

# RELIGION AND THE PPACA: AN ANALYSIS OF NON-SECULAR LINE DRAWING WITHIN THE HEALTH INSURANCE MANDATE

*Jeffery R. Mullen*<sup>1</sup>

*Human law must rest its authority ultimately upon the authority of that law which is divine. Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other.*<sup>2</sup>

- James Wilson, Justice of the Supreme Court of the United States (1804)

## I. INTRODUCTION

Over the summer the Supreme Court has decided the constitutionality of the sweeping health care reform law championed by President Barack Obama, formally entitled the Patient Protection and Affordable Care Act (the “PPACA” or the “Act”). The linchpin of this health care overhaul is its so-called “individual mandate” provision, which requires individuals to have minimum essential health care coverage or risk tax penalties.<sup>3</sup> While the health insurance mandate does not go into effect until 2014, it has quickly become one of the most divisive issues in the United States today.<sup>4</sup> In fact, only within minutes after the bill became law, the legal battle over the Act began when a coalition of thirteen states filed suit in

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1. Managing Editor, Rutgers Journal of Law and Religion; J.D. Candidate May 2013, Rutgers School of Law – Camden; B.S. Elizabethtown College, 2009. I would like to thank Dr. Donald Kraybill for his assistance as I went through the process of writing this article.

2. James Wilson, *Of the General Principles of Law and Obligation*, in THE WORKS OF THE HONORABLE JAMES WILSON, 104-06 (Bird Wilson eds., 1804).

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242 (2010) (codified as amended at 26 U.S.C. § 5000A) [hereinafter PPACA], amended by § 1002 of the Health Care and Education Reconciliation Act of 2010, P.L. 111-152 (2010).

4. *Kaiser Health Tracking Poll—Oct. 2011*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://www.kff.org/kaiserpolls/8251.cfm> (last visited Oct. 26, 2012). Polls released by the nonpartisan Kaiser Family Foundation indicate that public opinion was almost evenly divided on the law for more than a year after its passage. *Id.*

federal court to challenge the Act's constitutionality.<sup>5</sup> Legal momentum continued to swiftly build, resulting in conflicting rulings by the appellate courts.<sup>6</sup> Now, just a year after its enactment, and in a much-anticipated decision, the high court has ruled that the individual mandate is constitutional.<sup>7</sup>

While the Commerce Clause has been the star of the show thus far in analyzing the validity of the Act, both in the court of public opinion and the courts of law, another aspect of the individual mandate awaits in the shadows for its day in court—the exception to the rule. Here, the same general provision that requires health insurance at the peril of fiscal penalty also creates one exception to the mandate: people opposed to buying health care coverage for religious reasons.<sup>8</sup> Under the heading “Religious Exemptions,” the Act designates two categories of individuals as exempt from the mandate: (1) those with a “religious conscience” objection to the acceptance of benefits or insurance; and (2) those who are members of a “health care sharing ministry.”<sup>9</sup>

By definition, the first of the two exemptions, the “religious conscience exemption,” applies to anyone who is “a member of a recognized religious sect or division thereof described in [section] 1402(g)(1) [of the Internal Revenue Code]” and meets the additional requirements laid out in that section.<sup>10</sup> The referenced additional requirements further bound the exemption to religions that “make provision[s] for their dependent members which [are] reasonable in view of their general level of living,” and religions that have “been in existence at all times since December 31, 1950.”<sup>11</sup>

The language surrounding the religious conscience exemption is clear, as it is patterned on, and substantially identical to, an

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5. See, e.g., Complaint, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91), 2010 WL 1038209.

6. Compare Thomas More Law Ctr. v. Obama, 651 F.3d 529, 544 (6th Cir. 2011) (holding the individual mandate constitutional under the Commerce Clause), with Florida *ex rel.* Att'y Gen v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1311, 1320 (11th Cir. 2011) (holding that the individual mandate exceeds Congress's Commerce Clause powers).

7. Mike Sacks, *Supreme Court Health Care Decision: Individual Mandate Survives*, HUFFINGTON POST (July 5, 2012), [http://www.huffingtonpost.com/2012/06/28/supreme-court-health-care-decision\\_n\\_1585131.html](http://www.huffingtonpost.com/2012/06/28/supreme-court-health-care-decision_n_1585131.html).

8. 26 U.S.C. §5000A(d)(2).

9. *Id.*

10. 26 U.S.C. § 5000A(d)(2)(A).

11. 26 U.S.C. §§ 1402(g)(1)(D), (E) (2006).

existing religious conscience exemption to laws requiring workers to pay taxes for Social Security.<sup>12</sup> However, what is not so clear is whether this exemption, which was originally designed to apply only to the Old Order Amish, might be used by members of other religious groups, or even to those just alleging so, in order to evade the individual mandate.<sup>13</sup>

In addition, the PPACA provides a second religious exemption for those who do not belong to a religious sect conscientiously opposed to acceptance of the benefits of any private or public insurance, but nevertheless are members of a “health care sharing ministry.”<sup>14</sup> A health care sharing ministry is defined as an organization described in section 501(c) of the Internal Revenue Code, including corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, purpose or testing for public safety.<sup>15</sup> This specific language is accompanied by the more general requirements that members of the ministry share a common set of ethical or religious beliefs and share medical expenses, and retain membership even after they develop a medical condition.<sup>16</sup> Furthermore, the health care sharing ministry must have been in existence (and sharing medical expenses) since December 31, 1999, and must conduct an annual audit performed by an independent certified public accountant, available to the public upon request.<sup>17</sup>

The language surrounding the health care sharing ministries exemption is less clear and thus, how it will add or detract from the non-secular line drawing of the religious conscience exemption cannot be known with any degree of certainty until the relevant provisions of the PPACA become effective in 2014. This is in large part contributed to the juxtaposition of both specific and broad re-

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12. See Social Security Act, 42 U.S.C. § 402(v)(1) (1965).

13. Maura Reynolds, *Health bills allow some a religious exemption*, CQ POLITICS (Aug. 3, 2009), [http://www.msnbc.msn.com/id/32267628/ns/politics-cq\\_politics/t/health-bills-allow-some-religious-exemption/#.TsS\\_-WDu\\_Zo](http://www.msnbc.msn.com/id/32267628/ns/politics-cq_politics/t/health-bills-allow-some-religious-exemption/#.TsS_-WDu_Zo). Congress included the tax exemption to the Social Security Act, which also created Medicare, in response to Amish resistance when the Amish argued that Social Security was a form of public insurance, and their religious beliefs prevent them from taking part in public or commercial insurance. *Id.* Instead, the Amish effectively self-insure within their own community. When a church member needs medical care, for instance, the family pays out of pocket and the church takes up a collection or reimburses them from a common fund. *Id.*

14. 26 U.S.C. § 5000A(d)(2)(B).

15. 26 U.S.C. § 501(c)(3) (2010).

16. 26 U.S.C. § 5000A(d)(2)(B).

17. *Id.*

quirements within the conditions to qualification.<sup>18</sup> While on the one hand the conditions seem to effectively preclude a religious sect from creating a program to circumvent the PPACA, on the other, it grants any religious sect that has shared medical costs between its members at all times since December 1999, no matter how or to what extent it shared those costs, immunity from the Act's provisions.<sup>19</sup>

With the religious exemptions in place, somewhere in the middle a line must be drawn because there is no exclusive list of qualifying religions. Though the limits of the exemptions' coverage cannot be known with any certainty until effective, religious groups and individuals with general ideological objections to the Act are already questioning as to whom the religious exemptions will apply.<sup>20</sup> Some religious individuals have already brought a constitutional challenge to the PPACA's religious exemption clauses.<sup>21</sup> Once again, law and religion have run into each other and reconciliation is in order.

This note will first detail the PPACA and its purpose, including an examination of the history and logic behind the religious conscience exemption and the health care sharing ministries exemption. Next, the note will analyze the possible effect of the two religious exemptions on individual religious sects, including Amish, Christian Scientists and Muslims. Third, the note will extrapolate where the non-secular line can be drawn in order to effectuate the purpose of the PPACA while protecting fundamental religious liberties.<sup>22</sup> Finally, the note will assess the merits of the religious exemptions in answering the rhetorical question of whether the no-

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18. Compare 26 U.S.C. § 5000A(d)(2)(B), with 26 U.S.C. § 501(c)(3).

19. *Id.*

20. See, e.g., Drew Zahn, *Doctor's Orders: Does Your Faith Free You from Forced Obamacare?*, WORLDNETDAILY (Apr. 6, 2010), <http://www.wnd.com?pageID=137221>. While some organizations are posing legitimate questions about where the non-secular line drawing will take place, many others are searching for loopholes in the individual mandate by virtue of the Act's "religious exemptions." *Id.*

21. For a detailed analysis of early constitutional challenges to the PPACA's religious exemption clauses, see Jessica Donoghue, *PeopleV.US v. Obama: An analysis of Religious Challenges to the Patient Protection and Affordable Care Act*, 12 RUTGERS J. LAW & RELIG. 202 (2010).

22. U.S. CONST. amend. I. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion...; and the Free Exercise Clause states that "Congress shall make no law....prohibiting the free exercise [of religion]...." These two clauses are collectively known as the "Religion clauses" of the Constitution and are considered fundamental religious liberties.

tions of affordable health care coverage for all Americans and religious freedom are mutually exclusive.<sup>23</sup>

## II. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

On March 23, 2010, with the stroke of twenty-two pens, President Barack Obama signed a bill of historic proportions into law—The Patient Protection and Affordable Care Act (the “PPACA”).<sup>24</sup> This Act and the Health Care and Education Reconciliation Act comprised the health care reform of 2010, bringing to an end over a century long elusive stride to expand insurance coverage in the United States.<sup>25</sup> The resolution was not without struggle, as the legislative fight was bitter and divisive, illuminating a partisan divide on Capitol Hill as effectively as any issue in recent history.<sup>26</sup> To fully appreciate the passage of this legislation, one would need to go back nearly a century, long before President Obama took office, and review the progression of the health care system in the United States we know today. Nevertheless, President Obama made good on his pledge to bring about a “universal” health care

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23. While the PPACA has conflicting political undertones (championed by the Obama Administration and endorsed by those of the left, while right-winged conservatives push for a lesser role of government in health care), I do not endorse any political views. As I will demonstrate in this note, my ideas and suppositions stand on their own merits and on historical application of similar exemptions. For a more detailed look at both sides of the debate, see Joe Messerli, *Universal Health Care Pros & Cons, Arguments For and Against, Advantages & Disadvantages*, BALANCEDPOLITICS.ORG, [http://www.balancedpolitics.org/universal\\_health\\_care.htm](http://www.balancedpolitics.org/universal_health_care.htm) (last visited Oct. 26, 2012).

24. See David Jackson, *Obama signs health care bill generations have 'hungered to see'*, USA TODAY (Mar. 23, 2010), <http://content.usatoday.com/communities/theoval/post/2010/03/obama-signs-health-care-bill/1>.

25. Karen S. Palmer, Speech at the Physicians for a National Health Program Meeting (Spring 1999) (transcript available at [http://www.pnhp.org/facts/a\\_brief\\_history\\_universal\\_health\\_care\\_efforts\\_in\\_the\\_us.php?page=all](http://www.pnhp.org/facts/a_brief_history_universal_health_care_efforts_in_the_us.php?page=all)). For the purposes of this note, I make no distinction between the PPACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), which modified the PPACA when it was signed into law on March 30, 2010.

26. See *History of the Passage of the March 2010 Health Care Reform Laws*, PROCON.ORG (Feb. 3, 2011), <http://healthcarereform.procon.org/view.resource.php?resourceID=003712>. The PPACA passed the Senate on December 24, 2009 by a vote of 60-39, with all Democrats and Independents voting for, and all Republicans voting against. *Id.* It passed the House of Representatives on March 21, 2010 by a vote of 219-212, with all 178 Republicans and 34 Democrats voting against the bill. *Id.*

bill, a central tenant to his 2008 campaign and priority early in his first term.<sup>27</sup>

Specifically, the law implements a comprehensive set of health insurance reforms that will roll out in stages over the next four years and beyond, with most changes taking place by 2014.<sup>28</sup> Despite the Act's nearly one thousand pages, containing a breadth of provisions, judicial review, scholarship and media coverage have focused primarily on the "minimum essential coverage" provision, known popularly as the "individual mandate."<sup>29</sup> The so-called individual mandate is the keystone of the PPACA. It requires applicable individuals to maintain "minimum essential coverage" beginning on January 1, 2014 or face a tax penalty.<sup>30</sup> "Minimum essential coverage" for the purposes of the Act means any of the following: government sponsored programs such as Medicare or Medicaid, employer-sponsored plans, plans in the individual market, and grandfathered health plans.<sup>31</sup> Those without the minimum coverage pay a phased tax penalty, known as the "annual shared responsibility payment."<sup>32</sup> The annual shared responsibility payment is calculated by the greatest of \$695.00 per year up to a maximum of three times that amount, \$2,085.00, per family or 2.5% of household income.<sup>33</sup> This phased scale will gradually increase from

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27. Barack Obama, *Perspective: Health Care Reform and the Presidential Candidates*, 259 *NEW ENG. J. MED.* 1537, 1538 (2008), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp0807677>. Obama wrote, "We need health care reform now. All Americans should have high-quality, affordable medical care that improves health and reduces the burdens on providers and families." *Id.*

28. *Provisions of the Affordable Care Act, By Year*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/timeline/full.html> (last visited Oct. 26, 2012).

29. See Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, *N. ENG. J. MED.*, Jan 13, 2010, available at <http://healthpolicyandreform.nejm.org/?p=2764&query=home> (describing "individual mandate" as a loaded term because it suggests that everyone must obtain health insurance under the PPACA).

30. 26 U.S.C. § 5000A(b).

31. See *id.* § 5000(A)(f).

32. *Id.* § 5000A(b).

33. *Summary of New Health Reform Law*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://www.kff.org/healthreform/upload/8061.pdf> (last visited Oct. 26, 2012). The penalty will be phased according to the following schedule: \$95 in 2014, \$325 in 2015, and \$695 in 2016 for the flat fee; or, 1.0% of taxable income in 2014, 2.0% of taxable income in 2015, and 2.5% of taxable income in 2016. *Id.* After 2016, the penalty will be increased annually by the cost-of-living adjustment. *Id.*

2014-2016, at which time the penalty will increase annually, factoring in the cost-of-living adjustment.<sup>34</sup>

At the core of the complicated individual mandate is a simple concept: reform expands insurance coverage in America by requiring that people obtain it.<sup>35</sup> Fundamental economics explain why it has historically been more expensive for individuals and families to obtain health insurance coverage independently than what, for example, a public corporation pays for the policies of its employees as a fringe benefit. The expense is directly correlated to the size of a risk pool—a larger risk pool for the insurance company drives down the cost of premiums. In addition to the economic incentive to raise premiums for smaller risk pools, American insurance companies are incentivized to exclude those with pre-existing conditions.<sup>36</sup>

By requiring healthy people who might not need much health care to buy into the program, insurance companies can balance out the losses they would incur by ending the practice of denying coverage to people with pre-existing conditions, something the Act outlaws.<sup>37</sup> In other words, in theory, by requiring everyone to buy into the health care system, costs as a whole will be subsidized, hence affordable health care for all Americans. Therefore, because the utility of the whole system is premised on the notion that everyone buys into the risk pool, it is of little surprise that the PPACA

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34. *Id.*

35. Tom Curry, *Everyone into the risk pool—or else*, MSNBC (Aug. 11, 2009), [http://www.msnbc.msn.com/id/31782553/ns/health-health\\_care/t/everyone-risk-pool-or-else/#.TsYVWGDu\\_Zo](http://www.msnbc.msn.com/id/31782553/ns/health-health_care/t/everyone-risk-pool-or-else/#.TsYVWGDu_Zo). According to health care economist Linda Blumberg, “One of the goals of health reform is to create broader-based risk pools....[t]he more healthy people that we can bring in, the lower will be the average cost in that risk pool.” *Id.*

36. *Pre-existing Conditions*, TLC, <http://tlc.howstuffworks.com/family/pre-existing-condition.htm> (last visited Oct. 26, 2012). A pre-existing condition is defined as a “health condition or illness that [one] has had before [their] first day of coverage on a new plan.” *Id.* Because a person with a pre-existing condition can cost an insurance company millions, it is in their best interest to exclude those who have them. *See, e.g.*, Barack Obama, Remarks by the President in Town Hall on Health Care (Aug. 14, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-in-town-hall-on-health-care-Belgrade-Montana/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-town-hall-on-health-care-Belgrade-Montana/)) (describing a woman whose insurance was cut and was denied a double mastectomy because she had omitted declaring a pre-existing condition of acne).

37. Peter Grier, *Health care reform bill 101: rules for preexisting conditions*, THE CHRISTIAN SCIENCE MONITOR (Mar. 24, 2010), <http://www.csmonitor.com/USA/Politics/2010/0324/Health-care-reform-bill-101-rules-for-preexisting-conditions>.

provides for few exceptions. Among these exceptions to the individual mandate to obtain health insurance are individuals with financial difficulties and those who belong to certain religious institutions. The latter will be thoroughly detailed and analyzed throughout the remainder of this note.

### A. *Religious Exemptions*

#### Religious Conscience Exemption

The first religious exemption under PPACA is entitled the “Religious Conscience Exemption.”<sup>38</sup> This exemption allows individuals to avoid the individual mandate and annual shared responsibility payment by demonstrating that they are “a member of a recognized religious sect or division thereof described in [section] 1402(g)(1) [of the Internal Revenue Code (“IRC”)].”<sup>39</sup> The relevant section of the IRC further explains that the member must be an:

[A]dherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).<sup>40</sup>

The IRC further requires that such an exemption may be granted only if the accompanied by:

- (A) such evidence of such individual’s membership in, and adherence to the tenets or teachings of, the sect or division thereof as the Secretary may require for purposes of determining such individual’s compliance with the preceding sentence, and
- (B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person.<sup>41</sup>

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38. 26 U.S.C. § 5000A(d)(2)(A) (2010).

39. *Id.*

40. 26 U.S.C. § 1402(g)(1) (1986).

41. *Id.*



Lastly, the IRC only permits the exemption if the Commissioner of Social Security finds:

- (C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,
- (D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and
- (E) such sect or division thereof has been in existence at all times since December 31, 1950.<sup>42</sup>

The religious conscience exemption does not apply to those individuals who personally object to these requirements for religious reasons, but only those individuals who are part of a sect that as a whole is in opposition to the requirements.<sup>43</sup> Notably, there is some precedent for this exemption because the language, codified in section 5000A of the IRC, is substantially verbatim to the existing religious exemption clause in the Social Security Act, which covers taxes generated for use under Medicare and Medicaid.<sup>44</sup> The history leading up to the addition of this exemption to the Social Security Act may shed some light onto how the exemption will unfold in health care reform.<sup>45</sup>

Here, requirements (A) and (C) essentially necessitate that the individual is a member and follows the teachings of a religious denomination that conscientiously opposes insurance. Requirement (B) was omitted from the PPACA exemption simply by virtue of the fact that the requirement is limited to the scope of the Social Security program. The more specific requirements specified in (D) and (E) are likely implemented to limit the potential beneficiaries

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42. *Id.*

43. *Health care Bill Exemptions*, NEWS ON HEALTH CARE (Sept. 20, 2010), <http://www.newsonhealthcare.com/healthcare-bill-exemption/>.

44. Medicaid was enacted in 1965 under Title XIX of the Social Security Act as a federal entitlement program that provides health and long-term care coverage to certain categories of low income Americans. *Health Reform Glossary*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://healthreform.kff.org/health-reform-glossary.aspx#m> (last visited Oct. 26, 2012). Similarly, Medicare was enacted in 1965 under Title XVII of the Social Security Act as a federal entitlement program that provides health insurance coverage to forty-five million people, including those over age sixty-five and younger people with permanent disabilities. *Id.*

45. For a more detailed discussion on the history of the religious conscience exemption as applied to Social Security reform, see discussion *infra* section II (B).

of the exemptions in the Social Security context to the Old Order Amish and similar Anabaptist groups.<sup>46</sup>

### Health Care Sharing Ministry Exemption

For those who do not qualify for the religious conscience exemption, but nevertheless oppose the individual mandate on religious grounds, there is a second religious exemption under the PPACA entitled the “Health Care Sharing Ministry Exemption.”<sup>47</sup> This exemption allows individuals to avoid the individual mandate and annual shared responsibility payment by verifying membership in a qualifying health care sharing ministry. By definition, a qualifying health care sharing ministry includes the following specific requirements:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious....[and certain other] purposes....no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...and which does not participate in, or intervene in....any political campaign....<sup>48</sup>

In addition, the health care sharing ministry exemption includes the following, more generalized, conditions to qualification:

(II) [Has members] which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs....;

(III) [ensures that members can] retain membership even after developing a medical condition;

(IV) has been in existence [or a predecessor of which has been in existence] at all times since December 31, 1999....;

(V)....conducts an annual audit which is preformed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is available to the public upon request.<sup>49</sup>

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46. See DONALD B. KRAYBILL, *THE AMISH AND THE STATE* 130 (Johns Hopkins Univ. Press 2d ed. 2003). The religious exemption to the Social Security Act was established after a decade long battle between Congress and the Amish over payment of Social Security taxes. *Id.*

47. 26 U.S.C. § 5000A(d)(2)(B).

48. *Id.*

49. *Id.*

The statutory language found here suggests a potentially broader based exemption than that of the religious conscience exemption. Going forward, section (IV) expressly prohibits any religious group from implementing a new program sharing medical expenses in response to the PPACA. On the other hand, there is little by way of definitive retroactive language. For example, this exemption does not specify how or to what extent the costs need be shared in order to qualify. In addition, the generalized language found in section 501(c)(3) offers little specificity as to what exactly a health care sharing ministry is. Therefore, how this exemption will be practically extrapolated has the potential to be a far less rigid consideration as the accompanying religious conscience objection.

### *B. Historical Jurisprudence on Non-Secular Line Drawing*

While the sweeping health care reform is relatively new to our country, religious exemptions are entrenched in our contemporary jurisprudence. Here, it is well settled that the First Amendment of the Bill of Rights protects fundamental religious liberties. Among these are the Establishment Clause, stating, “Congress shall make no law respecting an establishment of religion...”, and the Free Exercise Clause, stating, “Congress shall make no law....prohibiting the free exercise [of religion]....”<sup>50</sup> This provision was later expanded to state and local governments through the incorporation of the Fourteenth Amendment.<sup>51</sup>

Although the Supreme Court had historically applied a heightened standard of review to government actions that interfered with one’s free exercise of religion,<sup>52</sup> the Court reinterpreted their “strict scrutiny” standard as applicable to religious challenges in 1990. Since, the Court has held that the Free Exercise Clause never “relieves an individual of the obligation to comply with a valid and neutral law of general applicability.”<sup>53</sup> Under this view, laws that do not specifically target or single out religion are not subject to heightened judicial review.

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50. U.S. CONST. amend. I.

51. See generally, *Religious Liberty: Establishment Clause*, BILL OF RIGHTS INSTITUTE (Jan. 10, 2011), <http://www.billofrightsinstitute.org/page.aspx?pid=471>.

52. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

53. *Employment Div., Oregon Dep’t of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

Nevertheless, Congress responded by enacting the Religious Freedom Restoration Act of 1993 (the "RFRA"), which statutorily reinstated the standard of protection of heightened scrutiny for government actions interfering with a person's free exercise of religion.<sup>54</sup> The RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except where the government action "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."<sup>55</sup> While the RFRA was originally enacted to apply to federal, state, and local government, its application to state and local government was held to be unconstitutional under principles of Federalism.<sup>56</sup>

Freedom of Religion in the United States is closely associated with the separation of church and state, a concept advocated by Thomas Jefferson in the eighteenth century.<sup>57</sup> Specifically, Jefferson wrote that the First Amendment erected a "wall of separation between church and state," likely borrowing the language from Roger Williams, founder of the First Baptist Church in America and the Colony of Rhode Island, who used the phrase in his 1644 book, *The Bloody Tenent of Persecution*.<sup>58</sup> Similarly, James Madison, often regarded as the father of the Bill of Rights, frequently wrote about the separation of church and state, describing it as a "perfect separation,"<sup>59</sup> a "line of separation,"<sup>60</sup> and a "[s]trongly

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54. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb1-4 (1993).

55. *Id.* See also *O'Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), *aff'd*, 389 F.3d 973 (10th Cir. 2004) (en banc) (holding that in challenging an act under the RFRA, courts are to apply "strict scrutiny review" in asking whether the government action is in furtherance of a "compelling" governmental interest).

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

57. Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), in LIBRARY OF CONGRESS, Vol. 57, No. 6 (June 1998), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

58. See NOAH FELDMAN, *DIVIDED BY GOD* 24 (Farrar, Straus and Giroux, eds., 2006).

59. Letter from James Madison to Edward Livingston (July 10, 1822), in *THE COMPLETE MADISON: HIS BASIC WRITINGS* (Harper & Bros. eds., 1953).

60. Letter from James Madison to Rev. Jasper Adams (Spring 1832), in *JAMES MADISON ON RELIGIOUS LIBERTY* 237-38 (Prometheus Books eds., 1989).

guarded.... separation between [r]eligion and [g]overnment....,"<sup>61</sup> which equated to "total separation."<sup>62</sup>

Despite the framers theoretical intentions to separate church and state, or alternatively, religions and the laws that affect them, the modern world has challenged the practicality of such a metaphorical barrier on numerous occasions.<sup>63</sup> Therein the following question arises: does the free exercise of religion stretch to the cultural margins and afford liberty to those who refuse to join the post-modern world? In answering this question, it is evident that the Social Security program in the United States is, in many ways, similar to the PPACA and current health care reform in Massachusetts, as these systems provide a lens through which we can view how social reform in a democratic society presses the limits and definitions of religious pluralism.

#### Social Security and the Amish

On August 14, 1935, President Franklin Theodore Roosevelt signed the Social Security Act into law as part of the New Deal.<sup>64</sup> At that time, the United States was just beginning to recover from the Great Depression.<sup>65</sup> Millions of citizens found themselves out of

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61. JAMES MADISON, DETACHED MEMORANDUM (circa 1823), *available at* <http://www.loc.gov/exhibits/madison/objects.html> (last visited Oct. 26, 2012).

62. Letter from James Madison to Robert Walsh (Mar. 2, 1819), *available at* <http://www.constitution.org/jm/jm.htm> (last visited Oct. 26, 2012).

63. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962) (holding government-imposed nondenominational prayer in public school to be unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding parents may remove children from public school for religious reasons); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding teaching creationism in public schools unconstitutional); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that the government must show a compelling interest to draw a statute targeting a religion's ritual (as opposed to a statute that happens to burden the ritual, but is not directed at it). Failing to show such an interest, the Court determined that the city's prohibition of animal sacrifice is a violation of the Constitution); *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (holding a university cannot fund secular groups from student dues, then exclude religious groups that also qualify under the same funding scheme).

64. *Social Security Timeline*, THE ANNENBERG CLASSROOM (Jan. 10, 2012), <http://www.annenbergclassroom.org/Files/Documents/Timelines/SocialSecurity.pdf>. The "New Deal" encompassed a series of economic programs implemented in the United States between 1933 and 1936 in response to the Great Depression, and focused on what historians call the "3 R's": Relief, Recovery, and Reform. *Id.*

65. *See, e.g.*, Gene Smiley, *Great Depression*, THE CONISE ENCYCLOPEDIA OF ECONOMICS (2008), *available at*

work and there was an ongoing concern for the elderly and retired Americans who had lost everything.<sup>66</sup> The Social Security program was intended to be, and essentially still is today, a social insurance program run by the government.<sup>67</sup> Fundamentally, workers make contributions to a trust fund from paychecks to pay for retirement and other benefits that they will need later on.<sup>68</sup> The Social Security tax does not go into a trust fund per se, but rather operates on a pay-as-you-go basis.<sup>69</sup> Tax funds paid by today's workers are used to finance the benefits afforded to today's collecting retirees.<sup>70</sup> This is an important distinction because voluntary participation would be easy to manage if Social Security operated by saving and investing each taxpayer's payments for her own future benefits.<sup>71</sup> The system simply would not accumulate the contributions of those who opted out of the program and would save the contributions of those who remained in the program, in order to finance their benefits. However, this is not the case. Rather, the grant of widespread exemptions would only hurt the retirees collecting today, who previously paid into the system to provide for the retirees when they were working. Perhaps this is one of several reasons why the legislature did not include a religious exemption upon the passage of the Act, much to the discontentment of the Amish.

Based on their religious tenets, the Amish seek to be separate from mainstream society.<sup>72</sup> As will be made clearer, the Amish by

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<http://www.econlib.org/library/Enc/GreatDepression.html> (last visited Jan. 7, 2012).

66. *Id.*

67. *Id.*

68. *Id.* Social Security, as an umbrella term, includes the Old-Age and Survivors Insurance Program, which pays cash benefits to retired workers over age sixty-five (or over sixty-two at a reduced rate), to the worker's survivors over age sixty-five (or over sixty at a reduced rate), and to pre-retirement survivors if the family has minor children. *Id.* It also includes the Disability Insurance program, which pays cash benefits to disabled workers before retirement age, and Medicare, which pays benefits to cover medical related expenses for those who qualify under the program. *Id.* For a detailed description of the qualifications and assessment rates, see *Understanding the Benefits*, U.S. SOCIAL SECURITY ADMINISTRATION (2012), available at <http://www.ssa.gov/pubs/10024.html> (last visited Oct. 26, 2012).

69. See CATO HANDBOOK FOR POLICYMAKERS 188 (7th ed. 2009), available at <http://www.cato.org/pubs/handbook/hb111/hb111-17.pdf> (last visited Oct. 26, 2012).

70. *Id.*

71. See PETER J. FERRARA, *Social Security and Taxes*, in KRAYBILL, *supra* note 46, at 135.

72. *Id.*

and large reject government insurance.<sup>73</sup> Despite this generalization, the Amish also believe that they must obey the law and pay their taxes, except when doing so violates their religious beliefs.<sup>74</sup> The Social Security program was strongly opposed by the Amish community under the latter proposition.<sup>75</sup> The Amish approach to social welfare flows naturally from their beliefs, practices, and social structure, which minimize, if not eliminate, the need for welfare assistance from the state.<sup>76</sup> The Amish way of life is to take care of their own, without assistance from the non-Amish world.<sup>77</sup> Perhaps most importantly, the care of the elderly is viewed as the responsibility of the family and community, not the government. As such, participation in a national social insurance program would violate one of their core religious ideologies.<sup>78</sup> Furthermore, it would be seen as an unnecessary burden. The Amish way of life is well structured to provide for the elderly, who are highly respected and retain social authority and control as patriarchs of large, extended families.<sup>79</sup> For that reason, Amish participation in Social Security would deprive young workers of money each year when they are trying to save to buy a farm, and would provide them income payments in their retirement years that they do not need nor desire.<sup>80</sup>

In 1955 the fears of the Amish community became a reality when the Social Security program was extended to cover self-employed farmers, and the Internal Revenue Service (“IRS”) sought to start collecting the Social Security payroll tax from the Amish.<sup>81</sup> In response to Amish opposition, the IRS began to seize and sell farm animals from the more resistant Amish in order to satisfy outstanding Social Security taxes.<sup>82</sup> This type of govern-

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73. *Id.*

74. See KRAYBILL, *supra* note 46, at 127. For Example, the Amish do pay income tax, sales tax, real estate tax, school tax, and personal property tax without objection, although they opt not receive many of the associated benefits. *Id.*

75. *Id.* at 129.

76. *Id.*

77. *Id.*

78. *Id.*

79. KRAYBILL, *supra* note 46, at 127-28.

80. *Id.* at 129.

81. *Id.* at 130.

82. See Brad Igou, *Valentine Byler vs. the IRS: “Pay Unto Caesar” The Amish & Social Security*, AMISH COUNTRY NEWS, <http://www.amishnews.com/amisharticles/amishss.htm> (last updated Feb. 1, 2010). A portion of Amish farmers did not want to contravene the dictates of their church, but they also did not want trouble with the IRS. *Id.* Therefore, they did

mental action prompted editorial support and public outcry both domestically and abroad.<sup>83</sup> The overwhelming reaction led the IRS commissioner to agree to meet with Amish bishops in September 1961 in an attempt to settle the matter.<sup>84</sup> The Amish leaders objected to any compromise on the grounds that the program amounted to forced participation in a public insurance scheme that violated their religious principles.<sup>85</sup> When no agreement was reached, a suit was filed in April 1962.<sup>86</sup> However, the Amish withdrew in January 1963 after having second thoughts about the lawsuit because going to court also violated their religious beliefs.<sup>87</sup>

Instead, the Amish sought protection from Congress, a task that they had undertaken since the program was first enacted in 1955. The struggle for a legislative exemption to the Social Security program continued for a decade. Despite broad support for the Amish campaign for an exemption, the legislature was faced with what it viewed as a critical policy concern: the grant of an exemption to Social Security for the Amish.<sup>88</sup> A staff memorandum prepared for the Department of Health, Education and Welfare in 1964 most notably argued that if Social Security were voluntary, a

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not pay the tax, but did make the execution of liens possible by maintaining bank accounts, which covered the tax. *Id.* Others were more resistant and closed bank accounts to avoid the tax altogether. *Id.*

83. *Id.* The New York Times Herald Tribune in May 1961, under the headline "Welfarism Gone Mad," stated in part, "What kind of 'welfare' is it that takes a farmer's horses away at spring plowing time in order to dragoon a whole community into a 'benefit' scheme it neither needs nor wants, and which offends its deeply held religious scruples?" *Id.* The IRS also confirmed that the seizure of farm animals was being reported by the press in Communist countries as evidence of the lack of freedom in the hypocritical United States. See Wayne L. Fisher, *The Amish in Court* 136 (1993) (unpublished manuscript), cited in KRAYBILL, *supra* note 46, at 132).

84. See KRAYBILL, *supra* note 46, at 132.

85. *Id.* at 133.

86. See *id.* at 131-32 for a detailed account of the case of Valentine Byler. Byler was an Amish farmer who had no bank account against which to levy for the tax due. *Id.* As such, the IRS seized three of his six horses, while he was plowing his fields, and sold them at public auction for \$460. *Id.* From this, they deducted the \$308.96 in tax due, plus \$113.15 for the expense of the auction sale, including feed for the horses, leaving a surplus of \$37.89, which was returned. *Id.*

87. See, e.g., Paul Charles Cline, *Relations between the 'Plain People' and Government in the United States 150-51* (1968) (unpublished Ph.D. dissertation, American University), cited in KRAYBILL, *supra* note 46, at 133.

88. These concerns are important because, as will be discussed *infra* section IV, history tends to repeat itself. Many of these concerns are relevant to the discussion on policy considerations in drawing religious lines within the PPACA.



problem of adverse selection would develop.<sup>89</sup> The good risks that expected to get less from Social Security would opt out, leaving behind the poor risks that expected to qualify for more.<sup>90</sup> The memorandum argued “this would increase the cost of the program for all who participate.”<sup>91</sup> Consequently, the memorandum concluded, Social Security must be compulsory for all.<sup>92</sup> The memorandum also posited the trepidation of a slippery slope. Here, exempting the Amish would establish a precedent that other religious groups could rely on.<sup>93</sup> Because the merits of the Social Security program rely on today’s workers paying for today’s retirees, if the scope of the exception is expanded, today’s retirees will suffer and the program will fail.

Lastly, the memorandum posed the question as to what would happen to individuals who left the Amish church after they opted out of the program.<sup>94</sup> This fairness argument suggests an administrative difficulty in monitoring those that might opt out when they are required to pay and then opt in closer to the time when they are to collect.

Nevertheless, in 1965, the Amish, backed by overwhelming public support, overcame all of these objections and were granted an exemption.<sup>95</sup> The initial exemption was granted to self-employed workers that were members of a recognized religious sect with established tenets opposed to accepting the benefits of any private or public retirement plan or life, disability, or health insurance.<sup>96</sup> This narrowly crafted language essentially translated into an exemption only for self-employed Amish farmers. While the exemption was a success for the Amish, one battle still remained. Amish not self-employed were beyond the safe harbor of the exemption.<sup>97</sup> When attempts to expand the exemption failed, the is-

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89. See KRAYBILL, *supra* note 46, at 134. See also BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 192 (Harvard University Press ed. 2002); Memorandum from the Department of Health, Education and Welfare to Staff regarding Request of the Old Order Amish for Exemption from the Social Security Self-Employment Tax (1964) [hereinafter *HEW Memo*](on file with the Department of Health, Education and Welfare).

90. See KRAYBILL, *supra* note 46, at 134.

91. *Id.*; *HEW Memo*, *supra* note 89.

92. KRAYBILL, *supra* note 46, at 134.

93. *Id.* at 136.

94. *Id.*

95. *Id.* at 137. The exemption to Social Security was attached to the Medicare bill and was enacted along with that legislation. *Id.*

96. *Id.*

97. KRAYBILL, *supra* note 46, at 138.

sue was taken to the courts in the landmark case of *United States v. Lee*.<sup>98</sup>

Amish man Edwin Lee employed Amish workers on his farm and his lumber business and refused to pay his share of the Social Security tax for these workers.<sup>99</sup> In 1978, he sued for an injunction contending that forcing him to participate in Social Security when his sincere religious beliefs forbade such participation violated his right to the free exercise of religion guaranteed in the First Amendment to the United States Constitution.<sup>100</sup> The case made its way up to the Supreme Court and in a unanimous decision, the Court accepted that both the payment of taxes into Social Security and the receipt of benefits from the program violated the Amish religion.<sup>101</sup> However, the Court held that this infringement on Lee's religious liberty was essential to accommodating an overriding government interest.<sup>102</sup> The Court argued that "mandatory participation is indispensable to the fiscal vitality of the Social Security system," and that a voluntary system would be "difficult, if not impossible, to administer."<sup>103</sup> Consequently, the Court held that although compulsory participation in Social Security interfered with Lee's free exercise rights, the requirement was valid because it was essential to accomplish an overriding governmental interest.<sup>104</sup> Therefore, such exemptions are not constitutionally required. Importantly however, the Court's decision did not restrict in any way Congress's power to grant such exemptions as it chooses.

In 1988, Congress did just that. The 1965 exemption was expanded to include Amish employees working for Amish employers, exempting both from the tax.<sup>105</sup> Over two decades later, the religious exemption to Social Security remains in effect and unchanged. Notably, it has also been carried over as one of two exemptions to the PPACA.

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98. 455 U.S. 252 (1982).

99. *Id.* at 254.

100. *Id.* at 255. For additional discussion of the legal consequences of *Lee* for religious liberty, see P. Brady, *Government's Interest in Taxation Outweighs Amish Free Exercise Rights*: *United States v. Lee*, TAX LAWYER 36, No. 2 450-59 (Winter 1983).

101. *Lee*, 455 U.S. at 257.

102. *Id.* at 258-59.

103. *Id.* at 258.

104. *Id.* at 261.

105. KRAYBILL, *supra* note 46, at 141.

Health care reform in Massachusetts<sup>106</sup>

As the media often recounts the 2012 campaign trail, the idea of a government mandate that individuals carry a minimum level of health insurance is not new; in fact, Massachusetts instituted such health care reform at the state level almost four years prior to the PPACA. On April 12, 2006, Massachusetts Governor, and later Republican presidential nominee, Mitt Romney, enacted legislation that required all adults in the state to purchase health insurance by July 1, 2007, and would impose financial penalties of up to 50% of the cost of a health insurance plan on those who do not via income tax filings.<sup>107</sup> The law established an independent public authority, the Commonwealth Health Insurance Connector Authority, which acts as an insurance broker to offer private insurance plans to residents.<sup>108</sup>

Like the PPACA, the Massachusetts individual mandate provides a religious exemption. However, unlike the PPACA, the Massachusetts religious exemption is not as restricted. To qualify for the religious exemption to the individual coverage requirement, an individual must file documentation with his or her tax return under the appropriate section of “Schedule HC.” The individual must state in the document “that his sincerely held religious beliefs are the basis of his refusal to obtain and maintain credible coverage during the [twelve] months of the taxable year for which the return was filed.”<sup>109</sup> Their signature attests to the truthfulness, under penalty of perjury, of their entire tax filing, including Schedule HC. Notably, less than 1% of Massachusetts’s residents have availed themselves of the exemption.<sup>110</sup>

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106. An Act Providing Access to Affordable, Quality, Accountable Health Care, MASS. GEN. LAWS ch. 58, § 12 (2006).

107. *Massachusetts Health Care Reform Plan: An Update*, THE HENRY J. KAISER FAMILY FOUNDATION (June 2007), <http://www.kff.org/uninsured/upload/7494-02.pdf>.

108. For More information on the Health Connector, see *Health Care Reform: Overview*, HEALTH CONNECTOR, <https://www.mahealthconnector.org/portal/site/connector/menuitem.d7b34e88a23468a2dbef6f47d7468a0c?fiShown=default> (last visited Oct. 26, 2012).

109. Individual Health Coverage, MASS. GEN. LAWS, ch. 111M, § 3 (2006).

110. *Data on the Individual Mandate: Tax Year 2008*, MASS. HEALTH CONNECTOR AND DEPARTMENT OF REVENUE, [https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Health%2520Care%2520Reform/How%2520Insurance%2520Works/Data\\_on\\_individual\\_mandate.pdf](https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Health%2520Care%2520Reform/How%2520Insurance%2520Works/Data_on_individual_mandate.pdf) (last visited Oct. 26, 2012).

To avoid the possibility of fraud and abuse, the exemption is invalidated if an individual receives medical care during the year that they cannot pay for out of pocket. In these cases, individuals must pay the tax penalty they would have incurred for not carrying the minimum required insurance. In 2007, about 9,700 individuals applied for the religious conscience exclusion.<sup>111</sup> According to the Massachusetts Department of Revenue, approximately 700 of these individuals who applied for the religious conscience exclusion were denied and fined.<sup>112</sup> With Massachusetts's health care reform in mind, we now return to the PPACA and its effects on selected religious sects.

### III. EFFECT OF THE PPACA'S EXEMPTIONS ON RELIGIOUS SECTS<sup>113</sup>

#### A. Amish<sup>114</sup>

The Amish are Anabaptist Christians that number about 261,150 in the United States, roughly .000834% of the domestic population.<sup>115</sup> The history of the Amish church began with a schism in Switzerland within a group of Swiss and Alsatian Anabaptists in 1693 led by Jakob Ammann.<sup>116</sup> Those who followed Ammann became known as the Amish.<sup>117</sup> As Anabaptists, the

111. Maura Reynolds, *Health bills allow some religious exemption*, CQ POLITICS (Aug. 3, 2009), [http://www.msnbc.msn.com/id/32267628/ns/politics-cq\\_politics/t/health-bills-allow-some-religious-exemption/#.Tzb29Zg5fZo](http://www.msnbc.msn.com/id/32267628/ns/politics-cq_politics/t/health-bills-allow-some-religious-exemption/#.Tzb29Zg5fZo).

112. Joel S. Weissman & JudyAnn Bigby, *Massachusetts Health Care Reform—Near-Universal Coverage at What Cost?*, N. ENGL. J. MED. 361:2012-2015 (Nov. 19, 2009), *available at* <http://www.nejm.org/doi/full/10.1056/NEJMp0909295>.

113. Discussion in this section assumes that both of the religious exemptions in the PPACA are constitutional. Whether this is the case is discussed further *infra*, section IV.

114. For additional information on the Amish, see DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* (2001).

115. *Amish Population by State (2011)*, YOUNG CENTER FOR ANABAPTIST AND PIETIST STUDIES AT ELIZABETHTOWN COLLEGE, [http://www2.etown.edu/amishstudies/Population\\_by\\_State\\_2011.asp](http://www2.etown.edu/amishstudies/Population_by_State_2011.asp) (last visited Oct. 26, 2012). While the Amish exist in twenty-eight states, about two thirds live in three states: Ohio, Pennsylvania and Indiana. *Id.* Domestic population calculated using data from *U.S. & World Population Clocks*, U.S. CENSUS BUREAU (Jan. 12, 2012), <http://www.census.gov/main/www/popclock.html>.

116. KRAYBILL, *supra* note 114, at 7-8.

117. *Amish Origins*, YOUNG CENTER FOR ANABAPTIST AND PIETIST STUDIES AT ELIZABETHTOWN COLLEGE, [http://www2.etown.edu/amishstudies/Amish\\_Origins.asp](http://www2.etown.edu/amishstudies/Amish_Origins.asp) (last visited Oct. 26, 2012).

Amish believe in a literal interpretation of the Bible and live by a set of largely unwritten rules known as the *Ordnung*.<sup>118</sup> An Amish minister says of the *Ordnung*: “A respected *Ordnung* generates peace, love, contentment, equality, and unity. It creates a desire for togetherness and fellowship, it binds marriages, it strengthens family ties to live together, to work together, to worship together and to commune secluded from the world.”<sup>119</sup> From the Amish perspective, the outside world, which uses coercion, differs from the peaceable kingdom of God.<sup>120</sup> Therefore, many Amish practices are based on the religious principle that the church should be separate from the larger society, a rejection of “worldliness.”<sup>121</sup> A related central theme in Amish ideology is the concept of *gelassenheit*. Literally translated from German to mean obedience or submission.

Health care practices vary across Amish communities and from family to family. While many Amish use modern medical services, others turn to alternate forms of treatment.<sup>122</sup> Regardless of the view in obtaining health care, the Amish do not believe in commercial insurance because it is seen as not trusting in God.<sup>123</sup> Rather, the Amish believe in “taking care of their own.” The Amish effectively self-insure within their own community. For instance, when a church member needs medical care, the family pays out of pocket and the community takes up a collection or reimburses the

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118. JOHN A. HOSTETLER, *AMISH SOCIETY* 82 (1993).

119. *Id.* at 84.

120. *Beliefs*, YOUNG CENTER FOR ANABAPTIST AND PIETIST STUDIES AT ELIZABETHTOWN COLLEGE, <http://www2.etown.edu/amishstudies/Beliefs.asp> (last visited Oct. 26, 2012).

121. KRAYBILL, *supra* note 46, at 125. The Amish often cite *Romans* 12:2 stating, “And be not conformed to this world: but ye transformed by the renewing of your mind, that ye may prove what is the good, and acceptable and perfect, will of God.” *Id.* Worldliness may be understood as the values, lifestyles, practices, and conduct of the outside world that reflect its predominantly sinful, ungodly nature. *Id.*

122. *Health*, YOUNG CENTER FOR ANABAPTIST AND PIETIST STUDIES AT ELIZABETHTOWN COLLEGE, <http://www2.etown.edu/amishstudies/Health.asp> (last visited Oct. 26, 2012). The Amish cite no biblical injunctions against modern health care or the latest medicines, but they do believe that God is the ultimate healer. *Id.* For additional information on Amish and health care, see generally VICTOR MCKUSICK, *MEDICAL GENETIC STUDIES OF THE AMISH* (1978).

123. Parman R. Green, *The Amish—Social Security and Medicare Taxes* (Jan. 12, 2002), <http://agebb.missouri.edu/agtax/issues/ssandse/amishss.pdf>. A prominent example of Amish taking care of their own is the practice of “barn raising.” *Id.* When a fire strikes and destroys the barn of a member of the community, neighboring farmers come from all around and rebuild the barn in a matter of days. *Id.*

family from a common fund. At the same time, however, the Amish believe in “render[ing] to Caesar what is Caesar’s,”<sup>124</sup> as long as it does not otherwise conflict with their religious beliefs. Here, the Amish believe that governments are of God, and consistent with *gelassenheit*, should be followed unless they clash with God’s higher law.<sup>125</sup> Consequently, with the exception of Social Security and Medicare taxes, the Amish pay the same income, property, sales, and other taxes as everyone else.<sup>126</sup> When it comes to the PPACA, because private health care insurance clashes with “God’s higher law,” the Amish will be seeking an outright exemption, as was the case with Social Security.

### B. *Christian Science*<sup>127</sup>

While the number of practicing Christian Scientists in the United States is generally unknown, it has been estimated that they number approximately 24,130 in the United States, roughly .000077% of the domestic population.<sup>128</sup> The Church of Christ, Scientist, the official church of the faith, was founded in 1879 “to commemorate the word and works of our Master, which should reinstate primitive Christianity and its lost element of healing.”<sup>129</sup> Christian Science is a system of thought and practice derived from

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124. Referring to *Matthew* 22:21 stating, “Render unto Caesar the things that are Caesar’s, and unto God the things that are God’s.

125. KRAYBILL, *supra* note 74, at 30. According to *Romans* 13:2, “Whosoever resisteth power [the government], resisteth the ordinance of God, for they that resist shall receive to themselves damnation.” The Apostle Paul became even more specific in declaring one should pay taxes levied by the government by stating, “[R]ender therefore to all their dues, tribute to whom tribute is due, custom to whom custom, fear to whom fear, honor to whom honor.” *Romans* 13:7.

126. *Green*, *supra* note 123.

127. For additional information on Christian Science see generally, MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* (Christian Science Board of Directors ed., 1994).

128. Stephen Barrett, *The origin and Current Status of Christian Science*, QUACKWATCH, <http://www.quackwatch.org/01QuackeryRelatedTopics/cs2.html> (last visited Oct. 26, 2012). The Christian Science church will not disclose how many members it has, but one can estimate from U.S. Postal Service data. Because of the class of postage used, the USPS requires the church to report how many copies of their CHRISTIAN SCIENCE SENTINEL they mail. *Id.* The figures show a drastic decrease, from 52,599 in 1996 to 24,130 in 2009. *Id.* Percentage calculation based on *U.S. & World Population Clocks*, U.S. CENSUS BUREAU (Jan. 12, 2012), <http://www.census.gov/main/www/popclock.html>.

129. MARY BAKER EDDY, *MARY BAKER EDDY’S CHURCH MANUAL* 17 (H.M. Wright Pub. J. ed., 1981).

the writings of Mary Baker Eddy<sup>130</sup> and the Bible, practiced by the members of the Church of Christ, Scientist as well as some non-members.<sup>131</sup> Therefore, unlike the Amish, it is not necessary to be a member of the church to study Christian Science. Christian Science encourages people to see things from a spiritual perspective, as Jesus taught.<sup>132</sup> As adherents of truth, Christian Scientists take the inspired word of the Bible as their sufficient guide to eternal life.<sup>133</sup> The religion is often confused with Scientology, faith healing, New Age practices, and Eastern religions. However, Christian Science teaches that it is never God's will for anyone to suffer, be sick, or die. Instead, it shows how God is entirely good, and therefore his will for each of us is only health and life.<sup>134</sup>

In regards to health care, Christian Scientists generally believe in spiritual healing rather than traditional medicines. Consistent with this belief, the faith has nurses who help individuals in need of physical assistance while relying on Christian Science treatment for healing.<sup>135</sup> The care they provide can include such things as helping people bathe, preparing special modified foods, bandaging, and helping people who need assistance to move about.<sup>136</sup> Christian Science nurses do not, however, diagnose, administer drugs, or provide any sort of physical therapy or other medical treatment.<sup>137</sup>

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130. *About the founder, Mary Baker Eddy*, CHRISTIAN SCIENCE, <http://christianscience.com/what-is-christian-science> (last visited Oct. 26, 2012). Mary Baker Eddy discovered and founded Christian Science in 1866. After many years of study as a Puritan, she discovered what she considered to be the Science of the Christianity, which Jesus taught and lived. She dedicated herself to teaching, preaching, and healing others through this system for applying spiritual laws – Christian Science – and in 1875 she published her primary book about it, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES. EDDY, *supra* note 127.

131. *Questions About Christian Science*, CHRISTIAN WAY, <http://www.christianway.org/Questions> (last visited Oct. 26, 2012).

132. See *John* 14:12 (Jesus said, “He that believeth on me, the works that I do shall he do also...”). See also EDDY, *supra* note 127, at xi:14. Mary Baker Eddy said, “These might works are not supernatural, but supremely natural.” *Id.*

133. *Supra* note 127, at 496.

134. To see how Christian Scientists relate to other faiths and ideologies, see *Ecumenical and interfaith dialogue*, CHRISTIAN SCIENCE, [https://community.christianscience.com/community/ecumenical\\_and\\_interfaith](https://community.christianscience.com/community/ecumenical_and_interfaith) (last visited Oct. 26, 2012).

135. For more information on Christian Science nurses, see *Christian Science nurses*, CHRISTIAN SCIENCE, <http://christianscience.com/prayer-and-health/talk-with-someone-or-get-help/christian-science-nurses> (last visited Oct. 26, 2012).

136. *Id.*

137. *Id.*

Despite this custom, Christian Scientists do not object to all medical care or to purchasing health insurance. Rather, every Christian Scientist makes his or her own financial and health decisions, including when and how to seek medical treatment and whether to carry health insurance.<sup>138</sup> Therefore, many Christian Scientists do seek medical treatment and carry private carrier health insurance. As such, unlike the Amish, Christian Science is not seeking an outright exemption from the PPACA, but recognition within it. They are trying to ensure that the law will provide every citizen a choice of health care, including the system of spiritual prayer that Christian Scientists have found to be effective.

Like the Amish, there is history between Christian Science and Medicare. Christian Science did not seek an outright exemption like the Amish, but desired to have their faith recognized. They succeeded, and today various federal, state, and private health insurance plans provide for the reimbursement for Christian Scientists' nursing care and practitioner treatment.<sup>139</sup> Additionally, seventeen Christian Science nursing facilities across the country are Medicare providers, which means individuals who have "Medicare Part A" can receive reimbursement at those facilities.<sup>140</sup>

Also relevant, Massachusetts, where the Church of Christ is headquartered, has instituted health care reform at the state level for almost four years prior to the passage of the PPACA.<sup>141</sup> Consistent with Christian Science theology, those practitioners that opt to receive healthcare can pay into the mandate while those that conscientiously oppose health insurance can opt out. All that is required is those Christian Scientists that wish to opt out, attest that it is for religious reasons on their individual tax returns. In doing so, they avoid the individual mandate, but the exemption is invalidated and an individual faces a tax penalty if he or she subsequently receives medical care during the year.

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138. *Relationship with Western medicine*, CHRISTIAN SCIENCE, <http://christianscience.com/what-is-christian-science#relationship-with-western-medicine> (last visited Oct. 26, 2012).

139. *Insurance Plans Covering Christian Science Care*, CHRISTIAN SCIENCE, <http://members.christianscience.com/committee-on-publication/federal-legislative-affairs/insurance/> (last visited Oct. 26, 2012).

140. *Id.* Christian Science services qualify as tax-deductible medical expenses under section 213(d) of the IRS code. *Id.* Because of this, health savings accounts or flexible spending accounts can be used for Christian Science care. *Id.*

141. For more information on the Massachusetts Individual Mandate, see Health Care Reform in Massachusetts, *supra* section II (B).



C. *Islam*<sup>142</sup>

Muslims number approximately 2,595,000 in the United States, or .008295% of the domestic population.<sup>143</sup> Islam is the world's second largest religion and dates back to 610 A.D.<sup>144</sup> The Arabic word "Islam" means peace, submission, and obedience.<sup>145</sup>

The Quran articulates the Islamic faith, a text considered by its adherents to be the verbatim word of Allah, and by the teachings and normative example of Muhammad, considered by Muslims to be the last prophet of Allah.<sup>146</sup> The moral code and religious law of Islam is known as Sharia's law and is derived from both the Quran and the Sunnah.<sup>147</sup>

Islam provides specific guidelines for Muslims to follow in their daily lives. Its guidance is comprehensive and includes the social, economic, political, moral, and spiritual aspects of life.<sup>148</sup> The "Five Pillars" of Islam are the foundation of Muslim life: (1) Faith or belief in the Oneness of God and the finality of the prophethood of Muhammad (*Iman*); (2) establishment of daily prayers (*Salah*); (3) concern for and almsgiving to the needy (*Zakah*); (4) self-purification through fasting (*Swam*); and (5) the pilgrimage to Makkah for those who are able (*Hajj*).<sup>149</sup>

Islam considers access to health care a fundamental right of the individual. Two main principles of Islamic Medicine are the emphasis on sanctity of human life, which derives for the Quran,<sup>150</sup>

142. A Muslim is a practitioner of Islam; as such, both are used interchangeably throughout.

143. *Muslim Population by Country*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Jan. 2011), <http://features.pewforum.org/muslim-population/>.

144. *What is Islam? An overview for Christians*, CHRISTIANANSWERS.NET, <http://www.christiananswers.net/islam.html> (last visited Oct. 26, 2012).

145. *Islam at a glance*, WAMY SERIES ON ISLAM No. 1, [http://www.sultan.org/books/islam\\_at\\_glance.pdf](http://www.sultan.org/books/islam_at_glance.pdf) (last visited Oct. 26, 2012).

146. *Quran* 2:136. The word "Allah" is the proper name of God in Arabic. *Id.* "We have believed in Allah and what has been revealed to us and what has been revealed to Abraham and Ishmael and Isaac and Jacob and the Descendants and what was given to Moses and Jesus and what was given to the prophets from their Lord. We make no distinction between any of them, and we are Muslims [in submission] to Him." *Id.*

147. *The Sunnah: Practice of Law (shari'ah)*, UNIVERSITY OF GEORGIA, <http://islam.uga.edu/shariah.html> (last visited Oct. 26, 2012). The "Sunnah" is the examples set forth by the Islamic Prophet Muhammad. *Id.*

148. *See Islam at a glance*, *supra* note 145.

149. *Id.*

150. *Quran* 5:32. "Whoever saves [a soul] – it is as if he had saved mankind entirely." *Id.*

and the emphasis on seeking a cure, which derives from the saying of the Prophet Mohammad, "seek cure as God has created no disease without creating a cure for it except for old age."<sup>151</sup> In regards to health insurance, like Christian Scientists, views between individual Muslims remain varied. While many domestic Muslims do carry health insurance, in the strictest sense of the religion, believers of Islam consider health insurance, and, for that matter, any form of risk insurance, to be forbidden or *haraam*. This is based on Shariah's law that mandates that insurance violates the tenets against *riba*<sup>152</sup> (interest), *almaisir* (gambling) and *al-gharar* (uncertainty).<sup>153</sup> Modern insurance entails paying something for nothing unless there is a claim, and given the interest involved with insurance investments, it runs contrary to Shariah's rules against usury.<sup>154</sup>

However, Muslims do not qualify for an exemption under Social Security. Indeed, Social Security can be viewed as consistent with the Muslim pillar of *Zakah*, or concern for and almsgiving to the needy. While the classical view adopted in Islamic law proscribes insurance on the interest component, a more modern view makes allowances for some types of excess in financial dealings by assigning money no intrinsic value.<sup>155</sup> For instance, there are accommodating Islamic institutions, like conventional banks, that serve as intermediaries in financial transactions. However, whereas a conventional bank will take ownership of the depositors' funds and become the borrower's partner, an Islamic bank will mediate the relationship between its aggregate depositor and its aggregate borrowers. If the Islamic bank is profitable, the depositors are entitled to a share of those profits.<sup>156</sup> As such, Muslims have devised

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151. IMANA Ethics Comm., *Islamic Medical Ethics*, ISLAMIC SOC'Y OF NORTH AMERICA, <http://www.isna.net/Leadership/pages/Islamic-Medical-Ethics.aspx> (last visited Oct. 26, 2012).

152. Barbara L. Seniawski, *Riba Today: Social Equity, The Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 707 (2001). The root of the Arabic word *riba* signifies "increase." The grammatical form of *riba*, a verbal noun, means "excess, increase, augmentation, expansion or growth." *Id.*

153. Eric Burns, *Muslims Exempt from ObamaCare?*, FRONTPAGEMAG (Oct. 14, 2011), <http://frontpagemag.com/2011/10/14/muslims-exempt-from-obamacare/>.

154. *Id.*

155. Mary-Patricia E. Wray, *Free Exercise and Compulsory Insurance: The Future of Mandatory Financial Responsibility and Religious Observance*, 12 LOY. J. PUB. INT. L. 239, 246-47 (2010).

156. Jean-Francois Sez nec, *Ethics, Islamic Banking and the Global Financial Market*, 23 FLETCHER F. WORLD AFF. 161, 12 (Spring 1999).

Sharia-compliant insurance models that function as a risk pool rather than a traditional insurance contract.

Therefore, there are varying degrees to whether a domestic health insurance mandate would be prohibited, as well as varying degrees to which it would be tolerated and accepted throughout the Islamic community.<sup>157</sup> The distinction is stark, traditional Muslims may in fact be religiously opposed to the PPACA's mandate, while some modern domestic Muslims have voiced support. For instance, the Islamic Society of North America applauded President Obama on the signing of the PPACA into law.<sup>158</sup> As such, Muslims fall somewhere in between the Amish and Christian Scientists when it comes to drawing the line for the PPACA's religious exemptions.

#### IV. DRAWING THE PPACA'S NON-SECULAR LINE

Government efforts to address social welfare issues have expanded dramatically in recent decades, culminating in the most recent example of the passage of the PPACA. As is seen in the realm of Social Security, as the government dabbles in paternalistic matters of social welfare, the resulting conflicts with religious beliefs become prominent. This remains true with the passage of the PPACA. The conflicts are indubitable, and their resolution calls for analysis.

Here, it is important to draw key distinctions from the outset between the Social Security program and the PPACA. The primary difference between the exemptions offered in the two programs is that they occur in separate legislation with very different underlying goals. Social Security was enacted with the goal of providing for working Americans when they retire. The PPACA was enacted with the goal of providing affordable health care coverage for all Americans. These differing goals influence the analysis of the legitimate governmental purpose behind creating each religious exemption. Therefore, even though the religious conscience exemp-

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157. *Id.*

158. Mohammed Eisanousi, *ISNA Welcomes the New Health Care Reform Law*, ISLAMIC SOC'Y OF NORTH AMERICA, <http://islam.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=islam&cdn=religion&tm=28&f=00&tt=12&bt=0&bts=0&zu=http%3A/www.isna.net/articles/News/ISNA-Welcomes-The-New-Health-Care-Reform-Law.aspx> (last visited Oct. 26, 2012). Mohammed Eisanousi, the Director of Community Outreach, declared, "This inclusive health care reform is important and necessary to protect the most vulnerable members of our society, the uninsured." *Id.*

tion to Social Security was found to be constitutional and that same exemption is applicable to the PPACA, it is not necessarily determinative as to whether the exemption is constitutional in the latter context. A separate strict scrutiny analysis is necessary.

Second, Social Security is a payment to the government, for a program administered by the government. The PPACA is largely based on payments to private insurers. This is important because requiring individuals to purchase a private good is arguably more drastic than requiring them to pay a tax for a publically administered program. While Anabaptists like the Amish generally oppose all forms of insurance, for other religious denominations, this distinction is more sweeping. Muslims, for instance, may find a publically administered program promoting welfare to be admirable as it is consistent with *Zakah* or concern for and almsgiving to the needy. On the other hand, they may be more inclined to find private financing of health insurance to be prohibited because of its inherent interest bearing implications. Similarly, Christian Scientists do not oppose Social Security, as long as it recognizes their spiritual health services. A private insurance mandate that does not recognize this theology is more likely to result in inequity.

Lastly, the PPACA, is grounded on the principal of everyone paying into the risk-pool to internalize the externalities of insurance. In other words, there is a negative correlation between the number of groups and individuals exempt from the mandate and the functionality of the program as a whole. On the other hand, while generalized participation is also important in the Social Security program, the correlation is not as discernable. In Social Security, the focal point is having enough individuals contributing today to provide for yesterday's retirees. Therefore, there is an inherent conflict in the PPACA's accommodations. Theoretically, the more strictly the religious exemptions are interpreted, the more inequalities that are likely to result. Conversely, the more broad the religious exemptions are interpreted, the less effective the Act is at achieving its goal – affordable health care for all. A religious exemption from the PPACA may adversely affect the Act's goal in a way that same or similar exemptions from Social Security would not.

With these distinctions aside, the first logical question in the analysis is whether the Constitution requires a religious exemp-

tion for mandatory health care programs.<sup>159</sup> Certainly, any congressional enactment imposing an individual mandate to purchase health insurance would be subject to constitutional analysis and would qualify for review under the RFRA as a federal action that potentially burdens religious exercise. Thus, religious challenges to the PPACA would be subject to strict scrutiny analysis. Under strict scrutiny, an exemption would be required only if the government does not have a compelling state interest that is achieved by the least restrictive means possible.

The Supreme Court has generally allowed federal mandates that relate to public health, but nonetheless interfere with religious beliefs, to continue without exemptions.<sup>160</sup> Public health is more or less an established compelling interest. The PPACA would also likely satisfy the “least restrictive means possible” requirement because it does provide for exemptions. This is further supported by the fact that the PPACA requires a more indirect participation in medical programs, at its core is not affirmative participation but funding for insurance programs. Therefore, given the current status of health care in our nation, the PPACA would likely pass strict scrutiny analysis if challenged on religious grounds. Without the exemptions, however, there is a stronger argument that the PPACA as enacted is not achieved by the least restrictive means possible.

Irrespective of strict scrutiny, Congress may, as it has done here, include an exemption for relevant religious objections even if it is not required. Because drawing a non-secular line may be construed as favoring a particular religion, or religion generally, it may seem as a *prima facie* violation of the Establishment Clause – prohibiting preferential treatment of one religion over another or preferential treatment of religion generally over non-religion.<sup>161</sup> However, the mere fact that a law addresses religion does not automatically make the law unconstitutional. Under an Establishment Clause analysis, a government action must meet the three part *Lemon* test.<sup>162</sup> Under this test, a law must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhib-

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159. The constitutionality of the PPACA’s religious exemptions is beyond the scope of this note. This note assumes from the outset that the religious exemptions are constitutional. Nevertheless, the basis for this assumption is briefly addressed.

160. See *Lee*, 455 U.S. 252; *Yoder*, 406 U.S. 205; *Verner*, 374 U.S. 398.

161. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

162. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

its religion, and (3) not lead to excessive entanglement with religion.<sup>163</sup> The Supreme Court has upheld religious exemptions for government programs, where the exemptions were enacted to prevent government interference with religious exercise.<sup>164</sup> The PPACA would likely pass the *Lemon* test because its religious exemptions are broad enough that they are not specifically available only to certain religions over others.

Lastly, concerns of preferential treatment for certain religions that raise Establishment Clause questions also raise questions under the Equal Protection Clause. The Equal Protection Clause prevents the government from treating some groups of individuals differently than others. If the disparate treatment results from a “suspect classification,” the Equal Protection Clause may be violated. Laws that treat groups of individuals differently because of some animus would be suspect classifications subject to strict scrutiny. Typically, animus in equal protection jurisprudence has been groups identified by race, national origin, or alienage. Religion, for the most part, has been analyzed under the First Amendment rather than equal protection doctrine. However, even if it were raised as a suspect classification under the First Amendment, the PPACA, with its exemptions, likely passes strict scrutiny as previously discussed.

Assuming the PPACA with its exemptions as written is constitutional, we turn to the central tenet of this note: which religions qualify for exemption? The Amish will likely be exempt from the PPACA’s individual mandate under both exemptions. The Amish will qualify under the religious conscience exemption because this is precisely a verbatim exemption lifted from the context of Social Security and the IRC that was created explicitly for the Amish. The Amish are members of a recognized religious sect or division thereof described in section 1402(g)(1) of the IRC. They are members of, and follow the teachings of, a religious sect that is conscientiously opposed to insurance. In addition, the Amish make provisions for their dependent members that are reasonable in view of their general level of living and have been in existence since December 31, 1950. They are also already removed from the Social Security program by virtue of their exemption. Therefore, the

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163. *Id.*

164. *See* *Locke v. Davey*, 540 U.S. 712 (2004). Some government actions that allow free exercise consequently raise questions of establishment, noting that there was room for “play in the joints” in this intersection of the religious clauses. *Id.* at 718 (citing *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 669 (1970)).

Amish are entirely immune from the tax penalties associated with the individual mandate per the religious conscience exemption.

In addition, the Amish can find immunity from the individual mandate in the health care sharing ministries exemption. They are groups of like-minded, religious individuals who agree to help pay for each other's medical expenses. This is indeed their theological belief in regard to health care. Therefore, it is apparent that the Amish will be exempt from the individual mandate of the PPACA. For Christian Scientists and Muslims however, the line is less discernable and perhaps even inequitable.

For Christian Scientists, there appears to be a looming inequity in the PPACA, the individual mandate will not likely include the nursing care they utilize. The Act does not have an accommodation for those who use spiritual care to meet their health needs.<sup>165</sup> Nor does it appear that Christian Scientists will find refuge in the PPACA's religious exemptions. The only Christian Science practitioners who will be exempt are those age sixty-five or older as they are automatically enrolled in "Medicare Part A", a grandfathered health plan. Christian Scientists do not satisfy the religious conscience exemption because members are not necessarily opposed to receiving any benefits of private or public insurance, including Social Security and Medicare benefits. While Christian Science emphasizes spiritual care, it is up to each individual member as to whether they carry private health insurance. Many Christian Scientists do in fact carry health insurance and would not be willing to waive all Social Security and Medicare benefits, taking the religious sect as a whole outside of the religious conscience exemption. Indeed, the way the exemption is worded primarily restricts its application to Anabaptist faiths, like the Amish.

Furthermore, the alternative health care sharing ministries exemption is of no assistance to Christian Science. There is nothing documented by the Church of Christ, Scientist or relevant literature indicating that practitioners share medical expenses among members in accordance with their beliefs. Therefore, Chris-

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165. While the types of health care offered under the PPACA are beyond the scope of this note, it is worth mentioning that there is no requirement that Christian Science practitioners and Christian Science nursing services be covered and reimbursed in health insurance plans under the PPACA. However, neither is there anything in the legislation that would restrict or eliminate existing provisions in the law that recognizes spiritual care. Therefore, whether the PPACA will prohibit participating insurance plans from offering coverage for spiritual care remains to be determined.

tian Scientists are unlikely to find exemption or recognition in the religious exemptions to the PPACA.

Now that we have seen a religious sect that is apparently exempt to the PPACA's individual mandate (Amish) and a religious sect that is not exempt (Christian Science), we turn to Islam. Here, Muslims fall somewhere in the middle of PPACA religious exemptions' non-secular line. Under a strict interpretation of the Quran, which forbids acceptance of public or private insurance, Muslims should be exempt under the religious conscious exemption. However, among domestic Muslims, this strict interpretation is in the vast minority. A great majority of American Muslims pays into Social Security and receives Social Security benefits, which arguably takes them outside of the scope of the religious conscious exemption. In examining a list obtained through the Freedom of Information Act of all groups that have successfully applied for exemptions under section 1402(g)(1) of the IRC, the overwhelming majority of them are explicitly Anabaptists,<sup>166</sup> while no Muslim group has ever qualified. Furthermore, as previously discussed, this exemption has been narrowly interpreted as applicable to only Anabaptist sects like the Amish. Such a narrow interpretation can be projected to continue into the interpretation of the individual mandate.

Therefore, Muslims seeking to be exempt from the PPACA's individual mandate for religious purposes will have to qualify under the health care sharing ministries exemption. This is the very premise of *takaful*, a type of Islamic insurance where members contribute money into a pooling system to guarantee each other against loss or damage.<sup>167</sup> A modern example of this insurance is Lexington Takaful Solutions offered by Risk Specialists Companies, Inc., a subsidiary of AIG Commercial Insurance.<sup>168</sup> This homeowner's insurance policy, which includes health insurance, is part of a series of Shariah-compliant insurance services in the United States. As such, Muslims participating in similar *takaful* programs may be eligible for the health care sharing ministry exemption because they are essentially sharing medical expenses

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166. Anabaptists include the Amish, Hutterite and Mennonite sects.

167. *Takaful*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/takaful.asp#axzz1mWARDYCr> (last visited Oct. 26, 2012).

168. *AIG Offers First Takaful Homeowners Insurance Product for U.S.*, INSURANCE JOURNAL (Dec. 2, 2008), <http://www.insurancejournal.com/news/national/2008/12/02/95930.htm> (last visited Oct. 26, 2012).



among members. The only requirement is that these costs must have been shared at all times since December 31, 1999. Notably, the PPACA exemption does not offer any guidance on how, or to what extent, a health care sharing ministry needs to share costs. Consequently, any sharing of health care costs for Islamic beliefs is arguably included in the health care sharing ministries exemption. Because of the vague and uncertain language, there is ambiguity as to whether other religious believers that “share” healthcare costs would similarly qualify as exempt.

The residual question remains, is this fair? Perhaps, any legal line drawing resulting in the exemption of some religions over others is never going to be entirely fair. In speaking with religious leaders of Amish, Christian Science and Islamic faiths, they all have valid arguments for or against exclusion from the PPACA. Therefore, why draw a line in the first place? Health care reform in Massachusetts and its related religious exemption provides a helpful model to resolve the inequity certain religions will undoubtedly face under the PPACA. The solution –allow any individual with a sincerely held religious belief against purchasing the mandated health insurance to be exempted from the requirement and its benefits, subject to strict penalties for abuse. It is inclusive, simple to use, and strikes an important balance between the responsibilities of citizens and their religious freedoms.

The logical criticism to this suggestion is that it exposes the PPACA to abuse and will undermine the effectiveness of the Act and its goal of affordable health care for all. Consequently, the PPACA must be as close as possible to compulsory. However, we can draw important lessons from the Amish fight in Social Security. There, the initial staff memorandum prepared for the Department of Health, Education and Welfare in 1964 documented this same principal concern as the rationale not to exempt the Amish. They feared that providing a religious exemption would lead to a slippery slope that would eventually undermine the premise of the whole program. Nevertheless, the Amish eventually won their battle and almost five decades later, the Social Security program is still intact.

Similarly, health care reform in Massachusetts has been functioning for six years despite its inclusive religious exemption. In fact, in the 2008 tax year, only 3.5% of Massachusetts’s residents

claimed a religious exemption.<sup>169</sup> Like Massachusetts, the federal program can limit the possibility of fraud or abuse by invalidating the exemption if an individual receives medical care during the year in which they cannot afford and assessing a more stringent tax penalty on these offenders. In Massachusetts, if an individual fraudulently applies for the religious exemption, they are assessed a tax penalty of up to half of the cost of health insurance in their location. This strict penalty is an incentive to pay the full premium and have health insurance when needed rather than pay the penalty and have nothing to show for it. On the other hand, the penalty under the PPACA is currently phased over a number years. Starting in 2014, the penalty would be the greatest of \$95 per year, per individual or 1% of modified adjusted gross income and would increase annually, rising to \$695 or 2.5% of modified adjusted gross income by 2016. The PPACA's penalty for non-compliance is not as harsh. Individuals who do not want to contribute for one reason or another are more likely inclined to risk the \$95 or 1% penalty than comply.

Moreover, just because a religious exemption is inclusive does not necessarily mean that it will open up the floodgates. Even if every Amish, Christian Scientist and Muslim in the United States opted for the exemption, it would translate into roughly 1% of the domestic population. While the Amish population will opt out, not every Christian Scientist or American Muslim will. Arguably the vast majority of these religions would opt for affordable health care coverage, which would reduce the percentage even further. Therefore, perhaps the slippery slope argument holds even less merit today than it did in 1965 when the Amish were vying for exemption from the Social Security program.

Additionally, there is also a common fallacy that some may "create" a religion to circumvent the Act's individual mandate. This is effectively prevented by the date restrictions imposed on the religious exemptions. For the religious conscience exemption, the sect had to have been in existence at all times since December 31, 1950, and for the health care sharing ministries exemption the

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169. See *Data on the Individual Mandate Tax Year 2008*, MASS. HEALTH CONNECTOR AND DEPARTMENT OF REVENUE, [https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Health%2520Care%2520Reform/How%2520Insurance%2520Works/Data\\_on\\_individual\\_mandate.pdf](https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Health%2520Care%2520Reform/How%2520Insurance%2520Works/Data_on_individual_mandate.pdf) (last visited Oct. 26, 2012). This figure does not include those that applied but were later denied the exemption.

sect had to have been in existence at all times since December 31, 1999. A similar restriction can be imposed on an inclusive religious exemption that would effectively close this potential loophole. Health care, by and large, is viewed as a necessity for the overwhelming majority of Americans irrespective of religious ideology. The notion that 1% of religious believers that do in fact oppose health care would upset the whole system is tenuous.

Nevertheless, because the premise of the PPACA is centered on the tenet of near compulsory participation, it is unlikely that the religious exemptions as written will be amended. It is plausible that an inclusive religious exemption, along with the Act's numerous other exemptions,<sup>170</sup> could negatively impact the underlying goal. However, many of the details of the Act will be determined over the next few years by federal regulators and subsequent legislation. Here, there is opportunity to respect the rights of religious minorities when it comes to their health care decisions. For instance, if the PPACA requires believers in spiritual healing, like Christian Science, to pay into the program, the legislature could include coverage of their services in the benefits offered by health insurance companies under the Act. Given the goal of the PPACA to provide coverage for all, it seems equitable that the new law meets the "essential" health needs of all individuals, irrespective of religious denomination. Religion and the law are not mutually exclusive. Through accommodation in the details of the PPACA, the Act can at least recognize the religious beliefs of sects like Christian Science and Muslims.

## V. CONCLUSION

Following the Supreme Court's decision affirming the constitutionality of the Act's individual mandate, more questions remain to be answered. Whether the religious questions will have their day in court remains to be seen, as the PPACA faces a long line of legal challenges. Now that the political challenge has been overcome, at least for the time being, individuals of all religions will be required to carry health insurance at the peril of fiscal penalty unless they satisfy one of two religious exemptions: (1) those with a "religious

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170. *Private Health Insurance Provisions in PPACA (P.L. 111-48)*, CONGRESSIONAL RESEARCH SERVICE, [http://bingaman.senate.gov/policy/crs\\_privhins.pdf](http://bingaman.senate.gov/policy/crs_privhins.pdf) (last visited Oct. 26, 2012). Other exemptions include Native Americans, those with financial hardships, and those grandfathered into existing Medicare or Medicaid plans. *Id.*

conscience” objection to the acceptance of benefits or insurance, and (2) those who are members of a “health care sharing ministry.”

The first of the two exemptions is carried over directly from the Internal Revenue Code exemption as created for Social Security and championed by the Amish. In the realm of Social Security, this exemption has been narrowly interpreted to apply only to Anabaptists like the Amish. While the purpose of the PPACA is different from the purpose of Social Security, a similar narrow interpretation is expected.

For denominations other than the Amish who also object to having health insurance for religious reasons, the health care sharing ministry exemption allows an individual to avoid the tax penalty by proving membership in a qualifying health care sharing ministry. The notion behind this exemption is that these ministries are groups of like-minded, religious individuals who agree to pay for each other’s medical expenses, thus avoiding the religious objection that some have to mandatory health insurance. While broader in scope than the religious conscience objection, the health care sharing ministries exemption is of little shelter to the Christian Scientists who do not share health care costs for religious reasons. However, it may be grounds for exemption for some Muslims who have participated in some takaful, or Shariah-compliant insurance programs since 1999. Muslims participating in these programs contribute money into a pooling system in order to guarantee each other against loss or damage. Because of the vague language employed in the health care sharing ministries exemption, these Shariah-complaint insurance programs may prove sufficient to satisfy exemption requirements for some Muslims.

For the most part, however, as currently drafted, the two religious exemptions to the PPACA will primarily be restricted to the Amish and other Anabaptists sects. The PPACA’s non-secular line drawing is very limited, perhaps too limited. It is helpful to draw upon experiences and lessons learned from the history of religious exemptions in Social Security and health care reform in Massachusetts. An inclusive and equitable exemption does not necessarily correspond with flawed health care reform. Of the three religions examined in this note, even if all three in their entirety opted for exemption from the individual mandate, that would total approximately one percent of the domestic population. Providing a more inclusive religious exemption along with more stringent penalties for abuse could achieve a more favorable and equitable result.

When religion and the law run into each other, it is not always necessary for one to be preeminent. The PPACA is a modern example of how two diverging goals, affordable health care for all Americans and religious believers opposed to healthcare, can coexist. At the very least, when the law and religion collide, the former should respect the latter.