delegation, 45 CFR 147.130, and the Threat to American Liberty

Under the PPACA, the coverage of women's preventative care and screenings are required by shared cost plans.[240] What is necessarily covered under this broad topic was to be determined by comprehensive guidelines created by the Health Resources and Services Administration ("HRSA").[241] The language of the clause is clear: Congress granted authority to the HRSA to compile a comprehensive set of guidelines that would explain what preventative services and screenings were necessary. Included in these comprehensive guidelines are "contraceptive methods and counseling" which include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[242]

In July 2010, an interim final rule was adopted that would ap-

---

[235] *See Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[236] *See O Centro*, 546 U.S. at 436 (characterizing the slippery-slope argument as "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions").

[237] *Id.*

[238] *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding religious accommodations for incarcerated persons under the Religious Land Use and Institutionalized Persons Act ("RLUIPA")).

[239] *O Centro*, 546 U.S. at 436.

[240] 42 U.S.C. § 300gg-13(a)(4).

[241] *Id.*

[242] HRSA Guidelines, *supra* note 22.

ply HRSA standards under the PPACA,[243] and in August 2011, an amendment was presented by the Department of Health and Human Services.[244] Hoping to "provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions," the relevant departments amended interim final rules to allow the HRSA the discretion to formulate an exemption for certain religious employers.[245] The HRSA determined that an employer is exempt if it: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.[246] Such a definition of the exemption was included in the Final Rule adopted on February 15, 2012.[247]

i. The Delegation Issue

The language of the PPACA Section 1001(5) is a delegation of legislative duty to the HRSA to alter the language of Public Health Service Act Section 2713 ("Section 2713"). The delegation was for the HRSA to create a set of standards that Congress would utilize to define preventative care for women under Section 2713.[248] Conversely, subsections one, two, three, and five of the same section directed that other required preventative health services would be determined and defined by preexisting standards already established by the HRSA, the United States Preventative Services Task Force, and the Center for Disease Control.[249] As such, of the five subsections, subsection four was the only one that constituted a delegation of legislative authority.

It is clear that subsection four is a delegation of legislative authority because of the language used in the Act dictating the use of comprehensive guidelines: "[S]upported . . . *for purposes of this par-*

---

243 *See* Interim Final Rules for Group Health Plans, *supra* note 27.
244 Group Health Plans II, *supra* note 30, at 46623.
245 *Id.*
246 *Id.* at 46,626.
247 *See* Group Health Plans I, *supra* note 26.
248 PPACA, *supra* note 5.
249 *See* 42 U.S.C. § 300gg-13.

agraph."[250] Whereas Congress defers to previously determined guidelines in the other subsections, subsection four authorizes the HRSA to determine the guidelines it will choose to apply regarding women's preventative care and screening.[251] In dictating what guidelines in entirety will apply to other sections and leaving this section to the discretion of the executive agency, Congress has effectively delegated its legislative power.

In order for a delegation to be legitimate, it must be shown that Congress, by an act of legislation, has laid down an intelligible principle that clearly dictates the general policy, the entity that will apply it, and the boundaries of such delegated authority.[252] Despite the Court's acknowledgement of its deferential attitude towards Congress's power to delegate,[253] this situation is distinguishable from precedent. In earlier cases, the Court affirmed Congress's ability to use broad language to set standards in legislation.[254] In this instance, the Court failed to provide any such standard, but instead essentially allowed the regulatory entity to set its own standard, which under the legislation, will be binding. This is made clear by separating subsection 2713(a)(4) into the three factors comprising an intelligible principle: (1) the general policy; (2) the entity that will apply the policy; and (3) the boundaries of the delegated authority.[255]

The intent of the legislation is clear: cost sharing requirements shall not be imposed for any additional preventative care and screenings for women that are not described in earlier sections and are provided for in the new comprehensive guidelines.[256] Unlike other cases, however, this is not a delegation of discretion in applying a broad

---

[250] *Id.* (emphasis added).

[251] *Id.*

[252] *See Am. Power*, 329 U.S. at 105; *see also J.W. Hampton*, 276 U.S. at 409.

[253] *See Whitman*, 531 U.S. at 474-75 (quoting Scalia's dissent in *Mistretta*).

[254] *See* cases cited *supra* note 72.

[255] *See Am. Power*, 329 U.S. at 105; *see also J.W. Hampton*, 276 U.S. at 409.

[256] The legislation reads in relevant part:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirement . . . with respect to women, such additional preventative care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

PPACA, *supra* note 5.

standard, but rather delegation of discretion to determine the standard. The general policy of the delegation is to prevent women from having to pay for particular preventative care and screenings. The entity responsible for applying this standard is the Department of Health and Human Services.[257] The boundaries of the delegated authority, however, are not clear. The legislation explains that the services covered are those that are to be found in the "comprehensive guidelines supported by the Health Resources and Services Administration *for purposes of this paragraph*."[258] This language means that there is no boundary established for the HRSA. Whereas the other subsections in Section 2713 have predetermined standards to apply, subsection four not only grants the authority to HRSA to determine new guidelines, but instructs the agency to establish such guidelines within the bounds of the very paragraph granting it the authority to create the guidelines—essentially a carte blanche delegation of legislative authority to determine the standards.

The delegation to the HRSA is "unconfined and vagrant,"[259] as there are no boundaries to limit the promulgation of whatever standards the HRSA determines to be fitting without approval from Congress.[260] In *Schechter*, the Court found that a section of the NIRA allowing the President to "approve a code or codes"[261] was ultimately too unrestrictive and unconfined.[262] As in the instant case, which thus is distinguishable from *Whitman* and *Mistretta*, the Court in *Schechter* struck down legislation that "[i]nstead of prescribing rules of conduct . . . authorize[d] the making of codes to prescribe them."[263]

When an agency is granted the task, in legislation, to create and provide the guidelines for enforcing the very same legislation granting the agency legislative discretion, there should be a clear indication of the bounds of such power. Even if the delegation was determined to be one of discretion and not legislative authority, it is

---

[257] The Health Resources and Services Administration is an agency of the Department of Health and Human Services. *See About HRSA*, HEALTH RESOURCES AND SERVICES ADMIN., http://www.hrsa.gov/about/index.html (last visited Mar. 4, 2013).

[258] 42 U.S.C. § 300gg-13(a)(4) (emphasis added).

[259] *See Schecter*, 295 U.S. at 551 (Cardozo, J., concurring) (referencing *Hot Oil*).

[260] *Id.*

[261] *Id.* at 521 n.4 (majority opinion).

[262] *Id.* at 541-42.

[263] *Id.* at 541.

problematic when the agency wields discretion to implement and enforce the very guidelines it was granted discretion to create. As such, there has not only been a lack of guidance and boundaries from Congress regarding the creation of guidelines, but there is a total absence of guidance from Congress on the appropriate application of such guidelines.

This lack of guidance and total delegation of authority is made evident by the frequent proliferation of amendments to the code.[264] Furthermore, there is little evidence to suggest that after hearing comments regarding February 2013's proposed alterations, the Department of Health and Human Services will decide not to implement the expanded exemption and accommodation for other eligible non-exempt, non-profit organizations. Truthfully, this is an argument belying great skepticism; however, there is substantial evidence in the previous interim rule and final rule papers that suggests that the Department of Health and Human Services has greatly downplayed the disapproval of the rule commenters.[265] In each of the papers, the author spends nearly equal space discussing the arguments for and against the proposals,[266] yet has clearly had to retreat from its initial strict application of the rule.[267]

Assuming arguendo that the Court is to find an intelligible principle and uphold the delegation on the basis of precedent, the next issue is whether the language of Title 45, Section 147.130 is within the boundary set by Congress in the legislation.[268] If the Court does indeed find an intelligible principle and deems the delegation legitimate, it will likely find that the religious exemption is also within the boundary set by the legislation. In allowing such a broad delegation of legislative authority to conduct fact finding and determine

---

[264] *See* Interim Final Rules for Group Health Plans, *supra* note 27 (introducing the preventative care language for 45 C.F.R. 247.130); *see* Group Health Plans II, *supra* note 30 (introducing the religious employer exemption); *see* Group Health Plans I, *supra* note 26 (adopting the religious employer exemption and providing the temporary enforcement "safe harbor"); *see* Coverage of Certain Preventable Services, *supra* note 25 (introducing proposal of creating 45 CFR 247.131 to replace 45 C.F.R. 147.130(a)(1)(iv), as well as expand the exemption and establish accommodations for other eligible organizations such as religious schools, colleges, and universities with religious based objections to coverage of contraceptive services).

[265] *See* Group Health Plans II, *supra* note 30, at 46, 623.

[266] *See* Group Health Plans II, *supra* note 30; *see* Group Health Plans I, *supra* note 26.

[267] *See* Coverage of Certain Preventable Services, *supra* note 25.

[268] *See Am. Power*, 329 U.S. at 105; *see also J.W. Hampton*, 276 U.S. at 409.

what should be included in comprehensive guidelines concerning preventative care and screening for women, it would be unlikely for the Court to find any policy resulting from the application of the agency's guidelines to be outside the scope of the delegation.

If the Court adheres to its precedent of deference to Congress's delegation of power to Executive agencies, despite the distinguishable nature of this case, it will likely find that the language of PPACA Section 1001(5) is a legitimate delegation, and will thus uphold the constitutionality of the narrow religious exemption language. In holding so, the Court would therefore reject the Nondelegation Doctrine that this Comment champions and instead opt to accept the more modern and deferential delegation position.

ii. The Free Exercise Issue

The Supreme Court may find that the legislation and resulting Federal Code could survive judicial scrutiny under a nondelegation claim. However, the real issue debated in the lower courts today is whether the contraceptive mandate should be upheld, regardless of whether it is a product of improper delegation.[269] The difficulty in addressing the constitutional validity of the regulation is that most of the decisions handed down by the courts have been rulings on procedure, such as ripeness and standing.[270] Currently there is a split among the Circuits regarding the appropriateness of injunctive relief on the merits.[271] The split is further exacerbated by the lack of a

[269] As of the writing of this Comment, there are forty-eight cases before District and Circuit Courts across the United States. *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Feb. 28, 2013).

[270] *See id.* Most of the difficulty surrounding these lawsuits is the result of the agency's ability to publish final rules and then proceed to further amend the final rules. Some courts have held off on handing down final decisions in order to see the further actions of the agencies.

[271] As it currently stands, the Seventh and Eighth Circuits have both issued injunctions in favor of the plaintiff. O'Brien v. US Dep't of HHS, No. 12-3357 (8th Cir. Nov. 28, 2012), *available at* http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/8th-circuit-order-granting-temporary-injunction-in-obrien-v-hhs.pdf; Korte v. Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); Grote v. Sebelius, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); Annex Medical v. Sebelius, No. 13-118 (8th Cir. Feb. 1, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2012/05/8thCircuitAnnex.pdf. The Third, Sixth, and Tenth Circuits have conversely denied injunctive relief. Hobby Lobby, Inc., v. Sebelius, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), *reh'g en banc granted*, (10th Cir. Mar. 29, 2013); Autocam Corp., v. Sebelius, No. 12-2673 (6th Cir.

unanimous decision of the Circuit Judges, with the exception of one case in the Eighth Circuit and one case in the Tenth Circuit.[272] Not only do the Circuit splits seem to destine the issue to reach the Supreme Court, but the Court itself also illustrated an interest in hearing the case when it ordered the Fourth Circuit Court of Appeals to rehear some arguments after a premature dismissal following *National Federal of Independent Business v. Sebelius*.[273]

RFRA provides that in order for a law burdening an individual's right to free exercise to be deemed constitutional, the federal government must demonstrate that the burden acts to further a compelling governmental interest and that such a burden is the least restrictive means of furthering the asserted governmental interest.[274] Accordingly, looking at the arguments presented by both parties in the cases that have reached the Circuit Courts, the explanations of the government's compelling interest and the plaintiffs' burdens should become clear.[275]

In rebutting a free exercise claim under RFRA, the Government must demonstrate a compelling governmental interest in implementing the contraceptive coverage mandate. Of particular concern, the government will have to illustrate the compelling governmental interest in the mandatory coverage of contraceptive services without imposition of cost sharing requirements by all non-exempt[276] group health plans or group/individual health insurance

Dec. 28, 2012), *available at* http://www.becketfund.org/wp-content/uploads/2012/05/order-denying-injunctionAutocam-CA6.pdf; Conestoga Wood Specialties Corp., v. Sect'y of the US Dep't of HHS, No. 13-1144 (3d Cir. Jan. 29, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/02/Conestoga-CTA-Order-Denying-Injunction.pdf.

[272] *See generally Annex Medical*, No. 13-118; *Hobby Lobby*, 2012 WL 6930302.

[273] *See SCOTUS Orders Appeals Court to Hear Liberty University Health Care Lawsuit*, POLITICO.COM, http://www.politico.com/news/stories/1112/84226.html (last updated Nov. 27, 2012). *See also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566.

[274] 42 U.S.C. § 2000bb-1.

[275] This Comment will regard these cases strictly for the arguments presented when the courts determined whether the plaintiff's arguments possessed any merit. *See Korte*, 2012 WL 6757353, at *2 (requiring "some likelihood of success on the merits"); *Hobby Lobby*, 2012 WL 6930302, at *1 (requiring "substantial likelihood of success on the merits"); *Autocam*, No. 12-2673, at 1 (requiring a strong likelihood of success on the merits"); *Conestoga*, No. 13-1144, at 2 (requiring "a likelihood of success on the merits"). This note serves as recognition that all of the Circuit Court decisions discussed were appeals for injunctive relief and thus are not necessarily indicative of how the courts would rule on the merits.

[276] Assuming that 78 FR 8456 has effectively removed religiously affiliated organizations from the mandate, the RFRA discussion will proceed focusing upon the burden on the reli-

coverage plans.[277] Several executive offices and associated individuals have argued that the compelling governmental interest is in promoting public health, ensuring access to the recommended preventative services, and ensuring that the decision whether to use contraception and in what form is a decision for the woman to make, rather than the employer.[278]

This argument is supported by the data upon which the HRSA relied when making the guidelines, most notably the study on preventative services for women published by the Institute of Medicine's Committee on Preventative Services for Women.[279] In that study, the Committee made the recommendation that women's preventative services include "the full range of Food and Drug Administration-approved contraception methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[280] This recommendation was used by the HRSA in its comprehensive guideline for "contraceptive methods and counseling."[281] Moreover, the study put forth several arguments to support the inclusion of contraception under the umbrella of women's preventative care, including a decrease in unintended pregnancies and the treatment of "menstrual disorders, acne, hirsutism, and pelvic pain."[282] The study's primary focus was on the unintended pregnancies, the costs of such pregnancies, and the effect on the mothers.[283] Furthermore, the study found that the most effective and long lasting contraceptive methods are typically out of the reach of women due to high costs[284] or their

gious rights of the remaining for-profit organizations with religious objections to the mandate.

[277] *See* 45 C.F.R. § 147.130.

[278] *See Korte*, 2012 WL 6757353, at *4; *see also Press Briefing by Press Secretary Jay Carney, 1/31/12*, WHITEHOUSE.GOV (Jan. 31, 2012), http://www.whitehouse.gov/the-press-office/2012/01/31/press-briefing-press-secretary-jay-carney-13112). Since the promotion of public health is such a broad interest, and the contraceptive mandate has a particular focus on ensuring and increasing the availability of contraceptive services, the accepted compelling governmental interest for the sake of this comment is primarily on the interest of ensuring and increasing availability of contraceptive services for women.

[279] CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS (Committee on Preventative Services for Women, Inst. of Med., 2011) [hereinafter CLINICAL PREVENTATIVE SERVICES].

[280] *Id.* at 110.

[281] HRSA Guidelines, *supra* note 22.

[282] CLINICAL PREVENTATIVE SERVICES, *supra* note 279, at 104, 107.

[283] *Id.* at 102-04.

[284] *Id.* at 108.

socio-economic background.[285]

While the Government may have a legitimate compelling interest in ensuring and increasing women's access to contraceptive services, it is not entirely clear that the Government has sufficiently supported this interest. Directly following the Federal Code provision dictating the necessary coverage of contraceptive services is a section dealing with determination of the "preservation of right to maintain existing coverage."[286] This section of the code sets forth standards dealing with grandfathered health plan coverage, which the text defines as "coverage provided by a group health plan, or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status under the rules of this section)."[287] The regulation exempts any such grandfathered coverage from the application of Title I(A) or Title I(C) of the PPACA.[288] Interestingly enough, Title I(A) of the PPACA includes Section 1001 of the bill, which provides for the modification and alteration of Section 2713 of the Public Health Service Act dealing with preventative services.[289]

A legitimate argument can be made that by establishing such a sweeping initial exemption, the Government cannot legitimately claim that it has a compelling governmental interest in ensuring and increasing women's access to contraceptive services or that the mandate furthers such an interest. Not only does Section 147.140 allow grandfathered plans to avoid having to cover contraceptive services, but it also allows plans that already cover contraceptive services to maintain a co-pay for services and even increase "fixed-amount copayments," provided the increase is less than "$5 times medical inflation, plus $5"[290] or a maximum percentage increase "determined by expressing the total increase in the copayment as a percentage."[291] The legitimacy of the Government's argument that the purpose of the contraception mandate is to ensure women's ready and affordable access to contraception is clearly eroded by the other language promul-

---

285 *Id.* at 102.
286 45 C.F.R. § 147.140 (2011).
287 *Id.* at § 147.140(a)(1)(i).
288 *Id.* at § 147.140(c)(1).
289 *See* Pub. L. No. 111-148, Title I.
290 45 C.F.R. §147.140(g)(1)(iv)(A).
291 *Id.* at §147.150(g)(1)(iv)(B).

gated by the very same corpus of regulation.[292]

Assuming arguendo that the Court does indeed find the Government's proposed governmental interest compelling and that the mandate furthers such an interest, the next issue would be whether the regulation is the least restrictive means of ensuring and increasing women's access to contraceptive services. The strongest argument the Government might present is that because the corporation pays for the health coverage, there is no dirtying of the hands or commission of sin by the corporate owners.[293] As such, the Government will most likely appeal to earlier decisions that it will claim deny corporations the right to sue under the RFRA because " 'the "historic function" of the particular guarantee has been limited to the protection of individuals.' "[294] Accordingly, the Government might argue, and has argued, that the mandate is the least restrictive means of ensuring and increasing women's access to contraceptive services because the burdened entities cannot assert such a deprivation of rights under the First Amendment. This is due to the fact that free exercise is a purely personal right.[295]

In *First National Bank of Boston v. Bellotti*,[296] the Court declined to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."[297] As such, the Government's assertion that corporations cannot claim the benefits of a "purely personal" protection is not as ironclad as the district court in *Hobby Lobby Stores, Inc. v. Sebelius* ("*Hobby Lobby I*")[298] would make it out to be.[299] Regardless of this, several district courts and some circuit courts, including the Tenth

---

[292] This conclusion equally applies to the unaddressed compelling governmental interest regarding the promotion of public health. To exempt a broad range of programs from application from the very beginning does nothing to further promote public health.

[293] *See Hobby Lobby*, 2012 WL 6930302, at *3 (explaining that "[s]uch an indirect and attenuated relationship appears unlikely to establish the necessary 'substantial burden' "); *see also* Korte, 2012 WL 6757353, at *5 (Rovener, J., dissenting) (explaining that the corporate form "does separate the Kortes, in some real measure, from the actions of their company").

[294] Hobby Lobby Stores, Inc., v. Sebelius (*Hobby Lobby I*), 870 F. Supp. 2d 1278, 1287-88 (W.D. Okla. 2012) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (quoting United States v. White, 322 U.S. 694, 698-701 (1944))).

[295] *Id.* at 1287.

[296] 435 U.S. 765 (1978).

[297] *Bellotti*, 435 U.S. at 777.

[298] 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

[299] *See id.* at 1288.

Circuit in *Hobby Lobby I*, have recognized a growing trend of courts enforcing RFRA to protect the individual rights of plaintiffs to participate or abstain from specific practices required or prohibited by their religion.[300] Several courts dealing with requests for injunctive relief on this particular issue have allowed the corporate owners as individual plaintiffs to have standing under RFRA.[301] In one case in particular, the court highlighted the plaintiffs' argument that " '[t]here is no business or corporation "exception" ' to RFRA or the Free Exercise Clause, and that these provisions protect the religious exercise of *any* entity . . . ."[302]

Further arguments can be made in opposition to the Government's claim that there is no burden on the individual business owner because of the indirect nature of the purchase of coverage. In particular, the Government's argument fails to consider the nature of corporate governance. The dissenting judge in *Conestoga* presented the plaintiffs' dilemma as: "[M]ake us pay for something poisonous to our religious beliefs or face the destruction of our business."[303] Does the corporate structure cause such a separation between the acts of the corporation and the owners that the government can impose such a choice upon the owners, but at the same time allow for the piercing of the corporate veil for corporate debts? This argument also raises the question whether partnerships or other business entities are left uncovered under RFRA. Additional concerns must be addressed regarding how well the mandate ensures and increases public health or women's access to contraceptive services for companies with less than fifty employees.[304] If an employer with fewer than fifty employees chooses to help provide health insurance for his or her employees, but finds the mandatory coverage of contraceptive services morally repugnant, he or she may instead decide not to provide insurance for the employees, as was the case in *Annex Medical Inc.*,

---

[300] *See Hobby Lobby*, 2012 WL 6930302, at *3.

[301] *See Korte*, 2012 WL 6757353, at *3; *see* Annex Med. Inc., v. Sebelius, No. 13-118; *see* Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635(RBW), 2012 WL 5817323, at *5-*9 (D.D.C. Nov. 16, 2012).

[302] *Tyndale*, 2012 WL 5817323, at *5.

[303] *Conestoga*, No. 13-1144, at 12 (Jordan, J., dissenting).

[304] *See* 26 U.S.C. § 4980(H) (2006) (establishing minimum requirements of employer-sponsored plans for "large employers"); *see also* 26 U.S.C. § 4980H(c)(2)(A) (defining "large corporations" as employing fifty or more individuals).

et al. v. Sebelius, et al.[305] In situations dealing with small business, it is difficult to see how the compelling interest proffered by the government is furthered. Even greater constitutional issues arise due to the exemption of some corporations and not others, which creates an equal protection classification scheme that raises additional issues beyond the scope of this Comment.

Despite the Government's assertion that the contraception mandate in its current form is the least restrictive means of furthering its compelling governmental interest, there are several alternative methods through which the same goal could be achieved. According to one author who found the religious exemption of Title 45, Section 142.130 to be constitutional under RFRA, "[t]he least restrictive means requirement must . . . mean that the Act could have gone further to protect the specific free exercise interests claimed by those challenging the Act."[306] The author established this meaning after stating that an Act cannot fail under RFRA simply for not including each and every exemption the plaintiff could think of.[307] While this is true, it does not change the fact that in crafting the contraception mandate, Congress and the executive agencies could have chosen a series of alternatives to achieve the same goals.

In *Korte, et al. v. Sebelius, et al.*,[308] the Seventh Circuit discussed, albeit very briefly, one such alternative posed by the plaintiffs illustrating that the contraceptive mandate as it is written is not the least restrictive means. Although it is only a quick aside, the court took notice of the plaintiff's proposal that the government offer tax deductions or credits for the purchase of plans covering contraception.[309] Such a concept has tremendous potential to encourage corporations and individual employers, which would otherwise not fall under the religious exemption, to purchase insurance plans with contraception services. Furthermore, this option would allow corporations and employers to retain autonomy in making decisions whether to cover the cost of employee health care.

In addition, a number of state programs could include the

---

[305] *Annex Med. Inc*., No. 13-118, at 3.

[306] Samuel T. Grover, *Religious Exemptions to the PPACA's Health Insurance Mandate*, 37 AM. J. L. & MED. 624, 644 (2011).

[307] Grover, *supra* note 306, at 644.

[308] *Korte*, 2012 WL 6757353.

[309] *Id.* at *3.

mandated coverage instead of all private insurance programs. Under services such as Medicaid, COBRA, and other state run health coverage programs,[310] a rider could be offered that would extend coverage of contraceptive services or could create new programs altogether. Such programs would likely be funded by general taxes, and any religiously objecting plaintiff would have a difficult time establishing a sufficient claim against such taxes because of the Supreme Court's decision in *United States v. Lee*.[311] In *Lee*, the Court held that if religious denominations were allowed to challenge a general tax, such as income tax or the tax enacted by the Social Security Act, premised solely on the assumption that the taxes may be spent in a manner violative of that sect's beliefs, the tax system could not function.[312]

Lastly, an alternative to the mandate could have been a tax deduction for all women working under employers who found the purchasing of coverage including contraceptive services to be contrary to their religious beliefs. One of the concerns arising out of the report from the Institute of Medicine was the cost of contraceptive services, especially among certain demographics.[313] In providing these deductions, the government would relieve the burden placed on the rights of religious employers as well as the financial hardship placed on the women employees.

VI. CONCLUSION

At the end of Federalist 48, Madison noted with concern that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[314] Justice Thomas raised this very same concern in *Whitman* when he observed that the plaintiffs had failed to raise the argument most obviously available to them—the granting of all legislative power to Congress in Article I, Section 1 of

[310] Approximately half the states in the Union already operate Medicaid-founded programs focusing on family planning and contraceptive services. CLINICAL PREVENTATIVE SERVICES, *supra* note 279, at 108.

[311] 455 U.S. 252 (1982).

[312] *Id.* at 260.

[313] CLINICAL PREVENTATIVE SERVICES, *supra* note 279, at 108.

[314] THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961).

the Constitution.[315]

The constant delegation of discretion and the more disturbing delegation of legislative authority from the legislature to the executive is something that should be carefully noted and skeptically observed by all citizens of the United States. It has become clear that the Supreme Court is hesitant to declare such delegations unconstitutional or unlawfully broad,[316] just as the Court has also come to deem the oppression of religious minorities to be an "unavoidable consequence of democratic governments."[317]

Results of recent legislation such as the contraceptive services coverage mandate arising out of the PPACA have finally awakened a sleeping public to the grave threat that such delegation poses to American liberties. To combat this threat, a plaintiff should acknowledge the wisdom of Justice Thomas and invoke Article I, Section 1 of the Constitution as one of several very strong arguments against this abuse.

[315] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives").

[316] *See Whitman*, 531 U.S. at 474-75.

[317] *Smith*, 494 U.S. at 890.