
STATUTORY MILLENNIALISM:
ESTABLISHMENT AND FREE EXERCISE
CONCERNS ARISING FROM THE
HEALTH CARE SHARING MINISTRY
EXEMPTION’S 1999 CUTOFF DATE

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INTRODUCTION

For nearly a decade, health care reform has been at the center of American politics. The development, enactment, and reform of the Patient Protection and Affordable Care Act (PPACA)—“Obamacare,” in the parlance of both opposition and advocates—dominated the election cycles of 2010, 2012, 2014, and 2016, and continued policy changes and market instabilities are all but certain to remain in the spotlight through 2018 and 2020. The endurance of this debate should come as no surprise: national attempts to expand access to affordable medical services have a long history, beginning not with Barack Obama, Mitt Romney, Bill Clinton, or even Lyndon Johnson, but with Teddy Roosevelt and the Progressive Party in 1912.¹ Along the way, while employer-provided insurance came to form the cornerstone of American health care coverage, a wide range of proposals sought to extend benefits to the uninsured, including efforts to create tax subsidies, to introduce single-payer government care, and to impose employer and individual mandates.² Of course, it was that final option—the individual mandate, requiring that taxpayers either carry insurance or pay for their failure to do so—that featured in the law finally passed by Congress in 2010. Of “critical importance,” the mandate was “the price for the [insurance] industry’s cooperation.”³ However, “perhaps because prominent Republicans had [originally] endorsed the idea, Democrats underestimated the problems it would cause.”⁴ While the mandate still survives in full through 2018, it will continue only nominally thereafter: shortly before this Note went to press, the narrow Republican majorities in Congress—following years of promises to “repeal and replace”⁵—reduced the mandate’s penalty to \$0 for 2019 and beyond, although procedural limitations required them to leave intact the theoretical

1. See Dan Balz, *Introduction* to STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 4 (2010) (“The [1912] party platform . . . call[ed] for ‘the protection of home life against the hazards of sickness, irregular employment and old age through the adoption of a system of social insurance adapted to American use.’”).

2. See PAUL STARR, REMEDY AND REACTION: THE PECULIAR AMERICAN STRUGGLE OVER HEALTH CARE REFORM 19–21 (2011).

3. *Id.* at 187.

4. *Id.* at 21. *Cf.* Stuart M. Butler, Assuring Affordable Health Care for All Americans, Address at Meharry Medical College (Oct. 2, 1989), in 218 HERITAGE LECTURES 6 (1989) (addressing problems with the American health care system and proposing an insurance mandate as part of a conservative solution).

5. See, e.g., Editorial, *Ding Dong, Repeal and Replace Is Dead. (For Now)*, L.A. TIMES (July 28, 2017, 9:15 AM), <http://www.latimes.com/opinion/editorials/la-ed-healthcare-skinny-repeal-20170728-story.html>. *Cf.*, e.g., Alex Pappas, *Trump: ‘Repeal and Replace Is Not Dead!’*, FOX NEWS (July 29, 2017), <http://www.foxnews.com/politics/2017/07/29/trump-repeal-replace-is-not-dead.html>.

command.⁶

The mandate has been the subject and survivor of substantial litigation, as well as of considerable scholarship.⁷ Underexplored, however, is a provision within the mandate giving special consideration and accommodation to those who obtain membership in a type of medical collective known as a health care sharing ministry: such members are entirely exempt from the PPACA's requirements.⁸ This provision is unique in federal law. Unlike traditional conscientious-objector exemptions (which the PPACA also grants), the sharing ministry exemption demands no showing of a religious burden: to avoid the demands of the individual mandate, one need only join a club structured around shared ethical principles.⁹ And as a nation, join we have: sharing ministry membership has expanded dramatically since 2010, so dramatically that the exemption may have helped to accelerate the destabilization of the very risk pools that the Act was meant to supply.¹⁰ But the ability to join is not universal to people of all faiths and creeds, for the exemption contains a cutoff-date clause that not only forecloses the formation of new sharing ministries, but also limits the benefit of an exemption to members of just those sharing ministries which were in operation ten years before the PPACA's passage.¹¹ Whether by accident or design, the effect of this limitation is to enshrine in law an accommodation for only five ministries—each one explicitly Christian in its tenets and joining requirements.¹²

This Note explores the sharing ministry exemption from several angles. Part I traces the history of the exemption's creation, looking at the passage of the PPACA and attacks on Obamacare before turning to the rise of sharing ministries and their incorporation into the text of the law. Part II reviews a prior court challenge to the legality of the exemption, looking at

6. Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, § 11801, 131 Stat. 2054, 2092 (2017) (to be codified at 26 U.S.C. §5000A(c)).

7. See Douglas A. Bass, Annotation, *Validity of the Minimum Essential Medical Insurance Coverage, or "Individual Mandate," Provision of § 1501 of the Patient Protection and Affordable Care Act of 2010*, Pub. L. No. 111-148, 124 Stat. 119, 60 A.L.R. Fed. 2d 1 (2011).

8. See I.R.C. § 5000A(d)(2)(B) (2012).

9. See *id.* ("The term 'health care sharing ministry' means an organization . . . members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs . . .").

10. See, e.g., Tracy Seipel, *Obamacare: 'Health Care Sharing Ministries' Increase Membership in Wake of New Law*, MERCURY NEWS (July 26, 2014, 10:33 AM), <http://www.mercurynews.com/2014/07/26/obamacare-health-care-sharing-ministries-increase-membership-in-wake-of-new-law>.

11. See I.R.C. § 5000A(d)(2)(B)(ii)(IV).

12. See *infra* note 49 and accompanying text.

why a suit brought on Establishment Clause grounds failed and how better probing of the legislative history might have warranted a different result. Finally, Part III examines unaddressed Free Exercise Clause concerns, including the burden on religious practice that the exemption creates (rather than alleviates); its inequitable effect on Muslim Americans, who are excluded from sharing ministry participation; and how these concerns fit within the framework established by the Religious Freedom Restoration Act. The Note concludes with a look ahead: whether or not the mandate's 2017 defanging survives future elections, individual claims for faith-based exemptions to government mandates in other realms will continue to stand in tension with equality concerns. Such concerns simultaneously compel both the granting of and withholding of accommodation, but the "*sensible* balanc[ing]" test for resolving these conflicts, as provided by Congress, remains underused.¹³ The sharing ministry exemption is a window into the usefulness of the test, and how in some cases it is possible to preserve legislative purpose only through the abrogation of legislative exemptions.

I. CREATING A SOLUTION AND A PROBLEM

A. THE PPACA

On March 23, 2010, following protracted battles in Congress and in the court of public opinion, President Obama signed the PPACA into law.¹⁴ The PPACA significantly expanded Medicaid, required insurers to cover pre-existing conditions, insured policyholders' children into adulthood, gave insurance subsidies to lower-income households, and created marketplaces for the purchase of private health care policies.¹⁵ To create a risk pool deep enough to ensure the affordability of such policies, the PPACA also included an "individual mandate," requiring most Americans to carry a compliant form of health insurance from 2014 forward, regardless of their health or employment status.¹⁶

In pitching this version of health care reform to the country, Obama

13. 42 U.S.C. § 2000bb (emphasis added). See, e.g., Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 419–20 (2016).

14. See Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Bill into Law, with a Flourish*, N.Y. TIMES (Mar. 23, 2010), <https://nyti.ms/2jDDkXM>.

15. See Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>.

16. See I.R.C. § 5000A(a); Casey B. Mulligan, *The Power of the Individual Mandate*, N.Y. TIMES: ECONOMIX (Oct. 23, 2013, 12:01 AM), <https://economix.blogs.nytimes.com/2013/10/23/the-power-of-the-individual-mandate>. ("[T]he individual mandate can be enforced and thereby help discourage millions of people from going without health insurance.").

made a series of public promises to those who already had health coverage, promises which he reiterated at the bill's signing:

If you like your current insurance, you will keep your current insurance. No Government takeover, nobody is changing what you've got if you're happy with it. . . . [W]hat works in our system won't change. And a lot of people are happy with the health care that they've got, and that won't change because of this legislation.¹⁷

While the degree to which this commitment could ever have been generally met is debatable,¹⁸ the PPACA does, in fact, contain a little-noticed provision guaranteeing exactly such rights to members of the then-obscure form of alternative risk distribution known as health care sharing ministries.¹⁹

That sharing ministries obtained a statutory accommodation for their members is remarkable: any exemptions from the individual insurance mandate had to be carefully limited by Congress if the wider program was to succeed, because the guarantee of preexisting-condition coverage hinged on the simultaneous enrollment of millions of healthy policyholders.²⁰ The list of exemptions was therefore short, with only two touching upon personal beliefs.²¹ The first such exemption acknowledges that some Americans have a conscientious objection to insurance programs of any sort, and so “member[s] of a recognized religious sect or division . . . ,”²² whose faith has also entitled them to absent themselves from participating in Social Security, face no penalty for failure to comply with the individual mandate.²³ This “[r]eligious conscience exemption”²⁴ thereby carries over

17. Remarks on the Patient Protection and Affordable Care Act, 1 PUB. PAPERS 402, 404 (Mar. 23, 2010) [hereinafter Remarks].

18. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 4:01 AM), <https://twitter.com/realDonaldTrump/status/816977937731878912> (“The fact is ObamaCare was a lie from the beginning. ‘Keep you [sic] doctor, keep your plan!’”).

19. I.R.C. § 5000A(d)(2)(A)(i).

20. See Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 64 (2010) (“With an individual mandate, the government creates a requirement that all Americans obtain insurance. Yet it leaves implementation for the most part in the hands of private insurers, who, to whatever degree permitted, design, price, and issue the plans that Americans must buy. This power over design, in essence, imbues insurers with a tremendous amount of delegated state power to determine the contours of how the mandate is put in place and effects Americans. Regulations, thus, may be seen as a way to ensure insurers implement the mandate consistent with intended legislative objectives, including health redistribution.”).

21. Both come under the heading “[r]eligious exemptions,” even though the sharing ministry may theoretically be organized along purely ethical lines. I.R.C. § 5000A(d)(2).

22. *Id.* § 5000A(d)(2)(A)(i).

23. Congress defined this group by direct reference to the longstanding conscientious objector exemption within the Social Security Act: to be exempt, a sect must have been in existence since 1950, it must teach adherents not to participate in insurance plans, and it must have an independent system for

precisely from the exemption already in place for a preexisting social welfare scheme, fulfilling, rather literally, the president's promise that objectors may keep "the health care that they've got": the care given internally by their sect, which their faith obliges them to take in preference to government assistance.²⁵

But with the second belief exemption—for health care sharing ministries—the very concept was appearing in the federal code for the first time.²⁶ As defined by the PPACA, sharing ministries must be audited 501(c)(3) organizations, which have been "in existence at all times since December 31, 1999" and have spread the costs of members' medical expenses "continuously and without interruption" since that date.²⁷ So long as a ministry's members (1) "share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs" and (2) can "retain membership even after they develop a medical condition,"²⁸ the members are entirely exempt from the command to maintain coverage meeting PPACA standards.

Of course, the 2016 election of President Trump called the future of the entire PPACA into serious question.²⁹ A cornerstone of Trump's campaign was a pledge "to immediately deliver a full repeal of Obamacare," including the "eliminat[ion of] the individual mandate."³⁰ Such action would obviate the need for special treatment of any insurance alternatives. Yet Trump took office espousing neither a clear nor a consistent vision of his administration's health care policy, variously expressing a desire to keep some aspects of the PPACA intact,³¹ to destroy

ensuring the well-being of members. *See id.* § 1402(g)(1) (requiring objectors to be "conscientiously opposed to acceptance of the benefits of any private or public insurance . . . [for] death, disability, old-age, or retirement or . . . medical care.").

24. *Id.* § 5000A(d)(2)(A).

25. A sect that made no care provision for its adherents would not fulfill the terms of the exemption.

26. *See* Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1671 (2012).

27. I.R.C. § 5000A(d)(2)(B)(ii)(IV)–(V).

28. *Id.* § 5000A(d)(2)(B).

29. *See* Jeffrey Toobin, *The Highest Court*, NEW YORKER, Nov. 21, 2016, at 58.

30. *Healthcare Reform to Make America Great Again*, DONALD J. TRUMP FOR PRESIDENT, <https://web.archive.org/web/20170207063426/https://www.donaldjtrump.com/positions/healthcare-reform> (last visited Jan. 3, 2018).

31. *See* Reed Abelson, *Donald Trump Says He May Keep Parts of Obama Health Care Act*, N.Y. TIMES (Nov. 11, 2016), <https://nyti.ms/2eIXqcX>.

Obamacare through inaction,³² or to spend enough federal funds to expand health care coverage even further.³³ Through much of Trump's first year in the White House, the mandate survived close calls. Early signs that Trump's IRS would cease to enforce the individual mandate flagged,³⁴ and although the agency agreed to process tax returns which do not answer the question of whether health coverage was maintained during the year—a change from Obama-era policies—the tax authority stated that “barring a legislative change, it w[ould] continue enforcing the Affordable Care Act, while ‘taxpayers remain required to follow the law and pay what they may owe.’”³⁵

That legislative action finally appeared at the end of 2017, a late addition to the tax reform bill advanced in Congress after the failure of attempts to more fully repeal the PPACA³⁶:

Remarkably, after the millions of words written by lawyers to attack and defend the mandate in court, the tax bill wipes it out with just two sentences. The penalty is either a flat dollar amount, \$695 for an adult, or 2.5 percent of household income above a certain threshold, whichever is greater. The tax bill slices the penalty to “\$0” and “zero percent,” starting in 2019, relieving taxpayers of \$43 billion in penalties they would otherwise pay through 2027, the budget office says.³⁷

This tax legislation, signed into law in late December 2017, obviously represents a near-total neutering of the mandate's power from 2019 forward.³⁸ But while the old maxim holds that there is no penalty without a law, the inverse is not quite true: there *is* still law without a penalty. With the structure of the mandate still enshrined in the code, restoration of the tax penalty is hardly unimaginable in a different political environment. This Note will therefore address the sharing ministry exemption as it stands through the 2018 tax year, mindful that even if the penalty's abrogation is

32. See Thomas Kaplan, 'Let Obamacare Fail,' *Trump Says as G.O.P. Health Bill Collapses*, N.Y. TIMES (July 18, 2017), <https://nyti.ms/2vyCGgZ>.

33. See Damian Paletta, *Trump Calls for More Spending on Health Care so It's 'The Best Anywhere,' but He Just Proposed Big Cuts*, WASH. POST (May 28, 2017), <http://wapo.st/2r2UFNm>.

34. See Peter Sullivan, *IRS Loosening Enforcement of ObamaCare Mandate*, HILL (Feb. 15, 2017, 12:41 PM), <http://thehill.com/policy/healthcare/319672-irs-takes-step-against-obamacare-mandate>.

35. Brianna Ehley & Aaron Lorenzo, *Trump Still Enforcing Obamacare Mandate*, POLITICO (May 3, 2017, 2:14 PM), <http://politi.co/2pFTUqW>.

36. Mike DeBonis & Damian Paletta, *Senate GOP Changes Tax Bill to Add Obamacare Mandate Repeal, Make Individual Income Cuts Expire*, WASH. POST (Nov. 14, 2017), <http://wapo.st/2hsekQS>.

37. See Robert Pear, *Without the Insurance Mandate, Health Care's Future May Be in Doubt*, N.Y. TIMES (Dec. 18, 2017), <https://nyti.ms/2CZJngA>.

38. See Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), <https://nyti.ms/2DyfGmW>.

permanent, a rigorous examination of potential challenges to the law may prove useful in future debates over the nuances of both health care reform and belief-based exemptions.³⁹

B. THE EXEMPTION

Taken at face value, the PPACA's belief exemptions appear reasonable: if the purpose of the law is to expand the number of Americans with health insurance while allowing those who liked their existing plans to keep their coverage intact, then why not permit people of shared belief, with a communal commitment to one another, to continue to meet their obligations outside of the confines of a commercial insurance product? Several objections apply to the sharing ministries, however, which do not impact the legitimacy of the religious conscience objector exemption. First, the sharing ministries are not simply unregulated. Unlike religious conscience communities, the organizations themselves do not assume ultimate responsibility for care or claims. Each ministry serves as a clearinghouse for the sharing of costs amongst its membership; the costs are those billed by unaffiliated medical providers beyond the community, and there is no recourse if individual financial obligations go unmet.⁴⁰ Second, the sharing ministry exemption language avoids entirely the traditional underpinnings of faith-based exemptions.⁴¹ While the religious conscience exemption applies to "an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of . . . insurance,"⁴² sharing ministry members need simply "share a common set of ethical or religious beliefs"

39. Although the PPACA is the only federal law to contain a sharing ministry exemption at present, Congress has considered adding the exception to existing legislation governing Health Savings Accounts (HSAs). *E.g.*, H.R. 1752, 114th Cong. (2015). Additionally, although beyond the scope of this paper, it should be noted that a number of states recognize sharing ministries and accord them special consideration, in some cases following exactly the language of the federal exemption. *See, e.g.*, N.H. REV. STAT. ANN. § 126-V:1 (LexisNexis 2016).

40. *See* Benjamin Boyd, *Health Care Sharing Ministries: Scam or Solution?*, 26 J.L. & HEALTH 219, 236–238 (2013) (discussing the dissent in *Commonwealth v. Reinhold*, 325 S.W.3d 272, 280–82 (Ky. 2010)). *See also* Ehren K. Wade, Comment, *Just What the Doctor Ordered? Health Care Reform, the IRS, and Negotiated Rulemaking*, 66 ADMIN. L. REV. 199, 221 (2014) ("[M]inistries . . . may refuse to cover certain treatments on religious grounds and are largely unregulated, such that they may not have reserves to cover large expenses and are not required to carry such reserves.").

41. Kent Greenawalt has identified three typical justifications for exemptions: necessity of avoiding offense to a religious belief; necessity of avoiding "grave practical difficulties" arising from noncompliance, as when a draftee refuses to fire on a battlefield; and necessity of allowing noncompliance from a law which compels morally abhorrent action or inaction. KENT GREENAWALT, EXEMPTIONS 5–6 (2016).

42. I.R.C. § 1402(g)(1) (2012).

and “share medical expenses . . . in accordance with those beliefs.”⁴³ The religious conscience exemption is thus aimed at those whose religious beliefs require active opposition to a program, but sharing ministry members need only have *a* belief; whether that belief is sincere, or central to their faith, or even in any way burdened by the government is immaterial. It is especially noteworthy that the belief need not be religious: ethics alone suffice, even though the ethical difference between a secularized cost-sharing program and an insurance policy is nearly impossible to discern.⁴⁴ Third, and relatedly, there is potential for abuse: again unlike a religious conscience objector, a sharing ministry member expresses no belief barring participation in traditional insurance at a later date. While shared faith—especially regarding an opposition to contraceptive coverage—is undeniably important to some, economic incentives are also in play,⁴⁵ with non-comprehensive coverage, unsurprisingly, costing less than insurance which meets the federal mandate.⁴⁶ The door nevertheless remains open to the public market should a ministry member require treatment for a preexisting or otherwise-uncovered condition.⁴⁷

There is also a fourth complication, critical yet largely unprobed, to be found within the cutoff date set by the PPACA. Because December 31, 1999 was chosen—when drafting the law a decade later—as the last possible date of establishment for qualified sharing ministries (though

43. *Id.* § 5000A(d)(2)(B)(ii)(II).

44. See Charlene Galarneau, *Health Care Sharing Ministries and Their Exemption from the Individual Mandate of the Affordable Care Act*, 12 J. BIOETHICAL INQUIRY 269, 280 (2015) (“Notably, a commitment to share medical expenses is also the core ethical principle underlying secular health insurance. . . . [W]hat does it mean to *share medical expenses in accordance with those beliefs?*”). Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

45. See Kimberly Leonard, *Christians Find Their Own Way to Replace Obamacare*, U.S. NEWS & WORLD REP. (Feb. 23, 2016, 1:12 PM), <http://www.usnews.com/news/articles/2016-02-23/membership-for-health-sharing-ministries-soars-under-obamacare> (“People say they join health sharing ministries for a variety of reasons—whether they’ve found exchange plans to be prohibitively expensive or because they prefer sharing medical costs with others who hold their faith and will pray for their medical hardships. Some say they don’t want to pay into a plan that violates their religious objections, such as those that cover abortions or emergency contraception, the latter of which is obligated under Obamacare for all private plans.”).

46. See, e.g., Holly Johnson, *Why We’re Joining a Healthcare Sharing Ministry*, CLUB THRIFTY (Dec. 10, 2014), <http://clubthrifty.com/joining-healthcare-sharing-ministry> (“[T]he fact is, when we shopped around for health insurance this year, we discovered that healthcare sharing ministries simply offered the best value out there.”).

47. See Galarneau, *supra* note 44, at 278–79.

enrollment of new *members* therein is unrestricted), only five sharing ministries are eligible to extend an exemption to their memberships of “well over 625,000”⁴⁸: Medi-Share, Samaritan Ministries, Christian Healthcare Ministries, Liberty HealthShare, and Altrua HealthShare.⁴⁹ This would not necessarily be a problem in and of itself if the range of pre-2000 ministries covered the full spectrum of ethical and religious beliefs within which medical costs might be shared.⁵⁰ But the sharing ministries began only in the 1990s, and at the end of the decade they remained a niche product, with perhaps 130,000 members across a handful of providers, some managing as few as forty families and all the subject of considerable skepticism from state insurance commissions.⁵¹ As written, then, the PPACA’s 1999 cutoff enshrines in law an exemption that is open, both in practice and actuality, to only a handful of first-moving companies—all of which limit membership to a single sect.⁵²

Each of the exemption-compliant ministries has a detailed set of joining requirements. Medi-Share, Samaritan, and Christian Healthcare each demand that members explicitly profess their faith, including testimony of “a personal relationship with the Lord Jesus Christ” confirmable by the member’s church.⁵³ Members must also “attend church

48. Kate Shellnutt, *Bearing Burdens After Obamacare: The Future of Christian Healthcare Sharing*, CHRISTIANITY TODAY (Feb. 2, 2017), <http://www.christianitytoday.com/ct/2017/february-web-only/future-of-christian-healthcare-ministries-after-obamacare.html>.

49. See Sean Parnell, *Make That Five Sharing Ministries* (Dec. 13, 2013), SELF-PAY PATIENT, <http://selfpaypatient.com/2013/12/13/make-that-five-sharing-ministries>. The PPACA precludes members of later-established ministries from circumventing the mandate, regardless of the sincerity of belief or the actual ability of the ministry to satisfy claims. An alternative form of non-compliant ministry also exists, in which membership fees are redistributed to offset tax penalties charged for failure to carry insurance, but this curious subset is beyond the scope of this paper. See *No Penalties for M.C.S. Members*, M.C.S. MEDICAL COST SHARING, <http://www.medicalcostsharing.com/penalties-m-c-s-members> (last visited Jan. 3, 2018).

50. See Hillary Rosner, Opinion, *Should I Lie About My Beliefs to Get Health Insurance?*, N.Y. TIMES (Dec. 10, 2016), <http://nyti.ms/2xXmpVr>.

51. See Chuck Fager, *Bearing (Some but Not All) Burdens*, CHRISTIANITY TODAY (Oct. 2, 2000), <http://www.christianitytoday.com/ct/2000/october2/17.24.html>.

52. *Health Care Sharing Ministry Exemptions*, OBAMACARE FACTS, <http://obamacarefacts.com/healthcare-sharing-ministry-exemptions> (last visited Jan. 3, 2018) (“If you don’t share the Biblical faith of a HCSM, then strongly consider another health coverage type. If you do, you may have just found a potentially cost effective health care option.”). Cf. Christen Varley, Comment to *Ask a Zenefits Advisor: Are Health Care Sharing Ministries Exempt from ACA Penalties?*, ZENEFITS, <https://www.zenefits.com/blog/ask-bud-health-care-sharing-ministries/#comment-2402353068> (last visited Jan. 3, 2018) (“I am obligated to point out Liberty HealthShare does not inquire of its [*sic*] members religious affiliation and or church/temple membership, support, or attendance. . . . We expect members to care for their bodies as creations of God and to respect the rights of all to worship the God of the bible. We made the conscious decision to broaden the availability of HCS to more Americans.”).

53. E.g., MEDI-SHARE, PROGRAM GUIDELINES & FREQUENTLY ASKED QUESTIONS 12 (2017), <https://mychristiancare.org/globalassets/media/medi-share/medi-share-guidelines.pdf>. The Medi-Share

regularly,”⁵⁴ and “embrace[] and follow[] the teaching of the New Testament in its entirety.”⁵⁵ The criteria used by Liberty and Altrua are somewhat broader, but they too remain deeply rooted in the Christian tradition.⁵⁶ At Liberty, in lieu of a statement of faith, members instead agree to “[o]bserve Christian [s]tandards” by following the teachings of the Bible and praying or worshipping regularly; to accept the community’s shared beliefs, including a fundamental “right to worship the God of the Bible,” and to live a “[g]odly [l]ifestyle” according to “Jesus Christ’s

Guidelines require that:

All adult Members age 18 and older must attest to a personal relationship with the Lord Jesus Christ. A church leader may be interviewed to verify their testimony. Adult Members profess the following Statement of Faith to qualify for Medi-Share membership: I believe that there is only one God (Deuteronomy 6:4) eternally existing in three Persons: the Father, Jesus Christ the Son, and the Holy Spirit (Matthew 28:19). I believe Jesus is God, in equal standing with the Father and the Holy Spirit (Colossians 1:15-20, 2:9). I believe the Bible is God’s written revelation to man and is verbally inspired, authoritative and without error (2 Timothy 3:16-17). . . . All Members agree to the following: Live by biblical standards[; b]elievers are to bear one another’s burdens[; a]ttend and actively support a fellowship of believers regularly.

Id. at 12–13.

54. *E.g.*, SAMARITAN MINISTRIES, GUIDELINES FOR HEALTH CARE SHARING 14–15 (2017), <https://samaritanministries.org/uploads/documents/2017-02-guidelines.pdf>. Samaritan requires that members:

- A. Be a professing Christian according to Biblical principles. . . .
- B. Be in agreement with the following member statement of faith:
I believe in the triune God of the Bible. He is one God Who is revealed in three distinct Persons—God the Father, God the Son, and God the Holy Spirit. *I believe* Jesus Christ was God in the flesh—fully God and fully man. . . .
- C. Attend a Christian church regularly (at least three out of four weeks per month that your health or weather permits). . . .
- D. Believe that you are to bear one another’s burdens as taught in the Bible. . . .
- L. Have your pastor or church leader sign a statement confirming that you meet the above requirements.

Id.

55. *E.g.*, CHRISTIAN HEALTHCARE MINISTRIES, CHRISTIAN HEALTHCARE MINISTRIES GUIDELINES 4 (2016), http://www.chministries.org/downloads/CHM_Guidelines_2016_V2.pdf. The Christian Healthcare Ministries membership requirements state that:

If you are a Christian, you can be a member of Christian Healthcare Ministries. A Christian is a person who embraces and follows the teaching of the New Testament in its entirety. Additionally, you must: abstain from the use of tobacco and the illegal use of drugs (1 Corinthians 6:19-20)[;] follow biblical principles regarding the use of alcohol[;] attend group worship regularly as health permits (Hebrews 10:25). . . .

Id.

56. Altrua was founded in 2000, but its post-PPACA acquisition of Blessed Assurance Bulletin, a small Texas sharing ministry in business since 1997, made the “December 31, 1999 date, chosen by the drafters . . . no longer an issue.” Sean Parnell, *Altrua Qualifies for Obamacare Exemption, Plus More on CMF Curo*, SELF-PAY PATIENT (Oct. 15, 2014), <http://selfpaypatient.com/2014/10/15/altrua-qualifies-for-obamacare-exemption-plus-more-on-cmf-curo>. Altrua’s narrow escape via this acquisition is discussed in more detail *infra* at note 102 and accompanying text.

mandates.”⁵⁷ Altrua, originally marketed to Latter-Day Saints,⁵⁸ has a somewhat more liberal policy, requiring that members “share in . . . standards” based upon “biblical beliefs,” including prohibitions on alcohol, premarital or same-sex relationships, most abortions, and abuse.⁵⁹ Yet Altrua still makes clear that it is an organization for Christians, heading

57. *Liberty HealthShare Sharing Guidelines*, LIBERTY HEALTHSHARE 5 (2017), <https://www.libertyhealthshare.org/Content/Sharing-Guidelines.pdf>. The guidelines provide that:

In order to become and remain a Sharing Member, a person must . . . : A. Observe Christian Standards. The modern medical cost sharing movement was begun by a small band of Christians to practically demonstrate how to fulfill the command by Christ to ‘bear one another’s burdens’. In accordance with that practice, every member of Liberty HealthShare is expected to: Strive to live in accordance with biblical principles. Honor the biblical teaching to ‘share one another’s burdens’ (Gal. 6:2). Participate regularly in worship or prayer. B. Accept Our Shared Beliefs. . . . It is our spiritual duty to God and our ethical responsibility to ourselves and the other members of our cost-sharing ministry to care for our bodies and maintain our health. . . . At the core of what we do, and how we relate to and engage with one another as a community of people, is a set of common beliefs. Our Statement of Shared Beliefs is as follows: 1. We believe that our personal rights and liberties originate from God and are bestowed on us by God, and are not concessions granted to us by governments or men. 2. We believe every individual has a fundamental religious right to worship the God of the Bible in his or her own way. 3. We believe it is our biblical and ethical obligation to assist our fellow man when they are in need according to our available resources and opportunity. 4. We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors or habits that produce sickness or disease to ourselves or others. 5. We believe it is our fundamental right of conscience to direct our own healthcare, in consultation with physicians, family or other valued advisors, free from government dictates, restraints and oversight. These beliefs form the religious and ethical basis for our interaction and relationship as a community. . . . C. Maintain a Godly Lifestyle. Members highly value the spiritual principle that our bodies are gifts from God and we must respect and care for our physical bodies. Further, we have an ethical obligation to our fellow members to live healthy and make wise choices so as not to place any unnecessary burdens on those who are sharing with us. As a community of people we try our best to live out Jesus Christ’s mandates.

Id. at 5–6.

58. Randall Sluder, Comment to *What Do You Know About Christian Healthcare Ministries as a Solution to the Health Insurance Problem? (January 2015 Update)*, JUNIOR GANYMEDE (Jan. 29, 2015), <http://www.jrganymede.com/2013/12/30>.

59. ALTRUA HEALTHSHARE, APPLICATION 7, http://www.pohealthcare.com/application_packet.pdf. Altrua requires a pledge, in full, that:

Because of the *biblical beliefs* listed in the Statement of Standards, I chose to live a clean and wholesome life, and share in the following standards and convictions with members of Altrua HealthShare: I believe in keeping my body clean with proper nutrition and consuming foods in moderation. I believe that the use of tobacco, illicit drugs, and excessive alcohol consumption is harmful to body and soul. I do not currently use and have not used tobacco or illegal drugs in the past 12 months. According to the word of God sexual relations outside the bond of marriage between a man and a woman are morally wrong. I believe that abortion is wrong, except in special circumstances such as rape or serious injury to the mother, and then, only after careful consideration by all concerned. I believe that I am obligated to provide and care for my family and that abuse of any kind of a family member or anyone else is wrong. I currently meet each of these standards in my daily life and will continue to do so.

Id. (emphasis added).

its membership guide with the exhortation of Galatians 6:2: “[c]arry each other’s burdens, and in this way you will fulfill the law of Christ.”⁶⁰ In short, while the PPACA created an exception nominally available to followers of any “common set of ethical or religious beliefs” so long as they had a collective agreement to share one another’s health care costs,⁶¹ the only such organizations actually eligible to accept members are, to varying degrees, affiliates of a single religious tradition.

The law thus appears to give a clear benefit only to those willing to profess allegiance to Jesus Christ: an act of statutory millennialism, both in the literal fact of the cutoff date and in the practical implications for Christians. What, though, of persons sharing beliefs regarding mutual support and actively practicing such who, while similarly-situated, lie beyond the protection of the exemption scheme? When Congress backdated the sharing ministry exemption to 1999, it did not simply grandfather existing plans while precluding the formation of new sharing ministries, a permissible distinction.⁶² Instead, Congress made it functionally impossible for ministries established between January 1, 2000 and the passage of the PPACA in 2010 to serve customers who otherwise met the criteria for a legislative exemption, customers whose ethics had *also* led them to seek to share their medical costs within a community of fellow-believers, but whose beliefs neither conformed to the standards of the grandfathered sharing ministries nor entitled them to the status of religious conscience objectors.⁶³

II. CHALLENGES TO THE LAW

A. *LIBERTY UNIVERSITY* AND THE ESTABLISHMENT CLAUSE

To date, only one constitutional challenge to the sharing ministry exemption has advanced through the courts. In *Liberty University, Inc. v. Geithner*, a non-profit Christian college argued that both the religious conscience and the sharing ministry exemptions violated the Establishment

60. ALTRUA HEALTHSHARE, MEMBERSHIP GUIDELINES 2 (2017), https://altruhealthshare.org/pdfs/ahs_membership_guidelines_2017-2.pdf.

61. I.R.C. § 5000A(d)(2)(B)(ii)(II) (2012).

62. For a full discussion of the grandfathering issue, see *infra* Part II.B.

63. A review of groups which have obtained Social Security exemptions—thereby making their members eligible for the religious conscience exemption—found that only Anabaptists and the Amish have qualified. See Jeffrey R. Mullen, Note, *Religion and the PPACA: An Analysis of Non-Secular Line Drawing Within the Health Insurance Mandate*, 14 RUTGERS J.L. & RELIGION 149, 178–80 (2012). This aligns with the intent of Congress in creating a very narrow exemption. See *Wisconsin v. Yoder*, 406 U.S. 205, 222–23 n.11 (1972) (“The history of the exemption shows it was enacted with the situation of the Old Order Amish specifically in view.”).

Clause, discriminating against the university's beliefs by granting accommodation only to sects which, respectively, qualified for the Social Security exemption or ran sharing ministries before 2000.⁶⁴ Their suit was dismissed by the trial court; on appeal, the Fourth Circuit found that the law did not explicitly discriminate amongst religions.⁶⁵ While the 1999 cutoff for sharing ministries might be "arbitrary, . . . neither the cutoff's text nor its history suggests any deliberate attempt to distinguish between particular religious groups."⁶⁶ Like the district court before them, it found the date cutoff to be similar in form to a 1950 cutoff date within the religious conscience exemption, a drawn line which had already survived Supreme Court challenges.⁶⁷ In the absence of a "proposed accommodation singl[ing] out a particular religious sect for special treatment"⁶⁸ which "makes explicit and deliberate distinctions between different religious organizations,"⁶⁹ the court would not subject the sharing ministry exemption to strict scrutiny, but instead reviewed for Establishment Clause violations under the "less rigorous" *Lemon* test.⁷⁰

Applying *Lemon*, the court "require[d] 'a secular legislative purpose,' a 'principal or primary effect . . . that neither advances nor inhibits religion,' and no 'excessive government entanglement with religion.'"⁷¹ The *Liberty University* court suggested that the PPACA's 1999 cutoff date advanced two secular purposes: ensuring the reliability of sharing ministries, and keeping closed "floodgates for any group to establish a new ministry to circumvent the Act."⁷² Without conducting further analysis, the court also determined that religion was neither advanced nor inhibited, and that the cutoff carried no entanglement risks for the government because "it applies only secular criteria"—in this case, a calendar date.⁷³

64. See *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 641 (W.D. Va. 2010), *vacated*, 671 F.3d 391 (4th Cir. 2011).

65. See *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101–03 (4th Cir. 2013).

66. *Id.* at 102.

67. See *id.* at 101 (citing *United States v. Lee*, 455 U.S. 252, 260–61 (1982)); *Liberty Univ.*, 753 F. Supp. 2d at 641.

68. *Liberty Univ.*, 733 F.3d at 101 (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706–07 (1994)).

69. *Id.* (citing *Larson v. Valente*, 456 U.S. 228, 246–47 & n. 23 (1982)).

70. *Id.*

71. *Id.* at 101–02 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

72. *Id.* at 102.

73. *Id.* Relying on Justice O'Connor's suggestion that primary effect and entanglement inquiries could be dealt with as one, the court also found that the religious conscience objector exemption was constitutional, as the secular purpose and primary effect of the PPACA were each to guarantee health coverage of some sort. See *id.* at 101–02 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring)).

B. *LIBERTY UNIVERSITY* REVISITED

Two factors suggest that a different plaintiff might have reached a different result on the sharing ministry question. First, Liberty University's chief complaint was rooted, fatally, in the *random* nature of the cutoff date⁷⁴: "Liberty alleges that the health care sharing ministries exemption discriminates against Liberty University's religious beliefs by implementing an arbitrary date of December 31, 1999 for participation in a healthcare sharing plan."⁷⁵ By asserting that the date was simply chosen at random, the plaintiff effectively foreclosed further inquiry into the legislative intent behind the exemption history. Both the trial and appeals courts simply proceeded on the assumption that the date *was* arbitrary, making no attempt to assess why the December 31, 1999 date was selected or what the consequences of such a cutoff might have been. While it is true that "[i]f Congress allowed any and all groups to form healthcare sharing 501(c)(3) organizations, it could effect an end-run around the mandatory coverage provisions," the conclusion that the purpose was sect-neutral stands only if one accepts that the 1999 date was indeed arbitrary.⁷⁶

At first glance, the date appears to be a classic example of legislative grandfathering. Grandfathering is a widespread practice throughout the federal code, enabling, in essence, time-tested and functional alternatives to new laws to continue status quo ante: "[t]hat grandfathering should be a common feature of the law is, of course, what one would expect . . . and . . . the type of grandfathering that we see is what one would predict, in the sense that it focuses on durable forms of compliance . . ."⁷⁷ Such concessions go to the very heart of Obama's promise that "nobody is changing what you've got if you're happy with it."⁷⁸ This view of sharing-ministries as standard grandfathering was echoed by Representative Tom Perriello, Democrat of Virginia, a staunch advocate for the provision: "A major touchstone of our efforts toward comprehensive health care reform has been consumer choice . . . [t]o that end, individuals who choose to receive their health care coverage through health sharing ministries instead of traditional health plans should not be penalized . . ."⁷⁹

74. *See id.* at 102.

75. *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 641 (W.D. Va. 2010) (internal quotation marks omitted).

76. *Id.*

77. Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 38–39, 69–70 (2008).

78. Remarks, *supra* note 17.

79. Janelle Rucker, *Health Care Ministries Keep Close Eye on Legislation*, ROANOKE TIMES

But the question must be asked: why create a ten-year gap between the cutoff date and the passage of the PPACA? Tax-related grandfathering, although common, typically impacts decisions made “after the date on which the change is enacted or after some later date,” not a decade prior.⁸⁰ While backdating can be efficient where a “transition is being considered by Congress but before it has been enacted,” to prevent taxpayers from benefitting from action taken especially for the avoidance of consequences on the visible horizon,⁸¹ efficiency and fairness demand only that this extend to “the date when the government first seriously considered the reform.”⁸² That is very different from the sharing ministry situation. Obama’s first comprehensive health care reform policy address was obviously not delivered in December of 1999, but nearly a full decade later, on June 15, 2009.⁸³

The closest statutory comparison, and the one made by the Fourth Circuit,⁸⁴ is to the 1965 act which enshrined in law the Social Security exemption for objecting “sect[s] or division[s] . . . in existence at all times since December 31, 1950,” incorporated into the PPACA for religious conscience.⁸⁵ As with the sharing ministry exemption, this cutoff date was set by Congress long after the year in question: in fact, eleven years following the Social Security Act first encompassed the self-employed.⁸⁶ Crucially, however, the December 31, 1950 date—even though much later imposed—represents a clear attempt to harmonize an exemption with the calendar and consequences of the original bill: “As originally enacted, the Self-Employment Contributions Act imposed a tax for each taxable year beginning after December 31, 1950, upon the self-employment income of every individual.”⁸⁷ The same date is used several times in the original 1954 act.⁸⁸ Although the 1965 accommodation may well have been tailored

(Apr. 7, 2010), at A12.

80. Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1134 (1996).

81. *Id.* at 1179.

82. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 607 (1986).

83. See President Barack Obama, Remarks by the President to the Annual Conference of the American Medical Association (June 15, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-annual-conference-american-medical-association>.

84. See *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101 (4th Cir. 2013).

85. Social Security Amendments of 1965, Pub. L. No. 89-97, § 319, 79 Stat. 286, 391 (codified as amended at I.R.C. § 1402(g)(1)(E) (2012)). See also I.R.C. § 5000A(d)(2).

86. See Social Security Amendments of 1954, Pub. L. No. 83-761, 68 Stat. 1052 (codified as amended at 42 U.S.C. §§ 402–405, 408–411, 413–418, 420–422).

87. Rev. Rul. 68-498, 1968-2 C.B. 377, 1968 IRB LEXIS 256.

88. See Social Security Amendments of 1954 *passim*.

to meet the needs of Old Order Amish taxpayers,⁸⁹ it ultimately requires only that a sect have been in existence longer than the period affected by self-employment contribution legislation.⁹⁰ Accordingly, a sect cannot be created for purposes of avoiding the tax, but any sect that predates the tax remains eligible for consideration. The PPACA, on the other hand, pegs no other requirement, penalty, or privilege to the December 31, 1999 date: it appears *ex nihilo*.

If the choice of cutoff date reflects neither the conventions of tax-related grandfathering nor an attempt to harmonize with related provisions, then the process by which the date was chosen deserves further scrutiny. It may be that the date truly is purely arbitrary, as the *Liberty University* plaintiff alleged.⁹¹ But the legislative history and statements from sharing ministry lobbyists suggest that there may have been a purpose behind it. According to a senior advisor to the Senate Committee on Health, Education, Labor, and Pensions (HELP), which drafted the sharing ministry exemption:

The Christian Care Ministry [CCM]—which runs . . . ‘Medi-Share’—reached out to Senate staffers and convinced us it was a legitimate, albeit unorthodox, coverage alternative for people of faith that would otherwise be forced out of business by the mandate. The exemption got into the original HELP bill markup in June 2009, got tightened along the way so that new entities could not use it as a loophole, and stayed.⁹²

The *untightened* language was likely that of Senator Jim DeMint, Republican of South Carolina, introduced in his own health care measure (to rival that of President Obama) on June 23, 2009: “For purposes of this paragraph, the term ‘health care sharing ministry’ means any health care cost sharing arrangement among persons of similar beliefs that is not in the

89. Amish resistance to Social Security was the driving force behind the 1965 religious conscience objection. Believing that “to pay social security tax . . . is to admit that the government has a responsibility for aged Amish members, and to admit this is to deny the faith,” a resistance movement arose; the I.R.S.’s 1961 seizure and sale of farm animals to compensate for unpaid taxes drew such opprobrium that enforcement was curtailed and a legislative accommodation developed. John. A. Hostetler, *The Amish and the Law: A Religious Minority and Its Legal Encounters*, 41 WASH. & LEE L. REV. 33, 44–45 (1984).

90. Cf. W. Wesley Hill, *Thou Shalt Opt Out: Reforming the Religious Conscience Exemption from Social Security and the Affordable Care Act Based on State Experience*, 43 U. MEM. L. REV. 659, 661 (2013) (“Among the conditions of the exemption is that the individual belong to a religious sect that has a support system in place for dependent members similar to Social Security. Because of this and a host of other requirements, the exemption is foreclosed to the overwhelming majority of the public.”).

91. See *supra* text accompanying note 75.

92. JOHN E. McDONOUGH, INSIDE NATIONAL HEALTH REFORM 122 (2011).

trade or business of providing health insurance,” full stop.⁹³ Four months later, though, when Senator Max Baucus, Democrat of Montana, introduced his version of the bill, the December 31, 1999 cutoff had been added to the definition.⁹⁴

One possible explanation for the evolution is that CCM successfully lobbied for a particular date in a targeted effort to restrict competition. Publicly, the group’s lobbying motivations were rooted in a desire to expand sharing ministry access generally, and shortly after the first draft of an exemption appeared in the Senate bill, CCM issued a position paper explaining its rationale⁹⁵:

[R]eform as it is being packaged right now will adversely affect our ability to serve the Christian community Religious freedom is in jeopardy. It starts with taking away the right to voluntarily share medical bills with other believers based on what CCM believes is a biblical mandate to care for one another. As Christians, CCM is concerned about any effort that limits the personal choice to help other Christians with dollars and prayers.⁹⁶

But the Senate’s “tightening” of the window grandfathered Medi-Share and the other evangelical Christian sharing ministries while excluding, by the very narrowest of margins, their principal competitor, Altrua HealthShare—founded in March 2000.⁹⁷ By itself, this could have simply been a ruthless business practice, of no constitutional concern. However, Altrua was not just a competitor: run by Latter-Day Saints, it was also the only organization open to non-evangelicals while calling itself a sharing ministry.

Of course, “the Constitution allows the State to accommodate religious needs by alleviating special burdens,”⁹⁸ and in granting such an

93. S. 1324, 111th Cong. (2009).

94. See S. 1796, 111th Cong. (2009). The committee report for Senator Baucus’s bill suggests that a sincerity test was intended to be inherent. See S. Rep. 111-89, at 52 (2009) (“Exemptions from the penalty are also allowed for . . . individuals with sincerely held beliefs who participate in health arrangements provided by established religious organizations (e.g., those participating in Health Sharing Ministries) . . .”).

95. Robert Y. Baldwin, *Healthcare Sharing and Healthcare Reform—A Position Statement from Christian Care Ministry, Inc. (CCM) in Response to Filing of Senate Bill on Healthcare*, PRWEB (Sept. 21, 2009), <http://www.prweb.com/releases/Medi/share/prweb2903324.htm>.

96. *Id.*

97. See Sluder, *supra* note 58. See also *The Kirtland Sharing Alliance*, UTAH DIVISION CORPORATIONS & COM. CODE, <https://secure.utah.gov/bes/details.html?entity=4756607-0141> (last visited Jan. 3, 2018) (listing the corporate establishment date of The Kirtland Sharing Alliance, another Altrua predecessor corporation, as June 1, 2000).

98. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994).

accommodation, the “government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.”⁹⁹ And CCM may fairly lobby for such accommodations in an attempt to safeguard its client base and business model. What is less clear, however, is whether the Senate’s response to the lobbying created not a lawful accommodation for religion generally, but instead constituted an “accommodation singl[ing] out a particular religious sect for special treatment.”¹⁰⁰ A cutoff date engineered to favor *evangelical* sharing ministries while excluding a *Mormon* competitor would be an “explicit and deliberate distinction[] between different religious organizations”—or in other words, exactly what the Fourth Circuit claimed the exemption was not.¹⁰¹ A single religious group asked for and received the accommodation they required. Consciously or not, Congress aided them in writing their similarly-situated competitors of a different faith out of a safe harbor, a devastating blow to Altrua’s business prospects which Altrua avoided only through a just-in-time 2014 merger with Blessed Assurance Bulletin, a hitherto-obscure Texas provider.¹⁰²

With further evidence that the date was *not* arbitrary but was a knowing attempt to exclude Latter-Day Saints,¹⁰³ the inquiry might proceed along different, more rigorous lines. Under the precedent of *Larson v. Valente*, though “the *Lemon v. Kurtzman* ‘tests’ . . . [may] reflect the same concerns that warrant[] the application of strict scrutiny” to a law discriminating amongst, rather than against, religions,¹⁰⁴ it is strict scrutiny that controls in the testing: “with . . . a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict

99. *Id.* at 705–06 (quoting *Hobbie v. Unemp’t Appeals Comm’n of Fla.*, 480 U.S. 136, 144–45 (1987)).

100. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101 (4th Cir. 2013) (citing *Kiryas Joel*, 512 U.S. at 706–07).

101. *Id.* at 101.

102. See Sluder, *supra* note 58. Blessed Assurance Bulletin had served as few as forty families, but it had done so since before 2000; Altrua’s acquisition of it thereby enabled its own members to qualify for a PPACA exemption. See Fager, *supra* note 51.

103. Although this Note will argue *infra* in Section III.A that Muslims, and not Mormons, may be most disadvantaged by the cutoff date, there is no evidence to suggest that Muslim insurance alternatives were intended to be either included *or* excluded by Congress or the CCM; commentators appear to have realized that some Muslim insurance programs might count as sharing ministries only at the time the PPACA was passing, in March 2010. See Steve Gilbert, *Islam Q&A: Health Insurance is “Haraam,”* SWEETNESS & LIGHT (Mar. 22, 2010), <https://web.archive.org/web/20170630110718/http://sweetness-light.com/archive/health-insurance-is-forbidden-under-islam>; WordWayze, *Amish, Muslims to Be Excused from Obamacare Mandate?*, AM. THINKER (Mar. 24, 2010), http://www.americanthinker.com/blog/2010/03/amish_muslims_to_be_excused_fr.html.

104. *Larson v. Valente*, 456 U.S. 228, 252 (1982).

scrutiny in adjudging its constitutionality.”¹⁰⁵ In *Larson*, Minnesota had granted an exemption only to religious organizations receiving more than half of their contributions from non-members, and the legislative history indicated that this threshold was specifically meant to distinguish among sects, favoring the Roman Catholic archdiocese while discriminating against the Unification Church.¹⁰⁶ The Court found facial neutrality lacking not by looking to the plain language of the statute, but to the process of choosing its terms. The law having been constructed to preference certain denominations, “that rule must be invalidated unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest.”¹⁰⁷

The sharing ministry exemption might not survive such scrutiny. Even assuming *arguendo* that President Obama’s promise—citizens with some form of health insurance can keep their existing coverage—represents a compelling government interest, the 1999 cutoff date is not “closely fitted” to that purpose. Sharing ministries created a mere three months after the deadline, ten years earlier, were providing customers with existing coverage of a type identical to that covered by the exemption. Additionally, consumers of traditional (commercial) insurance had been permitted to keep other non-compliant grandfathered plans so long as they held the policy *on the date of the PPACA’s passage*.¹⁰⁸ The sharing ministry exemption thus appears closely fitted only to the purpose of closing the door on a Mormon sharing ministry of ten years standing, while preserving identical programs run for evangelical Protestants. If a cutoff date predating Congressional consideration of the bill was necessary at all it would surely be to ensure that surviving ministries be able to demonstrate a degree of financial stability and reliability, so that consumers could rely on it in the absence of regular insurance; those ends could easily be met through less restrictive regulatory requirements,¹⁰⁹ including rigorous auditing standards and disclosure to the public of the percentage of claims covered in full and in part.¹¹⁰

105. *Id.* at 246.

106. *Id.* at 253–55.

107. *Id.* at 247 (citations omitted).

108. See 42 U.S.C. § 18011(a)(2) (2012) (“[W]ith respect to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after March 23, 2010.”).

109. See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1501–02 (2012).

110. See Samuel T. Grover, *Religious Exemptions to the PPACA’s Health Insurance Mandate*, 37

As in *Larson*, therefore, a challenger equipped to aggressively argue a discriminatory legislative intent might well succeed in defeating the exemption on Establishment Clause grounds—although as in *Larson*, the likely remedy is not necessarily invalidation of the policy generally, but invalidation of the denominationally-discriminatory criteria.

III. AN ALTERNATIVE INQUIRY: THE FREE EXERCISE CONCERN

As Kathleen Brady has explained, “respect for conscience requires a judicially enforceable right of exemption under the Free Exercise Clause. . . . [and a]ccommodations by legislatures and administrators still play a critical role in protecting conscience where the Free Exercise Clause does not mandate relief.”¹¹¹ That ability to accommodate is not absolute, however; while the legislature may act to expand Free Exercise even when the judiciary would not be compelled to do so, it can and should be constrained by certain limits, rooted in Establishment Clause concerns and traceable through judicial precedent:

[T]he Court’s decisions have identified . . . limits [to legislative exemptions] that make sense in light of First Amendment values. First, religious exemptions and other forms of accommodation designed to meet the needs of religious believers in conflicts with the state must address genuine burdens on religious exercise. These exemptions cannot be used as a means to advance religion. . . . accommodations must [also] take account of the value of religious equality. . . . [and] sometimes the burdens that legislative and administrative accommodations place on others will be impermissibly high.¹¹²

These limitations are a useful rubric for evaluating actual and potential Free Exercise claims stemming from the sharing ministry accommodation, both in terms of the appropriateness of the original legislative action and of the shape of a legal challenge thereto.

A. GENUINE BURDENS ON RELIGIOUS EXERCISE

In addition to its Establishment Clause claims, Liberty University had also argued that the PPACA’s mandate constituted a violation of the Free Exercise Clause, on the grounds that it compelled Liberty to fund abortifacient contraceptives; and the Fifth Amendment, on the grounds that the granting of religious conscience and sharing ministry exemptions to

AM. J.L. & MED. 624, 648–49 (2011).

111. KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 258–59 (2015).

112. *Id.* at 260.

other select groups denied equal protection to the school.¹¹³ But while the university did offer alternative (non-compliant) insurance to its employees,¹¹⁴ it never made a Free Exercise argument relating to that coverage. Instead, it argued that the existence of religious accommodations for some should simply invalidate the applicability of the PPACA for others. It is of course well-settled that legislative exemptions on religious grounds are in fact permissible,¹¹⁵ part of the “room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”¹¹⁶ The Fourth Circuit’s dismissal of the claim was thus unsurprising.¹¹⁷ However, a plaintiff whose practices *were* identical to those of actual sharing ministry members—rather than one claiming a different sort of religious exemption altogether—would bring a much stronger Free Exercise Clause argument.¹¹⁸ Altrua’s Mormon members might have been these plaintiffs save for the company’s merger,¹¹⁹ but another class of potential plaintiffs also exists: not the Latter-Day Saints whom the law so nearly excluded, but a subset of American Muslims.¹²⁰

Most Muslims in this country participate in both Social Security and regulated health care programs.¹²¹ But “in the strictest sense of the religion,

113. See *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 99–102 (4th Cir. 2013).

114. See *id.* at 86.

115. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

116. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970).

117. *Liberty Univ.*, 733 F.3d at 100, 103. See also *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (“Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment.”).

118. See *Grover*, *supra* note 110, at 644 (“A court will likely question why [a] group [claiming a Free Exercise violation] now needs a health care sharing ministry when it did not have one, or a predecessor to one, in existence prior to January 1, 2000. If indeed there is a religious group in existence that can convincingly answer these questions, then it is within the court’s power to strike down the grandfather clause . . . which is certainly severable from the rest of the exemption and from the rest of the PPACA.”).

119. See *supra* Part II.B.

120. This proposition has been advanced before, but on the assumption that some PPACA-compliant sharing ministries would be open to followers of Islam. See *Mullen*, *supra* note 63, at 174. See also *Gilbert*, *supra* note 103; *WordWayze*, *supra* note 103.

121. Even the most conservative of commentators appear to concede this point. See Eric Burns, *Muslims Exempt from Obamacare? Separating Rumor from Reality*, FRONTPAGE MAG. (Oct. 13, 2011), <https://www.frontpagemag.com/fpm/108489/muslims-exempt-obamacare-eric-burns>. It is nevertheless critical to note that the existence of a “Muslim exemption” within the PPACA is a persistent rumor, and a falsehood. The Act contains no such exemption in either fact or practice but rather, as this paper seeks to demonstrate, it may instead actually unconstitutionally discriminate against Muslims. See David Mikkelsen, *Muslims Exempt from Obamacare Requirements*, SNOPE (Apr. 13, 2016), <http://www.snopes.com/politics/medical/exemptions.asp>.

believers of Islam consider health insurance, and, for that matter, any form of risk insurance, to be forbidden or *haram*.”¹²² In 2008, in response to the problems conventional insurance causes such Muslims, the insurance giant AIG began to offer Lexington Takaful Solutions, a Sharia-compliant comprehensive insurance program, through which members contributed to a “pooling system” for the compensation of fellow participants.¹²³ The product line opened with homeowner’s coverage as a gateway to a full “range of Takaful products, including accident and health”¹²⁴ Such a pooling arrangement for health care would appear to fulfill not only the requirements of the faith, but also the requirements of a sharing ministry.¹²⁵

This domestic *takaful* launch did not go unnoticed.¹²⁶ Within days, members of Congress joined voices with constituents critical of a Sharia-compliant product being sold by a AIG, the beneficiary of a federal bailout; in a scathing letter to the company’s chairman, Representatives Sue Myrick, Republican of North Carolina, and Frank Wolf, Republican of Virginia, declared that “Shariah law is radical and fanatic Islamists use Shariah finance to become legitimate and mainstream, and slowly change the legal system to suit their ideology We would hate to see the FBI visit you one day, look into your books”¹²⁷ Although Lexington Takaful Solutions later removed its product from the market, it first sold a small number of policies, accounting for 0.0006% of Lexington’s 2009 revenues.¹²⁸ However, the 1999 cutoff date meant that even if the

122. Mullen, *supra* note 63, at 174.

123. *AIG Offers First Takaful Homeowners Insurance Product for U.S.*, INS. J. (Dec. 2, 2008), <http://www.insurancejournal.com/news/national/2008/12/02/95930.htm>.

124. *Risk Specialists Companies Announces First Takaful Homeowners Product for U.S.*, BUSINESSWIRE (Dec. 1, 2008, 10:24 AM), <http://www.businesswire.com/news/home/20081201005672/en/Risk-Specialists-Companies-Announces-Takaful-Homeowners-Product>.

125. See Mullen, *supra* note 63, at 180 (“Muslims seeking to be exempt from the PPACA’s individual mandate for religious purposes will have to qualify under the health care sharing ministries exemption. This is the very premise of *takaful*, a type of Islamic insurance where members contribute money into a pooling system to guarantee each other against loss or damage.”).

126. See, e.g., Jeffrey Imm, *Exclusive: AIG Defies U.S. Taxpayers by Promoting Sharia in America*, FAM. SECURITY MATTERS (Dec. 5, 2008), <http://www.familysecuritymatters.org/publications/detail/exclusive-aig-defies-us-taxpayers-by-promoting-sharia-in-america>.

127. Letter from Sue Myrick and Frank Wolf, Members of Cong., to Edward Liddy, Chairman of AIG (Dec. 18, 2008), <http://www.just-a-regular-guy.com/2008/12/18/congressional-reminder-to-aig-ceo-taxpayers-are-company-stockholders-sharia-law-compliant-insurance-products-unacceptable>.

128. See *Murray v. Geithner*, 763 F. Supp. 2d 860, 870 (E.D. Mich. 2011), *aff’d on separate basis sub nom. Murray v. U.S. Dep’t of Treasury*, 681 F.3d 744 (6th Cir. 2012). The date of Lexington’s withdrawal from the *takaful* market is unclear, but this foray into Sharia-compliant insurance formed the heart of an extensively-litigated post-PPACA Establishment Clause challenge to the Treasury Department’s bailout of AIG under the Emergency Economic Stabilization Act of 2008. See generally *id.*

Lexington policy suite expanded to include the planned health coverage before its withdrawal, it could not qualify as a sharing ministry under the PPACA—and no other provider has attempted to offer a health insurance product in the United States satisfying Sharia law as well as either the individual mandate or its permitted exceptions.¹²⁹ In its absence, currently-willing *takaful* participants, whether or not former holders of a *takaful* product which failed to satisfy the sharing ministry exemption because of the PPACA's cutoff date, but whose participation in conventional insurance runs contrary to their religious practice, might bring a Free Exercise claim.¹³⁰ And thanks to the Religious Freedom Restoration Act of 1993 (RFRA), such suits are substantially easier to litigate than Establishment Clause claims.

Under RFRA, a federal law cannot “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability [unless] . . . it demonstrates 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.”¹³¹ This statutory test repudiated the Supreme Court’s holding in *Employment Division v. Smith* that Free Exercise claims alone were generally insufficient grounds for the granting of exemptions from neutral laws of general applicability,¹³² instead reinstating (at least nominally) the strict scrutiny of the *Sherbert* test devised by Justice Brennan.¹³³ In RFRA analysis, the intent of the legislature is irrelevant, and “[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.”¹³⁴

The PPACA has already faced substantial and nearly-crippling challenges under RFRA, including, most famously, *Burwell v. Hobby*

129. One company does now offer homeowner’s policies, but without a health component. See *Homeowner’s Takaful*, ZAYAN TAKAFUL, <http://www.zayantakaful.com/products.php> (last visited Jan. 3, 2018).

130. One Christian commentator, former pastor Drew Zahn, realized the exemption’s potential limitations for Muslim *takaful* adherents almost immediately after the PPACA’s passage. See Drew Zahn, *Does Your Faith Free You from Forced Obamacare?: Why Amish Won’t Have to Purchase Insurance, but Muslims Will Cry Foul*, WORLDNETDAILY (Apr. 6, 2010, 8:34 PM), <http://www.wnd.com/2010/04/137221>. *Contra* Gilbert, *supra* note 103; WordWayze, *supra* note 103 (raising the possibility that Muslims *would* be exempt).

131. 42 U.S.C. § 2000bb-1 (2016).

132. See *Emp’t Div. v. Smith*, 494 U.S. 872, 878–81 (1990). See also *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

133. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Kennedy, J., concurring). See also *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963).

134. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

*Lobby Stores, Inc.*¹³⁵ In *Hobby Lobby*, a corporation's owners objected (in the vein of Liberty University, though more successfully) to insuring the provision of contraceptives which they believed caused abortions, a newly-required element of PPACA-compliant employee health insurance plans.¹³⁶ The corporation sought refuge within an already-existing exemption from the so-called "contraceptive mandate," created by Congress for the benefit of non-profit religious organizations. The Court found this accommodation expandable to for-profit, closely-held corporations whose owners asserted similar moral objections.¹³⁷ As "HHS [Health and Human Services] itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs," the Hobby Lobby owners should be given the same alternative.¹³⁸ The Court's willingness to open wider the doors of an exemption to accommodate additional objectors, once the government has created it for the benefit of some subset, strongly suggests that a challenge to the sharing ministry exemption would receive a sympathetic hearing.

Even so, the question cannot be adjudicated unless the burden is substantial: "[a]s RFRA's language makes explicit, strict scrutiny is triggered only by substantial burdens on religion, not by all burdens on religion."¹³⁹ The definition of substantiality and the methods by which courts might assess that factor—including theological or civil measures—have long been debated: as Michael Dorf wrote not long after RFRA's passage, "[n]either the text nor the legislative history of RFRA provides any clear indication of how courts ought to determine whether an incidental burden on religion is in fact substantial," and the cases to which Congress specifically draws the court's attention are "equally unilluminating" in resolving the question.¹⁴⁰ Even whether the substantiality is a measure of the pressure brought to bear by the government in its imposing of the burden, or instead a measure of the impact that compliance would bring upon the individual, is not a wholly settled question,¹⁴¹ although *Hobby Lobby* was merely the latest in a long

135. *Hobby Lobby*, 134 S. Ct. at 2751.

136. *See id.* at 2762–63.

137. *Id.* at 2785.

138. *Id.* at 2782.

139. Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 13.

140. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213–14 (1996).

141. *See, e.g.*, Chad Flanders, *Substantial Confusion About "Substantial Burdens,"* 2016 U. ILL. L. REV. ONLINE 27, 28–29.

series of cases suggesting that the courts give the claimant significant latitude in this regard.¹⁴² But however courts do the measuring, at some point they must “determine when the burden has crossed the line from being insubstantial to substantial.”¹⁴³ In other words, a law’s burden falls along a spectrum, impacting the faithful somewhere between their mere preferences and their sacred duties. Until the burden crosses a substantiality threshold, there is no need to even consider the government’s interest in determining whether RFRA demands accommodation.

Dorf has suggested a tripartite approach to answering the substantiality question.¹⁴⁴ First, is there a “bona fide religious belief that [the plaintiff] should engage in the burdened practice?”¹⁴⁵ Second, the courts should take a flexible approach to the consideration of alternative means of satisfying both the law and the belief.¹⁴⁶ Finally, “[b]y asking whether the burden imposed by a particular law on an adherent of a minority faith greatly exceeds the law’s effect on the majority—whose religious preferences the law reflects—we can give the substantiality test some concrete substance.”¹⁴⁷

The theoretical faithful-Muslim plaintiff easily satisfies both the first and third prongs of this test.¹⁴⁸ As to the second, the alternative means of satisfaction are limited to three potential choices: (1) acquisition of a PPACA-compliant insurance policy, administered by a non-religious entity and structured so as to violate some interpretations of Sharia law; (2) membership in a PPACA-compliant sharing ministry, similar in structure to a *takaful* plan but requiring either a profession of Christian faith or a willingness to participate in a Christian mission of shared responsibility; or (3) surrender of the “individual shared responsibility payment” imposed for failure to carry such insurance, capped for 2018 at the higher of (a) 2.5% of household income or the national average price of minimally-compliant insurance, or (b) \$695 per adult and \$2,085 per household (though of course now falling to \$0 in 2019).¹⁴⁹

142. See *Hobby Lobby*, 134 S. Ct. at 2778–79 (“[I]n these cases, the [plaintiffs] sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or substantial.”).

143. Michael A. Helfand, *Identifying Substantial Burdens*, 16 U. ILL. L. REV. 1771, 1790 (2016).

144. See Dorf, *supra* note 140, at 1216–17.

145. *Id.* at 1216.

146. See *id.* at 1217.

147. *Id.*

148. For discussion of the disparate impact on the minority faith, see *infra* beginning at Part III.B.

149. *Individual Shared Responsibility Payment—Reporting and Calculating the Payment*, IRS (last updated Dec. 22, 2017), <https://www.irs.gov/affordable-care-act/individuals-and-families/aca-individual-shared-responsibility-provision-calculating-the-payment>. See also *supra* text accompanying

For a *takaful* adherent, the first option is a substantial burden by essentially any standard. In her *Hobby Lobby* dissent challenging the Court's deference to substantiality claims,¹⁵⁰ even Justice Ginsberg appeared to consider a "command [to] purchase or provide [what] they find objectionable," as would here be required, to be obviously substantial.¹⁵¹ The second option, joining an existing sharing ministry, demands the equally untenable concession of subscribing to a Christian belief statement in order to satisfy a command of Islam. The third option, paying the shared responsibility payment tax for failure to carry insurance, is economically quantifiable—but a closer question. Willingness to pay the tax rather than purchase alternative insurance is by one measure itself confirmation of the substantiality of the first two burdens.¹⁵² But while a "law [which] simply regulates a secular activity and . . . operates so as to make the practice of [] religious beliefs more expensive" is permissible,¹⁵³ the Court has recently recognized the "severe burden that taxation . . . can impose."¹⁵⁴ And in *Hobby Lobby*, the Court declined to follow the argument of amici that the substantial burden of providing religiously-objectionable insurance coverage could be eliminated if the employer instead provided no insurance and paid the tax for so doing.¹⁵⁵ Because some sort of insurance is itself a valuable commodity for workers, it was not possible to state that the cost of the penalty and the lost benefit together were not higher than the cost of compliant insurance.¹⁵⁶ By the same logic, then, to say that no burden arises in paying a tax ignores the fact that an unaccommodated *takaful* adherent must (through this year) pay a penalty in addition to internalizing the out-of-pocket costs of health care, there being no acceptable insurance substitute to acquire. In short, a Muslim plaintiff should be able to demonstrate the substantiality of the burden through 2018.

note 37.

150. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (2014) (Ginsberg, J., dissenting) ("[T]oday's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.").

151. *Id.*

152. See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1924 (2015) ("A mild preference to abstain will not do; instead, it must be the case that contributing would cause the objector to experience a deep rift in his self, so much so that he would be willing to incur some penalty to avoid betraying his convictions.").

153. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

154. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

155. See *Hobby Lobby*, 134 S. Ct. at 2778–79.

156. See *id.*

B. THE BURDEN'S INEQUITABLE EFFECT

In creating the sharing ministry exemption, it is by no means certain that Congress was responding to what it perceived as a substantial Free Exercise burden on evangelical Christians. While other PPACA exemptions require takers to be “*conscientiously opposed* to acceptance of the benefits of . . . insurance,”¹⁵⁷ in the case of religious conscience, or to “oppose[] providing coverage . . . on account of *religious objections*,”¹⁵⁸ for religious employers, no oppositional requirement attaches to the sharing ministries. This absence reflects the theological problem faced by the exemption’s original advocates: the consumption of commercial health insurance does not burden the exercise of most Protestant faiths. (Despite the claims of some sharing ministry advocates that PPACA-marketplace insurance plans fund abortion, every state offers at least one plan which excludes abortion services.¹⁵⁹) The sharing ministry accommodation, then, is not motivated by a religious burden in the traditional sense.

However, including the sharing ministry exemption within the PPACA shifts the analysis radically. When the “religious preferences the law reflects” are those of Christian ministry members, an entirely different group of minority faiths bears the burden, and the burden for some Muslims, if forced to buy secular commercial policies in a world in which Christian counterparts do not, is not insubstantial. Indeed, their burden may well be as great as that felt by a Christian *religious-conscience* objector, even though the terms of that particular clause exclude Muslims by virtue of their sect’s broad ability to participate in Social Security.¹⁶⁰ This goes straight to the heart of Brady’s argument for applying an equality test to legislative accommodations:

Accommodations that entail substantial expense for a discrete segment of the community raise issues of religious equality. The accommodated

157. I.R.C. § 1402(g)(1) (2012) (emphasis added).

158. 45 C.F.R. § 147.131(b)(1) (2016) (emphasis added).

159. Compare 45 C.F.R. § 800.602(a) (“OPM will ensure that at least one of the MSP issuers on each Exchange in each State offers at least one MSP option that does not provide coverage of services described in section 1303(b)(1)(B)(i) of the Affordable Care Act.”), with *Obamacare Abortion Resources*, ABORTION OBAMACARE, <http://www.obamacareabortion.com/resources> (last visited Jan. 3, 2018) (“If you are dissatisfied with your state insurance choices, you may consider a healthcare sharing ministry. While healthcare sharing does not fix the problem of abortion funding in Obamacare, it does provide an option that respects conscience and moral values.”).

160. See Hania Masud, Comment, *Takaful: An Innovative Approach to Insurance and Islamic Finance*, 32 U. PA. J. INT’L L. 1133, 1140 (2011) (“Because insurance typically involves risk, uncertainty, and interest, it poses a unique challenge to Islamic law. Under traditional Islamic law, the game-oriented risk profiles of insurance would not meet the requirements of a legally-valid contract between parties.”).

faith is afforded protection with costs only some incur. When the costs of accommodation are not shared by the community at large, we worry that more popular or powerful faiths are being advantaged at the expense of those with less communal support. Unequal burdens raise concerns of religious favoritism.¹⁶¹

Regardless of the original legislative intentions, the imbalance in the degree of burden between accommodated and unaccommodated parties should therefore be a cause for concern.

C. THE BURDEN SHIFTED: LEGISLATIVE AND ADMINISTRATIVE HINDRANCE

In *Hobby Lobby*, the Court found it unnecessary to examine whether the provision of a variety of contraceptives represented a compelling interest of the government, and instead focused on whether the mandate that employer-sponsored health insurance cover such contraceptives was, in fact, the least restrictive means of achieving such an interest.¹⁶² Assessing the latter question requires asking, in the Court's language, whether "the fundamental point would still be that there simply is no less restrictive alternative to the categorical requirement."¹⁶³ And as previously discussed, the creation of an exemption for *some* does a great deal to undermine the argument that an *extension* of such an exemption would be fatal to the broader interest. Where "the record . . . shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. . . . [it appears that it] equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs."¹⁶⁴ By allowing *some* sharing ministries, therefore, the government makes it extremely difficult to tighten the spigot for similarly-situated—yet excluded—groups.

A Free Exercise challenge to the sharing ministry exemption would presumably not balance the believer's burden against the compelling interest behind the exemption, but rather against that behind the wider law. Here, the interest (at least until 2019) is to make health insurance coverage both more robust, through improvements in the minimum standards of saleable policies, and more affordable,¹⁶⁵ through the requirement that

161. BRADY, *supra* note 111, at 269.

162. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). See also *supra* text accompanying notes 136–38.

163. *Hobby Lobby*, 134 S. Ct. at 2758.

164. *Id.* at 2786 (Kennedy, J., concurring).

165. See Statement by the President on the Anniversary of the Affordable Care Act, 2013 DAILY COMP. PRES. DOC. 180 (Mar. 23, 2013) ("Because of the Affordable Care Act, insurance companies will no longer have unchecked power to cancel your policy, deny you coverage, or charge women more

Americans either spread risk by purchasing insurance or else offset the government's health care spending via the shared responsibility payment.¹⁶⁶ But RFRA's focus on the implications of a law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened—makes it difficult to defend the compelling interests inherent in a system which requires mass participation against any single defection.¹⁶⁷ The government has, in essence, conceded via the original exemption that the least restrictive means of achieving its wider ends do not require total consistency.

As with the contraceptive exception in *Hobby Lobby*, the existence of individual-mandate exemptions thus does nothing to help the government's case, and Congress may have underestimated their potential to threaten the PPACA's efficacy. Continuing criticism argues that "the law is poorly designed . . . [and t]he penalties attached to the individual mandate are too weak,"¹⁶⁸ leading to a withdrawal of insurers from the marketplace and escalating costs for those who remain. The porousness of the sharing ministry exemption has appeared at least partly to blame,¹⁶⁹ though the anti-PPACA rhetoric and policy certainly had an effect, as well¹⁷⁰ and anticipation of the 2019 penalty-elimination is likely to further accelerate the spiral.¹⁷¹ In 2011, however, shortly after the establishment of the exemption's enshrinement but well before either Altrua's qualification as an exempted sharing ministry or the individual mandate's imposition date,

than men. And soon, no American will ever again be denied care or charged more due to a pre-existing condition, like cancer or even asthma. . . . [and] private plans will compete to save middle class families money.").

166. The shared responsibility payment was designed to ensure that individuals could not simply wait until they were unhealthy to purchase the coverage which, by law, would now have to be sold inclusive of pre-existing conditions. Congress expected that millions of "citizens may lawfully choose to pay [it] in lieu of buying health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 568 (2012).

167. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

168. David Brooks, Opinion, *The Incredible Shrinking Obamacare*, N.Y. TIMES (Sept. 6, 2016), <https://nyti.ms/2cg1WTK>.

169. Early commentary appears to have expected exempted groups to be both static and small. *See, e.g.*, Jessica Donoghue, *New Development, PeopleV.US v. Obama*, 12 RUTGERS J.L. & RELIGION, 202, 207 (2010) ("The second religious exemption under the PPACA is for individuals who belong to a 'Health Care Sharing Ministry.' . . . A limited group of individuals qualify for this exemption.").

170. *See, e.g.*, Paul Demko & Rachana Pradhan, *Trump's War of Attrition Against Obamacare*, POLITICO (July 21, 2017, 5:19 AM), <http://www.politico.com/story/2017/07/21/trumps-war-of-attrition-against-obamacare-240777>; Haeyoun Park, *We're Tracking the Ways Trump Is Scaling Back Obamacare. Here Are 12.*, N.Y. TIMES (Oct. 12, 2017), <https://nyti.ms/2k1b9sO>; Margot Sanger-Katz, *Drop in Late Obamacare Enrollment Appears to Be a Trump Effect*, N.Y. TIMES: UPPSHOT (Feb. 3, 2017), <https://nyti.ms/2k5jvGa>.

171. Shelby Livingston, *Insurers Brace for Repeal of Individual Mandate*, MOD. HEALTHCARE (Dec. 18, 2017), <http://www.modernhealthcare.com/article/20171218/NEWS/171219884>.

membership amongst all ministries amounted to about 100,000—lower even than a decade earlier.¹⁷² Six years later, though, enrollment had jumped tenfold, to more than a million.¹⁷³ While it is possible that some members may pay the mandate’s penalties inadvertently,¹⁷⁴ the plans are often marketed as a way to avoid having to do so,¹⁷⁵ and members often tout that avoidance as a key benefit.¹⁷⁶ Together, they represent more than 3% of the twenty-nine million Americans without health insurance;¹⁷⁷ if members had instead purchased marketplace insurance, they would have increased the size of the commercial pool by 8%.¹⁷⁸ The exempted population thus constitutes a non-inconsiderable threat to the pool’s stability, especially given that ministry members—who typically pledge to abstain from risky behaviors including extramarital sex and the use of tobacco, alcohol, and other drugs—may be relatively healthy, and therefore especially important for maintaining a lower cost-per-patient average.¹⁷⁹ How, then, could this impermissibly-narrow exemption be widened without

172. Compare Timothy Stoltzfus Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL’Y 27, 43 (2011), with Fager, *supra* note 51 (estimating roughly 130,000 members in 2000).

173. See *History*, ALLIANCE HEALTH CARE SHARING MINISTRIES, <http://www.healthcaresharing.org/about-us/#history> (last visited Jan. 3, 2018).

174. See Dan Mangan, *IRS: More Paid Obamacare Fine than Expected*, CNBC (July 20, 2015, 5:29 PM), <http://www.cnbc.com/2015/07/20/irs-more-paid-obamacare-fine-than-expected.html> (estimating that about 4% of those who paid penalties in 2015 were, in fact, entitled to an exemption of some sort).

175. See, e.g., *Healthcare Reform*, CHRISTIAN CARE MINISTRY, <https://mychristiancare.org/medi-share/what-is-medishare/healthcare-reform> (last visited Jan. 3, 2018) (“Medi-Share members are exempt from the mandate to purchase insurance or face financial penalties.”).

176. See, e.g., Leonard, *supra* note 45 (“Jennifer, whose family’s membership in the ministry means they won’t incur the \$2,085 maximum fine families have to pay for going uninsured in 2016, estimates that members have shared \$30,000 of her family’s medical bills.”).

177. See Jessica C. Barnett & Marina Vornovitsky, *Health Insurance Coverage in the United States: 2015*, U.S. CENSUS BUREAU 7 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-257.pdf>. Although the government does not report the subset of uninsured Americans who claim exemption from the individual mandate—such as through sharing ministry membership—TurboTax estimates that 70 percent of uninsured filers pay no penalty because of their exempt status. See Sarah Ferris, *TurboTax: Most Uninsured Escaped ObamaCare Penalty* (Feb. 23, 2016, 9:38 AM), HILL, <http://thehill.com/policy/healthcare/270385-turbotax-most-uninsured-people-exempt-from-obamacare-penalty-in-2015>.

178. About 12.2 million Americans purchased marketplace coverage in 2017. See *Health Insurance Marketplaces 2017 Open Enrollment Period Final Enrollment Report: November 1, 2016–January 31, 2017*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Mar. 15, 2017), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-03-15.html> [hereinafter *2017 Enrollment Report*].

179. See Leonard, *supra* note 45. See also Stephanie Armour, *Fewer Uninsured Face Fines as Health Law’s Exemptions Swell*, WALL ST. J. (Aug. 6, 2014, 10:30 PM), <https://www.wsj.com/articles/fewer-uninsured-face-fines-as-health-laws-exemptions-swell-1407378602> (estimating that 90 percent of uninsured Americans will qualify for an exemption from the mandate’s penalty).

further undermining the very purpose of the law?¹⁸⁰ Though perhaps a moot question after 2019, once the mandate's penalty evaporates, the theoretical answer may nevertheless lie within RFRA's resurrection of *Sherbert*, which contains the underpinnings of a solution for laws that risk being swallowed up by exceptions. "[A]dministrative inconvenience alone does not negate the feasibility of an otherwise less restrictive means—unless the administrative problem would be 'of such magnitude' that it would render 'the entire statutory scheme unworkable.'"¹⁸¹ To strip away the cutoff date and allow new sharing ministries of all faiths—or ethically-grounded ministries of no faith at all—risks exactly such a destruction of statutory purpose. And as Justice Ginsburg observed in her *Hobby Lobby* dissent, "[a]ccommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties."¹⁸² Here the statutory accommodation impinges on the interests of non-Christian sharing ministry participants, while the most obvious remedy—expansion—impinges on those of the millions of American who participate in the health insurance marketplace.¹⁸³

The theoretical Muslim plaintiff's argument for the expansion of the exemption to include *takaful* participants thus runs aground. The legislature intended to accommodate sharing ministry members, but one unforeseen effect of the PPACA was to foreclose the offering of a sharing ministry equivalent catering to Muslims, forcing those same Muslims into a now-mandatory commercial insurance market, with Free Exercise concerns attendant. While an expanded exemption might restart American *takaful* programs, such an easy fix—via judicial elimination of the cutoff date—would undermine the legislature's original purpose in passing the wider law and impose potentially dramatic third-party burdens as more and more consumers leave the secular marketplace. The harder fix, then, is to eliminate the exemption altogether.

180. Cf. Remarks at a Listening Session with Health Insurance Industry Leaders, 2017 DAILY COMP. PRES. DOC. 144 (Feb. 27, 2017) ("Since Obamacare went into effect, nearly half of the insurers are stopped and have stopped from participating in the Obamacare exchanges. It has gotten so bad that nearly 20 million Americans have chosen to pay the penalty, or received an exemption rather than buy insurance. That's something that nobody has ever heard of or thought could happen, and they're actually doing that rather than being forced to buy insurance.").

181. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 24 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (quoting *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963)). See also *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (citation omitted) ("Properly applying [the Religious Land Use and Institutionalized Persons Act of 2000], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . .").

182. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2790 (2014) (Ginsburg, J., dissenting).

183. See 2017 Enrollment Report, *supra* note 178.

Although politically complicated, such a remedy is constitutionally sound, and there is precedent for a court's striking of accommodations. In *Texas Monthly, Inc. v. Bullock*, the Court found that a state sales-tax waiver for religious publications was unconstitutional, giving an effective grant-in-aid to religion in violation of the Establishment Clause:

[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it “provide[s] unjustifiable awards of assistance to religious organizations” and cannot but “conve[y] a message of endorsement” to slighted members of the community.¹⁸⁴

Similarly, and running in even closer parallel to the sharing ministry question, in *Boone v. Boozman*, the court examined the legislative exemption from vaccine laws granted to Arkansans whose “recognized church or religious denomination” forbade inoculations, in light of a religious plaintiff who had no denominational affiliation.¹⁸⁵ Faced with the construction of an exemption that excluded believers simply because they lack a recognized church, the court found it “difficult to imagine how the State would have a compelling interest in limiting the religious exemption to some religious sects . . . over others,” noting that “[w]here the State elects to accommodate religion on a particular issue like immunization, it is simply not constitutionally permissible for it to indulge the free exercise rights of some individuals and inhibit the free exercise rights of others on an arbitrary basis.”¹⁸⁶ But having found that the exemption cannot stand as written, the court did not expand its applicability. Instead, it focused on the legislative purpose of the vaccination law as a whole:

[T]he General Assembly sought to establish a comprehensive immunization program for school children, and the statute is complete in itself and capable of execution in accordance with that intent without the . . . religious exemption. [That exemption] must be stricken as unconstitutional, but the remaining portions of the statute remain in full force and effect. In other words, there now exists no statutory religious exemption to immunization in the State of Arkansas.¹⁸⁷

184. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (Brennan, J., plurality opinion) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)).

185. *Boone v. Boozman*, 217 F. Supp. 2d 938, 941–43 (E.D. Ark. 2002).

186. *Id.* at 951 (citing *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90–91 (E.D.N.Y. 1987)).

187. *Id.* at 952.

The vaccine analogy is especially apt when considering the insurance problem, for just as it is epidemiologically demonstrable that an immunization scheme fails unless a critical level of coverage can be maintained, so is it also with insurance risk pools.

Here, as with health insurance, substantive Free Exercise concerns were already handled by the religious conscience exemption.¹⁸⁸ Like the religious-publication tax grant at issue in *Texas Monthly*, the additional accommodation for sharing ministries appears to have been conceived not as an attempt to alleviate a substantial burden on religion but rather to answer a political demand—with the result that it created a larger problem than the one it ostensibly solved.

Of course, President Trump and the 115th Congress were never likely to amend the PPACA in such a way as to strengthen the individual mandate through the elimination of faith-based exemptions; now, removing the mandate's penalty will take the question of burdens off the table entirely come 2019. But so long as the mechanism of the mandate survives, there remains the potential for the legislature to restore the penalty—and with it, to restore exemption issues. A vigorous challenge, effectively litigated, would provide an opportunity not to extend the sharing ministry exemption to new groups, but to close it permanently, guiding consumers back into the regulated market, eliminating free-rider dangers, enhancing coverage, and helping to guarantee the efficacy of the mandate upon which the PPACA is built.

CONCLUSION

Regardless of the survival of the PPACA and the individual mandate, the need to measure a right to personal religious liberty against the rights of third parties, represented through compelling government interests—the very core of RFRA—will remain at the heart of how courts examine Free Exercise claims. In passing RFRA, Congress wrote its intentions into the statute, stating that “governments should not *substantially* burden religious exercise without *compelling* justification,” and “the compelling interest test as set forth in [pre-*Smith*] court rulings is a workable test for striking *sensible balances* between religious liberty and competing prior governmental interests.”¹⁸⁹ Yet more than two decades after RFRA's bipartisan passage,¹⁹⁰ the “competing prior governmental interests” are too

188. *But see* Grover, *supra* note 110, at 643–44 (arguing that the religious conscience exemption should be subsumed within that granted to sharing ministries).

189. 42 U.S.C. § 2000bb (2012) (emphasis added).

190. *See* Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17,

often ignored in discussions of religious freedom. In its 2016 platform, for example, the Republican Party argued not for “sensible balances,” but instead argued that:

The Free Exercise Clause is both an individual and a collective liberty protecting a right to worship God according to the dictates of conscience. Therefore, we strongly support the freedom of Americans to act in accordance with their religious beliefs, not only in their houses of worship, but also in their everyday lives. We support the right of the people to conduct their businesses in accordance with their religious beliefs and condemn public officials who have proposed boycotts against businesses that support traditional marriage. . . . We support the public display of the Ten Commandments as a reflection of our history and our country’s Judeo-Christian heritage and further affirm the rights of religious students to engage in voluntary prayer at public school events and to have equal access to school facilities. We assert the First Amendment right of freedom of association for religious, private, service, and youth organizations to set their own membership standards.¹⁹¹

The call for liberty is clear, but there is no acknowledgment of either the need to measure the substantiality of burdens upon that liberty, or the degree to which legitimate and compelling government interests might warrant imposition thereupon—unless the party in power hopes to elevate the “country’s Judeo-Christian heritage” itself to the status of such an interest.

The issues raised by the sharing ministry exemption deserve special consideration in an age of considerable deference to the individual belief-based claim. An object lesson in the complicated dynamics of religion-clause balancing tests, this exemption illustrates how the legislative process can give rise to Establishment Clause concerns, and how genuine desires to accommodate the needs of diverse faiths can both create new forms of discrimination and undermine the wider purposes of public laws. While sharing ministry litigation has been extremely limited, even in the era of the defanged mandate its persistence in the code will remain a potential landmine should the penalty be revived or the exemption’s structure be imported wholesale into new health care legislation. How the issue is eventually defused may have implications not just for the Christians who participate in ministries today, the Muslims who seek Sharia-compliant financial products, and the Americans of all faiths who rely on robust risk

1993), <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html> (noting bipartisan sponsorship and the Senate’s vote of 97-3).

191. PLATFORM COMM., REPUBLICAN PLATFORM 2016, at 12 (2016).

pools, but also for the larger challenge of how any administration must interpret and implement belief exemptions from social-cooperation laws. Though little noticed amidst a wider national debate, the choice here presented—whether to maintain a limited exemption, to open the floodgates to all claimants, or to excise the exemption for the sake of wider purpose—is thus one of fundamental importance.