The Contraceptive Mandate and the Regulatory Accountability Act: Lessons Learned Concerning Procedural Obstacles in Agency Rulemaking

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I. INTRODUCTION

When Congress enacted the Affordable Care Act (ACA) in 2010, a raging national debate began over its legitimacy and impact. Central to this debate is the role of government and whether regulations have become too broad, making compliance overly burdensome. One of the ACA's most controversial regulations is the contraceptive mandate, which requires insurance providers to cover contraceptives. The dispute surrounding the mandate offers observers the chance to evaluate an important part of our legal system: administrative rulemaking.

Opponents of government regulation often argue that agency rulemaking should be limited by more procedural requirements than those already delineated in the Administrative Procedure Act (APA).[1] These opponents of government regulation argue that additional rulemaking procedures are necessary to make the rulemaking process more transparent and inhibit the creation of unnecessarily burdensome regulations.[2] To these ends, members of Congress have proposed the Regulatory Accountability Act (RAA), a bill that would significantly amend the procedural rulemaking requirements of the APA.[3]

The implementation of the contraceptive mandate in the ACA provides an example of the effectiveness of the APA. While this Note does not offer any position on the soundness of the contraceptive mandate as a matter of policy, it seeks to analyze the procedure of its implementation. This analysis will be used to test the strength of the current APA and note the differences the RAA would have made in the mandate's creation. Ultimately, this Note concludes that Congress should not adopt the RAA because it would create more complications than it would resolve.

II. BACKGROUND

This Part first discusses the history of the APA, including the impact of its requirements on agency rulemaking. This Part then outlines the procedure that the Department of Health and Human Services (HHS) followed in implementing the contraceptive mandate (Mandate). Next, this Part summarizes the controversy surrounding the Mandate, including constitutional challenges that culminated in a circuit split and Supreme Court decision. Finally, this Part examines the recently proposed RAA and how it would reform the APA.

A. The Administrative Procedure Act of 1946

Among other provisions, the APA establishes rulemaking procedures for federal agencies.[4] This Note is specifically concerned with the rulemaking aspect of the APA

1. *See infra* Part II.D (describing the proposed Regulatory Accountability Act and the additional procedural requirements it would impose on administrative rulemaking).

2. *Id.*

3. *Id.*

4. *See generally* Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551, 553–59, 701–06) [hereinafter APA] (outlining the procedural requirements agencies must

contained in Section 553.[5] The following is a brief summary of the history of the APA and its requirements.

1. The Adoption of the APA

In the 1930s, the New Deal "heralded an expanded conception of federal agency involvement in people's lives."[6] As Congress expanded agency authority to a multitude of previously unregulated sectors of American life, it became imperative to regulate each agency's procedure and activities.[7] This sparked an intellectual clash that culminated in the adoption of the APA.[8] Some championed the role of agencies in big government as organizations that could deploy neutral scientific expertise to solve problems.[9] Others opposed agencies and their adjudicative function as an unconstitutional power grab from the judicial branch.[10] The enactment of the APA attempted to balance these concerns, and thereby became "a historic compromise" because it accepted the emergence of the administrative state while recognizing the need for legally imposed procedural boundaries that allowed courts to oversee agencies.[11]

2. Rulemaking Requirements of the APA

The APA prescribes a set of requirements that an agency must satisfy to create an enforceable rule.[12] There are three main requirements to implement a rule under the APA.[13] First, the agency must give general notice of proposed rulemaking.[14] This general notice must include the time, place, and nature of public rulemaking proceedings, along with the legal authority the agency is proposing the rule under.[15] Notice must also include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[16] Second, in what is commonly referred to as the comment period, an agency must give "interested persons" a chance to submit "written data, views, or arguments with or without opportunity for oral presentation."[17] Third, the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose."[18] Finally, the APA requires all agencies to allow interested persons "to petition for the issuance, amendment, or repeal of a rule."[19]

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meet to create administrative rules and regulations).

5. *Id.* § 553.

6. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 188 (2d ed. 2001).

7. *Id.*

8. *See* Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 954 (1997) (describing the political circumstances surrounding the adoption of the APA).

9. *See id.* at 953–54 (describing the pro-agency and big government perspective).

10. *See id.* (describing the arguments against the growth of the administrative state).

11. *Id.* at 954 (stating that the APA "signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints that have made the administrative process a good deal like the judicial").

12. *See generally* 5 U.S.C. § 553 (2012) (listing agency rulemaking requirements).

13. *Id.*

14. *Id.* § 553(b).

15. *Id.*

16. *Id.*

17. 5 U.S.C. § 553(c).

18. *Id.*

19. *Id.* § 553(e).

Courts have expounded upon the APA's basic rulemaking requirements. For instance, the notice requirement must grant "interested parties a reasonable opportunity to participate in the rulemaking process."[20] For example, it could be unreasonable for an agency to place notice of a considered rule in a footnote in the background section of a rulemaking notice.[21] The courts have also interpreted the notice, comment, and basis requirements to require a kind of conversation between the interested party and the agency: "there must be exchange of views, information, and criticism between interested persons and the agency."[22] This conversation requires that the agency "disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."[23] Once an interested party takes the opportunity to comment, the comment is useless unless the agency actually responds to the points the comments raised.[24] In responding, the agency must prove to a reviewing court that the agency has considered every relevant factor.[25] The goal, it seems, is to create a record that enables the reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[26] The policy behind the notice and comment procedure is to "allow the agency to benefit from the experience and input of the parties who file comments."[27] The collective experience of a multitude of commenters educates each agency, ensuring that agencies remain well informed when creating regulations.[28]

B. The Adoption of the Mandate

The adoption of the Mandate has been a complex process since its inception. What follows is a brief history of the Mandate's creation. This Note uses this history as an example to help determine whether the APA remains effective.

1. Legal Authority for the Mandate

Section 2713 of the ACA[29] amended the Public Health Service Act to include "[c]overage of preventive health services."[30] The amendment requires group health plans and health insurance issuers to provide "such additional preventive care and screenings . . . provided for in comprehensive guidelines supported by the Health Resources and Services Administration."[31] The Health Resources and Services Administration (HRSA) supports the use of all Food and Drug Administration (FDA) approved contraceptive methods as preventative care, with an exception for "women who are participants or beneficiaries in

20. Fla. Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988).

21. *See* MCI Telecomm. Corp. v. FCC, 57 F.3d 1136 (D.C. Cir. 1995) (holding that the FCC failed to provide adequate notice of its intention to create a regulation where the only mention of such regulation was in a footnote of the background section of the notice).

22. Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977).

23. *Id.*

24. *Id.* at 35–36.

25. *Id.* at 36.

26. *Id.*

27. Chocolate Mfgs. Ass'n. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985).

28. *Id.*

29. Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001) [hereinafter ACA].

30. ACA § 2713, 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13).

31. *Id.*

group health plans sponsored by religious employers."[32]

2. HHS Implementation of the Mandate

HHS first implemented the Mandate portion of Section 1001 of the ACA in an interim rule it released on July 19, 2010.[33] The interim rule required group health plans and group or individual health insurers to provide preventative care that HRSA supported, including FDA-approved contraceptives.[34] The Office of Management and Budget estimated the rule would have an annual cost on the economy of $100 million.[35] The interim rule did not include any exception for religiously affiliated organizations.[36] On August 3, 2011, when substantial resistance to this rule arose due to the potential consequences it would have on those organizations opposing contraceptives on religious grounds,[37] HHS delayed its timetable to implement the final regulation, amended the interim rule, and sought further input.[38] The amended rule exempted "certain religious employers" from the Mandate who met a four-prong test: the employer must "(1) ha[ve] the inculcation of religious values as its purpose; (2) primarily employ[] persons who share its religious tenets; (3) primarily serve[] persons who share its religious tenets; and (4) [be] a non-profit organization."[39] This amendment contained a statement waiving the ordinarily APA-required delay in implementation of the revised rule: interested parties had already had an opportunity to comment on the original rule (because of the July 19, 2010 notice required by the APA) and delaying implementation would be impractical under the circumstances.[40]

On January 20, 2012, HHS Secretary Kathleen Sebelius first announced the intention of HHS to create the final Mandate.[41] HHS provided formal notice of its proposed Mandate on March 21, 2012.[42] The notice included a request for comments regarding the means of accommodating organizations that object to the coverage of contraceptive services while ensuring contraceptive coverage for plan participants.[43] After receiving approximately 200,000 comments regarding the Mandate, HHS proposed yet another amendment to the

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32. *Women's Preventive Services Guidelines*, HRSA.GOV, http://www.hrsa.gov/womensguidelines/ (last visited Jan. 22, 2015).

33. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (proposed July 19, 2010) (codified at 45 C.F.R. § 147.100–147.200 (2014)).

34. *Id.* at 41,728.

35. *Id.* at 41,730.

36. *Id.*

37. *See infra* Part II.C (describing the controversy surrounding the Mandate).

38. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (proposed Aug. 3, 2011) (codified at 45 C.F.R. § 147.100–147.200 (2104)).

39. *Id.*

40. *See id.* at 46,624 (arguing that delaying the implementation for 30 days would cause students not to recognize the benefits of this regulation until the 2013–14 school year rather than the 2012–13 school year).

41. *See* News Release, Kathleen Sebelius, Sec'y of the U.S. Dept. of Health and Human Servs. (Jan. 20, 2012) *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (describing the goal of the HHS to create a final rule that will "ensure that women with health insurance coverage will have access to . . . all FDA-approved forms of contraception").

42. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

43. *Id.*

Mandate.[44] One such proposed amendment was to redefine religious employers by eliminating the first three prongs of the four-prong test, thereby making all non-profit organizations eligible for exemption from the Mandate.[45] In effect, this amendment made the applicability of the Mandate rest upon the organization's status as either a for-profit or non-profit organization.

C. Controversy Surrounding the Mandate and Other Regulations

These amendments made the Mandate inapplicable to non-profit organizations. The final rule, however, upset for-profit organizations opposed to the use of contraceptives for religious reasons. This sparked a series of litigation from such for-profit organizations that argued that they should be exempt from the Mandate. A summary of the litigation surrounding this issue follows.

Since the adoption of the rule, for-profit businesses that refuse to offer contraceptives to their employees have filed more than 40 lawsuits claiming the Mandate is unconstitutional.[46] The major issue in many of these suits is whether the Mandate violates the Religious Freedom Restoration Act (RFRA).[47] The two cases drawing the most public attention are *Conestoga Wood Specialties Corp. v. Sebelius*[48] and *Hobby Lobby Stores, Inc. v. Sebelius*.[49] These two cases produced a circuit split and prompted President Obama to request that the Supreme Court review the issue.[50] The Supreme Court granted review and consolidated the cases.[51]

Conestoga Wood involved a furniture factory entirely owned by the Hahn family—a Mennonite family opposed to the use of certain contraceptives for religious reasons.[52] The Hahns argued that the RFRA and the Free Exercise Clause of the First Amendment protect a for-profit organization's exercise of religion in the same way that they protect an individual's, and the family sought to enjoin the government from enforcing the Mandate.[53] The Third Circuit rejected this argument, holding that neither the RFRA nor the Free Exercise Clause protect a for-profit, secular corporation because "such a

44. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8458–59 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, and 156).

45. *Id.* at 8461.

46. Michael Kirkland, *Contraception Mandate Reaches Justices*, UPI (Sept. 29, 2013, 3:30 AM), http://www.upi.com/Top_News/US/2013/09/29/Under-the-US-Supreme-Court-Contraception-mandate-reaches-justices/UPI-97671380439800.

47. For example, each of the following cases involves a for-profit company seeking an injunction against enforcement of the contraceptive mandate under the RFRA: Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012); Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013).

48. Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377 (3d Cir. 2013).

49. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).

50. *See* Lawrence Hurley, *Obama Asks High Court to Review Contraception Mandate Ruling*, REUTERS (Sept. 19, 2013, 6:06 PM), http://www.reuters.com/article/2013/09/19/us-usa-courts-contraception-idUSBRE98I15N20130919 (reporting President Obama's request for the Supreme Court to review the *Hobby Lobby* decision).

51. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

52. *Conestoga Wood*, 724 F.3d at 379.

53. *Id.* at 387–88; *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2013) (providing that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless such burden satisfies judicial strict scrutiny); U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

corporation "cannot engage in the exercise of religion."[54]

The Tenth Circuit decided the opposite in *Hobby Lobby*.[55] The owners of Hobby Lobby Stores, Inc., the Green family, brought a similar challenge against the Mandate.[56] As in *Conestoga Wood*, the Greens argued that corporations are "persons" and are able to exercise religion under the RFRA and the Free Exercise Clause.[57] The government argued that the "non-profit status is an objective criterion for determining whether an entity is a religious organization" in other areas of the law and that "Congress did not intend for the RFRA to expand the scope of the Free Exercise Clause."[58] The Tenth Circuit rejected the government's argument, holding that the "collective presence [of the Greens] is sufficient for Hobby Lobby . . . to qualify as 'persons' under RFRA."[59] The court limited its analysis to the situation of a family-owned business.[60] The court emphasized the uniqueness of Hobby Lobby's situation: the Greens used their business to proselytize, made "business decisions according to their faith," and "are unanimous in their belief that [the Mandate] violates [their] religious values."[61]

The Supreme Court affirmed the Tenth Circuit's decision and reversed and remanded to the Third Circuit.[62] Justice Alito, writing for the majority, noted that the Court's holding "effectively dispatches any argument that the term 'person' as used in the RFRA does not reach the closely held corporations involved in these cases."[63] Alito reemphasized the special circumstances these cases represent: "The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."[64] Applying the RFRA to the cases, the Court had "little trouble concluding" that the Mandate "substantially burdens" the exercise of religion.[65] The Court applied the "least-restrictive-means standard" to the Mandate and concluded that HHS had other means at its disposal to meet its regulatory goals.[66]

D. The Regulatory Accountability Act

On May 23, 2013, a bipartisan group of legislators reintroduced the RAA.[67] The RAA had already been introduced once before in the 112th Congress in 2012, but the Senate failed to pass it.[68] Co-author Senator Mark Pryor[69] argued that the RAA would "fight[]

54. *Conestoga Wood*, 724 F.3d at 388.
55. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1114 (10th Cir. 2013).
56. *Id.* at 1125.
57. *Id.* at 1128.
58. *Id.* at 1128–29.
59. *Id.* at 1137.
60. *Hobby Lobby*, 723 F.3d at 1137.
61. *Id.*
62. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2804 (2014).
63. *Id.* at 2769.
64. *Id.* at 2774.
65. *Id.* at 2775.
66. *Id.* at 2780.
67. The Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. (2013).
68. Ben Goad, *Bipartisan Bill Would Overhaul Regulatory System, Target 'Mega-Rules'*, THE HILL (May 23, 2013), http://thehill.com/blogs/regwatch/legislation/301721--bipartisan-bill-would-overhaul-regulatory-system-target-mega-rules.
69. Democrat, Arkansas.

overreaching regulations to give businesses the certainty, confidence, and flexibility they need to invest and expand."[70] Pryor argued that the RAA would accomplish this by "building a decision-making process based on results and costs."[71]

The RAA's proposed amendments focus on Section 553 of the APA and would make a significant number of changes.[72] First, the RAA creates a higher standard of procedures for rules that are projected to have a significant cost on the national economy by first classifying the rule as either a "major rule" (a rule that has an economic cost of $100 million or more) or "high-impact rule" (a rule that has an economic cost of $1 billion or more).[73] Second, the RAA expands the notice requirement by compelling an agency to publish advance notice in the Federal Register 90 days before the agency publishes standard notice of a proposed major or high-impact rule.[74] Third, the RAA also expands the time interested parties have to comment on a proposed major or high-impact rule by requiring an agency to give interested parties 120 days to submit written data, views, or arguments (instead of the 60-day requirement for other rules).[75] Fourth, the RAA forces agencies to conduct a hearing whenever any high-impact rule is introduced, or whenever a "member of the public," via petition, shows that a rule violates the Information Quality Act.[76] Fifth, any rule adopted by an agency under the RAA must adopt the least costly rule that is based on the "best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule."[77] Finally, an agency must review any major or high-impact rule within 10 years to determine whether the rule is still necessary, whether the rule is achieving its statutory objectives, whether the rule's benefits justify its costs, and whether the rule can be reformed to "reduce costs while continuing to achieve statutory objectives."[78] The RAA grants some deference to agencies in special circumstances, including exceptions for: impracticability, national security, and "de minimis technical or clerical error" rule adoptions.[79]

III. ANALYSIS

The proposal of the RAA has been met with substantial resistance. Upon its

70. Press Release, Rob Portman, U.S. Senator, Portman, Pryor Renew Push to Reduce Red Tape on Job Creators (May 23, 2013), *available at* http://www.portman.senate.gov/public/index.cfm/2013/5/portman-pryor-renew-push-to-reduce-red-tape-on-job-creators.

71. *Id.*

72. *See generally* The Regulatory Accountability Act of 2013, H.R. 2122 (proposing a myriad of procedural amendments to the APA).

73. *See* The Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. § 2(3)(15)–(16) (2013) (defining a "major rule" as "any rule that . . . is likely to impose an annual cost on the economy of $100,000,000 or more" and a "high-impact rule" as "any rule that . . . is likely to impose an annual cost on the economy of $1,000,000,000 or more").

74. *Id.* § 3(b).

75. *Id.* § 3(b)(d)(3).

76. *Id.* §§ 3(b)(d)(4), 3(b)(e); *see* Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763A-153 (2000) (requiring the Office of Management and Budget to issue guidelines that would maximize the "quality, objectivity, utility, and integrity of information"); *see also* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452-01 (Feb. 22, 2002) (enacting those regulations).

77. The Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. § 3(b)(f)(1), 3(b)(f)(2) (2013).

78. *Id.* § 3(b)(f)(4)(G).

79. *Id.* § 3(b)(g)(2)(A), 3(b)(g)(3).

introduction, the Obama administration threatened to veto it and released a statement claiming that the RAA would "impose unprecedented procedural requirements on agencies that would prevent them from performing their statutory responsibilities."[80] Additionally, the administration posited that the RAA would create regulatory uncertainty and increase costs for businesses and governments—an ironic position given the RAA's least costly rule requirement.[81] When evaluating the RAA, the issue becomes whether the benefits the RAA would bring in terms of transparency and agency legitimacy are worth the costs it would simultaneously impose on the rulemaking process. This Part discusses the opposing viewpoints and arguments of the sponsors of the RAA and the American Bar Association (ABA).

The sponsoring members of Congress,[82] who proposed the RAA, disagree with the Obama administration.[83] These members argue that the exorbitant cost of regulation on the national economy, combined with the economic uncertainty additional regulation brings, requires Congress to update the APA, which fails to address the needs of our modern government.[84] These sponsoring members argue that the APA needs to be reformed to help agencies create better regulations and increase the transparency of the regulatory process.[85]

Oppositely, the ABA argues the rulemaking process is already too burdensome on agencies, and Congress should instead be taking steps to streamline the process, rather than adding more procedures that would impede the responsiveness of administrative regulation.[86] The ABA's belief that "the strength of the APA derives in no small part from the fact that it confines itself to the fundamentals" is apparent throughout its critique of the RAA.[87] The ABA recommends that Congress exercise restraint in reforming the APA and avoid fixing problems that do not exist.[88]

A. The RAA as a Tool to Help Agencies Make Better Regulations

Sponsors of the RAA argue that the bill will help agencies make better regulations by doing three things. First, the RAA will codify rulemaking principles found within executive orders.[89] Second, the RAA will improve notice-and-comment rulemaking.[90] And finally,

80. Pete Kasperowicz, *Administration Threatens Veto of House Deregulation Bills*, THE HILL (Nov. 29, 2011), http://thehill.com/blogs/floor-action/house/196049-administration-threatens-veto-of-house-deregulation-bills.

81. *Id.*

82. Reps. Goodlatte (R-Va.), Peterson (D-Minn.), Bachus (R-Ala.), Coble (R-N.C.), Owens (D-N.Y.), Schrader (D-Or.), Smith (R-Tex.), Barr (R-Ky.), Griffin (R-Ark.), Bachmann (R-Minn.), Calvert (R-Cal.), Cotton (R-Ark.), Franks (R-Ariz.), Holding (R-N.C.), Kline (R-Minn.), Noem (R-S.D.), Sessions (R-Tex.), Terry (R-Neb.), Smith (R-Mo.), Crawford (R-Ark.), Davis (R-Ill.), Issa (R-Cal.), Marchant (R-Tex.), Gibbs (R-Ohio). H.R. REP. NO. 113-237, at 1 (2013).

83. *See* H.R. REP. NO. 112-294, at 10–13 (2011) (explaining the rationale for proposing the RAA).

84. *Id.* at 10–11 (citing a Small Business Administration study finding a Federal regulation cost of $1.75 trillion dollars on the national economy).

85. *Id.* at 22.

86. Michael Herz, Chair of the American Bar Association Section of Administrative Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 624, 626 (2012) [hereinafter ABA Comments] (arguing that Congress's goal should be "to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so").

87. *Id.* at 626.

88. *Id.*

89. *Infra* Part III.A.1.

90. *Infra* Part III.A.2.

the RAA will bring major guidance within the rulemaking process.[91]

1. Codification of Executive Orders

The sponsors argue that, while executive orders have required agencies to conduct greater analyses before creating regulations, the lack of judicial review has allowed agencies to ignore these orders and simply avoid complying with them.[92] According to Dr. Jerry Ellig,[93] the lack of judicial review leads to the result that "agency regulatory analysis is often incomplete and seldom used in decisions."[94] The sponsors believe that agencies currently have many incentives, and no disincentives, to create regulations.[95] The sponsors argue that this leads agencies to the unfortunate result of opting to create regulations, with little analysis done upfront about the problem it seeks to solve, and then conducting the necessary analysis after the adoption of the rule.[96] By codifying these executive orders, Congress would create judicially enforceable law that would force agencies to conduct further analysis before enacting a rule.[97]

2. Modification of Notice-and-Comment Rulemaking

RAA sponsors argue that having a functional, transparent notice-and-comment rulemaking process is important for making better regulations.[98] The sponsors point to a study that reports that "agencies do a poor job of both analyzing the problem that they are trying to solve and then applying [that analysis] to the drafting of a new regulation."[99] By requiring more from the notice-and-comment procedures, the RAA would provide incentives for agencies "to produce good analysis and use it to guide decisions."[100]

3. Bringing Major Guidance Within Rulemaking Requirements

There is evidence that current doctrines of judicial review "encourage agencies to

91. H.R. REP. NO. 112-294 at 22–27 (2011).

92. *Id.* at 23 (stating that "Executive Orders 12291, 12866, 13422 and 13563 all required regulatory agencies in the Executive Branch to conduct regulatory impact analyses, including cost-benefit analysis requirements").

93. Jerry Ellig, Ph.D., is the director of the Regulatory Report Card project at George Mason University's Mercatus Center, and the former deputy director and acting director of the Office of Policy Planning at the Federal Trade Commission.

94. H.R. REP. NO. 112-294 at 23 (2011) (citing *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the H. Comm. On the Judiciary*, *Subcommittee on Courts, Commercial and Administrative Law*, 112th Cong. 20 (Feb. 28, 2011) (statement of Jerry Ellig, Ph.D.)).

95. *Id.* at 24.

96. *Id.*

97. *Id.* at 25 (describing how commissioners ignore executive orders to conduct cost-benefit analysis by citing the statement of Commissioner Nord of the Consumer Product Safety Commission: "a majority of the Commissioners at this agency have proactively decided to ignore the President's direction to conduct cost-benefit analysis for new regulations").

98. *Id.* at 26 ("A Federal agency should solicit ideas from the public first rather than develop a predetermined rule before seeking public comment." *Cost Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcommittee on Courts of the H. Comm. On the Judiciary*, 112th Cong. 37 (2011) (statement of Harold Furchtgott-Roth, Ph.D.)).

99. H.R. REP. NO. 112-294 at 26–27 (2011).

100. *Id.* at 27.

issue broad, ambiguous regulations, and then interpret those regulations through mere guidance documents which do not have to be promulgated through any established processes."[101] The sponsors of the RAA argue that subjecting major guidance to some rulemaking requirements would guard against the issuance of such broad regulations and "curb agency abuse."[102]

B. The RAA as a Tool to Increase Regulatory Transparency

RAA's sponsors believe that agencies have transformed the rulemaking process to one where agencies make decisions "behind closed doors, away from the public eye and before commencing the legally required regulatory process."[103] To counter this secrecy and transform rulemaking into a more transparent process, the RAA requires advanced notice of potential rulemakings.[104] The advanced notice would serve to "crystalize" for the public the reasons why an agency believes regulation is necessary, whether a regulation's benefits justify its costs, and whether repeal of an existing regulation could solve the problem at issue.[105]

The sponsors of the RAA attempt to extend this transparency by expanding the use of formal rulemaking to the issuance of high-impact rules.[106] While formal rulemaking has become an extinct practice,[107] the sponsors argue that formal rulemaking is advantageous because it requires a higher standard of proof and better reveals the decision-making process of an agency.[108] The sponsors recognize this may be especially useful for regulations regarding complex empirical or scientific issues.[109] Additional features include the ability to cross-examine proponents of the regulation and the creation of a formal record that would assist in judicial review.[110]

C. ABA Response: The RAA Will Be Overly Burdensome on Agencies and Current APA Addresses RAA Sponsors' Concerns

The ABA argues that the requirements of more investigation and analysis in the rulemaking process would be "enormously burdensome" to agencies, especially at a time when budgets and deadlines are tight.[111] The ABA recognizes the need for more analysis for rules of greater importance but argues that the "blanket approach" of the RAA ignores

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101. *Id.* (citing *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcommittee on Courts of the H. Comm. On the Judiciary*, 112th Cong. 179–80 (2011) (statement of Noel J. Francisco)).

102. *Id.* at 50.

103. H.R. REP. NO. 112-294 at 32 (2011).

104. *Id.* at 48.

105. *Id.*

106. *Id.* at 49.

107. Note that, while the APA outlines the procedures for formal rulemaking, Congress can choose whether or not to require a formal rulemaking procedure in the relevant enabling act. The inefficiencies of formal rulemaking relative to its negligible benefits have resulted in Congress electing, less and less, to require formal rulemaking. For a defense of the legitimacy of formal rulemaking, despite it rarely being used, see generally Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014).

108. H.R. REP. NO. 112-294 at 35 (2011).

109. *Id.* at 36.

110. *Id.*

111. ABA Comments, *supra* note 86, at 632.

alternative solutions already in existence.[112] These alternatives include the ability of Congress to "specify the factors that an agency should take into account when regulating pursuant to a specific provision" in an enabling act, and the requirement of the APA for agencies to respond to any important factors and issues interested members of the public identify through the comment period.[113]

1. Codifying Executive Orders Would Encumber Administrative Rulemaking

The ABA urges Congress to reconsider codifying the Executive Orders, noting that the orders are essentially "hortatory" and require additional analysis and procedures in only "a small minority of cases."[114] If Congress adopts the RAA, the ABA suggests federal agencies will go the way of California's agencies, when California amended its APA in 1979.[115] California suffered from a rulemaking process that was "slow and cumbersome and consume[d] large quantities of staff resources."[116] These encumbrances of the rulemaking process adversely affected the public health and safety.[117] The ABA argues that California's failed attempt at amending its APA "suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure."[118]

2. The APA Needs to Be Streamlined

The ABA suggests that a better solution to regulatory issues would be the "thoughtful harmonization and streamlining" of the procedural burdens the APA places on rulemaking.[119] The ABA's recommendation would be for Congress to collaborate with the President to "rework" rulemaking findings and analysis requirements "with an eye toward rationalizing [them] while also maintaining effective political oversight and promoting sound regulatory outcomes."[120] To this end, the RAA does too much by forcing agencies to base every rule on factual determinations.[121] Some rules rest solely "on law or pure policy determinations" and therefore are not germane to an administrative rehashing of evidentiary support.[122] It would be best, in the ABA's view, to require further evidentiary analysis "only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate."[123] This allows Congress to customize procedural requirements

112. *Id.* at 633.
113. *Id.*
114. *Id.* at 634.
115. *See id.* at 635 (describing how California's amendment of California's APA resulted in a variety of unfortunate results, including the need for lawyers to supervise every step of the rulemaking process, an increase of boilerplate findings caused by insufficient funding, and a decrease in agency responsiveness to health and safety issues due to the slowing and burdening impact the amended APA has on agency rulemaking). Note that each state has its own administrative procedure act to handle state agency procedures.
116. ABA Comments, *supra* note 86, at 635.
117. *Id.*
118. *Id.* at 635–36.
119. *Id.* at 636.
120. *Id.*
121. ABA Comments, *supra* note 86, at 637.
122. *Id.*
123. *Id.* at 639.

to the specific needs of an agency, rather than creating a one-size-fits-all solution.[124] Additionally, the ABA notes that the comment period already requires an agency to "respond to material comments" made about a proposed rule, creating challenges to a rule that lacks evidentiary support.[125]

3. Agencies Should Not Become Further Politicized

The fact that some rules rest solely on the law or policy considerations raises another issue with the RAA's requirement of a cost-benefit analysis: most laws Congress passes are enacted under a process where Congress weighs and resolves both the costs and the benefits of the law through the political process.[126] The ABA thinks it is "unlikely" that conducting a cost-benefit analysis in the rulemaking procedure would be a more beneficial opportunity for these kinds of determinations.[127]

4. The Current Notice-and-Comment Requirement Is Effective

The ABA questions the validity of the RAA's requirement of giving advanced notice of proposed rulemaking and instead believes the current comment period is sufficient to handle the issues the RAA seeks to fix.[128] For the ABA, advanced notice is a "useful tool" but one that an agency should only use at its own discretion, or when Congress explicitly requires.[129] To require advanced notice for every major or high-impact rule would often result in "the costs of the delay [being] greater than the benefits associated with an improved final regulation."[130] The ABA argues that the current comment period allows private parties to point out an agency's real error.[131] If such an error exists, the agency will conduct another round of notice-and-comment, functionally making the original notice of proposed rulemaking an advanced notice of proposed rulemaking.[132]

5. Formal Rulemaking Is Obsolete

The ABA also rejects the RAA sponsors' belief that formal rulemaking would be of any value to the rulemaking process and describes formal rulemaking as "obsolete."[133] The ABA contrasts trial-like proceedings, which adjudicate "sharply framed issues," and rulemaking proceedings of administrative policymaking, which often turn on "value judgments" and "policy perspectives that are inherently uncertain."[134] Such hearings naturally become abstract, have "heavy social costs," and prevent agencies from performing their duties "expeditiously."[135] The oft-cited example of the inefficiency of

124. *Id.*
125. *Id.*
126. ABA Comments, *supra* note 86, at 642.
127. *Id.*
128. *Id.* at 643–45.
129. *Id.* at 643–44.
130. *Id.*
131. ABA Comments, *supra* note 86, at 645.
132. *Id.*
133. *Id.* at 650.
134. *Id.* at 651.
135. *Id.* at 652–53 (showing that all 16 FDA formal hearings lasted at least two years and, in two instances, more than ten years and "tended to be drawn out, repetitious and unproductive").

formal rulemaking is the Food and Drug Administration's use of formal rulemaking to determine whether peanut butter should consist of 87% or 90% peanuts—a procedure which lasted about nine years and generated 7736 pages of transcript.[136] The ABA urges the sponsors of the RAA to either "fundamentally reappraise or omit" the formal rulemaking requirement from the RAA.[137]

IV. RECOMMENDATION

While congressional supporters of the RAA offer persuasive reasons for why Congress should implement the RAA, the implementation of the Mandate exemplifies the soundness of the APA's current form and therefore, supports the ABA's argument. If Congress had enacted the RAA prior to the implementation of the Mandate, it is unlikely that the RAA would have made any significant substantive change to the Mandate. Enacting the Mandate under the RAA would have only resulted in greater delays and administrative costs added to its implementation, without any resolution of regulatory issues which were not subsequently resolved through litigation. Accordingly, the RAA creates more problems than it solves, and Congress should not adopt it.

A. The RAA Applied to the Mandate

The RAA would have affected the Mandate's implementation in a number of ways. First, HHS would have classified the Mandate as a "major rule" because the OMB estimated the Mandate to have an annual economic impact of $100 million.[138] The RAA would have required HHS to release advanced notice 90 days before publishing the standard interim rule notice.[139] Because the Mandate is not a high-impact rule (since it was not projected to cost the national economy at least $1 billion), the RAA would not require a formal rulemaking hearing.[140] The RAA, however, would still require the HHS to conduct further analysis to determine whether the Mandate was "the least costly rule."[141] Furthermore, the RAA would require the HHS to review the Mandate ten years after implementation to determine whether the Mandate was achieving its objectives, whether it was cost effective, and whether HHS could reform the Mandate to reduce costs while continuing to achieve those objectives.[142]

B. In the Case of the Mandate, the RAA Would Have Failed to Achieve its Goals

By introducing the RAA, Congress sought to help agencies create better regulations and increase the transparency of the regulatory process.[143] Congress would have failed to further either of these goals by applying the RAA to the Mandate's implementation. Instead, the RAA would have only increased the level of bureaucratic inefficiency, while

136. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 227 (3d ed. 2009).

137. ABA Comments, *supra* note 86, at 654.

138. *See supra* note 73 and accompanying text (defining "major rule") and Part II.B.2 (describing the estimated economic impact of the Mandate).

139. *See supra* Part II.D (outlining RAA's procedural modifications of the APA).

140. *Id.*

141. *Id.*

142. *Id.*

143. *See supra* Part III (describing the RAA sponsors' rationale for implementing the RAA).

adding nothing to the rule's substance and transparency.

1. The RAA Would Not Have Helped HHS Create a Better Mandate

The RAA would have required HHS to do two things differently, with the aim of creating a better quality rule. First, the RAA's requirement of a longer term of notice concerning the proposed rule would give concerned parties a longer time period to formulate their critiques and solutions to the rule. Second, the RAA's required least-costly-rule analysis would ensure that the HHS did all it could to guarantee that the Mandate was as cost efficient as possible. Neither of these alterations would have created a better Mandate.

The longer term of notice would have made little to no difference in creating a better rule. As discussed above, the Mandate went through several phases.[144] The first phase began when HHS introduced the interim rule on July 19, 2010.[145] Resistance to the interim rule required HHS to amend the rule and request further input in its second phase on August 3, 2011.[146] This led to the notice of the final rule on March 21, 2012, and the final proposed amendments on February 6, 2013.[147] Therefore, the period from the original notice of the interim rule to announcement of the final rule took two and a half years. In each of these phases, HHS gave concerned individuals the opportunity to comment on the rule, and HHS responded to the material concerns raised. Surely, adding advanced notice to the beginning of this period would have done nothing more to increase the quality of comments and discourse along each step of this procedure. Instead, the implementation of the Mandate strongly supports the ABA's contention that the APA already provides ample time for concerned individuals to make comments because the APA requires an agency to respond to material comments.[148] HHS allowed more time for the public to comment on the Mandate and delayed its implementation due to the errors the public revealed during the notice-and-comment period.[149] This delay reveals the brilliant simplicity of the APA. The APA requires there to be a notice-and-comment period, and that period will only be expanded in proportion to the number of material issues that interested parties raise upon the rule's proposal. In other words, the APA does not apply a one-size-fits-all mentality, but instead realizes that some rules will require more time to implement than others due to their controversial or complicated nature.

The implementation of the Mandate reveals that a least-costly rule would be superfluous in the APA's notice-and-comment regime.[150] The notice-and-comment system allows interested parties to conduct a least-costly analysis for the agency, effectively placing the work in the hands of the market instead of the government. The Mandate's transformation between proposal and implementation exemplifies the market's function in improving administrative rules. The Mandate's original interim rule overlooked a serious

144. *See supra* Part II.B.2 (describing the implementation of the Mandate, including the many revisions it underwent to conform to the material concerns raised during the comment period).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See supra* Part III.C (pointing out how the APA requires agencies to conduct another round of notice-and-comment when comments reveal errors in the proposed rule).

149. *See supra* Part II.B.2 (describing the change the Mandate underwent during the notice-and-comment period).

150. *See supra* Part II.D (describing the "least costly rule" and its purpose).

constitutional issue: whether the government could require non-profit organizations, which were, for religious reasons, opposed to the use of contraception to provide contraceptives for their employees. Interested parties raised this issue after the HHS introduced the interim rule, and HHS addressed the concern by providing an exemption for all non-profit organizations in the amended Mandate.[151] While this was a constitutional issue and not an economic issue, the results are the same. Private citizens and corporations have an interest in government rules being economically efficient and as little a burden as possible. To this end, the public will offer their expertise and knowledge of the market to achieve the "least costly rule" through the medium of making comments to the agency.

The APA's notice-and-comment approach continues to be effective in resolving legal issues. The Mandate, again, provides an example. The circuit split that resulted from Mandate-incited litigation shows that the problematic aspects of the Mandate were ones not solvable through the rulemaking process.[152] If individuals like the Greens and the Hahns had challenged the Mandate and the challenge resulted in a unanimous determination by circuit courts that the Mandate was unconstitutional or otherwise unenforceable, it would be arguable that the rulemaking process failed because the rulemaking process should resolve such issues before implementation. Alternatively, a circuit split shows the success of the rulemaking process because the remaining controversy involved law that had no clear legal precedent, requiring the Supreme Court's attention and eventual resolution.[153] Every regulation has its winners and losers. Legal conflict surrounding a regulation is inevitable. The outcomes of those conflicts reveal how well the regulation was crafted. A regulation, like the Mandate, that results in a circuit split reveals that there were no blatant constitutional errors in its implementation—at least no errors that could be resolved without the help of the Supreme Court. This issue even divided the Supreme Court, producing a 5–4 decision.[154]

2. The RAA Would Have Encumbered the Mandate's Rulemaking Procedure with Little Positive Benefit

As previously discussed, the RAA would have failed to produce a better Mandate. Not only would the Mandate remain unimproved by the RAA, but the additional procedures required would have added considerable costs to implementing the Mandate and mired any progress in policy debate. Every hour that agencies spend on publishing advanced notice, determining the least costly rule, and holding hearings consumes taxpayer money that is in short supply. If the sponsors of the RAA are truly concerned about regulatory costs on the economy, certainly one of those costs Congress should avoid is the waste of taxpayer dollars. By allowing interested parties in the market, rather than the agency as required by the RAA, to submit their collective thoughts and suggestions on how to make the rule more efficient and effective, the market does the work for the government.

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151. *See supra* Part II.B.2 (outlining how the Mandate was transformed during the notice-and-comment period as interested parties raised material issues).

152. *See supra* Part II.C (describing the controversy surrounding the Mandate, including the circuit split developed by Conestoga Wood Specialities Corp. v. Sebelius, 724 F.3d 377 (3d Cir. 2013) and Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)).

153. *See id.* (reviewing the Supreme Court's holding in favor of Hobby Lobby, affirming the Tenth Circuit overturning the Third Circuit's analysis in *Conestoga Wood*).

154. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Ginsberg, J., Sotomayor, J., Breyer, J., and Kagan, J., dissenting).

C. Congress Already Holds the Power to Solve the Problems the RAA Seeks to Address

Congress has the ability to specify the procedural steps an agency must take to enact a particular regulation in the regulation's enabling statute. Congress's unique tailoring of procedural safeguards that an agency should follow for a given kind of regulation allows Congress to avoid the problem of creating safeguards that are too broad to fit unique regulatory aims. The Environmental Protection Agency and the Federal Aviation Administration deal with dissimilar problems, so their approaches to problem solving should be different. If Congress notices that a particular agency is failing to consider important input, or is adopting rules too quickly, then Congress should address the problem by narrowly constraining that *particular* agency by enacting more procedures for that agency to follow. The alternative would be to treat all agencies the same and risk a lot of wasted time and resources in those agencies where current procedures are sufficient.

Raising the bar for all agencies directly frustrates one of the goals the sponsoring members of Congress hoped to achieve: "to fight overreaching regulations."[155] The APA applies to both rulemaking and deregulation. Any agency wishing to get rid of any overreaching regulation under the RAA would have to follow all of the procedures that it would have to follow to create a regulation—which are significantly more complex under the RAA. Therefore, these same members of Congress who sponsored the RAA would severely frustrate any attempts to deregulate the economy by passing a law that, ironically, hopes to decrease regulation.

The principal danger to the RAA is that it would force agencies to become more political than ever before. Agencies have been, and should remain, entities of the government that work primarily to implement policy, rather than the centers for political debate. As policy implementers, agencies will no doubt be involved in the political discussion, but it is the executive and legislative branches that should serve as the driving forces behind policy. And this makes sense: citizens vote for their representatives, senators, and president. Citizens do not directly vote for the Secretary of HHS or the Administrator of the EPA, and therefore these officers are not required to answer directly to the electorate. To force agencies to conduct hearings for high-impact rules and conduct least cost analyses on regulations would place into their hands the very decisions that are reserved to our political branches of government. Congress should instead designate, case-by-case, one enabling act at a time, whether an agency must undergo a cost analysis considering factors relevant to the issue Congress hopes the agency will address. Such an approach prevents the broad-stroke approach of the RAA that would unnecessarily inhibit the important work of agencies by transforming them into even greater madhouses of political punditry than they already are. Politicians should avoid unneeded delegations of power, and begin solving problems by fighting through the gridlock into bipartisanship, thereby addressing any ineffective and overly burdensome regulations at their sources: Congress and the President.

V. CONCLUSION

The proposed RAA offers many changes to the APA that would have a significant impact on agency rulemaking. Adding substantial procedures to an agency's introduction

155. *See supra* Part II.D (quoting Senator Mark Pryor's statement in favor of the RAA, giving his rationale for sponsoring the RAA).

of regulations under the APA would, arguably, make rulemaking more transparent or, at the very least, more difficult. Requiring agencies to conduct a least costly rule analysis, while being burdensome on the agency, would foreseeably decrease the weight of our administrative system on the economy and promote a spirit of fiscal responsibility. But Congress would achieve these ends at too great a cost.

The ABA raises significant concerns with the RAA's approach to administrative procedure, the corpus of which seems to deny the existence of solutions under the current APA regime. The ABA argues that the APA possesses all of the tools necessary to solve the problems confronting regulatory issues but that Congress must implement those tools on a case-by-case basis to prevent a one-size-fits-all solution. The needs in our society for effective regulation are as numerous as they are essential. These various needs demand varying procedural remedies. To conclude otherwise would be like applying New York City parking restrictions nationally—including rural Kansas—producing universally heightened restrictions due to the severe circumstances experienced in a few situations. The ABA's approach would allow Congress to continue to specify, in enabling legislation, the precise procedural requirements for every kind of regulation, and thereby avoid the overburdening effect universal requirements would bring to areas of regulation where unneeded heightened procedural requirements only work to impede a drowning government.

The implementation of the Mandate reveals that the current procedural standards of the APA continue to be effective. HHS addressed the concerns raised by interested parties during the notice and comment period and resulted in an amended Mandate that exempted non-profit religious organizations. Citizens then litigated the remaining issues in the amended Mandate, leading to the development of American jurisprudence in the *Hobby Lobby* decision. It is doubtful that the RAA would have resulted in any significant changes in the implementation of the Mandate and would have instead only increased the cost and time it took for HHS to complete its congressionally created task. The Mandate teaches a valuable lesson: it would be brash to amend the APA to include greater procedural requirements when such requirements would do little to nothing to increase regulatory effectiveness and transparency.