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Kamera Boyd

I. Background: The Contraception Mandate

1. What's So Great About Birth Control Anyway?

Whether it is your mother, sister, aunt, grandmother, or even yourself, women need special health care coverage to regulate their reproductive health. From the young women hoping to finish college to the families struggling to make ends meet[1], birth control has helped a range of women of all ages, races, and socioeconomic statuses organize their lives.[2] Health insurance plans that cover contraceptives have alleviated the burden for women who worry about paying to maintain their reproductive health. Mandated birth control shows that the government has taken the initiative in responding to women's health concerns with the appropriate care. The Affordable Care Act ("ACA") is one of the greatest advancements for women's health.[3] The improvement of health quality reflects women's experiences as patients, mothers, and caregivers.[4] For some women, contraceptive coverage offers a sense of control over their reproductive rights while for others, it provides security that institutions are working toward acknowledging their health, body, and mind.[5] On average, women spend far more time involved in the health care system than men.[6] Women's involvement in the health care system increase during their reproductive years.[7]

[1] Planned Parenthood Action Fund, *Birth Control Stories*, (2019) plannedparenthoodaction.org/issues/birth-control-stories.
[2] *Id.*
[3] National Partnership for Women, *Families, Why the ACA Matters for Women: Summary of Key Provisions*, (July, 2012) www.nationalpartnership.org/ACA.http://go.nationalpartnership.org/site/;
[4] *Id*.
[5] *Id*.
[6] *Id*. (Beginning in 2014, the ACA will prohibit new plans in the individual and small group market from charging women higher premiums simply because of their gender. [F]or the first time in history, gender discrimination will be prohibited in all federally funded health care).
[7] *Id.*

Women's right to "Full and Equal" health care is under attack by the Trump Administration's recent promulgation of the "Moral IFC."[8] These regulations allow employers to adopt health care plans that deny contraceptive coverage to female employees if the employer expresses a moral or religious objection.[9] The exemption applies to any employer or college/university with student health plans, that has religious objections to contraception coverage, and to any non-profit employer, except publicly traded corporations with moral objections to contraception.[10] This comment intends to examine how the passage of the mandate titled the "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act,"[11] also known as the "Moral IFC", is procedurally and substantively impermissible, and encroaches on important constitutional values. First, the comment examines the failure of the Department of Health and Human Services to follow the notice-and-comment provision under the Administrative Procedure Act. Second, the comment analyzes the inconsistencies between the recent adoption of the Moral IFC and the Affordable Care Act (ACA). Then, this comment takes a look at broader issues regarding the Moral IFC—specifically (1) the implications of the countless instances in which the Trump Administration failed to follow administrative procedures and how that alarming trend effects the constitutional principle of separation of powers; and (2) how the Moral IFC undermines the important constitutional rights regarding privacy and bodily autonomy.

2. ACA's Contribution to Women's Health

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[8] I refer to the Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act (document citation 83 FR 57592) as the "the Moral IFC" because that is the short name used by "Agencies". When I use the term "Agencies" I am referring to the Department of Treasury, Employee Benefits Security Administration, Department of Labor, and Department of Health and Human Services; the "IFC" stands for Interim Final Regulations with request for comments. Federal Register *The Daily Journal of the United States*, National Archives 11/15/2018 https://www.federalregister.gov/documents/2018/11/15/2018-24514/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable

[9] Moral Exemptions and Accommodations for Coverage of Certain Preventive Services, 83 Fed. Reg. 57592 (Nov. 15, 2018) (to be codified at 26 C.F.R. 54)

[10] *Id.*

[11] *Id.* at 57596 In respect to the Moral IFC passed by The Trump Administration, the executive departments responsible for promulgating the rules include the Department of Health and Human Services ("HHS"), the Department of Labor, and the Department of Treasury (offered referred as "The Departments" or "Agencies" under 83 FR. 57592.)

The ACA created affordable health plans that included reproductive coverage so women could satisfy their health care demands.[12] Originally, the Affordable Care Act excluded preventive services that many women advocates and medical professionals believed were critical for women's health.[13] To address women's health concerns, Senator Barbara Mikulski introduced the Women's Health Amendment ("WHA"), which added a new category to the ACA dedicated to preventive services catered to women's health.[14] Senator Mikulski stated, "copayments are so high that women avoided getting preventive and screening services in the first place."[15] According to sponsors of the bill, an increase in contraceptive coverage would produce important public health gains.[16] Under the passage of the WHA, the ACA required new insurance plans to include coverage without cost sharing of "additional preventive care and screening."[17] These services were provided for in the comprehensive guidelines outlined by the Health Resources and Services Administration (HRSA).[18]

The WHA ensured that women had access to certain health-care services and this health coverage amendment allowed 62 million women to gain health care coverage.[19] In 2010, The Patient Protection and Affordable Care Act of 2010 confirmed the contraceptive mandate for women's preventive services without cost-sharing.[20] In other words, health insurance plans had to cover ACA-approved contraceptive methods and counseling provided by an in-network provider, without charging a co-payment or coinsurance, even if the deductible had not been met.[21] This extensive coverage has been revolutionary for women of all generations because the mandate implemented by the ACA has greatly improved

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[12] Kristyn Densmore, *The Struggle of a Woman's Body in a Man's World*, 18 APPALJL. 25, 26 (2018)
[13] *Burwell v. Hobby Lobby Stores, Inc.*, J. Ginsburg *dissenting* 573 U.S. 682, 742 (2014).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Planned Parenthood Action Fund, *The Fight for Birth Control*, (2020) https://www.plannedparenthoodaction.org/fight-for-birth-control*The Fight for Birth Control*, Planned Parenthood
[20] 42 USCA § 300gg-13; ehealthinsurance, *History and Timeline of the Affordable Care Act (ACA)* (Mar. 5, 2018) ehealthinsurance.com/resources/affordable-care-act/history-timeline-affordable-care-act-aca.
[21] Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, (2011) https://www/ncbi.nlm.nih.gov/pmc/articles/PMC3001814/.

women's access to preventive care coverage.[22] Without insurance, birth control pills would typically cost between $15 to $50 per month which adds up to $600 per year, intrauterine devices cost $1,300, birth control implants costs $1,300, vaginal rings cost $200 per month, and birth control shots cost $150 every three months.[23] The goal for the Contraceptive Mandate under the ACA was that women would not have to pay more than men for health insurance policies, women would not be denied coverage due to sickness or pre-existing conditions, and that more low-income women would have timely access to family planning services.[24] This note makes clear that the Trump Administration did not start the regression of the birth control mandate; rather, controversial religious debates surrounding the issue may have influenced the Trump Administration to significantly alter the Contraceptive Mandate under the ACA.

3. The ACA Has Not Been Accepted by Everyone

The ACA is known for being a controversial legislation, so it is no surprise that the Contraceptive Mandate within the ACA provoked intense and fervent debate. Many committed supporters and opponents alike have used the media to express their views on the legislation.[25] The controversy prompted modifications (through regulation and litigation) to the Contraceptive Mandate to provide various exemptions and accommodations for employers with religious and moral objections to contraceptive services in health plans.[26] For example, in 2012, the Departments of Labor, Human

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[22] National Partnership for Women, *supra* note 3(July, 2012) (The National Partnership summarizes key provisions of the ACA and their relationship to women's health, they include a list of statistics that show how the Contraceptive Coverage under the ACA has benefitted women since its enactment in 2012: By 2014, major changes to the health care system could make nearly 19 million previously uninsured women eligible for affordable, comprehensive health coverage; 2.5 million more young adults are insured because the ACA allows them the right to stay on family's health insurance until the age of 26; Women will be guaranteed preventive services such as birth control, mammograms, cervical cancer screening, with no deductibles or copays; Family planning providers will continue to provide health services to women they serve; Pregnant and parenting women on Medicaid will get access to needed services such as professional parenting information on post-partum depression and anti-smoking programs).

[23] *The Fight for Birth Control*, Planned Parenthood Action Fund (2020) https://www.plannedparenthoodaction.org/fight-for-birth-control; *Birth control*, Planned Parenthood.org (2020) https://www.plannedparenthood.org/learn/birth-control

[24] *Id.*

[25] Ctr. for Reproductive Rights, *The Contraceptive Controversy: A Comprehensive Reply*, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_the_contraception_controversy.pdf

[26] Patricia A. Moran *The Affordable Care Act's Contraceptive Mandate A Loss in Massachusetts and Other Current Events*, March 20, 2018. Mintz.com.

Services, and the Treasury provided a full exemption for a group of religious employers; mainly churches and establishments deemed houses of worship.[27] Between 2013 and 2014, the Departments adopted an accommodation for non-profit, religious organizations that opposed covering contraceptives for employees under their health plans for some or all contraceptive services.[28] Under the accommodation, an objecting employer had to self-certify and notify the department of Health and Human Services, the plan's insurer, or the plan's third party administration of its objection, and these parties would separately provide the coverage to the employee.[29] The accommodation allows the employee to still get insurance through the employer's insurance plan, even though the employer removes them from providing contraceptive coverage. In *Burwell v. Hobby Lobby*, the Supreme Court agreed with Hobby Lobby that the accommodation was too narrow and should be extended to additional employers.[30] Thus, pursuant to Hobby Lobby, the accommodation was extended to closely-held, private, for-profit employers, whose owners objected to the contraceptive mandate based on religious beliefs.[31] In 2012, the accommodating health plans had the approval of the majority of Americans and has even gained the support of many large Catholic Organizations such as the Catholic Health Association, the Association of Jesuit Colleges and Universities, and the Sisters of Mercy of the Americas, and other Catholic charities.[32] These organizations appreciated the benefits of the Contraceptive Mandate, including far reaching coverage for women in economically and socially disadvantaged backgrounds.[33] On the other side of the debate, opponents of the Birth Control Mandate under the ACA grounded their opposition in claims of religious freedom.[34] For example, the United States Conference of Catholic Bishops (USCCB) and some other religious leaders have vehemently objected to the policy, claiming it would violate religious liberty

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[31] Moran, *supra* note 26.
[32] Ctr. for Reproductive Rights, *supra* note *25* at 2.
[33] Ctr. for Reproductive Rights, *supra* note *25* at 2.
[34] Ctr. for Reproductive Rights, *supra* note *25* at 3.

despite not being charged for the contraceptive coverage, or required to communicate about it.[35] Instead, they urge support for radical and highly unpopular legislation to allow any employer, including anyone who "runs a Taco Bell" to refuse to provide coverage for any services on any moral or religious ground.[36] Arguably, it appears that the points made by religious dissenters mirror the same rationale outlined by the Trump Administration in the Moral IFC. Thus, there is strong evidence that legal consensus sometimes yields to the face of passionate dissenters. In this case, the Trump Administration shaped its' policy initiatives to undermine a major provision in the ACA.

4. Contraception Coverage with a New Face—Promulgated by the Department of Health and Human Services (HHS)

With the recent passage of the Moral IFC, the Trump Administration threatens to corrode women's advanced health care envisioned by the Affordable Care Act. The Moral IFC is comprised of two regulations: (1) a rule that "allows nonprofit and for-profit employers with an objection to contraceptive coverage based on *religious* beliefs to qualify for an exemption and drop contraceptive coverage from their plans," and (2) a rule that "exempts all but publicly traded employers with *moral* objections to also qualify under the exemption to contraception."[37] These regulations also apply to "private institutions of higher education that issue student health plans."[38] The rules were promulgated by the HHS and the Department of Labor and Treasury ("the Agencies") to finalize the interim rules issued in the Federal Register on October 13, 2017.[39] The purpose of the rules are to "expand exemptions to protect religious beliefs for certain entities and individuals whose health plans are subject to a mandate of contraceptive coverage through guidelines issued pursuant to the Patient Protection and Affordable Care

[35] Ctr. for Reproductive Rights, *supra* note *25* at 3.
[36] Ctr. for Reproductive Rights, *supra* note *25* at 3.

[37]83 Fed. Reg. 57592, *supra* note 9 at 57537; Laurie Sobel, Alina Salganicoff, Caroline Rosenzweig *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*, (Nov. 19, 2018) https://www.kff.org/health-reform/issue-brief/new-regulations-broadening-employer-exemptions-to-contraceptive-coverage-impact-on-women/
[38]*Id.*
[39]*Id.* at 57536.

Act."[40] The time to challenge these regulations is now because the rules have been in effect since January 14, 2019.[41]

There are serious procedural, substantive, and constitutional problems with the Trump Administration's decision to scale back employers' obligations to provide women with contraception in their health plans. First, this comment will trace the procedural errors made by the Trump Administration, demonstrating that the promulgation of both regulations ultimately violated the Administrative Procedure Act. The comment hopes to make clear that a blatant disregard for procedural rules by any administration is unacceptable. Second, this comment will summarize the Third Circuit's conclusions that the Moral IFC is incompatible with the Affordable Care Act ("ACA") and not authorized under the Religious Freedom Restoration Act ("RFRA"). The final part of this comment explores the constitutional implications of the Moral IFC in two sections: (1) the comment situates the regulations within the Trump Administration's broader pattern of cases showing non-compliance with administrative procedures. The implications of this extensive record show that the Moral IFC is part of a disreputable trend of defiance and disregard for administrative procedures and fairness by the Trump Administration, which ultimately threatens the constitutional doctrine of separation of powers; (2) the comment will analyze how the unilateral executive action by the Trump Administration encroaches on women's health rights. The Supreme Court's recognition of a constitutional right to privacy, though not directly applicable to the Moral IFC, remains significant for two reasons. The Moral IFC encroaches on values whose importance has been repeatedly emphasized by the court; and the regulations threaten to erode women's reliance on health insured birth control solidified by the Women's Health Amendment and the Affordable Care Act.

II. Procedural Invalidity of the Moral IFC (i.e., why/how the Trump Administration violated the APA)

To analyze whether the Moral IFC complies with the procedures under the Administrative Procedure Act and is compatible with the ACA and the RFRA, this comment analyzes arguments made

[40] *Id.*
[41] *Id.*

by both parties in recent civil suit *Pennsylvania v. President U.S.* This comment also examines the reasoning set forth by the Third Circuit when deciding the case.

A. What is the Administrative Procedure Act?

The Administrative Procedure Act sets out procedures that Agencies must follow when promulgating rules and issuing orders.[42] In particular, this note focuses on the notice-and-comment provision of Section 553 which governs the informal rulemaking process. The notice-and-comment provision consists of a three-step rule for Agencies to follow when issuing a new interpretation of a rule.[43] First, the agency must give notice of proposed rulemaking and describe the proposed rule in detail.[44] Second, "the agency must solicit, receive, and consider comments on the proposed rule from interested members of the public."[45] Third, after considering public comments, the agency has to publish the final rules along with a concise general statement of purpose.[46] Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law."[47] Congress intended for the APA's notice-and-comment procedures to serve several objective such as: exposure to diverse public comments to ensure that agency regulations are experimented, provide fairness to interested parties, and give affected parties an opportunity to develop a record for Judicial Review.[48]

Congress prescribed the Administrative Procedure Act as a way to improve the rulemaking process by creating administrative procedures for Executive agencies to follow.[49] Therefore, the APA is a

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[42] David B. Chaffin, *Remedies for Non-Compliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of United States Steel and Western Oil & Gas*, 1982 Duke LJ. 461, 461 (1982)
[43] *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1203 (2015); 5 U.S.C. § 553
[44] Richard J. Pierce Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMLR 547, 549-50 (2000); §553(b).
[45] *Id.*
[46] *Id.*
[47] *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979).
[48]Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011) (quoting *Int'l Union, United Mine Workers of Am. V. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).
[49] Senate Comm. on the Judiciary, Administrative Procedure Act: Report on the Committee of the Judiciary, S. Rep. no. 752, 79th Cong., 1st Sess. 7 (1945), *reprinted* in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 1, 187 (1946); David B. Chaffin, *Remedies for Non-Compliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of United States Steel and Western Oil & Gas*, 1982 Duke LJ. 461, 472 (1982).

way for Congress to limit the Executive "rulemaking" powers.[50] Congress adopted Section 553 of the Act to set minimum procedures that agencies are, in most instances, obligated to follow when promulgating rules.[51] According to the Senate Judiciary Committee Report on APA, "Section 553 was designed to help agencies promulgate more rational, accurate rules by exposing the rulemaking process to criticism from interested parties, commentators, and the public."[52] Another value underlying Section 553 is to help ensure that agencies act in a way that encourages public participation and deliberation.[53] It is a procedural device that requires agencies to collect and grapple with a lot of information before acting, thus fully embracing the *quality* of rulemaking while also acting on a sort of check on the executive branch.[54]

The APA makes notice-and-comment required in informal rulemaking unless otherwise specified by statute or agency action falls within one of the exceptions.[55] The notice-and comment provision does not apply to all rules issued by agencies.[56] Hence, under 553, two narrow exceptions allow agencies to bypass the notice-and-comment requirements.[57] Under the first exception, the APA provides that "unless another statute states otherwise by notice or hearing, the notice-and-comment requirement does not apply to interpretative rules, general statements of policy, or rules of agency organization of procedure or practice."[58] The second exception states that agencies are precluded from following the notice-and-comment provision when the agency shows a "good cause"— that is, a reason why following notice and comment procedures would prove impracticable, unnecessary, or contrary to public interest.[59]

The APA's rulemaking requirements thus act as a procedural safeguard to ensure that federal governmental agencies are held accountable and make well-reasoned decisions.[60] Under the first exception, notice and comment are not required if an agency is merely interpreting a rule. According to

[50]*Id.*
[51] 5 U.S.C § 553 (b)(1976).
[52] Chaffin, *supra* note 42 at 472.
[53] Chaffin, *supra* note 42 at 464.
[54] Chaffin, *supra* note 42 at 464.
[55] 5 U.S.C. § 553(b) (2012).
[56] *Id.*
[57] *Id.*
[58] 5 U.S.C. § 553(b)(A).
[59] §553(b)(B).
[60] *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004).

Perez, the APA distinguishes between two types of rules: (1) 'legislative rules' which are issued through notice-and-comment rule making and (2) "interpretative rules", which are issued merely to advise the agency's construction of the statutes and rules and, by contrast, does not require notice-and-comment rulemaking.[61] Rules issued by agencies qualify as legislative rules if they have "force and effect of law."[62] In other words, an agency must use the APA's notice-and-comment procedures when it issues a novel interpretation of a regulation that deviates significantly from one the agency adopted in the past.[63] The dominant test for differentiating between legislative rules and interpretative rules is the Legal Effects Test, articulated in *American Mining Congress v. Mine Safety & Health Administration*.[64] Under the test, the legal effect is discovered by asking four questions: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is yes, the rule is a legislative rule.[65]

Under this Legal Effects Test, the Moral IFC is a legislative rule and therefore HHS was bound to follow notice-and-comment procedures set forth in the APA. Just one of the four questions need to be answered in the affirmative for the Moral IFC to be a legislative rule. When applying the Legal Effects test, the Moral IFC is a legislative rule because the HHS has published the regulations in the Code of Federal Regulations.[66] The Moral IFC is more akin to a legislative rule than an interpretative rule for a few other reasons. One, the Moral IFC issued by the HHS constitutes a "final agency action" for APA

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[61] Perez, *supra* note 43 at 1200-01 (citing *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 84, 99 (1995)). *See also* §§ 553(b),(c).
[62] Perez, *supra* note 43 at 1203 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979).
[63] Chaffin, *supra* note 42 at 472.
[64] *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). *See also Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); Texas *Children's Hosp. v. Azar*, 315 F.Supp.3d 322, 337 (D.C. Cir. 2018).
[65] *Id.*
[66] *See* 83 Fed. Reg. *supra* note 9 at 57592.

purposes because it marks the completion of the Agency's decision-making process.[67] Two, the Moral IFC constitutes an action from which "legal consequences will flow" because the Moral IFC alters the regulatory scheme, instituted by the Health Resources and Services Administration[68] (HRSA). [69] Three, the expansion of employers that can now eliminate contraceptive coverage of birth control will have an adverse impact on women across the country. Thus, the rules proscribed by HHS "must be subjected to a notice and comment period before taking effect."[70]

B. Procedures Utilized by the HHS

In May 2017, President Donald Trump issued an executive order mandating the HHS and the Departments of Labor and Treasury to "consider issuing revised regulations consistent with applicable law to address moral and religious-based objections to the preventive care mandate promulgated under 42 U.S.C. § 300gg-13(a)(4)."[71] In response, the Agencies issued two new interim final regulations without issuing a notice of proposed rulemaking or soliciting public comment.[72] The Agencies disregarded the core purpose of notice and comment, which is to give the public an opportunity to express their opinions before the regulations become finalized. When Agencies, such as HHS and the Departments of Labor and Treasury, promulgate interim final rules, there are set rules they must follow. However, the Agencies erroneously relied on both the statutory and good cause exceptions under the APA. Under the APA, if no exceptions qualify, Agencies must issue Notice of Proposed Rulemaking (NPRM), and then issue a final

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[67] *Bennett v. Spear*, 520 U.S. 154 (1997) (The *Bennett* case identified two conditions that had to be satisfied for agency action to be final and subject to review under the Administrative Procedure Act: (1) The action must mark the consummation of the agency's decision making process and (2) the action must be one by which rights and obligations have been determined, or from which legal consequences will flow.))
[68] The Health Resources and Services Administration is a component of the U.S. Department of Health and Human Services that focuses on improving health care to people who are geographically isolated, economically or medically vulnerable. Hrsa.gov. https://www.hrsa.gov/about/index.html. Congress directed the HRSA to issue guidelines setting forth the preventive health care services that women should be provided.
[69] *Bennett v. Spear* at 178 (1997) (note: the regulatory scheme issued by HRSA will be explored in section III.)
[70] *New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2d Cir. 2001).
[71] *Pennsylvania v. President U.S.*, 930 F.3d 543, 558 (3d. Cir. 2019)
[72] *Id.*

rule accompanied by an explanation before the final rulemaking may go into effect.[73] Here, the Moral IFC went into effect on Oct 6, 2017 and was never withdrawn in an attempt to preserve procedural rules.[74]

C. Arguments Advanced in the Third Circuit

The Moral IFC is procedurally invalid because the Agencies under the Trump Administration did not follow notice-and-comment and do not qualify for any exceptions under the APA. The Third Circuit found that the Agencies failed to meet both exceptions to the APA notice-and-comment provision. For the first exception, the court found no expressed statute that authorized the Agencies to defy the notice-and-comment provision.[75] The Health Insurance Portable and Accountability Act ("HIPAA") provision that the government relies on to justify deviation cannot possibly eliminate the requirement of notice-and-comment because the APA only allows for a subsequent statute to modify or supersede procedural requirements to the extent the statute expressly says so.[76] However, the Moral IFC provision does not contain express language exempting Agencies from the APA nor does it provide alternative procedures that could reasonably be understood as departing from the APA and thus authorizing the Agencies to disregard the notice and comment requirements.[77] Thus, the notice-and-comment requirement was superseded by HIPAA.

As to the second exception, the Third Circuit also found that the Agencies failed to demonstrate good cause for disregarding the notice-and-comment provision when it adopted the Moral IFC.[78] The court explained that HHS had not shown that following the APA procedures would have been impracticable, unnecessary, or contrary to public interest. The Third Circuit construed the good cause exception narrowly[79] and in *Nat. Res. Def. Council, Inc. EPA* ("NRDC"), the Third Circuit recognized that "[c]ircumstances justifying reliance on the [good cause] exception is indeed rare and

[73] 5 U.S.C. § 533 (b)-(d);
[74] *Id*.
[75] Pennsylvania, *supra* note 71 at 34.
[76] 5 U.S.C. §559
[77] Pennsylvania, *supra* note 71 at 34.
[78] Pennsylvania, *supra* note 71 at 35.
[79] Pennsylvania, *supra* note 71 at 35; *Nat. Res. Def. Council, Inc. EPA* ("NRDC") 683 F.2d 752, 764 (3d Cir. 1982).

will be accepted only after the court has closely examined proffered rationales justifying the elimination of public procedures."[80] All three arguments made by the government failed to meet the standard for good cause and were dismissed by the Third Circuit for being too broad and vague in details.[81]

The government cited three reasons why it believed there was "good cause" to promulgate the rule without notice and comment (1) the urgent need to alleviate harm to those with religious objections to the previous regulations; (2) the need to address "continued uncertainty, inconsistency, and costs arising from litigation challenging the current rules;" and (3) the fact that the Agencies had already collected comments on prior mandate-related regulations.[82] The court found that none of these claims were an adequate showing of good cause. First, the need to address harm to religious objections did not obliterate the need to follow required procedures.[83] Because most regulations are directed toward reducing some harm, stating a mere attempt to mitigate harm to affected parties, without more specific facts, does not create the urgency necessary to establish good cause.[84] Allowing an agency to invoke the good cause exception any time it sought to mitigate harm would abandon the narrow construction of the exception.[85] In addition, the agency failed to cite any facts or impending deadlines sufficient to raise good cause.[86] Second, the court found that the government's need to address uncertainty was likewise insufficient to establish good cause because uncertainty follows every regulation. Consequently, the court reasoned, relying on the presence of uncertainty to forgo notice-and-comment requirements, "would have the effect of writing those requirements out of [the majority] of statutes."[87] Third, the agency's previous collection of comments regarding other rules about the Contraceptive Mandate cannot substitute for notice-and-comment.[88] If comments were made after the passage of

[80] Pennsylvania, *supra* note 71 at 35.
[81] Pennsylvania, *supra* note 71 at 36.
[82] Pennsylvania, *supra* note 71 at 36.
[83] *United States v. Reynolds*, 710 F.3d 498, 509 (3d Cir. 2013).
[84] *Id.*
[85] *Id.* at 511.
[86] Pennsylvania, *supra* note 71 at 34.
[87] Pennsylvania, *supra* note 71 at 37; Chaffin, *supra* note 42 at 510.
[88] Pennsylvania, *supra* note 71 at 37-38.

Final Regulations, it would defeat the intended purpose to involve interested parties in the rule-making process because their participation would not make any difference.[89] By the same token, the agency cannot avoid conducting comments prior to issuing Final Regulations.[90] The court reasoned that if previous comments on similar matters met the standard, that would have the effect of eradicating not only the involvement of current interested parties, but the specific directions given by Congress to steer Agencies in the right direction of rulemaking.[91]

Lastly, the government contended that to the extent it violated the APA by forgoing notice and comment, it nonetheless, had remedied the violation by subsequently facilitating notice-and-comment. Under the Third Circuit precedent, post-promulgation of notice-and-comment procedures cannot cure the failure to provide such procedures before the final regulations are issued.[92] The APA does not allow for notice-and-comment after the rule becomes final, therefore the Agencies cannot issue notice and comment after the Moral IFC has already been finalized and published. In *Sharon Steel Corp.*, the Third Circuit held "that the period for comments after promulgation cannot substitute for prior notice-and-comment required by the APA.[93] The Third Circuit reasoned that the notice-and-comment period initiated after the final regulations did not remain true to the core goals of the APA.[94] In sum, the agency failed to show how the Moral IFC is unique and fits into the narrow framework of the good cause exception thus, they were bound to follow notice-and-comment.

III. Substantive Invalidity of the Moral IFC

In addition to procedural defects, the Moral IFC is also substantively inconsistent with the Affordable Care Act and not authorized by the Religious Free Restoration Act. The opponents of the Moral IFC, make textual and statutory arguments to the Third Circuit in support of invalidating the Moral

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[89] Pennsylvania, *supra* note 71 at 37-38.
[90] Pennsylvania, *supra* note 71 at 37-38.
[91] Pennsylvania, *supra* note 71 at 37-38.
[92] *United States v. Reynolds*, 710 F.3d at 509; *Nat. Res. Def. Council, Inc. EPA* ("NRDC"); Pennsylvania, *supra* note 71 at 37-38.
[93] *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979)
[94] Pennsylvania, *supra* note 71 at 38.

IFC, while the Government relies on the ACA and the RFRA as substantive guidelines for the enactment of the Moral IFC.[95] The Third Circuit concluded that the Moral IFC is substantively invalid because neither the Affordable Care Act (ACA) nor the Religious Freedom Restoration Act (RFRA) authorize or require the final rules.[96] Thus, the court characterized the Moral IFC as arbitrary, capricious, and an abuse of discretion because it was issued in excess of the Agencies' statutory jurisdiction and authority.[97]

According to the Third Circuit, the Moral IFC was incompatible with the ACA because it (1) conflicted with the explicit language of the ACA and (2) misconstrued congressional intent. The Third Circuit found no textual support for the Agencies' claim of authority under the ACA to create such an expansive exemption that allows employers to choose whether to provide contraceptive coverage.[98] The ACA's Women's Health Amendment (WHA) allows Agencies to issue "comprehensive guidelines" concerning the type of services that are to be provided, but it does not give those Agencies the authority to undermine Congress' directive concerning *who* must provide coverage for these services.[99] Section 300gg-13(a) of the Public Health and Welfare Statute, explicitly demands that group health plans and insurers "shall provide" the preventive care services set forth in the HRSA's comprehensive guidelines.[100] Under this section, Congress issues a guide for the HRSA to follow when deciding *what* preventive services must be covered, while expressly limiting HRSA's ability to determine *who* must provide these services.[101] In other words, the statute allows the agency to identify services that must be covered but does not allow HRSA to exempt *certain employers* from providing these health services. In addition, the absence of language that explicitly forbids Agencies from expanding exemptions, does not give them

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[95] "The Government" represents the agencies which for purposes of this paper is comprised of the Department of Treasury, Employee Benefits Security Administration, Department of Labor, and Department of Health and Human Services.
[96] Pennsylvania, *supra* note 71 at 41.
[97] Pennsylvania, *supra* note 71 at 41.
[98] Pennsylvania, *supra* note 71 at 41.
[99] Pennsylvania, *supra* note 71 at 42-43; 42 U.S.C. § 300gg-13(a) (emphasis added).
[100] § 300gg-13(a)
[101] *Id.;* Plaintiff brief 2:17-cv-04540-WB, 2

power to do so. The fact that the ACA did not contain language specifically precluding Agencies from creating exemptions does not indicate that they have the authority to do so.[102]

Judge Shwartz acknowledged that the language of the Women's Health Amendment is mandatory.[103] The language provides that "group health plans and health insurance issuers shall, at a minimum, provide coverage for and shall not impose any cost sharing requirements for preventive services for women identified by HRSA."[104] Thus, HHS's regulation that increases the number of employers who can choose to opt out of birth control coverage is in direct conflict with the statute. Most employers with a thinly veiled religious objection can now deny women free contraceptive coverage, and when that fails, employers can raise a moral objection, which can encompass a broad spectrum of moral rights and wrongs (a moral objection is too low of a threshold to meet as a justification to deny women basic birth control coverage). Further the Section 300gg-13(a) states that health insurers "shall" not impose cost-sharing.[105] The Third Circuit points out that the use of the word *shall* is not subject to discretion, thus the term *shall* is mandatory and insurers are prohibited from forcing women to share in the costs of contraceptives covered under their health plan.[106] Nothing in Section 300gg-13(a) gives HRSA the discretion to exempt employers of its choosing from providing the guided services.[107] The Women's Health Amendment does not authorize Agencies to adopt plans that would alleviate employers from providing preventive care services set forth in the HRSA-supported comprehensive guidelines.[108] If employers can easily opt out of providing contraceptive methods, more women would be forced to share the costs of necessary services in order to have access to birth control and other forms of preventive care. This practice of cost-sharing is explicitly forbidden by the Women's Health Amendment.[109]

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[102] Pennsylvania, *supra* note 71 at 42.
[103] Pennsylvania, *supra* note 71 at 45.
[104] 42 U.S.C § 300gg-13(a)(4).
[105] Pennsylvania, *supra* note 71 at 43.
[106] Pennsylvania, *supra* note 71 at 43.
[107] Pennsylvania, *supra* note 71 at 43.
[108] § 300gg-13(a)
[109] *Id.*

The Third Circuit also noted that previous actions taken by Congress also show that Congress—and not the Trump Administration retains the authority to exempt certain employers from providing contraceptive coverage.[110] Congress has demonstrated its power to exempt certain employers from various ACA requirements, including the Women's Health Amendment, by explicitly exempting grandfathered plans[111], and employers with fewer than 50 employees.[112] The Third Circuit reasoned that by exempting specific actors from the ACA's mandatory requirements, Congress reserved for itself (not the Agencies) the exclusive role of making exemptions.[113] Further evidence that Congress intended to be the sole governing body to exempt employers comes from 2012, when Congress considered and rejected a statutory conscience amendment that would have operated similarly to the challenged exemptions in the Moral IFC.[114] The decisions to reject similar exemptions and adopt certain ones, is evidence that Congress not only intended to have the responsibility of exempting employers, but also to set an example of behavior for agencies to follow. By adopting the Moral IFC that intended to do what Congress refused, the Agencies took actions that directly conflicted with Congress' intent and further exacerbated the power struggle between the two branches of government.

As a supplemental argument, the legislative intent was clear that family planning was always intended to be a part of the ACA's Contraceptive Mandate, as several senators discussed the obligation to provide important services for women.[115] Thus, when addressing women's health, Congress added the

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[110] Pennsylvania, *supra* note 71 at 45.
[111] 42 U.S.C § 18011; (The "grandfathered plans" refers to the portion of the Affordable Care Act that "permits some health plans. Those offered before the ACA passed, to be exempt from some of the law's rules and protections. The idea was that the exemptions would help smooth the transition and allow businesses and individuals to keep current policies without having to make substantial changes.") *FAQ: Grandfathered Health Plans*, Sarah Barr, Kaiser Health News. November 13, 2013. https://khn.org/news/grandfathered-plans-faq/
[112] 26 U.S.C. § 4980H(c)(2); 42 U.S.C. §§ 18011(a), (e); 26 U.S.C. § 4980H(c)(2)
[113] Pennsylvania, *supra* note 71 at 45.
[114] 158 Cong. Rec. S1162, 1173-74 (2012); *Pennsylvania*, 930 F.3d at [43.];
[115] 155 Cong. Rec. S12,271 (daily ed. Dec. 3, 2009); see, e.g., 155 Cong. Rec. S12 *see. e.g*., 155 Cong. Rec. S12, 271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("under [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as. . .family planning."); *id.* at 12,274 (statement of Sen. Murray) ("we have to make sure we cover preventive services, and the WHA takes into account the unique needs of women. . .women will have improved access to. . .family planning services."); 155 Cong. Rec. S12, 025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("these health care services include. . .family planning services."); *id.* at S12, 027 (statement of Sen. Gillibrand) ("with [the WHA], even more preventive screening will be covered including. . .family planning.")

WHA to the statute (ACA) as a directive to the HHS to develop a list of services to be covered and as noted by some senators, "contraception was always intended to be on it."[116] The Moral IFC threatens women's ability to get contraceptive coverage through their insurance; a service for women that was discussed and advocated by several senators when enacting the WHA. The Moral IFC under the Trump Administration also deviates from the purpose of the ACA, to close the gap between the amount of health coverage men pay compared to the excessive costs women pay for health care.[117] The ACA addresses longstanding gender disparities in health care services, and the Contraceptive Coverage Mandate was intended to effectuate that goal.[118] Senator Kirsten Gillibrand noted, "Not only do women pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men."[119] Senator Gillibrand also highlighted that the current health care system puts women at an economic disadvantage because of the cost not only associated with child bearing, but maintaining reproductive health at older ages.[120] In sum, the Moral IFC conflicts with text of the Affordable Care Act, which designates Congress as the institution charged with determining the extent of employers exemptions' under the Contraception Mandate. The Moral IFC also does not abide by the legislative spirit and intent of Congress, thus the Third Circuit correctly found that the Moral IFC was substantively invalid because it conflicts with the ACA.

In addition, to the Moral IFC's incompatibility with the ACA, the Third Circuit also found that the Moral IFC could not be salvaged by the Religious Freedom Restoration Act (RFRA). The RFRA

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[116] Sarah Lipton-Lubet, *Symposium: Gender Matters: Women, Social Policy, And the 2012 Election: Contraceptive Coverage under the Affordable Care Act*, 22 Am. U.J Gender Soc. Pol'y & L. 343, 346.
[117] 155 Cong. Rec. S12,026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) (noting that the amendment was a response to "punitive practices of insurance companies that charge women more and give [them] less in a benefit.")
[118] Lipton-Lubet, *supra* note 116.
[119] 155 Cong. Rec. S12, 027 (daily ed. Dec. 1, 2009) (Statement of Sen. Gillibrand); *see also* Lipton-Lubet, *supra* note 116 at 347. *see also* 155 Cong. Rec. S12, 272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) ("Women of childrearing pay on average 68 percent more for their health care than men do.")
[120] *Id*; *see also* 155 Cong. Rec. S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it."); *see also* 155 Cong. Rec. S12, 272 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) ("Women of childrearing pay on average 68 percent more for their health care than men do.")

provides that the federal government "shall not substantively burden a person's exercise of religion even if the burden results from a rule of general applicability.[121] The court held that the Government's effort to construe RFRA as providing appropriate authority for religious exemptions was erroneous because (1) the RFRA does not authorize the enactment of additional religious exemptions to address religious burdens and (2) the accommodation addresses burdens imposed on third parties who face consequences for complying with contraceptive mandates.[122]

The Third Circuit found several reasons why the RFRA does not empower agencies to allow religious objectors to decline to provide contraceptive coverage without notifying their insurance issuer or employees.[123] One, the court recognized that RFRA's protections apply only to religious *objectors*, who oppose the accommodation process, not third parties.[124] In respect to the accommodation process, the actual provision of the contraceptive coverage is by a third party, so the court reasoned that "any possible burden from the notification procedure [was] not substantial."[125] Two, the court found that the RFRA does not permit the granting of broad exemptions such as the one established by the Moral IFC nor retain the right to not provide notice of an employer's decision not to provide coverage.[126] As the Third Circuit explained in *Geneva Coll. v. Sec'y of U.S. Dept. of Health & Human Servs* "the self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be provided by federal law."[127] Federal law, rather than any involvement by the employers in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services.[128] Third, the court noted that "Agencies downplayed this burden on women, contradicting Congress's mandate that women be provided

[121] 42 U.S.C. § 2000bb-1(a).
[122] Pennsylvania, *supra* note 71 at 46; *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).
[123] Pennsylvania, *supra* note 71 at 49.
[124] Pennsylvania, *supra* note 71 at 50.
[125] Pennsylvania, *supra* note 71 at 50.
[126] Pennsylvania, *supra* note 71 at 49.
[127] Pennsylvania, *supra* note 71 at 49
[128] Pennsylvania, *supra* note 71 at 49.

contraceptive coverage.[129] Further, the court pointed out that the Agencies downplayed the significant burden the new religious exemptions would impose on female employees who would lose coverage.[130] Under the ACA, the religious exemptions and accommodation should not hinder woman's ability to get health coverage. As *Hobby Lobby* held "no prior decision under the RFRA allows a religious-based exemption if the accommodation would be harmful to women, the very persons the contraceptive coverage requirement was designed to protect.[131] Judge Shwartz emphasized that "the Agencies even recognized the record shows that thousands of women may lose contraceptive coverage if the [Moral IFC] is enforced and frustrate their right to obtain contraceptive."[132]

In sum, the Third Circuit held that the Contraceptive Mandate, did not infringe on the religious exercise of covered employers because RFRA only applies to employers not third parties, and federal law dictates the obligation of insurance issuers and third parties to provide coverage, not the Agencies.

IV. Bigger-Picture Problems

The Third Circuit has found that the Moral IFC is procedurally and substantively invalid. Procedurally, the Moral IFC is deficient because the HHS failed to follow notice-and-comment and did not qualify under any exceptions. Substantively, the rule conflicts with the spirit and purpose of the ACA and the RFRA does not authorize the promulgation of such an expansive religious and moral exemption of protected contraception. The Moral IFC does not just invoke procedural and substantive challenges, but also calls into question core constitutional principles. First, the Trump Administration's record reveals that the Moral IFC is only a piece of a larger trend of administrative malfeasance. This trend of imprudence shows not only that the Trump Administration continuously fails to follow various procedural rules in a range of administrative fields, but also implicates larger separation of powers concerns. Second, the passage of the Moral IFC is problematic because the denial of women contraception signifies privacy rights associated with bodily autonomy and dignity.

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[129] Pennsylvania, *supra* note 71 at 51.
[130] Pennsylvania, *supra* note 71 at 51.
[131] Pennsylvania, *supra* note 71 at 50 (citing Hobby Lobby, 573 U.S. at 764)
[132]Pennsylvania, *supra* note 71 at 50.

A. The Trump Administration's Pattern of Unilateral Executive Action and the Impact on Separation of Powers

The blatant disregard for administrative-law protections is not a new phenomenon under the Trump Administration. The pattern of unilateral executive action during the Trump Administration proves that the promulgation of the Moral IFC without proper notice-and-comment is no outlier. This portion of the comment explores the trend of cases reflecting the Trump Administration's non-compliance with administrative procedures which ultimately implicates larger separation of power concerns. The sheer numbers and magnitude of cases showing non-compliance and disregard for core procedural and substantive requirements of the APA and other restrictions on executive-branch power is especially concerning.

In a range of administrative fields including healthcare, environmental, and consumer protection, the Trump Administration has frequently failed to adhere to the procedures set forth by the APA and courts have struck down many of the Trump Administration's actions on procedural grounds. For instance, in *Philbrick v. Azar*, a district court in D.C. struck down HHS's effort to roll back the Medicaid expansion of the Affordable Care Act as arbitrary and capricious for failing to address the loss of coverage that would occur under the decision.[133] The Second Circuit also found agencies to be non-compliant with the APA in *Natural Res. Def. Council, Inc. v. EPA*, holding that the Environmental Protection Agency acted arbitrarily and capriciously by applying a lesser standard and failing to examine key assumptions when promulgating a rule to regulate discharge of ballast water from ships.[134] In another case involving the EPA, *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, a federal district court in California found that the EPA's persistent delays of a rule designed to reduce harmful pesticides were illegal because the agency failed to comply with notice-and-comment requirements.[135] In *Am. Acad. of*

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[133] *Philbrick v. Azar*, 397 F. Supp.3d 11 (D.D.C Cir. 2019); Institute for Policy Integrity New York University School of Law, *Roundup: Trump-Era Agency Policy in the Courts*, (last updated Feb. 25, 2020). https://policyintegrity.org/trump-court-roundup

[134] *Natural Res. Def. Council, Inc. v. EPA*, 808 F.3d 556 (2d. Cir. 2015)

[135] *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018); Institute for Policy Integrity, *supra* note 133.

Pediatrics v. FDA, a Maryland federal district court found that the Food and Drug Administration illegally failed to follow notice-and comment requirements and intentionally delayed a rule which would have required e-cigarette manufactures to obtain pre-approval before marketing their products.[136] The Department of Education also failed to comply with the APA, in *Bauer v. DeVos*, in which a D.C. district court held that the Department of Education's third delay of the Borrower Defense Rule was illegal because the Agency failed to comply with the negotiated rulemaking requirements of the Higher Education Act.[137] In *Natural Resources Defense Council v. Interior*, the Department of Interior was put under pressure by the court to include bumble bees in the endangered species listing after being sued for failing to follow notice-and-comment procedures in its delay of protections for bumble bees.[138]

Most district courts have struck down the Trump Administration's attempt to undermine various regulatory initiatives of the Obama Administration. Generally, courts have rejected Agencies' attempts to unilaterally pass regulations without the appropriate procedures for a few reasons. One, courts have emphasized the importance of the opportunity for public comment because the "new rules" issued by Agencies typically conflict directly with strong, well-documented public opinion.[139] Thus, the courts recognize that facilitation of public comment to counter agency action is a core part of legitimizing administrative fairness. Two, Agencies under the Trump Administration have rarely shown why they could not achieve the same goals by going through notice-and-comment procedures.[140] Three, courts have universally rejected various attempts by Agencies to argue that they were planning to undertake notice-and-comment in the future.[141] If courts allowed notice-and-comment to take place in the future after the rule is already in effect, then comments from interested parties after the fact would be futile. Further, such a poor argument would defeat the purpose of the APA to promote civic engagement,

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[136] *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp.3d (D. Md. 2019); Institute for Policy Integrity, *supra* note 133.
[137] *Bauer v. DeVos*, 325 F. Supp.3d 74 (D.D.C. 2018); Institute for Policy Integrity, *supra* note 133.
[138] *Natural Resources Defense Council v. Interior*, No. 17-01130 (S.D.N.Y); Institute for Policy Integrity, *supra* note 133.
[139] Glicksman, Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 Duke L.J. 1651, 1675 (May. 2019).
[140] Glicksman, *supra* note 139.
[141] Glicksman, *supra* note 139.

accountability, and fairness. The remedy in most courts has been to strike down regulations promulgated without notice-and-comment and to require Agencies to comport with the APA's procedures before imposing binding rules on regulated parties. [142] Considering the Moral IFC is one part of this trend reflecting the Trump Administration's disregard for administrative procedures and acknowledging the sweeping impact the employer expansion will have on women's health care, we all should be especially troubled by the separation-of-powers implications invoked by Trump Administration's actions.

The Moral IFC, like other regulations denied by courts across the country, is constitutionally impermissible because it is a product of unilateral executive action which operates to weaken constitutional separation of powers. The Trump Administration's unilateral executive actions reveal a stark departure from the Framers' vision of separated powers. The Framers intentionally established a structure of government that divided power in such a way so that no one branch would have too much power or authority over the others, with each branch beholden to specific constitutional duties.[143] The Trump Administration's blatant attempt to ignore procedural rules, set out by the branch of government that entrusted them with this power, strays further from the Framers' intent to create a government in which each branch maintains its constitutionally designated roles and monitors each other.[144]

Congress relies immensely on Agencies "to promulgate rules and standards that have binding force of law."[145] Congress acknowledges that it may not have the time nor expertise to adequately complete the laws, but it recognizes that administrative Agencies have the specialized knowledge and experience to effectively carry out the legislative mandate.[146] Thus, Agencies are sometimes more

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[142] Glicksman, *supra* note 139.
[143] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 579-80; Illan Wurman, *Constitutional Administration*, 69 Stn. LR. 359, 367 (2017).
[144] Wurman, *Constitutional Administration* at 143 ("The separation of powers combined with checks and balances was the chief innovation of the Constitution); Strauss, *The Place of Agencies in Government* at 604 ("The checks and balances idea embodied in the Constitution creates and demands the continuance of a tension among the branches. . .limiting each other.") (internal quotations omitted)
[145] *Id.*
[146] Tracey L. Cloutier; *Joined at the Hip: The Nondelegation Doctrine and the Principle of Deference—The Struggle For Power Has The EPA Caught in the Middle*, 7 TXWLR 63, 73-74 (2000).

equipped than the legislative branch to identify and address the details that could inhibit effective rules and regulations.[147]

By not following the procedural rules mandated in Section 553 in the APA, the Trump Administration abuses the responsibility bestowed on it by the Legislative Branch; exercising a prerogative that the Constitution does not countenance. Under the ACA's contraceptive mandate, Congress has not left Agencies with "genuine ambiguous relations," and thus, deference to HHS's is not warranted.[148] Congress provides very specific and limiting instructions for HHS in providing regulations related to women's health care coverage. Thus, the regulations (Moral IFC) were enacted in excess of statutory jurisdiction, authority, and limitation, and the Agencies' approach to repeal contraceptive coverage treads perilously close to usurping Congress' constitutional duty to make laws.

The Women's Health Amendment to the ACA further affirms the existence of a firm legislative check on the Agencies' ability to prescribe rules of their choosing.[149] Congress adopted Section 553 as a mechanism to retain some semblance of control over the administrative Agencies.[150] Because Congress delegated substantial power to administrative Agencies, it is indispensable in the interests of justice and fairness for Congress to be granted authority to restrain the Executive Branch from completely taking over its role as law maker. Thus, procedures of Section 553 are a method for Congress to legitimize agency legislation[151] and acts as a check on Executive power as a way to uphold democratic principles.[152]

The continuous trend of cases demonstrating the refusal of the Trump Administration to follow congressionally mandated limits further jeopardizes the essential goal of the Framers: to prevent one branch from becoming too powerful. Unilateral action by the executive may not be too uncommon but

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[147] *Id.*
[148] *Kiser v. Wilkie*, 139 S.Ct. 2400 (2019).
[149] Mention above in Section III, other portions of the ACA show Congress retain the authority to exempt certain employers.
[150] Senate Comm. on the Judiciary, Administrative Procedure Act: Report on the Committee of the Judiciary, S. Rep. no. 752, 79th Cong., 1st Sess. 7 (1945), *reprinted* in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 1, 187 (1946).
[151] Chaffin, *supra* note 42 at 473; William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103, 104.
[152] *See* Chaffin, *supra* note 42 at 473, n. 76.

considering the laundry list of cases in the Trump Administration's record, we should be especially concerned of this discord between executive power and administrative procedures.

B. The Encroachments on Health-Care-Related Rights (and the Rights of Women in Particular)

At a general level, the Constitution affords us the freedom to explore different lifestyles. One such freedom that has been influential in shaping the lives of women is the freedom to use birth control. Birth control is a basic health care service that benefits women of all ages, races, and socioeconomic statuses.[153] Women's use of contraceptives has been solidified in groundbreaking Supreme Court cases such as *Griswold v. Connecticut* and *Eisenstadt v. Baird*.[154] In *Griswold*, the Court reasoned that governmental regulation cannot sweep so broadly as to invade areas of protected freedoms such as marriage and procreation.[155] *Eisenstadt* took the idea of protected freedoms a step further and extended the right to privacy of reproductive rights to all individuals, thus preserving the right to be free from unwarranted governmental intrusion into personal decisions to bear children.[156] Though not necessarily an outright violation of these principles, the Moral IFC certainly undercuts their force, by significantly restricting women's ability to obtain birth control. If more employers are able to opt out of providing birth control coverage under their health insurance plans, then a large number of women could be left with no contraceptive coverage at all. Essentially, the Moral IFC presents two serious problems: (1) the regulations undermine the vitality of the right to privacy established by the Court's substantive due process jurisprudence, and (2) the regulations unfairly cut against women's desire to maintain steady, unobstructed access to birth control.

The development of the right to privacy began with *Griswold v. Connecticut*. In *Griswold*, the Court considered a Connecticut law that made it illegal for anyone to use or assist in the use of

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[153] Planned Parenthood Action Fund, *supra* note 1. .
[154] Although the majority's conclusion in Griswold ultimately rested on the right to privacy, the decision represents the initial understanding of the use of contraception to control sexuality and reproduction as the heart of personal identity and dignity.
[155] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).
[156] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

contraception.[157] The Supreme Court found the law invalid because it operated to control intimate relations between married couples, which the court found was a fundamental right in the "penumbra" of the Bill of Right.[158] The Court recognized privacy as a fundamental right in preventing intrusions into the spatial boundaries of the home and wanted to protect the ability to control information about contraceptive use.[159] After *Griswold*, there seemed to be uncertainty whether the right to privacy was rooted in preventing intrusions in the home, protecting martial relationships, or safeguarding personal autonomy. However, the Court would later clarify that 'privacy' for women's access to birth control extends beyond the narrow reading of 'right to privacy' in *Griswold*.[160] Although *Griswold* is important because it exemplifies the court's rudimentary discussion of the fundamental right to marriage and procreation, Griswold and its progeny articulates a negative right, that only applies to governmental prohibitions and restrictions on contraceptive services.[161] After *Griswold*, the court followed a trend of expanding the scope of privacy in different contexts. For example, *Eisenstadt* expanded the protected decisions among married couples to private choices made by individuals concerning procreation.[162] Although the case was not decided on a substantive due process framework, Justice Brennan's opinion in *Eisenstadt* explained that the right to privacy can be "unmistakably understood" as an expansion of the narrow reading of privacy under *Griswold*.[163] The Court's expansion of the right to privacy in the context of marriage to privacy rights of individuals was critical in laying the groundwork for *Roe v. Wade*.[164]

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[157] *Id.* at 480.
[158] *Id.* at 484.
[159] *Id.*
[160] Although *Griswold* was the leading case in recognizing 'right to privacy,' the case seemed to only extend to the right of contraception for martial couples in the private intimate setting of their home.
[161] *Id.*
[162] In *Eisenstadt v. Baird*, the Supreme Court overturned the conviction under a law that banned the distribution of contraceptives to an unmarried person under the Equal Protection Clause of the Fourteenth Amendment. Although the court avoided deciding whether the fundamental right recognized in Griswold extended beyond married couples, Justice Brennan's explained the nature of the right to privacy.
[163] *Id.*
[164] *Eisenstadt* at 453. ("It is true that in Griswold the right of privacy in question inhered in the martial relationship. Yet the martial couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.")

Roe reaffirmed by *Planned Parenthood of Southeastern Pa. v. Casey*, established a right to bodily autonomy as a fundamental right protected under the Due Process Clause.[165] Both cases restrict governmental interference with a woman's access to abortion.[166] *Roe* established that the Fourteenth Amendment's concept of personal liberty is broad enough to encompass a woman's decision to terminate her pregnancy.[167] *Roe* helped conceptualize the evolution of privacy from physical privacy of the home and marriage[168] to include decisional autonomy.[169]

The Supreme Court does not per se recognize a positive "right to birth control" nor does it guarantee the "right for health care plans to cover contraceptives." However, these cases emphasize the willingness of the Court to acknowledge a right of privacy and the recognition of the important role that contraceptives play in securing bodily freedom and autonomy. A right to bodily autonomy and dignity are constitutional touchstones that are in jeopardy when a large class of employers are given the "green light" to eliminate contraceptive coverage from their health plans. Employers should not be allowed to take away a key health service for women and essentially control important personal decisions that should only be made by women such as procreation, bodily regulation, and choice of lifestyle. The protection of a woman's right to access contraceptives are twofold; in general, the use of birth control has been approved by courts in *Griswold* and *Eisenstad*t[170] and a woman's right to make personal decisions about procreation and bodily well-being has been encompassed under the expansive right to privacy in *Roe* and *Casey*.[171] Thus, because contraception is intertwined in the right of privacy, courts should review with close scrutiny any executive-branch action that undermines statutory guarantees that the court has helped to effectuate. Thus, the Moral IFC should be reviewed carefully because contraceptive coverage invokes rights of women's health and privacy. The restriction of access to birth control is an encroachment on

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[165] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[166] *Id.*
[167] *Roe*, *supra* note 165 at 152.
[168] *See Griswold*, *supra* note 155.
[169] *Roe*, *supra* note 165 at 152.
[170] *See Griswold*, *supra* note 155; *Eisenstadt, supra* note 156.
[171] *See Roe*, *supra* note 165; Planned Parenthood of Southeastern Pa., *supra* note 165.

women's health care. Such encroachment seriously threatens the constitutional right to freedom of choice and bodily autonomy.

To be clear, these cases do not represent the linchpin to defeating or suppressing the passage of the Moral IFC. This argument would be very difficult to make. The Constitution prohibits states from *criminalizing* the use of birth control, but it does not explicitly require the federal government through intermediary or private employers to fully subsidize the use of birth control. In fact, the contraception jurisprudence shows that courts have disfavored compelling the government to subsidize abortion and family health-planning services. In *Maher v. Roe*, the court upheld a state regulation granting Medicaid benefits for childbirth but not for medically unnecessary abortions because the statute placed no obstacle in a pregnant women's path. [172] Similarly, in *Rust v. Sullivan*, the court affirmed that Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services.[173] Thus, while *Roe v. Wade* only protected a woman's choice to terminate pregnancy, the state is still allowed to withhold financial support for abortion and other family planning services. Although the Supreme Court has not directly recognized the government's decision not to publicly fund contraception, the Court's inclination to uphold a similar right in the abortion context, may reveal its' tendency to affirm federal or state refusal to fund birth control.

Even so, however, the Supreme Court's recognition of individual rights and personal bodily autonomy should encourage courts to review with special care administrative actions that render it more difficult for individuals to exercise those rights. Justice Harlan's dissent in *Poe v. Ullman* recast the strict traditional notion of privacy as referring only to the physical wellbeing, to the progressive conception to include "moral soundness of its people."[174] Justice Harlan viewed the right of privacy in broader terms to include a right of individuals to make important decisions about marriage, family, children, and procreation.[175] Harlan's broad construction helps conceptualize the court's recognition of women's

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[172] *Maher v. Roe*, 432 U.S. 464 (1977).
[173] *Rust v. Sullivan*, 500 U.S. 173 (1991).
[174] *Poe v. Ullman*, 367 U.S. 497, 546 (1961).
[175] *Id.* at 500.

freedom to make personal decisions[176], while *Roe* takes the individualized liberty established by Harlan in *Griswold* a step further to include the right to make choices concerning the body and procreation.[177] The Moral IFC chips away at this almost 55-year-old Supreme Court precedent of individualized decision-making. According to Planned Parenthood, 57 percent of women would not be able to afford contraception unless subsidized through insurance.[178] Thus, if the option for contraceptive coverage is taken away by employers, women and families are not truly given the option to control whether they want to expand their families. This critical and deeply intimate decision is left to employers and ultimately refutes the idea of providing "moral soundness" for women.

The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive rights.[179] *Roe* emphasized that the government "cannot force upon women physical and psychological burdens and make then incubators against their will."[180] Although most employers will retain the right to deny contraceptive coverage in their health coverage plans, women will still have the right to use birth control. However, birth control may be harder to obtain if women have to pay for them out of pocket and employers are given the power to influence women's bodily decisions.

Although, the government has no obligation to subsidize abortion or contraception, these cases show that the court disfavored governmental action that threaten to disrupt women's personal lives by making it difficult to obtain an abortion.[181] Women's reliance on contraceptive coverage invokes a serious issue for the HHS's Moral IFC. Restricting a health service guaranteed to women under the ACA and the WHA can possibly be seen as a similar denial of the fundamental right to bodily autonomy as a state's hinderance to a women's ability to get an abortion. Both federal action under the HHS and state

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[176] *Id.*
[177] *See Roe*, *supra* note 165.
[178] Planned Parenthood Action Fund, *supra* note 19 ("Before the Affordable Care Act, an astounding 5 percent of women (ages 18 to 34) said they struggled to afford birth control.") https://www.plannedparenthoodaction.org/fight-for-birth-control
[179] *Id.* at 856.
[180] *Roe*, *supra* note 165 at 153.

anti-abortion laws, create roadblocks for women to ensure their bodily health and a rightful exercise of their personal autonomy. The courts should keep in mind that women have structured their lives around access to contraception in the same fashion that women have arranged their lives around the ability to obtain an abortion. Taking away contraceptives would upset the way that millions of women have organized their lives. Justice Ginsburg, writing for the dissent in *Casey*, emphasized the government's evidence establishing the importance of contraception to a range of woman's health needs and concluded that contraceptive coverage under the ACA further compels the public health and interests of women.[182]

V. Putting it all together/conclusion

In conclusion, the Moral IFC is procedurally invalid due to the failure of the Agencies to follow notice-and-comment without invoking any exceptions. It is also substantively invalid because the ability to expand the number of employers exempt from providing contraceptive coverage conflicts with the narrow religious exception outlined in the ACA and is not authorized under the RFRA. These defects in and of themselves provide ample grounds for invalidating the Moral IFC in its entirety. But they are made all the more glaring in light of the Moral IFC's troubling relationship to the Trump Administration's general disregard for separation-of-powers principles and to an important and enduring set of privacy-related constitutional guarantees.

[182] *Burwell*, *supra* note 30 at 740-44.