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Tough Pill to Swallow: Whether Catholic Institutions are Obligated under Title VII to Cover Their Employees' Prescription Contraceptives

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TOUGH PILL TO SWALLOW: WHETHER CATHOLIC INSTITUTIONS ARE OBLIGATED UNDER TITLE VII TO COVER THEIR EMPLOYEES' PRESCRIPTION CONTRACEPTIVES

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I. INTRODUCTION

In the last decade, many employers around the United States have felt an ever-increasing push by their employees to adopt group health plans that would provide coverage for prescription birth control. The exclusion of such birth control on health plans went largely unnoticed for years, and it wasn't until a significant number of insurance plans decided to cover male "potency drugs" in the mid-1990s that interest groups became inspired to fight for female contraceptive coverage.[1] It was not long before state legislatures responded favorably to this movement by enacting laws that required the inclusion of contraceptive drugs and devices in all comprehensive prescription drug plans.[2] In the past ten years, over twenty-six states passed bills requiring insurance providers to cover prescription birth control.[3]

However, state laws cannot regulate self-funded insurance plans:[4] plans under which the employer, not an insurance company, bears the medical costs for participants.[5] Self-funded plans are

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1. *See* Sandra Jordan & Roger Rathman, *Planned Parenthood Urges Congress to Make Contraceptive Coverage a Reality This Year*, COMMON DREAMS NEWS WIRE (June 8, 1999), http://www.commondreams.org/pressreleases/june99/060899c.htm ("The FDA approval of Viagra and its almost instantaneous insurance coverage exposed the discrimination women face from insurers.").

2. Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 741 (2005).

3. *See* Fair Access to Contraception Project, Planned Parenthood Fed'n of Am. & Planned Parenthood of W. Wash., *Cover My Pills*, http://www.covermypills.org/facts (follow "State Law" hyperlink) (last visited Oct. 15, 2006) [hereinafter *Cover My Pills*].

4. The terms "self-funded" and "self-insured" will be used interchangeably throughout this Article.

5. Jill Alesch, *The Americans With Disabilities Act: An End to Discrimination Against HIV/AIDS Patients or Simply Another Loophole to Bypass?*, 52 DRAKE L. REV. 523, 527 (2004). State laws can, however, regulate fully insured plans such as those offered by Health

governed exclusively by the Employee Retirement Income Security Act (ERISA), which preempts state law. [6] Self-funded plans are, thus, only subject to federal law.[7] Despite this preemption issue, employees have found a way to challenge self-funded insurance plans that selectively exclude prescription birth control from coverage.[8] Specifically, employees have successfully argued that the selective exclusion of prescription birth control from an otherwise comprehensive prescription drug plan discriminates against women "affected by pregnancy"[9] in violation of Title VII.[10]

This recent legal trend is generally recognized as a positive step in the direction of gender equality. However, the courts have not yet addressed how this issue affects self-insured religious institutions opposed to prescription birth control use.[11] Many Catholic institutions

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Maintenance Organizations (HMOs). *Id.* Under such plans, an employer pays a premium to an insurance provider who, in exchange, assumes the risk of providing all of the medical coverage. Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997).

6. *See* 29 U.S.C. § 1003(a)(1) (2000 & Supp. 2005) (stating that ERISA applies to any "employee benefit plan if it is established or maintained—by any employer engaged in . . . any industry or activity affecting commerce . . . ."); 29 U.S.C.S. § 1002(1–3) (LexisNexis 2006) (defining "employee benefit plan" as an "employee welfare benefit plan" which is "established or maintained by an employer . . . .").

7. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1144(a), 1191 (2000). This Article is only concerned with self-insured plans for two reasons. First, more Catholic institutions will be affected by a federal contraceptive coverage mandate. Such a requirement would not only be enforced nationwide, but would also require all self-insured Catholic institutes to be directly responsible for all birth control payments. Second, many state contraceptive coverage laws include a "conscience clause," which exempts religious institutions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2008). Such an exemption is currently not included in the Pregnancy Discrimination Act. *See* 42 U.S.C. § 2000e(k) (2000).

8. *See, e.g.*, Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998). *But see* Stabile, *supra* note 2, at 767–72 (arguing that Professor Law provided "no real claim that coverage of contraceptives is necessary to promote equal treatment of women").

9. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 200e(k) (2000).

10. *See* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001); U.S. E.E.O.C. Decision, Dec. 14, 2000, *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html. *But see* Cummins v. Ill., No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S. D. Ill. Aug. 30, 2005) (holding an employee health plan does not violate Title VII if both men and women are denied contraceptive coverage). *Cummins* is the only decision with this holding. *Id.*

11. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 73 (Cal. 2004) (raising the issue of how prescriptive drug plans in violation of Title VII affect self-insured religious institutions opposed to prescription birth control use). In *Catholic Charities*, a Catholic social services organization brought an action under the Establishment and Free Exercise Clauses of the U.S. and California Constitutions, against the State, seeking a declaratory judgment that California's Women's Contraceptive Equity Act (WCEA) was unconstitutional. *Id.* The WCEA imposed a general requirement that all employers offering

currently do not cover their employees' prescription contraceptives because of the Catholic Church's long and adamant stance that such birth control is "intrinsically evil."[12] Universal application of the Title VII contraceptive coverage mandate would compel these Catholic institutions to choose between adherence to the laws of the Church and the laws of the State. Such an application of Title VII would be an alarming step towards the enactment of laws, which offend the integrity and autonomy of all religious institutions.

Therefore, as this legal trend progresses, one crucial question must be answered: Should self-insured Catholic institutions be exempt from any Title VII contraceptive coverage mandate?[13] This Article examines this question and, in doing so, ultimately posits that, in light of the U.S. Supreme Court's decision in *Gonzales v. O Centro Espirita*

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insurance coverage for prescription drugs must provide coverage for prescription contraceptives. *Id.* at 74. The California Superior Court upheld the WCEA despite the substantial burden the law imposed on the Catholic employer. *Id.* The court reasoned that the WCEA did not unconstitutionally infringe on the employer's First Amendment free exercise right because it was a neutral and generally applicable law under the U.S. Supreme Court's *Smith* Standard. *See id* at 84; *see also infra* notes 58–69 and accompanying text. However, this decision is not applicable to the issues discussed in this Article because this Article is only concerned with self-insured plans. Unlike the fully-insured plans at issue in *Catholic Charities,* self-insured plans fall under ERISA which preempts state laws. *See supra* notes 6–7 and accompanying text. Therefore, a contraceptive coverage mandate which conflicts with a religious employer's self-insured plan must conform to the more stringent standard set forth under the Religious Freedom Restoration Act (RFRA), and not the *Smith* standard used by the California Supreme Court in *Catholic Charities. See infra* notes 87–105 and accompanying text.

12. CATECHISM OF THE CATHOLIC CHURCH § 2370 (1994) ("[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible' is intrinsically evil.") (quoting PAUL VI, HUMANAE VITAE § 14 (July 25, 1968)). The Church's antipathy towards birth control dates back to the fifth century when Augustine of Hippo wrote that marriage is a legal contract designed specifically for procreation. *See* St. Augustine of Hippo Sermons on Selected Lessons of the New Testament, Benedictine Edition, Sermon 1, § 22, *available at* http://www.newadvent.org/fathers/160301.htm (last visited Oct. 1, 2008). The Church's modern position against contraceptives was largely influenced by the publication of Casti Connubii by Pope Pius XI's, which became the Church's official marriage document until 1968. *See* ROBERT MCCLORY, TURNING POINT: THE INSIDE STORY OF THE PAPAL BIRTH CONTROL COMMISSION, AND HOW *HUMANE VITAE* CHANGED THE LIFE OF PATTY CROWLEY AND THE FUTURE OF THE CHURCH 22 (1995). It stated that "any use whatsoever of matrimony exercised in such a way that the act [of sexual intercourse] is deliberately frustrated in its natural power to generate life is an offense against the law of God . . . and those who indulge in such are branded with the guilt of a grave sin." Pope Pius XI, Casti Connubii § 56 (Dec. 31, 1930), *available at* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

13. The "*PDA* contraceptive coverage mandate" and the "*Title VII* contraceptive coverage mandate" are often use interchangeably in legal decisions and scholarly articles. So too will they be used interchangeably in this Article as they refer to the same law.

Beneficente Uniao do Vegetal[14] [hereinafter *O Centro*], Catholic employers should be exempt from Title VII's contraceptive coverage mandate because the mandate substantially burdens such employers' free exercise rights in violation of the Religious Freedom Restoration Act (RFRA).

Part II proffers background on the recent legal trend supporting mandatory contraceptive coverage.[15] Part II also briefly explains the relevant history behind our current free exercise jurisprudence.[16]

Part III examines the tension that resulted from the U.S. Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[17] and how the Court largely resolved this tension by affirming RFRA's application to federal law in *O Centro*.[18] Part III also analyzes the likelihood that Catholic institutions can earn an exemption from Title VII's contraceptive coverage mandate by raising a successful RFRA claim.[19]

Part IV illustrates the benefits of exempting Catholic institutions from Title VII's contraceptive coverage mandate. Specifically, Part IV demonstrates (1) the policy benefits of exempting Catholic institutions from the contraceptive coverage mandate;[20] and (2) how such an exemption does not prevent Title VII from accomplishing its legislative purpose.[21]

II. BACKGROUND

Although the legal trend toward instituting mandatory contraceptive coverage is in its early stages, the principle guiding this trend dates back at least thirty years—when Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA).[22] This section briefly illustrates the legal history behind the PDA's formation and its role in recent decisions compelling private employers to cover contraceptives in their health plans. This section also proffers background on Free Exercise Clause jurisprudence by examining its

14. 546 U.S. 418 (2006).

15. *See infra* notes 26–48 and accompanying text.

16. *See infra* notes 49–101 and accompanying text.

17. 494 U.S. 872 (1990).

18. *See infra* notes 102–197 and accompanying text.

19. *See infra* notes 199–242 and accompanying text.

20. *See infra* notes 244–252 and accompanying text.

21. *See infra* notes 254–260 and accompanying text.

22. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

legal history from the U.S. Supreme Court's decision in *Sherbert v. Verner*,[23] to its recent 2005 decision in *O Centro*.[24]

A. Evolution of the Pregnancy Discrimination Act

Title VII was enacted in 1964[25] with the goal of ending "discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce."[26] To this end, Title VII states, in pertinent part, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex."[27] In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA), which defined discrimination "on the basis of sex" to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy*."[28]

Congress passed the PDA in response to[29] the Supreme Court's decision in *General Elec. Co. v. Gilbert*.[30] In *Gilbert*, the Court held that an employer's selective exclusion of benefits for pregnancy-related disabilities did not constitute discrimination "because of . . . sex"[31] under Title VII.[32] Justices Brennan and Stevens sharply

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23. 374 U.S. 398 (1963).

24. 546 U.S. 418 (2005).

25. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2 (2000)).

26. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001). Ironically, Title VII opponents added "sex" to the bill hoping that the additional term would make the proposed Act too controversial, and thus, defeat it. *See* Mark Musson, *Sexual Harassment in the Workplace: The Time Has Come for All Offenders to Personally Suffer the Consequences of Their Actions*, 64 UMKC L. REV. 237 (1996).

27. 42 U.S.C. § 2000e-2(a) (2000).

28. *Id.* at § 2000e(k) (emphasis added). In 1993, Congress enacted the Family and Medical Leave Act which extended the PDA's protections by granting eligible employees up to twelve weeks of unpaid leave during any twelve month period for one of the following four issues: (1) the birth of, and care for, a newborn; (2) the placement of a foster or adopted child in the employee's home; (3) care for a nuclear family member who is seriously ill; or (4) the employee's own serious illness. Susan A. Kidwell, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1298–99 (2001).

29. Kidwell, *supra* note 28, at 1293.

30. 429 U.S. 125 (1976).

31. 42 U.S.C. § 2000e-2(a)(1) (2000).

32. *Gilbert*, 429 U.S. at 145–46.

> When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . . ," without further explanation of its meaning, we should not readily infer that it meant something different

dissented from this conclusion, arguing that "it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'"[33] The U.S. Supreme Court has since recognized that the PDA's enactment demonstrates that Congress viewed the dissenting opinions in *Gilbert* as more reflective of the principles behind Title VII.[34]

B. Emergence of the PDA's Contraceptive Coverage Requirement

In the late 1990s, legal scholars and women's rights groups began to question whether the PDA could be used to require employers to provide insurance coverage for prescription contraceptives.[35] Although the exact origin of this debate is unclear, many argue that it began as a direct result of the increased health insurance coverage for Viagra and other male potency drugs.[36] Regardless of its origins, the debate has gained considerable momentum over the past few years due to a number of significant rulings in favor of mandatory contraceptive coverage.[37]

In 2000, the Equal Employment Opportunity Commission (EEOC) ruled that employers who exclude contraceptives from prescription health plans discriminate along gender lines in violation of Title VII—as amended by the PDA.[38] Although the EEOC's

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> from what the concept of discrimination has traditionally meant . . . . We therefore agree with petitioner that its disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities.

Id. (quoting 42 U.S.C. § 2000e-2(a)).

33. *Id.* at 139 (Brennan, J., dissenting).

34. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978 [by enacting the PDA], it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."); *see also In re* Union Pac. R.R. Empl. Practices Litig., 378 F. Supp. 2d 1139, 1143 (D. Neb. 2005).

35. *See, e.g.*, Law, *supra* note 8, at 364–68 (discussing how impediments to contraceptives contribute to unintended pregnancies, which, in turn, can result in harmful consequences for women, infants, and society).

36. Stabile, *supra* note 2, at 770 (arguing that there is no validity to the claim that contraceptive coverage is necessary to promote equal treatment of women because the Viagra coverage is not analogous to the contraceptive coverage); *see also* Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing the link between Viagra coverage and the demand for contraceptive coverage).

37. *See infra* notes 38–47 and accompanying text.

38. U.S. E.E.O.C., Decision, Dec. 14, 2000, available at http://www.eeoc.gov/policy/docs/decision-contraception.html ("However, prescription contraceptives are available only for women. As a result, Respondents' explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion.").

decisions are not binding on federal courts, its decisions are highly persuasive because it is the administrative body responsible for Title VII enforcement.[39] This EEOC decision constituted a major turning point in the contraceptive coverage debate and inspired female employees around the country to file Title VII claims against their employers, demanding that their prescription health plans comply with the new EEOC policy.[40]

Less than a year after the EEOC decision,[41] a federal court addressed the issue for the first time in *Erickson v. Bartell Drug Co.*[42] In *Erickson*, an employer was sued for rejecting coverage of birth control for non-union employees in its Prescription Benefit Plan.[43] The *Erickson* court agreed with the EEOC, and held that the employer's prescription drug plan discriminated because of sex in violation of the PDA.[44] The court concluded that when an employer decides to selectively exclude drugs from an otherwise comprehensive prescription drug plan, "it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."[45] The *Erickson* decision generated considerable publicity[46] and initiated a legal trend that quickly gained momentum across the country.[47]

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39. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 642 (1998) ("[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("The EEOC's interpretation of Title VII, for which it has primary enforcement responsibility . . . need only be reasonable to be entitled to deference."); *In re* Union Pacific, 378 F. Supp.2d at 1143 ("The EEOC's policy is not binding on this Court, but is entitled to some deference, because the EEOC is the administrative body responsible for enforcement of Title VII and the PDA."); Holthaus v. Compton & Sons, 514 F.2d 651, 653 (8th Cir. 1975) ("Regulations issued by the [EEOC] in furtherance of [Title VII] are entitled to great deference by the courts.").

40. *See infra* note 47 and accompanying text; *see also Cover My Pills*, *supra* note 3 (follow "State Law" hyperlink).

41. U.S. E.E.O.C., Decision, Dec. 14, 2000, *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.

42. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

43. *Id.* at 1268.

44. *Id.* at 1272 ("In light of the fact that prescription contraceptives are used only by women, Bartell's choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory").

45. *Id.*

46. *See, e.g.*, Lisa Girion, *Judge Orders Coverage of Birth Control*, L.A. TIMES, June 13, 2001, at A1; Sarah Schafer, *Judge Orders Firm to Cover Birth Control*, WASH. POST, June 13, 2001, at E1.

47. *See* Stocking v. AT&T Corp., 223 F.R.D. 522 (D. Mo. 2004) (stating that an employee sought injunctive relief against her employer's restricted coverage for prescribed

The U.S. Supreme Court has yet to address whether Catholic institutions should be exempt from the PDA due to the Catholic Church's moral objection to prescription contraceptive use.[48] However, since the *Erickson* decision, a large number of new Title VII claims have surfaced—many of which are targeted at Catholic institutions.

C. The Free Exercise Clause from Sherbert to Lukumi

The First Amendment provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[49] Although free exercise claims are often brought against laws that intentionally discriminate against religion,[50] most claims seek exemption from facially neutral laws that, nevertheless, indirectly compel individuals to act against their religious beliefs.[51]

In the 1963 case *Sherbert v. Verner*, the U.S. Supreme Court set forth what would ultimately become the standard for free exercise jurisprudence for almost thirty years.[52] In *Sherbert*, the claimant was

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contraceptives to mail-order acquisition); Cooley v. DaimerChrysler Corp., 281 F. Supp. 2d 979, 981 (E.D. Mo. 2003) (holding that the employer's exclusion of prescription contraceptives from its employee health care plan had a disparate impact on women and, thus, constituted gender discrimination in violation of Title VII); Mauldin v. Wal-Mart Stores, 2002 WL 2022334, *1 (N.D. Ga. Aug. 23, 2002) (holding that the employer discriminated against women by refusing to provide health insurance coverage for prescription contraceptives). *But see In re* Union Pacific R.R. Employment Practices Litig., 479 F.3d 936, 942 (8th Cir. 2007) (reversing the trial court's decision that the PDA required the defendant employer to cover its employees contraceptives stating that "the PDA does not require coverage of contraception because contraception is not 'related to' pregnancy for PDA purposes and is gender-neutral.").

48. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76 (Cal. 2004) (addressing this contraceptive coverage issue, as it applies to state law). The Court upheld the state law, finding that the statute did not impermissibly interfere with the employer's autonomy and that the statute's conscience clause did not purposefully exclude Catholic institutions. *See id.* at 76–79. The Court also held that the statute was not subject to strict scrutiny because it was a neutral law of general applicability, as defined by *Smith*. *See id.* at 82–84; *accord* Catholic Charities of Diocese of Albany v. Serio, No. 110 (N.Y. Oct. 19, 2006) (upholding the application of a state contraceptive coverage mandate over an employer's free exercise claim because the employer's primary focus was not the inculcation of religious values). *See generally* Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

49. U.S. CONST. amend. I.

50. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993);

GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1477 (13th ed. 2004).

52. 374 U.S. 398, 407 (1963). Although this is the earliest U.S. Supreme Court decision that is pertinent to this Article, the Court's first major decision concerning free exercise exemptions was *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the U.S. Supreme Court upheld the application of a federal anti-polygamy law to a Mormon who claimed that

denied unemployment compensation because she refused to accept any employment that required her to work on Saturdays.[53] The claimant was a member of the Seventh-day Adventist Church, which considers it a sin to work on Sundays.[54] Consequently, the plaintiff argued that the denial of these benefits violated her right to freely exercise her religious beliefs.[55] The Supreme Court held in favor of the claimant, declaring that any law which burdens the free exercise of religion, directly or indirectly, must be (1) justified by a "compelling State interest" and (2) narrowly tailored to satisfy that interest.[56]

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[57] the Supreme Court abandoned the *Sherbert* balancing test[58] and stated that the *Free Exercise Clause* does not require exemptions from "neutral law[s] of general applicability."[59] In *Smith*, the claimants were fired for ingesting peyote for sacramental purposes.[60] Moreover, since peyote ingestion was criminal under Oregon law, the claimants' actions constituted work-related

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polygamy was his religious duty. *Id.* at 164–66. The Court held that while the Free Exercise Clause forbids laws that infringe on an individual's religious beliefs, its protection does not extend to religious conduct. *Id.* at 166. To exempt religious conduct from criminal laws, the Court argued, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167. *Reynolds* was overruled sixty years later in *Cantwell v. Connecticut*. 310 U.S. 296, 303–04 (1940) ("Thus the [First] Amendment embraces two concepts—freedom to believe and freedom to act.").

Another significant decision, prior to *Sherbert*, concerning the Free Exercise Clause is *Braunfeld v. Brown*, 366 U.S. 599 (1961). In *Braunfeld*, the Court rejected a free exercise challenge to a local ordinance which required all businesses to be closed on Sundays. *Id.* at 601. Orthodox Jews argued that the Sunday closing law substantially hindered their ability to compete with other businesses since their religion already required them to not work on Saturdays. *Id.* at 602. The Court held that a statute that only indirectly burdens religiously motivated conduct does not violate the Free Exercise Clause unless the State can accomplish its purpose by means which do not create such a burden. *Id.* at 606–07. This standard was later modified in *Sherbert* where the Court held that all laws which burden religion, regardless of whether that burden was direct or indirect, must be narrowly tailored to serve a compelling State interest. *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

53. *Sherbert*, 374 U.S. at 400–01.

54. *Id.* at 399 n.1.

55. *Id.* at 399–400.

56. *Id.* at 406 (defining the standard that is generally referred to as the *Sherbert* balancing test).

57. 494 U.S. 872 (1990).

58. *Id.* at 885 ("We conclude today that the sounder approach . . . is to hold the [*Sherbert* balancing] test inapplicable to . . . challenges . . . [concerning neutral] generally applicable prohibitions of socially harmful conduct . . . .").

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

60. *Id.* at 874.

"misconduct" and, thus, disqualified them from unemployment compensation.[61] The Supreme Court held that the State's denial of compensation did not infringe on the claimants' free exercise rights because the Free Exercise Clause does not relieve an individual from his obligation to comply with "neutral law[s] of general applicability."[62] The Court argued that allowing exemptions from such laws would deny states the ability to effectively regulate socially harmful conduct and allow each man to "become a law unto himself."[63]

The majority in *Smith* met sharp criticism from the other Justices. Although Justice O'Connor concurred with the decision, she would not join the majority, stating that its analysis "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[64] Justice O'Connor criticized the majority's departure from the *Sherbert* standard,[65] arguing that the First Amendment bars Congress from passing any law that burdens an individual's free exercise of religion, regardless of whether that burden is direct or indirect.[66] Therefore, according to Justice O'Connor, any law that prohibits religiously motivated conduct raises First Amendment concerns, regardless of whether such law is generally applicable.[67] Additionally, Justice Blackmun—joined by Justices Brennan and Marshall—dissented, hinting that the majority's opinion represented nothing more than dangerous judicial activism in that, to achieve its own political ends in the war on drugs, the majority mischaracterized

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61. *Id.*

62. *Id.* at 879, 890.

63. *Id.* at 885. (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

64. *Id.* at 891 (O'Connor, J., concurring).

65. *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

66. *Smith*, 494 U.S. at 895 (O'Connor, J., concurring).

> [T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices . . . whether the burden is imposed directly . . . or indirectly through laws that, in effect, make abandonment of one's own religion . . . the price of an equal place in the civil community.

Id. at 897.

67. *See id.* (O'Connor, J., concurring). "The First Amendment . . . [does] not distinguish between laws that are generally applicable and laws that target particular religious practices." *Id.* at 894.

Supreme Court precedent by "overturning . . . settled law concerning the Religion Clauses of our Constitution."[68]

The Supreme Court eventually incorporated both the *Smith*[69] and *Sherbert*[70] rules into a new, two-part test for analyzing free exercise claims in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[71] In *Lukumi*, the Court declared that a law violates the Free Exercise Clause if it (1) is not neutral and generally applicable as defined in *Smith*; and (2) is not narrowly tailored to further a compelling State interest, as defined in *Sherbert*.[72] The *Smith* rule[73] clearly dominates the *Lukumi* standard since a court must first find that a law fails the *Smith* rule before analyzing that law according to the *Sherbert* compelling interest test.

The *Lukumi* decision also illustrated the deep divide that continued to exist between the Supreme Court Justices concerning the *Smith* rule.[74] For example, Justice Blackmun flatly stated in his concurring opinion in *Lukumi*: "I continue to believe that *Smith* was wrongly decided."[75] Justice O'Connor joined Blackman in his concurrence.[76]

Justice Souter did not take part in the *Smith* decision, but wrote one of the more intriguing concurring opinions in *Lukumi*, stating that the *Smith* rule was "decidedly untypical of the cases involving the same type of law."[77] He explained that *Smith* was the first decision to require proof that the Legislature used religion as a standard for action or inaction (*i.e.*, proof of a discriminatory intent on part of the Legislature) to invalidate a law under the Free Exercise Clause.[78]

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68. *See id.* at 908 (Blackmun, J., dissenting) ("One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.").

69. *Id.* at 881–82 (holding that all neutral laws of general applicability are exempt from First Amendment scrutiny).

70. *Sherbert*, 374 U.S. at 406.

71. 508 U.S. 520, 540 (1993).

72. *Lukumi*, 508 U.S. at 531–32; *Smith*, 494 U.S. at 881–82; *Sherbert*, 374 U.S. at 406. The Supreme Court held in *Lukumi* that the city's ordinance failed the *Smith* rule because its purpose was to prevent the plaintiff from building a house of worship in their city. *Lukumi*, 508 U.S. at 540.

73. *Smith*, 494 U.S. at 881–82.

74. *See infra* notes 78–79.

75. *Lukumi*, 508 U.S. at 578 (Blackmun, J., concurring).

76. *Id.* at 577.

77. *Id.* at 564 (Souter, J., concurring).

78. *Id.* at 562–63 (Souter, J., concurring).

Therefore, Justice Souter argued, a law only has to be "formally neutral" to be Constitutional under the *Smith* rule.[79]

Justice Souter further explained that the four justices who denounced the *Smith* rule, by contrast, embraced "substantive neutrality."[80] These Justices believed that a law that is "neutral on its face" may nonetheless violate the Free Exercise Clause if its application burdens religiously motivated conduct.[81] This notion of neutrality is more consistent with the *Sherbert* line of cases, since the government would have to justify any law which burdens the free exercise of religion, directly or indirectly, to satisfy a substantive neutrality requirement.[82] Justice Souter therefore concluded that because *Smith* "left those prior cases [decided under the *Smith* standard] standing, we are left with a free exercise jurisprudence in tension with itself, a tension that should be addressed . . . by reexamining the *Smith* rule."[83]

D. The Current Standard: The Religious Freedom Restoration Act and O Centro

The *Smith* decision not only divided the U.S. Supreme Court, but it was also met with considerable public criticism.[84] In response to the public outcry against *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) under its Section V enforcement

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79. *Id.* at 562. Justice Souter explained how the *Smith* rule embraces formal neutrality in the following statement:

> Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of a formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within reaches of the Free Exercise Clause; the latter, *laws that satisfy formal neutrality*, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application.

Id. (Souter, J., concurring) (emphasis added).

80. *Id.* at 562 (Souter, J., concurring).

81. *Id.* (Souter, J., concurring).

82. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (stating that any imposition on the free exercise of religion requires a compelling justification); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); Wisconsin v. Yoder, 406 U.S. 205, 235 n.22 (1972).

83. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring).

84. *See Struggle to Define Religious Freedom is Never Finished*, L.A. TIMES, Dec. 14, 1991, at 16 (stating that "about [fifty] civil rights and religious groups, such as the National Assn. of Evangelicals, . . . the National Council of Churches, . . . and most Jewish groups" went to Congress requesting it take measures to reverse the *Smith* decision).

powers in the Fourteenth Amendment.[85] Congress enacted RFRA with the stated purpose of "restor[ing] the compelling interest test as set forth in [*Sherbert*]."[86] Congress based RFRA on findings that "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[87]

RFRA's Constitutional legitimacy was first challenged in *City of Boerne v. Flores*.[88] In *City of Boerne*, St. Peter Catholic Church challenged a city ordinance under RFRA that prevented it from enlarging its church to accommodate a large influx of new worshipers.[89] However, the Supreme Court held that Congress's power "to enforce" under Section V of the Fourteenth Amendment is only preventative or "remedial."[90] Furthermore, since most of the state laws RFRA applied to were not motivated by bigotry, RFRA could not be considered a preventative or remedial statute in compliance with Section V.[91] The Court, therefore, determined that Congress was not "enforcing" the Free Exercise Clause through RFRA, but rather, trying to invoke substantial changes to the protections granted by the Clause.[92] The Court, therefore, invalidated RFRA as it applied to state laws.[93] It left open, however, the possibility that RFRA could be applied to federal laws.[94]

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85. GUNTHER, *supra* note 51, at 1499.

86. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2000). To fulfill its purpose, the RFRA states:

> [The] Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless the] [g]overnment . . . 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 . . . . A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Id. at §§ 2000bb-1(a)–(c).

87. *Id.* at § 2000bb(a)(2).

88. 521 U.S. 507 (1997).

89. *Id.* at 511–12.

90. *Id.* at 519 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

91. *Id.* at 529–36.

92. *Id.* at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

93. *Id.* at 535. The Supreme Court held that RFRA constituted an unconstitutional attempt by Congress to replace the Court's interpretation of the Constitution with its own:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the

The U.S. Supreme Court most recently upheld a RFRA claim in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*.[95] In *O Centro*, a Christian Spiritist sect sued the government for intercepting a shipment of hallucinogenic tea, which the sect commonly uses for sacramental purposes.[96] The tea's hallucinogenic agent, *hoasca* (more generally referred to as DMT), is outlawed under the federal Controlled Substance Act.[97]

In many ways, the *O Centro* case is analogous to *Smith* in that both involve a free exercise challenge to a criminal drug law. The major distinguishing quality between the two cases is that *Smith* involved a free exercise challenge to state criminal laws[98] whereas *O Centro* involved a free exercise challenge to a federal criminal law.[99]

> Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

See Id. (citations omitted).

94. *See* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006) ("As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, we held the application to States to be beyond Congress' legislative authority under [Section V] of the [Fourteenth] Amendment.") (citations omitted); *see also* Jama v. United States INS, 343 F. Supp.2d 338, 368 (D.N.J. 2004) ("Every single other Circuit court that *has* squarely addressed the question, however, has held that Boerne did *not* invalidate RFRA in its entirety, and that the statute remains valid as applied to the federal government."); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) ("We have in the past left open the question whether the RFRA may be applied to the internal operations of the national government . . . today we join the other circuits and hold that it may be so applied."); Sutton v. Providence St. Joseph Medical Center, 192 F.3d 831 (9th Cir. 1999) ("Supreme Court's decision in *City of Boerne v. Flores* did not invalidate RFRA as applied to federal law.").

95. 546 U.S. 418, 439 (2006).

96. *Id.* at 423.

97. 21 U.S.C.S § 842 (LexisNexis 2007). Hoasca is also known as dimethyltryptamine, or DMT, and appears on Schedule One of controlled substances outlawed by the Controlled Substance Act. *See id.* at § 812.

98. *See* Employment Div., Dept. Human Resources of Ore. v. Smith, 494 U.S. 872, 874 (1990) (involving a facial challenge to a number of Oregon criminal statutes which "prohibit[ed] the knowing or intentional possession of a 'controlled substance'"—such as peyote—even if this controlled substance was used for sacramental purposes) (quoting Ore. Rev. Stat. § 475.992(4) (1987)).

99. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (involving a RFRA challenge to the federal Controlled Substances Act that outlawed the use of the controlled substance DMT, which the plaintiff used for sacramental purposes).

However, the unanimous *O Centro* Court utilized the standard set forth in RFRA and held that the government needed to justify its infringement on the plaintiff's free exercise rights under RFRA.[100] In doing so, Justice Roberts, in his first written opinion as the Chief Justice, stated:

> We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one . . . . But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.[101]

O Centro marks a turning point in free exercise jurisprudence as the Supreme Court expressly recognized that although RFRA's balancing test can be more complicated than the *Smith* test, it is nonetheless the correct legal standard, as set forth by Congress, to assess federal law.

III. ANALYSIS: WHY THE U.S. SUPREME COURT'S DECISION IN *O CENTRO* EXEMPTS CATHOLIC EMPLOYERS FROM THE TITLE VII CONTRACEPTIVE COVERAGE MANDATE

The *Smith* decision created considerable tension in free exercise jurisprudence. This section will analyze this tension and address how it was largely related to a disagreement between the U.S. Supreme Court Justices concerning the Free Exercise Clause's neutrality requirement. Then, this section will illustrate how the Supreme Court resolved this tension by unanimously upholding RFRA's application to federal law in its *O Centro* decision. Finally, this section will demonstrate how the PDA's contraceptive coverage mandate substantially burdens Catholic employers' free exercise rights under RFRA, and why Catholic employers should, consequently, be exempt from any such mandate.

100. *Id.* at 439.
101. *Id.*

A. The Importance of Defining "Neutrality" in Free Exercise Jurisprudence

It is generally accepted that the Free Exercise Clause contains a "requirement for governmental neutrality."[102] However, the Supreme Court Justices differ greatly in their determination of what kind of "neutrality" is required by the Free Exercise Clause. [103] This section analyzes the tension in free exercise jurisprudence created by the *Smith* decision and defines the different notions of "neutrality" that underlie this tension.

1. "Intolerable Tension" Resulting from Smith

For almost thirty years, the *Sherbert* balancing test was the only standard of analysis in free exercise jurisprudence. The *Smith* decision dramatically changed this area of the law, but it did not overrule prior case law. Rather, the majority in *Smith* claimed its decision was in accordance with prior Free Exercise Clause precedence.[104] Despite the majority's claim, the *Smith* rule is a departure from the principles set forth in *Sherbert*, which subjected all laws that burdened religious exercise, directly or indirectly, to a strict scrutiny analysis.[105] Justice Souter stated that the *Smith* majority created an intolerable tension in free exercise law by setting forth a new rule that conflicted with prior free exercise precedent without overruling those subsequent cases that conflicted with the new rule.[106] This section will explore the tension created by the *Smith* decision by comparing the conflicting interests between those Justices who support the *Smith* rule and those who oppose it.

a. The Smith Majority: The Smith Rule is a "Permissible Reading" of the Free Exercise Clause that Allows the State to Enforce Its Laws More Effectively

The majority in *Smith* acknowledges that its interpretation of the Free Exercise Clause was simply a "permissible reading" of the

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102. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 560 (1992) (Souter, J., concurring) (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

103. *See supra* notes 77–83 and accompanying text.

104. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, at 879 ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with 'valid and neutral laws of general applicability.'") (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

105. *See supra* notes 52–56 and accompanying text.

106. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring).

First Amendment.[107] The *Smith* majority did not argue, however, that its reading of the Clause was the only permissible reading, or even that it was the truest. Rather, the *Smith* majority simply argued that its new standard was a more effective way for the Court to decide free exercise claims while still staying within the bounds of the Constitution.[108]

Although the standard set forth in *Smith* is dramatically different from the balancing test used in the *Sherbert* line of cases, the *Smith* majority did not overrule these subsequent decisions.[109] Rather, most of the opinion is dedicated to reconciling the new standard with past free exercise case law.[110] Justice Scalia, who wrote the majority opinion in *Smith*, argued that every law that has been upheld over a Free Exercise Clause challenge was neutral and generally applicable.[111]

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107. *Smith*, 494 U.S. at 878 ("It is a *permissible reading of the text* . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.") (emphasis added).

108. *See id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a government action on a religious objector's spiritual development.'") (quoting Lying v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988)).

109. *See Lukumi*, 508 U.S. at 573–74 (Souter, J., concurring).

110. *See id.* at 520–47. The majority's attempt to reconcile the *Smith* rule with past free exercise precedent was most apparent in its analysis of *Cantwell v. Connecticut*, and *Wisconsin v. Yoder*. *See generally* Cantwell v. Conn., 310 U.S. 296 (1940); Wisconsin v. Yoder, 406 U.S. 205 (1972). In both of these cases, the U.S. Supreme Court invalidated a neutral and generally applicable law because it indirectly burdened religious exercise. *See Cantwell*, 310 U.S. at 311; *Yoder*, 406 U.S. at 207.

More specifically, in *Cantwell*, the Supreme Court invalidated the conviction of a Jehovah's Witness who was arrested for "inciting a breach of the peace" while proselytizing on a public street. *Cantwell*, 310 U.S. at 303–07. The common law offense of inciting a breach of the peace is neutral and generally applicable in compliance with *Smith* because its object is not to restrict the defendant's free exercise of religion. Likewise in *Yoder*, the Supreme Court reversed the conviction of an Old Order Amish member who refused to comply with a Wisconsin school attendance requirement because the requirement conflicted with the defendant's "fundamental belief that salvation requires life . . . separate and apart from . . . worldly influence." *Yoder*, 406 U.S. at 210, 219–29. Application of the Wisconsin law would likely be upheld under *Smith* since burdening the Amish's religious exercise was not the law's stated objective. *See generally* WIS. STAT. § 118.15 (1969).

Instead of overruling these cases, which seemingly conflict with the *Smith* rule, the majority created an exception to the new standard for "hybrid" cases where the Free Exercise Clause, in "conjunction with other Constitutional protections," is infringed. *Smith*, 494 U.S. at 881. *Cantwell* and *Yoder* involved—according to the *Smith* majority—violations of both the defendants' free exercise right and their rights to speech and family. *Id.* Only in such a "hybrid situation" may a free exercise claim overrule a neutral, generally applicable law. *Id.*

111. *See Smith*, 494 U.S. at 879–80 (listing the following cases where a neutral, generally applicable law was sustained over an individual's Free Exercise Clause claim: Prince v. Mass., 321 U.S. 158 (1944) (holding that a mother could be prosecuted under child labor laws for making her children dispense religious literature); Braunfeld v. Brown, 366 U.S. 599 (1961)

In reconciling the *Smith* rule with prior free exercise precedent, the Supreme Court majority explained in greatest depth its decision in *United States v. Lee*.[112] In *Lee*, an Amish employer sought an exemption from Social Security taxes on the grounds that the Amish faith does not condone participation in government support programs.[113] The *Lee* Court conceded that the petitioner's free exercise rights were burdened by the tax, but nonetheless rejected his claim holding that the country's tax system could not function properly if tax payments had to conform to each individual's religious beliefs.[114]

The *Smith* majority went into such great detail explaining *Lee* because it was the most analogous case. The *Lee* Court decided that increased efficiency in the tax system was more important than an individual's free exercise rights.[115] Likewise, the *Smith* rules significantly restricted the rights granted under the Free Exercise Clause to limit its influence on lawmaking and, thus, increase legal efficiency.[116] This is evidenced by Scalia's opinion that "the government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[117] Therefore, in the interests of lessening the influx of free exercise claims and increasing the efficiency of the American judicial system, the *Smith* majority created a new rule.[118] Basing the new rule on a "permissible reading" of the Free Exercise Clause,[119] the Smith majority significantly lowered the scrutiny applied to Free Exercise challenges.

(upholding a Sunday-closing law against the claim that it burdened the religious practices of individuals whose religions compelled them to refrain from work on Saturdays); Gillette v. United States, 401 U.S. 437, 461 (1971) (holding that the military Selective Service System did not violate the Free Exercise Clause by conscripting persons who opposed a particular war on religious grounds); and United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (sustaining a free exercise claim from an Amish employer seeking an exemption from collection and payment of Social Security taxes on the grounds that the Amish faith prohibited participation in governmental support programs)).

112. 455 U.S. 252 (1982).

113. *Id.* at 255–57.

114. *Id.* at 260 ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

115. *See supra* note 114 and accompanying text.

116. *Smith*, 494 U.S. at 872.

117. *Id.* at 885 (quoting Lying v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988)).

118. *See id.* at 879.

119. *Id.* at 878.

b. The Other Side of the Debate: The Smith Rule Dramatically and Unnecessarily Departs From Settled First Amendment Precedent

Those Supreme Court Justices who opposed the *Smith* rule generally argued that such a restriction on First Amendment rights directly and unnecessarily conflicted with the principles of *stare decisis*.[120] More specifically, they argued that in setting forth the *Smith* rule, the Supreme Court effectively discontinued the *Sherbert* balancing test, which had been the standard in free exercise jurisprudence for almost thirty years.[121] Justice O'Connor's concurrence in *Smith* is illustrative of this discontent.[122] She wrote that in order to establish the *Smith* rule, the majority had to first "give a strained reading of the First Amendment" and then "disregard [the Court's] consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."[123] This section explores the argument against the *Smith* rule by analyzing the inconsistencies between the *Smith* decision and prior free exercise jurisprudence.

While the First Amendment does not distinguish between laws that are generally applicable and those that target specific religious practices, it does not forbid such a distinction.[124] However, the Supreme Court previously considered incorporating this distinction into the Religion Clauses in *Hobbie v. Unemployment Appeals Comm'n*,[125] and chose not to do so. In doing this, the Court reasoned that such a distinction "has no basis in precedent" because it "relegates a serious First Amendment value to the barest level of scrutiny."[126] Therefore, such a First Amendment interpretation is inconsistent with the way the Supreme Court had previously construed the amendment.[127]

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120. *See supra* notes 112–23 and accompanying text.

121. *See supra* notes 53–64 and accompanying text (illustrating that the *Sherbert* balancing test was first used in 1963 and was the only standard used in over a dozen free exercise cases until *Smith* modified it in 1990). *See generally* Sherbert v. Vernan, 374 U.S. 398 (1963).

122. *See Smith*, 494 U.S. at 892 (O'Connor, J., concurring).

123. *Id.*

124. *See* U.S. CONST. amend. I. (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); *see also supra* notes 107–119 and accompanying text (analyzing the argument that the *Smith* decision constitutes a "permissible reading" of the First Amendment).

125. 480 U.S. 136, 137 (1987).

126. *Id.* at 141–42 (quoting Bowen v. Roy, 476 U.S. 693, 727 (1986).

127. *But see* Reynolds v. United States 98 U.S. 145, 166 (1847) (imposing a distinction between those laws which regulate religious belief and those which regulate religious

The *Smith* decision also conflicts with the Supreme Court's decisions in *Cantwell*[128] and *Yoder*.[129] The *Smith* majority tried to justify this conflict by labeling *Cantwell* and *Yoder* as "hybrid" cases.[130] However, Justice O'Connor noted in her concurring opinion in *Smith* that the Supreme Court's reference to "hybrid" cases is novel terminology for the Court. [131] Furthermore, O'Connor argued that the *Cantwell*[132] and *Yoder*[133] decisions yield no indications that they would have been decided differently if other First Amendment rights were not infringed.[134] Additionally, a hybrid exception to the *Smith* rule is useless because there is little reason for a litigant to raise a free exercise claim if he could obtain an exemption from the law under another Constitutional provision.

The *Smith* majority also asserted that the Court abstained from applying the *Sherbert* test in the years leading up to *Smith*.[135] However, significant evidence suggests the contrary—namely that the *Sherbert* test was, and still is, a "fundamental part of our First Amendment doctrine."[136] The Court repeatedly used the *Sherbert* standard to decide free exercise claims in the decades leading up to

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conduct—the latter being outside the scope of Free Exercise Clause scrutiny—despite the fact that such a distinction is not in the First Amendment.).

128. Cantwell v. Conn., 310 U.S. 296, 303–04 (1940).

129. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *See Smith*, 494 U.S. at 884. Although the *Smith* decision is at odds with the *Sherbert* decision, the *Smith* majority did not argue that *Sherbert* falls under the same "hybrid" exception that *Cantwell* and *Yoder* fall under. Rather the *Smith* majority distinguished *Sherbert* because it involved a free exercise challenge to the denial of unemployment compensation and not an "across-the-board prohibition on a particular form of conduct." *Smith*, 494 U.S. at 884. The majority then held the *Sherbert* standard inapplicable to latter form of prohibitions. *Id.* at 885. This also distinguished *Smith* from other free-exercise challenges dealing with unemployment compensation denials. *See generally* Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Com., 480 U.S. 136, 141 (1987).

130. *Cantwell*, 310 U.S. at 303–04; *Yoder*, 406 U.S. at 215; *see supra* text accompanying notes 109–111.

131. *See Smith*, 494 U.S. at 896 (O'Connor, J., concurring) ("The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . . .") (citations omitted).

132. *Cantwell*, 310 U.S. at 303–04.

133. *Yoder*, 406 U.S. at 215.

134. *Smith*, 494 U.S. at 896–97. (O'Connor, J., concurring).

135. *Id.* at 883 (majority opinion) ("In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.").

136. *Id.* at 900 (O'Conner, J., concurring).

Smith.[137] This includes a case that was decided only one year prior to the *Smith* decision.[138] The importance of the *Sherbert* test is also evidenced by the subsequent enactment of the RFRA and the Religious Land Use and Institutionalized Persons Act of 2000,[139] both of which curtail the effect of the *Smith* rule by reinstating the *Sherbert* compelling interest test.[140]

In analyzing the arguments for and against the *Smith* rule, one might already see how differing notions concerning the Free Exercise Clause's neutrality requirement underlie this debate. Those justices[141] who support the *Smith* rule feel that the government performs more efficiently if the Free Exercise Clause had a more limited neutrality requirement than that interpreted into the Clause by the *Sherbert* Court.[142] They justify this restriction by arguing that their alternate interpretation of the Free Exercise Clause is "permissible."[143] By contrast, the *Smith* rule's critics argue that such a limited neutrality requirement conflicts with *stare decisis*.[144] More specifically, they argue that after *Sherbert*, the Court's practice was to hold that laws

137. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Bowen v. Roy, 476 U.S. 693 (1986); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); *Yoder*, 406 U.S. at 205.

138. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding that the appellant's denial of unemployment compensation benefits violated the Free Exercise Clause, even though the appellant did not state that his membership in a particular religious sect forbid him to be work on Sunday). It should be noted that this case involved the denial of unemployment compensation and the *Smith* majority conceded that the *Sherbert* standard has been recently used in such cases. *Id.*; *see also Smith*, 494 U.S. at 883. However, there is no indication by the *Frazee* Court that it would not have applied the *Sherbert* balancing test if the case did not involve a denial of unemployment compensation. *See Frazee*, 489 U.S. 829.

139. 42 U.S.C. § 2000cc (a)(1) (2000) (stating that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise" unless that burden is the least restrictive means of satisfying a compelling interest).

140. *Id.* (applying compelling scrutiny to land use ordinances that impose a substantial burden on free exercise); 42 U.S.C. 2000bb (b)(1) (2000) (stating that the purpose of enacting the RFRA statute was to "restore the compelling interest test as set forth in [*Sherbert*] . . . .").

141. United States Supreme Court Justices O'Connor, Blackmun, Brennan, and Marshall all dissented from the *Smith* majority. *See* Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 891 (1990).

142. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring, O'Conner, J., joining) ("I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."); City of Boerne v. Flores, 521 U.S. 507, 544–45 (1997) (O'Connor, J., dissenting) ("I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there."); *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990).

143. *See supra* text accompanying notes 107–119.

144. Laycock, *supra* note 142, at 999.

enacted without a discriminatory purpose might, nonetheless, be insufficiently neutral towards religion to satisfy First Amendment scrutiny.[145] This debate over which notion of "neutrality" best satisfies the purpose behind the Free Exercise Clause will be further analyzed later in this paper.[146]

2. Defining Neutrality: Formal vs. Substantive

To understand the tension resulting from *Smith*, one must examine the differing notions of "neutrality" which underlie this tension. As Justice Souter explained in *Lukumi*, while the majority in *Smith* "assume[d] that free exercise neutrality is of the formal sort[,] . . . [t]he four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing . . . substantive neutrality."[147] Justice Souter explained that these differing notions of neutrality are at the heart of the tension that surrounds free exercise jurisprudence and, therefore, should be addressed when "reexamining the *Smith* rule."[148] This section will compare the two notions of formal and substantive neutrality and discuss how each applies to the current contraceptive coverage controversy.

a. Defining Formal Neutrality

The best-known definition of formal neutrality was written by Professor Philip Kurland in 1961: "The [Religion Clauses] should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."[149] Kurland argued that the government should not take religion into account when assessing a law's potential effects on the public.[150] He feared our laws would lose their effectiveness if offenders were able to get around legal enforcement by simply arguing that their illegal activity was due to a

145. *See Smith*, 494 U.S. at 896 (O'Connor, J., concurring) (stating that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." (quoting Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972))).

146. *See infra* Part III.A.2.

147. *Lukumi*, 508 U.S. at 562 (Souter, J., concurring).

148. *Id.* at 564 (Souter, J., concurring).

149. Phillip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961). One should note, however, that Kurland's principle has only recently been termed "formal neutrality" by Justice Souter and Douglas Laycock. *See Lukumi*, 508 U.S. at 561; Laycock, *supra* note 142, at 1001. The principle used to be known as "Kurland's rule." Laycock, *supra* note 142, at 999.

150. Kurland, *supra* note 149, at 5–6.

conflict between the law and their personal conscience.[151] Kurland argued that in the interests of effective lawmaking, the Free Exercise Clause should extend only to those laws whose objective is to discriminate against a particular religious practice.[152]

The majority opinion in *Smith* illustrates Kurkland's view of "neutrality." One of the concerns of the *Smith* majority was the difficulty of drafting and enforcing laws in this country due to its religious diversity.[153] Justice Scalia explained that making "an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . permit[s] him, by virtue of his beliefs 'to become a law unto himself.'"[154] Thus, the *Smith* majority exempted all laws lacking a discriminatory objective towards religious practice from the *Sherbert* balancing test. As a result of this ruling, lawmakers will not have to accommodate for the plethora of religious beliefs their laws could potentially burden.

Formal neutrality has a number of advantages over other notions of "neutrality." First, it is easy to apply. Evidence as to whether lawmakers enacting legislation possess the requisite intent to discriminate against religious practice either exists or does not exist. Second, applying formal neutrality would significantly limit the number of free exercise claims that are brought before the Court. Laws are rarely enacted to discriminate against a religious belief.[155] Furthermore, finding evidence that a law was passed with discriminatory intent is often difficult, since many laws are passed quickly leaving little, if any, legislative history.[156] Careful legislative drafting can also easily disguise a discriminatory objective.[157] Third, there is an "apparent even-handedness" to formal neutrality that is appealing.[158] Since all religious practices could not be accounted for when drafting laws, there would be no legal exemptions that could serve as encouragement for others to join a specific faith.[159]

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151. *Id.*

152. *Id.*

153. *See* Employment Div., Dept. Human Resources of Ore. v. Smith, 494 U.S. 872, 888 (1990) (stating that "many laws will not meet the [Sherbert balancing] test" due to our "society's diversity of religious beliefs ... .").

154. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

155. *Id.* at 894 (O'Connor, J., concurring) ("[i]ndeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such.").

156. Laycock, *supra* note 142, at 999.

157. *Id.*

158. *Id.*

159. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

Yet, until the *Smith* decision, courts and legal scholars had almost universally rejected the notion of formal neutrality.[160] Douglas Laycock stated that the most prominent reason for its unpopularity was due to its universal application that produces unexpected results.[161] Laycock demonstrated this inconsistency with a historical example—the National Prohibition Act (NPA).[162] The NPA forbade the sale or consumption of alcohol, but exempted the use of sacramental wine.[163] However, assuming *per arguendo* that the NPA did not include this sacramental wine exemption, then celebrating many religious ceremonies such as the Eucharist, Seder, or the Sabbath would have been a criminal offense under the statute.[164] Despite this substantial burden on important religious ceremonies, the statute would have been formally neutral, unless it was proven that the law was passed to discriminate against those religions which used sacramental wine.

Furthermore, without such proof of a discriminatory intent, the statute would also be constitutional under *Smith* because the *Smith* rule only requires formal neutrality.[165] Before *Smith*, a neutral law could be successfully challenged in court, but the majority in Smith embraced the notion of formal neutrality.[166] Following *Smith*, exemptions that were previously guaranteed by the First Amendment "are now a matter of legislative grace."[167]

b. Defining Substantive Neutrality

Justice Souter and the four other Justices who rejected the *Smith* rule[168] did so because they interpreted the Free Exercise Clause as embracing substantive neutrality. One often cited definition of

160. Laycock, *supra* note 142, at 1000.

161. *Id.*

162. *Id.* at 1000–01.

163. *See* Prohibition of Intoxicating Beverages, ch. 85 § 6, 41 Stat. 305, 311 (1919).

164. Laycock, *supra* note 142, at 1000.

165. The *Smith* majority implied that it would only declare another prohibition law unconstitutional if the law made clear that it was banning the use of sacramental wine for religious purposes:

> the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . participating in sacramental use of bread and wine . . . . It would be true, we think . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Employment Div., Dept. Human Resources of Ore. v. Smith, 492 U.S. 872, 877 (1990).

166. *See supra* text accompanying note 164.

167. Laycock, *supra* note 142, at 1001.

168. Justices O'Conner, Marshall, Brennan, Blackmun, and Souter have all rejected the Smith Rule. *See Smith*, 492 U.S. at 891.

substantive neutrality comes from Douglas Laycock who stated: "The [R]eligion [C]lauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[169] Laycock explains that by minimizing encouragement, "religion is to be left as wholly to private choice as anything can be."[170]

In other words, a law that is neutral on its face may nonetheless unconstitutionally infringe upon an individual's free exercise rights if it incidentally burdens that individual's religious practices. This notion of neutrality is apparent in the *Sherbert* decision.[171] In *Sherbert*, the Court held that it was immaterial whether the ordinance intentionally discriminated against members of the petitioner's faith; it mattered only that the ordinance, in effect, forced the petitioner to choose between the law and her religion.[172]

One disadvantage of substantive neutrality is the application can be more complex than that of formal neutrality. While a law may burden particular religiously motivated conduct, an exemption from that same law may also violate substantive neutrality by encouraging others to join that religion. For example, while the NPA may significantly burden certain religions by outlawing their use of sacramental wine, an exemption from that same law may encourage others to practice that religion so they may legally drink alcohol.[173] Such encouragement is, arguably, not substantively neutral since it would promote certain religious practices.[174] Furthermore, the First Amendment's Establishment Clause bars the government from encouraging religion in such a manner.[175] Accordingly, for a law to be substantively neutral, a court must balance the potential burden that the law imposes on religious exercise with any possible encouragement a religious exemption to that law would create.

However, a substantive neutrality requirement can also be less burdensome on a court than formal neutrality, since the intent of the Legislature when enacting the legislation at issue is irrelevant under a

169. Laycock, *supra* note 142, at 1001.

170. *Id.* at 1002.

171. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

172. *Id.* ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits . . . such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

173. Laycock, *supra* note 142, at 1003.

174. *See supra* text accompanying notes 168–169.

175. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

substantive neutrality standard.[176] Therefore, the Court does not have to sift through evidence such as the text of the statute, legislative history, and the circumstances surrounding the law's enactment to determine whether a law is substantively neutral towards religious exercise.[177] Additionally, by balancing the potential burdens that a law imposes on religious activity with the potential benefits created by an exemption, the application of substantive neutrality assures that the Court's judgment will not directly lead to religious persecution.[178]

B. Whether the O Centro Decision Constitutes a Significant Step Towards Ending the Judicial Tension Resulting from Smith

Justice Souter stated in *Lukumi* that the Smith rule was so "decidedly untypical" from past free exercise case law that it created an "intolerable tension" in that area of the law.[179] Justice Souter went on to say that this tension must "be resolved, consistently with the principles of *stare decisis*, in a *case* in which the *tension is presented* and *its resolution is pivotal*."[180] The Supreme Court's unanimous decision in *O Centro* to uphold RFRA's application to federal laws

176. Under substantive neutrality all that matters is whether an exemption would minimize the State's influence religious practice. *See* Laycock, *supra* note 142, at 1001–02. Therefore, unlike under formal neutrality, encouraging or discouraging religious conduct does not have to be a law's objective for it to not be substantively neutral.

177. The Court's decision in *Lukumi* provides a good example of how formal neutrality can be an inefficient neutrality standard. Since the Supreme Court used the notion of formal neutrality in *Lukumi*, it had to undergo a number of steps to determine whether it violated the Free Exercise Clause. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993) ("if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . .").

First the Court had to sift through the law's text to determine whether it discriminated on its face. *See id.* at 533–42. It then had to examine statute's legislative history, and the circumstances surrounding its enactment, to determine whether the object behind the ordinance was neutral towards religion. *Id.* at 540–42. After this analysis, the Court had to determine whether the ordinance was generally applicable. *Id.* at 542–46. Finally, after finding that the ordinance was not neutral or generally applicable the Court then had to determine whether it was narrowly tailored to serve a compelling state interest. *Id.* at 546–47. As will be explained in greater detail later in this Article, this method is a needlessly long way to determine whether a statute violates the Free Exercise Clause, and cuts against the Court's interest in establishing the *Smith* rule to increase efficiency in the Judiciary. *See infra* text accompanying notes 184–86.

178. Laycock, *supra* note 142, at 1003 (arguing that when applied to a prohibition law which does not exempt sacramental wine, substantive neutrality gets the right answer through balancing the law's burdens with an exemptions benefits, while "[f]ormal neutrality . . . would lead directly to religious persecution.").

179. *Lukumi*, 508 U.S. at 564, 574 (Souter, J., concurring).

180. *Id.* at 574 (emphasis added).

signifies the Court's new embrace of substantive neutrality and an end to the tension created by *Smith*.

In enacting RFRA, Congress clearly demonstrated its desire that the Court expand its formal interpretation of the Free Exercise Clause's neutrality requirement and require that laws be substantively neutral towards religiously motivated conduct.[181] This is most apparent in RFRA's drafting as the clear language in the statute supports substantive neutrality.[182] Justice Souter stated that those Justices who support substantive neutrality believe that a "law 'neutral on its face' . . . may 'nonetheless offend [the Free Exercise Clause's] requirement for government neutrality if it unduly burdens the free exercise of religion.'"[183] Furthermore, those Justices thought that "free-exercise neutrality . . . 'require[s] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest.'"[184] RFRA similarly rejects the *Smith* rule[185] and expressly states that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[186] Furthermore, RFRA also reveals that Congress agrees "governments should not substantially burden religious exercise without compelling justification."[187]

Although RFRA was drafted in 1993, the Supreme Court did not affirmatively recognize its constitutional validity until *O Centro*.[188] The Supreme Court has previously decided a RFRA claim only once

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181. 42 U.S.C. § 2000bb(b)(1) (2000) (stating that the purpose of the statute was to "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

182. *See infra* text accompanying notes 190–95.

183. *Lukumi*, 508 U.S. at 562–63 (quoting Employment Div., Dept. Human Resources of Ore. of Ore. v. Smith, 492 U.S. 872, 896 (O'Connor, J., concurring)).

184. *Id.* at 563 (quoting Employment Div., Dept. Human Resources of Ore. v. Smith, 492 U.S. 872, 894 (O'Connor, J., concurring)) (emphasis in original).

185. Congress explained its preference for the compelling interest test over the standard set forth in *Smith* by stating the following in the RFRA:

> [I]n *Employment Division v. Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a)(4)–(5) (2000) (emphasis added) (citation omitted).

186. 42 at § 2000bb(a)(2).

187. 42 at § 2000bb(a)(3).

188. *See supra* text accompanying notes 95–101. *See generally* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

before in *City of Boerne*, when the Court held that RFRA could not be applied to state laws as such an application is beyond Congress's Section V powers under the Fourteenth Amendment.[189] Chief Justice Roberts distinguished *O Centro* from *City of Boerne* early on by stating that *City of Boerne* only held that RFRA's application to state law is unconstitutional.[190] By contrast, a person whose religious practices are substantially burdened by federal law "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief" under RFRA.[191] By affirmatively recognizing RFRA's constitutional validity when applied to federal law, the Supreme Court in *O Centro* unanimously embraced the notion that federal laws are only valid when they are substantively neutral.

Additionally, the language in Chief Justice Robert's opinion suggests his support of the notion that laws, at least at the federal level, must be substantively neutral to be valid. A law is considered substantively neutral when it "minimize[s] the extent to which it either encourages or discourages religious belief."[192] To make sure of this, courts must (1) "accommodate religious differences by exempting religious practices from formally neutral laws;"[193] and (2) balance any burden from the formally neutral law with any possibility that the promotion of an exemption to that law would create.[194] In his role as Chief Justice, Justice Roberts has embraced this burden on the courts. He first accepted the idea in *O Centro* by stating that RFRA "contemplates that *courts* would recognize exemptions" to formally neutral laws, reiterating that this "is how the law works."[195] He went on to hold that the courts, on a case-by-case basis, are required to "strike sensible balances between religious liberty and competing prior governmental interests."[196] Justice Roberts concluded that "[w]e have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one" but the Court is bound to "strike sensible balances, pursuant to a compelling interest test."[197]

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189. *See supra* text accompanying notes 88–94.

190. *O Centro*, 546 U.S. at 424 n.1. This decision was Chief Justice Roberts' first written opinion.

191. *Id.* at 424 (quoting 42 U.S.C. § 2000bb-1(c) (2000)).

192. *Laycock*, *supra* note 142, at 1001.

193. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 562 (1993) (Souter, J., concurring).

194. *See supra* text accompanying notes 168–177.

195. *Gonzales*, 546 U.S. at 434 (emphasis in original).

196. *Id.* at 439 (quoting 42 U.S.C. § 2000bb(a)(5) (2000)).

197. *Id.* at 1225.

It should also be noted that since *City of Boerne*, many states have been passing "mini-RFRAs," which like the federal RFRA, demand that their state laws be substantively neutral towards religion.[198] A significant number of states enacted mini-RFRAs before 2006,[199] stripping the *Smith* rule of much of its influence before the *O Centro* decision.[200] Consequently, there was concern in the legal community that some of the members of the *Smith* majority—in particular Justice Scalia—would likely invalidate these mini-RFRAs to preserve their interpretation of the Free Exercise Clause.[201] This illustrates that the unanimous decision in *O Centro* to uphold RFRA's application to federal law indicates that the Supreme Court is beginning to embrace the notion of substantive neutrality.

By upholding the application of RFRA to federal law, the *O Centro* Court created the perfect compromise between the Justices who supported the *Smith* decision and those who were against it. The Justices who denounced the *Smith* rule did so largely because its neutrality requirement was far more limiting than what the Supreme Court had interpreted from the Free Exercise Clause in the past. Because RFRA's purpose is to reinstate the standard set forth in *Sherbert*, the *Smith* rule's critics should be satisfied that the *O Centro* Court upheld RFRA's application to federal law. Additionally, since *O Centro* did not overturn the *Smith* decision, those who support the *Smith* rule should be satisfied that their interpretation of the Free Exercise Clause's neutrality requirement will remain intact.

C. Whether a Religious Institution Can Obtain an Exemption from the PDA by Virtue of a Successful RFRA Claim in Light of O Centro

In its *O Centro* decision, the Supreme Court outlined the requirements for courts to issue an exemption to a Federal law under

198. As of 2005 the status of state RFRAs was as follows: "twelve states (AZ, CT, FL, ID, IL, MO, NM, OK, PA, RI, SC, and TX) have enacted RFRAs by legislation; twelve states (AK, IN, MA, ME, MI, MN, MT, NC, OH, VT, WA, and WI) have interpreted their state constitutions to require strict scrutiny for accidental interferences with religion; one state (AL) has implemented a RFRA by state constitutional amendment." Nicholas Nugent, Note, *Toward A RFRA That Works*, 61 VAND. L. REV. 1027, 1052 n.146 (2008).

199. *See, e.g.*, H.R. 4376 § 1, 89th Leg., Reg. Sess. (Mich. 1997) (stating that "this act shall be known . . . as the 'Michigan religious freedom restoration act.'"); Tex. Civ. Prac. & Rem. 110.003 (2007).

200. *See supra* text accompanying note 197.

201. *See, e.g.*, *Symposium: Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 501, 524 (2000).

the RFRA.[202] First, the plaintiff must establish a prima facie case under RFRA by proving that the application of a federal law[203] imposes a substantial burden on a sincere religious exercise.[204] If a plaintiff raises a prima facie RFRA claim, then the opposing party may raise the affirmative defense that the "application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest."[205] The repercussion of this decision is that Catholic employers can raise a prima facie RFRA claim against the PDA's contraceptive coverage mandate and that such employers should be granted an exemption from the mandate, as it is not narrowly tailored to serve a compelling state interest.

1. Catholic Institutions Can Raise a Prima Facie Case that the Contraceptive Coverage Mandate Violates Its Rights Under RFRA Despite the Law's Formal Neutrality

Given the precedence set forth in *O Centro*, courts will likely recognize that the PDA's contraceptive coverage mandate substantially burdens Catholic employers' free exercise rights in violation of RFRA.[206] According to *O Centro*, a Catholic employer will be exempted from the PDA's contraceptive coverage mandate if it proves that the federal mandate imposes a substantial burden on one or more of its sincere religious exercises.[207] Catholic employers will likely meet this burden since the PDA mandate would require that these employers pay for birth control, which the Catholic Church has long deemed "intrinsically evil."[208] Furthermore, *O Centro* and RFRA's embrace of substantive neutrality renders moot any argument

202. *Gonzales*, 546 U.S. at 434 ("RFRA, however, plainly contemplates that *courts* would recognize exceptions—that is how the law works.") (emphasis in original).

203. *See id.* at 424 n.1 ("As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.") (citations omitted).

204. *Id.* at 428 (stating that claimant must prove application of a federal law "would (1) substantially burden (2) a sincere (3) religious exercise" to raise a prima facie case under RFRA).

205. *Id.* at 424 (quoting Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1(b) (2000)).

206. *Id.* at 428, 430–31.

207. *Id.* (stating that claimant must prove application of a federal law "would (1) substantially burden (2) a sincere (3) religious exercise" to raise a prima facie case under RFRA).

208. *See infra* text accompanying notes 219.

that Title VII and the PDA are exempt from free exercise scrutiny because they are formally neutral and generally applicable laws.[209]

Catholic employers could raise a prima facie RFRA claim against the PDA's contraceptive coverage mandate because the PDA is a federal law that forces Catholic employers to pay for birth control, which they have moral objections to. Considering the Catholic Church's long-held position against birth control, the sincerity of its moral objection is not to be doubted as it is rooted in the teachings of the Catholic faith.[210] The Catechism of the Catholic Church labels as "intrinsically evil" any "action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible."[211]

Furthermore, the Catholic Church has not changed its position against birth control use despite growing opposition to its stance on this issue. This is illustrated in Pope John Paul II's 1995 encyclical, Evangelium Vitae, which stated that the "sacredness" and "inviolability" of life requires that the Catholic Church continue its moral opposition to birth control.[212] Therefore, the Catholic Church's position on birth control is not merely a standalone issue, but rather, an important part of its overall commitment to the sanctity of life.[213] Pope John Paul II has also stated along these lines that "the right to life [is] the most basic and fundamental right," and must be "defended with maximum determination."[214] Therefore according to the teaching of Catholicism, compelling Catholic employers to pay for birth control is forcing them to disobey what is "most basic and fundamental" to their religion.[215]

Despite this moral burden on Catholic employers, such employers would not be exempt from the PDA's contraceptive coverage mandate under the *Smith* rule due to the fact that Title VII and the PDA are both formally neutral.[216] Formal neutrality, according

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209. *See infra* text accompanying notes 223–33.

210. *See infra* text accompanying notes 219–23.

211. CATECHISM OF THE CATHOLIC CHURCH § 2370 (quoting PAUL VI, HUMANAE VITAE § 14 (July 25, 1968)).

212. POPE JOHN PAUL II, LETTER *EVANGELIUM VITAE* (1995).

213. *Id.*

214. Pope John Paul II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIELES LAICI*, *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html (last visited Sept 24, 2008).

215. *Id.*

216. The PDA's contraceptive coverage requirement is also not generally applicable under the *Smith* rule because it does not selectively "impose burdens only on conduct

to the Supreme Court decision in *Lukumi*, is determined by both the text of the law and any evidence presented of a discriminatory intent.[217] Nothing in the plain language of either Title VII or the PDA reveals a discriminatory intent. Neither statute mentions a specific religion by name, nor do they list any specific religiously motivated conduct.[218] Additionally, Title VII and the PDA both apply equally to all employers regardless of their religious affiliation.

Furthermore, there is no evidence supporting the assertion that Congress's objective in passing the PDA was discriminating against Catholic institutions. As previously stated, Title VII was enacted for the purpose of ending "discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce."[219] Congress enacted the PDA in response to the U.S. Supreme Court's

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motivated by religious belief . . . ." *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993).

217. *Id.* at 533–43 ("To determine the object of a law, we must begin with its text . . . '[t]he Court must [also] survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'") (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

218. 42 U.S.C. § 2000e-2(a) (2005), provides, in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.

42 U.S.C. § 2000e-2(a) (2005).

The PDA provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This sub-section shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.
>
> 42 U.S.C. § 2000 e(k) (2005).

It is clear from the excerpts above that neither Title VII, nor the PDA discriminate on their face.

219. *See supra* text accompanying note 26; *see also infra* Part II.A..

decision *General Elec.*[220] because it agreed with the dissenting opinion that classifications in a company health insurance plan which "revolv[e] around pregnancy is . . . at the minimum strongly 'sex related.'"[221] Clearly, unreasonable inferences from the justifications that Title VII or the PDA were enacted to discriminate against Catholic institutions would go beyond the purpose of the legislation. Any extra burden on such institutions is merely incidental. Therefore, the PDA is formally neutral despite the substantial burden that a prescription contraceptive coverage requirement would impose on Catholic institutions.

However, the *O Centro* Court recently accepted the idea that formally neutral laws may nonetheless burden an individual's free exercise rights in violation of RFRA.[222] Therefore, Catholic institutions will not be denied an exemption from the PDA's contraceptive coverage mandate simply because the PDA is formally neutral. As a result, the courts will likely recognize that the mandate places a substantial burden on Catholic employers because the requirement is not substantively neutral.

A substantively neutral law minimizes the extent to which the government encourages or discourages religious conduct. The PDA's contraceptive coverage mandate, on the other hand, compels Catholic employers to pay for birth control that the Catholic Church has objected to for many years. Therefore, the PDA discourages Catholic employers from practicing their faith by forcing them to choose between compliance with State law or Church law.

Furthermore, an exemption from the PDA would not encourage secular institutions to take up Catholicism in order to get around the contraceptive coverage requirement because it is not in these companies' best economic interests to do so. Studies consistently show that it is more cost-effective for a company to cover the cost of its employees' contraceptives since it will otherwise have to cover the costs of those employees' unplanned pregnancies.[223] Compared to the costs of labor, health care, and delivery for unplanned pregnancies, all methods of prescription contraception are far more cost-effective. For example, while the average annual cost of contraceptives per person is

220. General Elec. Co. v. Gilbert 429 U.S. 125 (1976); *see also supra* text accompanying notes 30–32.

221. *See supra* text accompanying note 33.

222. *See supra* text accompanying notes 182–186.

223. *See Cover My Pills, supra* note 3 (follow "Facts" hyperlink); *see also* Sarah S. Brown & Leon Eisenberg, THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES (1995); Trussell, *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AMERICAN JOURNAL OF PUBLIC HEALTH No. 4 (April 1995).

$480, the average annual medical cost incurred by a mother and her infant—from pregnancy to birth—amounts to ten thousand dollars.[224] Furthermore, given the high rate of unintended pregnancies in the United States, a health insurance plan only needs to increase its members' use of contraceptives by fifteen percent to save enough money to offset the cost of contraception for everyone in the plan.[225]

It is ultimately in a company's best economic interests to cover the cost of employees' contraceptives in its employee health plans. The only institutions that would likely resist such coverage would be those who have a true moral or religious objection to their use. It follows that an exemption from the PDA would not encourage other secular institutions to associate themselves with the Catholic Church simply to avoid covering prescription contraceptives. Therefore, an exemption from the PDA's contraceptive coverage mandate would minimize the extent to which it encourages and discourages Catholicism and make the statute substantively neutral. Both RFRA and the *O Centro* decision embrace the need for federal laws to be substantively neutral towards religion,[226] thus, the Courts will likely recognize the substantial burden the PDA's contraceptive coverage mandate has on Catholic employers. Consequently, Catholic employers should have no problem raising a prima facie RFRA claim against the mandate.

2. *The PDA's Contraceptive Coverage Mandate Is Not Narrowly Tailored to Serve a Compelling State Interest*

Since Catholic employers can raise a prima facie case that the PDA's contraceptive coverage mandate violates their rights under RFRA, they can only be denied an exemption from the mandate if its burden on such employers is in furtherance of a compelling government interest, and is the least restrictive means of furthering that interest.[227] A compelling government interest must be of the "highest order" such that "only the greatest abuses, endangering paramount interests, give occasion for permissible limitation."[228] No showing of merely a rational relationship to some colorable interest will suffice.[229] The Supreme Court has not yet formalized a test to

224. *See Cover My Pills*, *supra* note 3 (follow "Facts" hyperlink).

225. *Id.*

226. *See supra* text accompanying notes 179–201.

227. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (quoting Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1(b) (2005)).

228. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

229. Thomas v. Collins, 323 U.S. 516, 530 (1945).

determine which interests are compelling; rather the Court has addressed each case on an *ad hoc* basis.[230]

The PDA was enacted for the purpose of reducing gender discrimination on the basis of pregnancy in the workplace.[231] It does so by expanding Title VII's definition of gender discrimination to include unfair treatment of "women affected by pregnancy."[232] The Supreme Court has not heard a case that addresses whether the State's interest in reducing gender discrimination is sufficiently compelling to restrict an individual's free exercise rights. It has, however, held that this interest is sufficiently compelling to justify a restriction on an individual's First Amendment right to free assembly.[233] Furthermore, the lower courts have generally recognized that Title VII's purpose of eradicating employment discrimination is a "compelling government interest."[234] Therefore, the Courts would likely find this interest sufficiently compelling as to satisfy the first prong of the RFRA standard.

However, even assuming that reducing gender discrimination is sufficiently compelling to satisfy the first RFRA prong, Catholic employers should still be exempt from the PDA's contraceptive coverage mandate since the mandate is not narrowly tailored to serve this interest. To demonstrate that a challenged application of a federal law is narrowly tailored in compliance with RFRA, the challenging party must demonstrate with "particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption" to the religious institution.[235]

An exemption from the PDA for Catholic institutions would not inhibit its effectiveness in reducing gender discrimination because

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230. *Compare, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (holding that unifying unemployment compensation rules to prevent fraudulent religious objections was not a compelling interest), *with* United States v. Lee, 455 U.S. 252, 258 (1982) (holding that the unifying the collection of Social Security taxes was a compelling interest).

231. *See supra* text accompanying notes 25–34.

232. 42 U.S.C. § 2000e(k) (2000).

233. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (holding that the state's interest in eliminating gender discrimination was sufficiently compelling to justify infringement on the all-male Jaycees' First Amendment right to freedom of association).

234. *See, e.g.*, Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004); Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 220 (E. D.N.Y. 2006); E.E.O.C. v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002).

235. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 431 (2006) (quoting Wisconsin v. Yoder, 406 U.S. 205, 236 (1972)).

such an exemption would likely have a limited scope. First, only Catholic employers would fall under the exemption since Catholicism is the only religion that has labeled contraceptive use as a sin.[236] Second, a Catholic employer cannot act in opposition to his faith unless he actively participates in the birth control use. Therefore, only those Catholic employers who are actually paying for the birth control can argue that the PDA infringes their RFRA rights. For example, an individual Catholic executive at a secular institution cannot claim that he has a RFRA right to deny his employees contraceptive coverage unless he is the one paying for that coverage.

Third, unlike self-insured employee health plans, which are governed exclusively by federal law,[237] fully-insured health plans are subject to both federal and state law.[238] Therefore, fully-insured health plans, such as those offered by Health Maintenance Organizations (HMOs), must still cover contraceptives in states that have passed mandatory contraceptive coverage laws since RFRA cannot be applied to state statutes.[239] Twenty-six states (including New York, California, Texas, and Illinois) have passed laws requiring fully-insured health plans to cover contraceptive drugs and devices.[240] Additionally, twelve states have full contraceptive coverage bills pending in their state legislatures.[241] As a result of these state laws, a PDA exemption would only affect employees that work at self-insured Catholic institutions and those fully-insured Catholic institutions that are situated in the minority of states that have not yet passed a state contraceptive

236. *See infra* text accompanying note 253.

237. ERISA preempts all self-insured plans from state law. *See supra* text accompanying notes 4–7.

238. *See generally* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 32 Cal.4th 527 (Cal. 2004) (holding that a fully-insured employee health plan must cover contraceptives in compliance with California's Women's Contraceptive Equity Act).

239. The Supreme Court held in *City of Boerne v. Flores* that it was beyond Congress's Section V enforcement powers under the Fourteenth Amendment to apply RFRA to state statutes. *See supra* text accompanying notes 88–94. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997).

240. The following twenty-four states have enacted laws requiring full contraceptive coverage: Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. The following six states have contraceptive equity bills pending: Kentucky, Michigan, New York, Oregon, Pennsylvania, and Texas. *Cover My Pills*, *supra* note 3 (follow "State Law" hyperlink).

241. The following six states have new contraceptive equity bills pending in 2007: Kentucky, Michigan, Oregon, Pennsylvania, and Texas. *Id.*

coverage mandate.[242] This constitutes a small number of institutions in comparison to the vast number of organizations that must still comply with the requirement. Catholic institutions should, therefore, be exempted from the mandate.

IV. IMPACT: EXEMPTING CATHOLIC INSTITUTIONS FROM THE PDA'S CONTRACEPTIVE COVERAGE MANDATE BEST SATISFIES PUBLIC POLICY

This Article has set forth the argument that Catholic Institutions may successfully raise a RFRA claim and be exempt from any PDA contraceptive coverage requirement.[243] While it seems most apparent that such an exemption will significantly advance the citizenry's religious autonomy rights, there are other public policy reasons to grant such an exemption. This section purports to show how exempting Catholic institutions from the PDA prevents what would otherwise be religious persecution without significantly hindering the State's interests in reducing gender discrimination.

A. Religious Institutions Would Likely Discontinue or Significantly Restrict Their Prescription Health Care Plans If They Are Not Exempted from the PDA

Catholic employers cannot cover their employees' prescription contraceptives without committing what they feel is a fundamental sin against the tenets of their religious faith.[244] Therefore, Catholic employers likely cannot provide prescription birth control to their employers in compliance with the PDA and remain true to their religious convictions and affiliation. To comply with the mandates of their Catholic faith, religious institutions may be forced to discontinue, or significantly restrict, the prescription health care plans available to employees if unable to obtain an exemption.

The court in *Erickson v. Bartell Drug Co.*[245] did not directly mandate all employers to cover their employees' prescription

242. For more information concerning which states have passed state contraceptive mandates see *infra* text accompanying notes 249–50. *See also Cover My Pills*, *supra* note 3 (follow "State Law" hyperlink). Moreover, the Catholic Church is the only major religion that has labeled contraceptive use as "intrinsically evil." *See infra* text accompanying note 253. Therefore, only those institutions who are associated with the Catholic Church can qualify for an exemption, because a payment for contraceptives would only conflict with its belief structure.

243. *See supra* text accompanying notes 216–240.

244. *See supra* text accompanying note 12.

245. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

contraceptives.[246] Rather, the *Bartell* court stated that an employer cannot selectively exclude women-only benefits—such as prescription birth control—from its prescription drug plan so that the resulting plan unjustly benefits one gender more than the other.[247] In other words, an employer is only required to cover prescription birth control if its current plan covers preventative treatment for medical conditions that pose an equal or lesser health threat than pregnancy.[248] Therefore, a religious employer who is unable to provide prescription contraceptive coverage may avoid doing so by refusing to cover treatment for any medical condition that possesses a lesser health risk than pregnancy.[249] Since no legal authority has defined which medical conditions are less threatening than pregnancy, such religious institutions will most likely discontinue their prescription drug plans to assure compliance with the PDA and avoid accusations of discrimination because of sex.

Although this would likely be the only option available to Catholic employers, it certainly would not be appealing to the parties on either side of this debate. It is the Catholic Church's position that employers are morally obligated to consider the well-being of their employees by paying them fair wages and benefits.[250] However, when forced to decide between satisfying its obligation to offer fair benefits, and satisfying its obligation to not support contraceptive use, many religious employers will choose the latter since prescription birth control has been labeled by the Church as an intrinsic evil.[251] Discontinuing prescription drug plans would put Catholic employers at

246. *See supra* text accompanying notes 42–47.

247. *See Erickson*, 141 F. Supp. 2d. at 1272 ("[t]he exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.").

248. *See In re* Union Pacific R.R. Employment Practices Litig., 378 F. Supp. 2d 1139, 1149 (D. Neb. 2005) ("[Defendant's] policy of excluding prescription contraceptives . . . violates . . . the PDA, because it treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees' health than is pregnancy.").

249. The courts have held that those plans which exclude contraceptives—but cover other medicines designed to prevent medical conditions which "pose an equal or lesser threat to employees' health than does pregnancy"—are not in compliance with the PDA. *See In re* Union Pacific R.R. Empl. Practices Litig., 378 F. Supp. 2d 1139, 1148–49 (D. Neb. 2005), *rev'd*, 479 F.3d 936 (8th Cir. 2007). However, the courts have not defined what medical conditions pose an equal or lesser threat to pregnancy. *See, e.g.*, *In re* Union Pacific R.R. Empl. Practices Litig., 378 F. Supp. 2d 1139, 1146 (D. Neb. 2005). Consequently, imposing the PDA requirement on Catholic institutes may create a freezing effect on the ability of Catholic institutions to offer employee health plans because they have been given no guidance on how to draft plans which exclude contraceptives but are gender equal in compliance with Title VII.

250. Stabile, *supra* note 2, at 773.

251. *See supra* text accompanying note 12.

a significant competitive disadvantage: health benefits are an important tool Catholic institutions use to attract competent employees due to the fact that they are generally unable to offer high salaries.[252]

Needless to say, an employer's discontinuance of prescription health care would have a negative effect on all employees. It is axiomatic that most female employees would prefer to receive a generally comprehensive prescription drug plan that selectively excludes prescription contraceptives, rather than no coverage at all. This illustrates how the PDA burdens those it purports to help when enforced against Catholic employers.

The discontinuance or significant restriction of prescription health care plans at Catholic institutions is not socially desirable. However, given the Catholic Church's stance against contraceptive use, this is the only option for Catholic employers if they are denied an exemption from the PDA. Therefore, such an exemption would benefit both Catholic employers and their employees.

B. The Interest of Advancing Equal Treatment of Female Employees Is Not Significantly Advanced by Denying Religious Employers an Exemption from the PDA

The purpose behind the PDA's enactment—namely, reducing gender discrimination in the workplace—is certainly a compelling interest.[253] However, exempting Catholic employers from the PDA contraceptive coverage requirement would not thwart the fulfillment of this interest to the extent that it justifies infringing these employers' free exercise rights.

Professor Sylvia Law, who wrote the leading article on the PDA's contraceptive coverage mandate, stated three reasons why excluding contraceptives from insurance coverage disproportionately affects women:[254] first, the exclusion of contraceptives from health insurance plans increases the risk of unplanned pregnancies;[255] second, women "bear all of the physical risks and hassles" of obtaining contraception because all "medically prescribed reversible methods of contraception must be obtained and used by women;"[256] and third, women pay a disproportionate share of out-of-pocket financial costs of health care services "because employment-based insurance plans that

252. *See* Stabile *supra* note 2, at 774.
253. 42 U.S.C. § 2000e-2(a) (2005).
254. Law, *supra* note 8, at 364–74.
255. *Id.* at 364.
256. *Id.* at 374.

ordinarily cover prescription drugs single out and exclude coverage for contraception."[257] However, none of these arguments suggest that any disproportionate impact on women would be solved by imposing this contraceptive requirement on religious institutions.

With regard to Law's first argument, no evidence is presented suggesting that most unplanned pregnancies are a direct result of an employer's failure to cover prescription contraceptives.[258] This lack of evidence is especially pertinent to the issue of whether a Catholic employer exemption from the PDA would inhibit the State's interest in reducing gender discrimination. It is possible that some female employees at Catholic institutions are of the same faith as their employer and, therefore, might not choose use prescription contraceptives even if their employer covered them. As a result, it is difficult to argue that requiring Catholic institutions to cover contraceptives would significantly decrease the rate of unintended pregnancies.

With regard to Law's second argument, women will bear the "risks and hassles" involved with obtaining contraceptives regardless of whether their employers cover it.[259] Furthermore, since many Catholic employers will choose to discontinue their self-funded insurance plans as a result of the PDA contraceptive coverage mandate, [260] the risks and hassles involved with all pregnancy-related medical conditions will be greatly enhanced if an exemption is denied.

With regard to Law's third argument, requiring religious employers to cover their employees' prescription contraceptives would not help decrease the current gender disparity in out-of-pocket medical costs for two reasons. First, female employees can reduce the risk of pregnancy and lower their out-of-pocket medical expenses by seeking contraceptive coverage through their employer's HMO insurance plans or by using alternative methods of birth control.[261] Condoms, in particular, can significantly reduce out-of-pocket medical expenses since they are effective in preventing both unwanted pregnancy and

257. *Id.*

258. Stabile, *supra* note 2, at 768 n.111. Stabile argued that

> it is not enough to suggest that many unintended pregnancies occur among women who do not use birth control. One must also demonstrate that unintended pregnancies occur among employed women . . . who did not use prescription contraceptives but who would have used them if their employer's plan covered them.

Id. (citations omitted).

259. *See id.* at 768.

260. *See supra* text accompanying note 243.

261. *See supra* text accompanying notes 239–240.

the transfer of sexually transmitted diseases. Second, since most employees at Catholic institutions are also Catholic, it is reasonable to assume that most female employees at these institutions are not currently purchasing contraceptive drugs and devices. Therefore, requiring religious employers to cover prescription birth control will not significantly decrease the disparity in out-of-pocket medical expenses.

While an exemption for Catholic employers would not significantly inhibit the State's interests in enacting the PDA, the denial of such an exemption would be devastating not only to the Catholic Church, but to religious autonomy in general. In this way, the *O Centro* decision and RFRA significantly advance religious autonomy, without significantly burdening the PDA's objectives.

V. CONCLUSION

The universal application of the PDA's contraceptive coverage mandate should alarm every American regardless of his or her opinion concerning the Catholic Church's stance on prescription birth control. A federal law requiring Catholic institutions to pay for prescription contraceptives would be one of the most significant burdens imposed by the United States' government on religious autonomy in many generations. Such application of the law should concern members of all faiths. While few interests are more compelling than gender equality, the State should not lose site of the freedoms bestowed in the First Amendment to achieve this interest.