VIRGIN MARY OR MARY MAGDALENE: AN EXAMINATION OF THE CONTRACEPTIVE MANDATE CASES AND THE RELIGIOUS FREEDOM RESTORATION ACT'S SUBSTANTIAL BURDEN STANDARD

I. INTRODUCTION

What's a mob to a king?
What's a king to a god?
What's a god to a non-believer?
Who don't believe in anything?

–*"No Church in the Wild,"* Kanye West and Jay-Z[1]

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act into law.[2] The Patient Protection and Affordable Care Act (PPACA) represented a significant overhaul of healthcare policies within the United States.[3] The PPACA contained several politically controversial healthcare initiatives, including the individual mandate and a dramatic Medicaid expansion, the Act's "key provisions."[4] Recently, however, the PPACA provision garnering the most controversy, both within and outside the judicial arena, is the "contraceptive mandate."[5]

More gas has been added to this controversy's fire in the form of Supreme Court certiorari.[6] In November 2013, the Supreme Court agreed to grant review of both the *Hobby Lobby* and *Conestoga* decisions in order to determine the constitutionality of the contraceptive mandate as well as the nature and extent of religious plaintiffs' Religious Freedom Restoration Act (RFRA) rights.[7] A key issue within this litigation will be how the Supreme Court interprets the RFRA's substantial burden standard.[8] Therefore, with this increased attention on the RFRA and contraceptive mandate, the Supreme Court should take these cases as an opportunity to further define and refine religious individuals' rights and obligations under the RFRA.

Thus, this Note will explore the conflicts that have arisen following the initiation of the PPACA's contraceptive mandate with a particular focus on

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1. KANYE WEST & JAY-Z, *No Church in the Wild*, *on* WATCH THE THRONE (Roc-A-Fella Records 2011).

2. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified at 42 U.S.C. §§ 18001–18121 (2012)).

3. *See* Newland v. Sebelius, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

4. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

5. *See* Robert Barnes, *Conflicting Rulings on Contraceptive Mandate*, WASH. POST, July 27, 2013, at A2; Editorial Board, *The Contraception Battle*, N.Y. TIMES, July 2, 2013, at A24.

6. Lyle Denniston, *Court to Rule on Birth-Control Mandate (Updated)*, SCOTUSBLOG (Nov. 26, 2013, 12:20 PM), http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/.

7. *Id.*

8. *Id.*

how the RFRA's substantial burden standard should be applied in the context of the contraceptive mandate. Part I of the Note will provide an overview of the current circuit court decisions with a detailed examination of the circuit courts' treatment of the RFRA's substantial burden standard. Part II of the Note will examine how the RFRA's substantial burden standard has been applied in prior regulatory contexts and how this prior regulatory precedent affects the contraceptive mandate. Finally, Part III of the Note will evaluate current circuit court arguments, and advocate that the Supreme Court utilize a modified centrality test when deciding contraceptive mandate cases.

II. THE CONTRACEPTIVE MANDATE

The PPACA's contraceptive mandate provision requires covered employers to offer group health plans or other insurance covering "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration."[9] The Health Resources and Services Administration (HRSA), an agency within the Department of Health and Human Services,[10] in conjunction with the Institute of Medicine,[11] set guidelines mandating PPACA employer health plans cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling."[12] The contraceptive methods covered by these HRSA guidelines include religiously controversial contraception methods such as "Plan B (the 'morning after pill') and *ella* (the 'week after pill')."[13]

Additionally, these HRSA guidelines include coverage of other, less religiously controversial contraceptive methods such as oral contraceptives, condoms, and intrauterine devices.[14] The more controversial contraceptive methods, Plan B and *ella*, are religiously contentious because of their functionality. These contraceptives terminate pregnancy by "preventing the

9. Patient Protection and Affordable Care Act of 2010, Title I, § 1001(5), 42 U.S.C. § 300gg-13(a)(4) (2012).

10. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

11. *Id.* at 1123.

12. *See Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well Being*, HEALTH RESOURCES & SERVICES ADMINISTRATION, http://www.hrsa.gov/womensguidelines/ (last visited Feb. 22, 2015).

13. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

14. *See Hobby Lobby*, 723 F.3d at 1123.

implantation of a fertilized egg."[15] The other, less controversial contraceptive methods function by preventing fertilization at the outset.[16]

The PPACA included the contraceptive mandate, despite its controversy, largely because it represented a monumental health advancement for women while simultaneously being cost efficient.[17] The contraceptive mandate provides women with increased access to effective contraceptives and, correspondingly, an increased ability to plan pregnancies.[18] Furthermore, the mandate eases the financial burden poor and working class women are exposed to when forced to purchase unsubsidized contraceptives.[19] For example, almost a fifth of women report inconsistent contraceptive use because of financial difficulty.[20] Therefore, for both financial and humanitarian reasons, the PPACA included the contraceptive mandate.

However, religious individuals, and their affiliated businesses, have repeatedly and fervently attacked the contraceptive mandate.[21] Prominent political officials have also attacked the mandate on financial and religious grounds.[22] These religious litigants' main claim is that the PPACA's contraceptive mandate violates statutory rights granted by the Religious Freedom Restoration Act.[23]

III. THE RELIGIOUS FREEDOM RESTORATION ACT AND THE SUBSTANTIAL BURDEN STANDARD

The Religious Freedom Restoration Act (RFRA) provides "[g]overnment shall not substantially burden a person's exercise of religion

15. *Id.*

16. *Id.*

17. NAT'L WOMEN'S LAW CTR., FACT SHEET: DENYING COVERAGE OF CONTRACEPTIVES HARMS WOMEN 1–2, *available at* http://www.nwlc.org/sites/default/files/pdfs/denying_covg_of_cont_harms_women_081312_pdf.pdf (2012).

18. *Id.*

19. *Id.*

20. *Id.* at 2.

21. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381–82 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Grote v. Sebelius, 708 F.3d 850, 853 (7th Cir. 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111–12 (D.D.C. 2012); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292–93 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

22. *See* Michael Gryboski, *Ron Paul Expresses Support for Hobby Lobby, Says Lawsuit Is About 'Rights,' Not 'Contraception,'* CHRISTIAN POST (Dec. 11, 2013, 10:55 AM), http://www.christianpost.com/news/ron-paul-expresses-support-for-hobby-lobby-says-lawsuit-is-about-rights-not-contraception-110541/.

23. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *Tyndale*, 904 F. Supp. 2d at 109; *Newland*, 881 F. Supp. 2d at 1293.

even if the burden results from a rule of general applicability."[24] However, the RFRA states that a government may substantially burden a person's free exercise of religion if the government "demonstrates that application of the burden to the person[] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[25] The RFRA is seen largely as a retaliatory statute to blunt the effects of the Supreme Court's decision in *Employment Division v. Smith*.[26]

In *Employment Division v. Smith*, the Supreme Court held that neutral laws of general applicability, despite their discriminatory effect, did not "discriminate against religious objectors," and that burdened religious individuals should look to legislatures, not courts, for religious exemptions.[27] Lawmakers in both parties were upset over the Court's decision in *Smith* and, in 1993, passed the RFRA to reinstitute the pre-*Smith* jurisprudence.[28] Though the Supreme Court held the RFRA unconstitutional as applied to the states,[29] the RFRA continues to be applied at the federal level.[30] Additionally, since 1997, state legislatures have enacted "mini-RFRAs" at the state level, and "a dozen more [states have] interpreted their state constitutions to follow the [RFRA]."[31]

A key term left undefined by the RFRA is "substantial burden." Though the RFRA frames the substantial burden standard in categorical terms,[32] courts have used three divergent definitions when applying the standard.[33] The three predominant substantial burden interpretations that have emerged from the RFRA jurisprudence are (1) the "centrality test";

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24. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C. § 2000bb-1(a) (2012).

25. *Id*. § 2000bb-1(b).

26. Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/; *see generally* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 35 S. Ct. 853 (2015).

27. Volokh, *supra* note 26; *see generally Smith*, 494 U.S. 872.

28. Volokh, *supra* note 26.

29. *See* City of Boerne v. Flores, 521 U.S. 507, 534–36 (1997).

30. Volokh, *supra* note 26.

31. *Id.*

32. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C. § 2000bb-1(a) (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . .").

33. *Compare* Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996) (stating that a court's substantial burden inquiry should be limited to "whether a claimant sincerely holds a particular belief and whether [that] belief is religious in nature"), *and* Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 492 (6th Cir. 1995) (declining to find a substantial burden because the religious services were not "fundamental" to Rahman's religion), *with* Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995) (holding that a substantial burden does not exist where the claimants had "neither been compelled to engage in conduct proscribed by their religious beliefs, nor h[ad] they been forced to abstain from any action which their religion mandate[d] [] they take").

(2) the "compulsion test"; and (3) the "religious motivation test."[34] The centrality test, adopted by the Sixth and Tenth Circuits,[35] requires the religious claimant to prove the burdened religious exercise is "central" to the claimant's religious belief.[36] The compulsion test, a more rigorous standard, requires the religious claimant to "demonstrate that the government [action] infringes upon a practice that is mandated by her faith, or that the government [action] requires the claimant to engage in conduct . . . prohibited by her religion."[37] A religious claimant satisfies the religious motivation test, the broadest standard of the three, if the claimant demonstrates that the government action simply "infringes upon a practice . . . [of] sincere religious belief."[38]

Despite confusion over the multiple substantial burden definitions, the Supreme Court "has not resorted to any single formulation of words to describe a religious practice burdened by the government."[39] The Supreme Court sidestepped this definitional issue in its most recent RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[40] because "the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV."[41] Thus, the Court's continued "demonstrat[ion] that the concept of 'burden' is presently amorphous" injects further ambiguity into how the Supreme Court would analyze a for-profit corporation's burden under the contraceptive mandate.[42]

IV. RELIGIOUS PLAINTIFFS' RFRA CLAIMS AGAINST THE CONTRACEPTIVE MANDATE

The religious plaintiffs in these contraceptive mandate cases argue that requiring them, through their established for-profit corporations, to provide contraceptive access to their employees substantially burdens their free exercise of religion.[43] These religious plaintiffs claim the contraceptive

34. Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1474–75 (1997).

35. *Id.* at 1474 n.13.

36. *Id.* at 1474.

37. *Id.* at 1474–75.

38. *Id.* at 1475.

39. *Id.* at 1485–86 (citing Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 271 (1994)).

40. 546 U.S. 418 (2006).

41. *Id.* at 426.

42. Idleman, *supra* note 39, at 271.

43. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1140 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Gilardi v. Sebelius, 926 F. Supp. 2d 273, 275–76 (D.D.C.), *aff'd in part, rev'd in part sub nom.* Gilardi v. U.S. Dep't of Health & Human

mandate forces them, and their for-profit corporations, into a Hobson's choice of either facilitating and providing access to contraception against their religious scruples or adhering to their religion, thereby exposing their businesses to severe financial penalties.[44]

While there are exceptions to the PPACA's contraceptive mandate, none of the Act's exceptions would apply to for-profit corporations.[45] The PPACA's first exception covers "group health plan[s] established or maintained by [] religious employer[s]."[46] However, the Act currently defines a "religious employer" as an organization that "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code . . . ."[47] Thus, religious individuals who have established for-profit corporations will necessarily fall outside the "religious employer" exception.

The government also grants exceptions to other "non-profit organizations . . . that have maintained religious objections to contraceptive coverage yet will not fall within the amended definition of a religious employer."[48] Again, this "non-profit" exception is unavailable to religious individuals who structure their for-profit corporation around religious tenets. Finally, businesses that have not made significant changes to their health plans after the PPACA's effective date or who employ less than fifty employees are also not required to abide by the PPACA's contraceptive mandate.[49] Despite the numerous statutory exceptions, none of these exceptions would allow large for-profit corporations organized around religious principles to avoid the contraceptive mandate.[50] And though this for-profit contraception coverage controversy has been litigated in forty-nine separate lawsuits,[51] the circuit courts are still deeply divided about key issues such as whether the contraceptive mandate even poses a substantial burden on the religious claimants.[52]

Servs., 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (mem.); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

44. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1140; *Gilardi*, 926 F. Supp. 2d at 276.

45. *Hobby Lobby*, 723 F.3d at 1124.

46. 45 C.F.R. § 147.131(a) (2013).

47. *Hobby Lobby*, 723 F.3d at 1123.

48. *Id.* at 1124.

49. *Id.*

50. *Id.*

51. *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Feb. 22, 2013).

52. *Compare* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), *and* Gilardi v. Sebelius, 926 F. Supp. 2d 273 (D.D.C.), *aff'd in part, rev'd in part sub nom.* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S.

V. CIRCUIT COURTS' APPLICATION OF THE RFRA'S SUBSTANTIAL BURDEN STANDARD IN CONTRACEPTIVE MANDATE CASES

A. The Tenth Circuit: Hobby Lobby v. Sebelius

The Tenth Circuit, in *Hobby Lobby Stores, Inc. v. Sebelius*, was one of the first appellate courts to issue a ruling on the RFRA's application to the contraceptive mandate.[53] The plaintiffs in *Hobby Lobby* were several members of the Green family and their affiliated corporations, Hobby Lobby and Mardel.[54] The Green family established and ran both Hobby Lobby and Mardel according to Judeo-Christian religious tenets.[55] These corporate religious tenets were reflected through Hobby Lobby and Mardel's business practices such as refraining from business operations on the Sabbath, purchasing full-page advertisements in newspapers inviting readers to have a personal relationship with Christ, and abstaining from entering into business arrangements that promoted the use of alcohol.[56] Additionally, one of the religious principles the Greens, and their affiliated businesses, adhered to was the belief that "human life begins when sperm fertilizes an egg."[57] Thus, the Greens believed it was contrary to their religion to use or facilitate access to contraception methods that could cause the death of a fertilized embryo.[58]

Thus, the Greens, on behalf of themselves, Mardel, and Hobby Lobby, filed suit against the Department of Health and Human Services alleging that forcing them, through their religious corporations, to comply with the contraceptive mandate violated their free exercise rights under the RFRA.[59] In deciding this case, there were a number of issues the Tenth Circuit had to resolve, including whether Hobby Lobby and Mardel qualified as "persons" exercising religion for purposes of the RFRA.[60] Since the Greens, as individuals, were not being coerced into facilitating access to contraception, Hobby Lobby and Mardel were the actual entities with judicially recognizable claims.[61] After a lengthy analysis, the Tenth Circuit held that Hobby Lobby and Mardel qualified as "persons" able to exercise

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Ct. 2902 (2014) (mem.) (both finding that corporations could not engage in exercise of religion, and thus had no statutory rights under the RFRA), *with Hobby Lobby*, 723 F.3d 1114 (finding a substantial burden was faced by the for-profit religious corporation).

53. 723 F.3d 1114.
54. *Id.* at 1122.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1120–21.
60. *Id.* at 1128.
61. *See id.* at 1126 & n.4.

religious rights under the RFRA.[62] The Tenth Circuit then turned its attention to "whether the contraceptive-coverage requirement constitute[d] a substantial burden on Hobby Lobby and Mardel's exercise of religion."[63]

The Tenth Circuit ultimately found the contraceptive mandate imposed a substantial burden on Hobby Lobby and Mardel.[64] The court, applying the religious motivation test in its substantial burden analysis, stated that a substantial burden on free exercise exists if "it: (1) 'requires participation in an activity prohibited by a sincerely held religious belief,' (2) 'prevents participation in conduct motivated by a sincerely held religious belief,' or (3) 'places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief.'"[65] After tracing the genesis of the substantial burden standard through case law history, the court applied its interpretation of the substantial burden standard to Hobby Lobby and Mardel's claims.[66]

In applying the religious motivation version of the substantial standard, the Tenth Circuit found "it is difficult to characterize the pressure [on Hobby Lobby and Mardel] as anything but substantial."[67] The court concluded the contraceptive mandate required Hobby Lobby and Mardel to either "[1] compromise their religious beliefs, [2] pay close to $475 million more in taxes every year, or [3] pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees."[68] The court remarked that "[t]his is precisely the sort of Hobson's choice" the RFRA was meant to protect against.[69]

Then, the Tenth Circuit proceeded to dismantle the government's arguments that the contraceptive mandate "place[d] no burden on Hobby Lobby or Mardel."[70] The government argued since the contraceptive mandate was "another form of non-wage compensation—supposedly the equivalent of money,"[71] Hobby Lobby and Mardel were not burdened by the regulation. Relying on *United States v. Lee*[72] and *Thomas v. Review Board of the Indiana Employment Security Division*,[73] the Tenth Circuit rejected the government's position "because it assume[d] that moral culpability for the religious believer can extend no further than the

62. *Id.* at 1137.
63. *Id.*
64. *Id.* at 1138.
65. *Id.* (quoting Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010)).
66. *Id.* at 1140–41.
67. *Id.* at 1140.
68. *Id.* at 1141.
69. *Id.*
70. *Id.*
71. *Id.*
72. 455 U.S. 252 (1982).
73. 450 U.S. 707 (1981).

government's legal culpability."[74] The court reiterated its inability to decide whether the moral line Hobby Lobby and Mardel drew in their resistance to the contraceptive mandate "was an unreasonable one."[75] Thus, the court held Hobby Lobby and Mardel had "established a substantial burden to their sincerely held religious beliefs."[76]

B. The Third Circuit: Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services

The Third Circuit used a radically different analysis when it decided its own contraceptive mandate case, *Conestoga Wood Specialties Corp. v. Secretary of the United States Department of Health & Human Services*.[77] Instead of utilizing the RFRA to analyze the religious plaintiff's claims, the Third Circuit began and ended its analysis by asking, "whether . . . a for-profit, secular corporation, can exercise religion."[78] In ultimately holding that for-profit secular corporations cannot exercise religion, the Third Circuit simultaneously concluded, "Since Conestoga [the for-profit, secular corporation] cannot exercise religion, it cannot assert a RFRA claim."[79] Thus, the court was able to avoid applying the substantial burden standard by holding that for-profit, secular corporations were not entitled to the RFRA's religious protections.[80]

The Hahns, a Mennonite family, and their affiliated corporation, Conestoga, were the plaintiffs in the case.[81] The Hahns, as Mennonites, believed "anything that terminates a fertilized embryo" amounted to the taking of a life and was a sin against God.[82] Specifically, the Hahns objected to being forced, through their corporation, to provide or facilitate access to Plan B and *ella*.[83] After stating that Conestoga is currently subject to the mandate, the Third Circuit began its review of corporate personhood to determine whether Conestoga, alone, could exercise religion under the First Amendment or the RFRA.[84]

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74. *Hobby Lobby*, 723 F.3d at 1142.
75. *Id.* at 1141 (quoting *Thomas*, 450 U.S. at 715).
76. *Id.* at 1142.
77. 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
78. *Id.* at 383.
79. *Id.* at 388.
80. *Id.*
81. *Id.* at 381–82.
82. *Id.*
83. *Id.*
84. *Id.* at 382–83.

The Third Circuit first discussed whether Conestoga, as a corporation, was entitled to free exercise rights under the First Amendment.[85] The Third Circuit noted that while corporations may exercise some rights under the First Amendment, "certain guarantees are purely personal because the historic function of the particular guarantee has been limited to the protection of individuals."[86] The court then had to determine whether religious exercise was a "guarantee [that] is purely personal [and] is unavailable to corporations . . . [based] on the nature, history, and purpose of the particular constitutional provision."[87]

After examining the First Amendment's history, the Third Circuit concluded "the purpose of the Free Exercise Clause 'is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.'"[88] Therefore, the Third Circuit was "unable to determine that the 'nature, history, and purpose' of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under [the Free Exercise] provision."[89] The Third Circuit adopted language from the district court's opinion in the *Hobby Lobby* case stating: "General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."[90]

The Third Circuit also examined whether Conestoga could exercise religion under the "'passed through' theory."[91] The passed through doctrine, developed by the Ninth Circuit, operates by projecting the religious beliefs of business owners onto those business owners' corporations.[92] The Third Circuit rejected application of the passed through theory noting the doctrine "fails to acknowledge that, by incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities."[93]

85. *Id.* at 382–88.

86. *Id.* at 383 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)) (internal quotation marks omitted).

87. *Id.* (quoting United States v. White, 322 U.S. 694, 698–701 (1944)) (internal quotation marks omitted).

88. *Id.* at 385 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963)).

89. *Id.* (quoting *Bellotti*, 435 U.S. at 778 n.14).

90. *Id.* (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)).

91. *Id.* at 386.

92. *Id.* at 387.

93. *Id.* at 387–88.

Thus, the Court could not "ignore the distinction" between the Hahns, with their devout religious beliefs, and Conestoga, a default corporation existing solely for the creation of profit.[94] The Third Circuit then summarily dispatched with Conestoga's RFRA claims stating, "Since Conestoga cannot exercise religion, it cannot assert a RFRA claim."[95] The Third Circuit never reached the issue of whether the contraceptive mandate imposes a substantial burden on the corporation.

C. At the District Court Level: Tyndale House Publishers, Inc. v. Sebelius

The District Court in Washington, D.C., faced a decidedly unique set of facts when deciding its own contraceptive mandate case, *Tyndale House Publishers, Inc. v. Sebelius*.[96] Unlike the simplistic corporate ownership schemes in *Hobby Lobby* and *Conestoga*, the religious plaintiffs in *Tyndale* used a complex variety of trusts and other corporate mechanisms to organize their religious businesses.[97]

Dr. Kenneth Taylor and his wife founded Tyndale House Publishers, the religious plaintiff, in 1962.[98] However, unlike the direct individual-corporation ownership relationships in *Conestoga* and *Hobby Lobby*, the Tyndale House Foundation, a religious non-profit institution, owned a 96.5% stake in Tyndale House Publishers.[99] The Tyndale Trust owned the remaining stake in Tyndale House Publishers and also owned "84% of the voting shares" in Tyndale House Publishers.[100] Therefore, the Tyndale Trust "primarily directed" the operations of Tyndale House Publishers.[101]

While Mr. Taylor and his wife organized their business entities in a rather complicated scheme, there was significant commonality between the board members of each entity.[102] Additionally, each board member, trustee, foundation, and organization in the Taylor's macro-corporate organization signed a "'statement[] of belief and policy' outlining their religious beliefs" including "respect for the inviolable sanctity of the life of every human being as created in the image and likeness of God."[103]

Using the passed through theory, the district court imputed the Taylors religious beliefs, as defined by their "statement of belief," onto Tyndale

94. *Id.* at 388.
95. *Id.*
96. 904 F. Supp. 2d 106 (D.D.C. 2012).
97. *See id.* at 111–12.
98. *Id.* at 111.
99. *Id.*
100. *Id.* (quoting Compl. ¶¶ 2, 52).
101. *Id.* (quoting Compl. ¶¶ 2, 52).
102. *Id.* at 111–12.
103. *Id.* at 112 (quoting Compl. ¶¶ 31, 51, 59, 62).

House Publishers.[104] After determining that Tyndale House Publishers, by way of the passed through theory, could exercise religion within the meaning of the RFRA, the district court turned its attention to "whether the government action puts substantial pressure on [the] adherent to modify [its] behavior and to violate [its] beliefs."[105]

The court began its substantial burden analysis by reviewing *Wisconsin v. Yoder* and *Sherbert v. Verner*, the RFRA's axiomatic cases. The court cited approvingly to the holding in *Yoder* that "because the 'law affirmatively compel[led] [the religious plaintiffs], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs,'" the Amish plaintiffs' free exercise rights were substantially burdened.[106] The court also engaged in a discussion of *Sherbert*, which held that "the state had substantially burdened the plaintiff's religious exercise by denying [the plaintiff] unemployment benefits because, in accordance with the tenets of her faith, she was unwilling to work on Saturdays."[107]

The district court ended its substantial burden precedent review with a discussion of *Thomas v. Anchorage Equal Rights Commission*.[108] In *Thomas*, the Ninth Circuit found that forcing religious landlords to comply with a state law that "prohibit[ed] discrimination in housing based on marital status" presented a substantial burden to the religious landlord's free exercise rights because the effect of the law "bann[ed] [the religious landlords] from the rental market due to their inability to comply with the law in accordance with their religious belief."[109] The court adopted and applied the reasoning of the *Thomas* court:

> The contraceptive coverage mandate similarly places the plaintiffs [the Taylors and Tyndale House Publishers] in the untenable position of choosing either to violate their religious beliefs by providing coverage of the contraceptives at issue or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance.[110]

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104. *Id.* at 117 ("Accordingly, because Tyndale does 'not present any free exercise rights of its own different from or greater than its owners' rights,' it has 'standing to assert the free exercise rights of its owners.'" (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009))).

105. *Id.* at 120 (quoting Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008)) (internal quotation marks omitted).

106. *Id.* at 121 (quoting Wisconsin v. Yoder, 406 U.S. 205, 219 (1972)).

107. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 403–04 (1963)).

108. *Id.* at 121–22.

109. *Id.* (citing Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 712–14 (9th Cir. 1999), *rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc)).

110. *Id.* at 122.

After a review of the substantial burden precedent, the court considered the federal government's compelling interest arguments. The government asserted that because the contraceptive mandate payments would be funneled through several payment mechanisms with no guarantee of use, "the burden on the plaintiffs' religious exercise was simply too attenuated to qualify as 'substantial.'"[111] The court rejected this line of argument by quickly noting that in Tyndale's case "the plaintiffs provide direct coverage to Tyndale employees through a self-insured plan in which 'Tyndale acts as its own insurer.'"[112] The court also took pains to emphasize that "[b]ecause it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties."[113]

Finally, the district court reiterated that it was not in the position to question the religious lines the plaintiffs had drawn and concluded that "[t]he plaintiffs have therefore shown that the contraception coverage mandate substantially burdens their religious exercise."[114] After rejecting the government's other compelling interest arguments, the court granted Tyndale House Publishers and the Taylors preliminary injunction against the contraceptive mandate.[115]

VI. A BRIEF EXAMINATION OF CORPORATE PERSONHOOD

While the details of corporate personhood are outside the scope of this article, a brief summary of the circuit courts' corporate personhood arguments is necessary to provide appropriate context for these courts' decisions. Though the *Hobby Lobby* and *Conestoga* courts reached diametrically opposite conclusions concerning corporate personhood,[116] each court used similar methodologies and reasoning to arrive at their opposite conclusions.

The Third Circuit began its corporate personhood analysis by considering "whether there is a similar history of courts providing free

111. *Id.* (citing O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159–60 (E.D. Mo. 2012), *reversed in part, vacated in part*, 766 F.3d 862 (8th Cir. 2014)).

112. *Id.* at 123 (quoting Compl. ¶ 73).

113. *Id.* at 124.

114. *Id.* at 125.

115. *Id.* at 130.

116. *Compare* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137–38 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (finding "Hobby Lobby and Mardel to qualify as 'persons' under RFRA.") *with* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (concluding that "Since Conestoga cannot exercise religion, it cannot assert a RFRA claim.").

exercise protection to corporations."[117] The Third Circuit concluded that there was no history of corporations utilizing free exercise protections.[118] The Third Circuit also took pains to point out that corporations would be unable to exercise these religious protections because "business corporations do not, separate and apart from . . . their individual owners or employees, exercise religion. [Corporations] do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."[119] Though the Third Circuit acknowledged the applicability of *Citizens United* to their decision, they distinguished a corporation's right to religious protections from speech protections by noting that corporations were poised to exercise speech rights but not religious rights.[120] Thus, after rejecting the passed through theory, the Third Circuit concluded that for-profit corporations did not qualify as "persons" under the RFRA.[121]

The Tenth Circuit, in *Hobby Lobby*, reached exactly the opposite conclusion in their analysis of the history of the First Amendment and its application to for-profit corporations.[122] The Tenth Circuit began its analysis by rejecting the Third Circuit's conclusion that freedom of religion is a "purely personal guarantee[] . . . unavailable to corporations and other organizations because [of] the historic function [of the amendment]."[123] The Tenth Circuit also resisted hinging corporate free exercise rights on the corporation's profit status.[124] The Court concluded that because non-profit associations were entitled to religious free exercise rights, for-profit corporations were also entitled to these same religious rights.[125] Thus, the Tenth Circuit concluded Hobby Lobby and Mardel qualified as persons under the RFRA.[126] The diametrically opposing conclusions of the Tenth and Third Circuits show how important the concepts of corporate personhood are in deciding contraceptive mandate cases.

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117. *See Conestoga*, 724 F.3d at 384.

118. *Id.*

119. *Id.* at 385 (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)).

120. *Id.*

121. *Id.* at 388.

122. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

123. *Id.* at 1133–34 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)) (internal quotation marks omitted).

124. *Id.*

125. *Id.* at 1136.

126. *Id.* at 1137.

VII. IN SEARCH OF THE ANSWER: THE RFRA'S SUBSTANTIAL BURDEN PRECEDENT

A. IRS Claims—Adams *and* Droz

While the Supreme Court has only sparingly granted cert to RFRA cases, circuit courts have considered a number of RFRA issues, including how the RFRA and the substantial burden standard operate when applied to a regulatory scheme.[127] These circuit court RFRA decisions and the corresponding substantial burden analyses provide an examination of the issues and reasoning the Supreme Court will likely rely on when deciding the fate of the contraceptive mandate scheme.

Religious claimants frequently challenge the Internal Revenue Code as violating the RFRA.[128] These cases provide fertile regulatory precedent, because the Internal Revenue Code, like the PPACA, is an overarching regulatory system designed to improve public welfare and decrease government inefficiency. However, the Internal Revenue Code's longevity and history, when compared with the PPACA's recent passage, may limit the precedential value of these IRS cases.

Rather than objecting to tax collection altogether, many religious plaintiffs object to how their tax dollars are distributed to certain government programs.[129] For example, in *Adams v. Commissioner*, a devout Quaker objected to paying taxes to fund the military and argued she was exempt from paying federal income tax because of her religious beliefs.[130] While the Third Circuit agreed that the Internal Revenue Code substantially burdened the plaintiff's free exercise of religion, the court held "[t]he least restrictive means of furthering a compelling interest in the collection of taxes—a compelling interest that Adams has conceded—is in fact, to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to [sic] built into the legislative scheme."[131] Thus, the Third Circuit concluded uniformity in the application of the U.S. government's regulatory tax system was a

127. *See* United States v. Lee, 455 U.S. 252 (1982) (applying the substantial burden standard to the religious plaintiff's free exercise suit against the government); Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999); Goehring v. Brophy, 94 F.3d 1294 (9th Cir. 1996); Droz v. Comm'r, 48 F.3d 1120 (9th Cir. 1995).

128. *See* Bethel Baptist Church v. United States, 822 F.2d 1334 (3d Cir. 1987); Lull v. Comm'r, 602 F.2d 1166 (4th Cir. 1979); Graves v. Comm'r, 579 F.2d 392 (6th Cir. 1978); First v. Comm'r, 547 F.2d 45 (7th Cir. 1976); Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969).

129. *Adams*, 170 F.3d at 174; *Droz*, 48 F.3d at 1121.

130. *See Adams*, 170 F.3d at 174.

131. *Id.* at 179.

compelling government interest and was the least restrictive means by which the government could institute a functioning tax system.[132]

The Ninth Circuit faced a similar issue in *Droz v. Commissioner.*[133] In *Droz*, the religious claimant, Martin Droz, failed to pay taxes "on the ground that he had religious objections to the Social Security system."[134] In discussing the applicability of the RFRA, the Ninth Circuit noted, "To determine whether a government regulation impermissibly burdens an individual's First Amendment right[s] . . . a court must decide whether that regulation substantially burdens a sincerely held religious belief."[135] Using the religious motivation version of the substantial burden standard, the Ninth Circuit then went on to acknowledge the presence of a substantial burden but deny the plaintiff's RFRA claim.[136]

The Ninth Circuit reiterated the Third Circuit's arguments about the need for uniformity within the tax system, stressing that "permitting [the religious plaintiff] to opt out of the Social Security system would not only threaten the integrity of the system, but would threaten Congress's goal of ensuring that persons who opt out are provided for (and will not burden the public welfare system)."[137] Thus, as did the Third Circuit, the Ninth Circuit found that the Internal Revenue Code substantially burdened the religious plaintiff's free exercise rights but this burden was justified by the need for uniformity within the government's taxation system.[138]

B. Claims Against Other Regulatory Systems: Goehring v. Brophy

Though claims against the IRS make up a good deal of the regulatory system RFRA suits, other circuit courts have applied the RFRA to different regulatory systems.[139] In *Goehring v. Brophy*, the Ninth Circuit again considered a religious claimant's RFRA challenge to a regulatory system, but this time the regulatory system in question was a state university fee system.[140] Students at a state funded California university challenged the university's mandatory fee system, which allotted money to healthcare facilities that provided abortions. These student plaintiffs challenged the fee system as violating "their sincerely held religious beliefs prevent[ing]

132. *Id.* at 180.
133. *Droz*, 48 F.3d at 1120.
134. *Id.* at 1121.
135. *Id.* at 1122.
136. *Id.* at 1123–24.
137. *Id.* at 1123
138. *Id.* at 1123–24
139. *See* Goehring v. Brophy, 94 F.3d 1294 (9th Cir. 1996).
140. *Id.* at 1298.

them from financially contributing to abortions."[141] After laying out the RFRA's components and applying the religious motivation test version of the substantial burden inquiry, the Ninth Circuit concluded that the student claimants had not shown a substantial burden.[142]

The Ninth Circuit placed an emphasis on the attenuated nature of the students' claim noting, "[T]he plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services."[143] Thus, while most courts have chosen to sustain regulatory systems on the basis of the compelling interests those regulatory systems serve, *Goehring v. Brophy* stands for the ancillary proposition that regulatory systems can sometimes be so attenuated to the individual that the system imposes no substantial burden to a religious claimant's free exercise rights.

VIII. EVALUATING THE COMPETING "SUBSTANTIAL BURDEN" DEFINITIONS

When courts face legal disputes arising under the RFRA, the type of substantial burden standard these courts employ can have a dramatic effect on the outcome of the litigation.[144] While the religious motivation definition of substantial burden applies to all religious practices that are motivated by a sincere religious belief, the centrality and compulsion tests "confine[] the [RFRA] to the fundamental aspects of one's faith . . . [or] to practices that are either mandated or prohibited by one's religious beliefs."[145] Legitimate criticism has been leveled at each substantial burden definition; however, a modified centrality test could provide the correct mixture of incentives to allow government to effectively create, maintain, and fund important regulatory programs while simultaneously respecting citizens' free exercise rights.

The compulsion standard should be disfavored because it "is difficult to reconcile with the broad remedial purposes of the RFRA."[146] The compulsion test fails to adequately serve the RFRA's purpose because, at a fundamental level, the compulsion test views religion as a binary set of rules and regulations.[147] This binary view of religion limits the free exercise rights of citizens who subscribe to a faith that does not deal in absolutes.[148]

141. *Id.*
142. *Id.* at 1298.
143. *Id.* at 1300.
144. *Seeger*, *supra* note 34, at 1498–99.
145. *Id.* at 1498
146. *Id.* at 1500.
147. *Id.*
148. *Id.* at 1499.

For example, in *Brandon v. Board of Education*,[149] the Second Circuit denied a Christian student organization's request to conduct prayer meetings on campus based on the untenable differences between compulsory and voluntary prayer.[150] The Second Circuit noted that had the student organization practiced Islam, which mandates prayer, the decision likely would have been different.[151] Many academics lambasted the Second Circuit's decision; one stated that "an approach that affords different treatment to Christian and Muslim prayer offers insufficient protection for the exercise of religion."[152] Additionally, courts employing the compulsion definition "unwittingly reintroduce majoritarian religious perspectives, as evidenced by the exclusion of minority religious groups."[153] Thus, the compulsion definition for the RFRA's substantial burden standard has fundamental problems that should persuade future courts to discard their commitment to the compulsion test.

While the compulsion test has been met with a barrage of criticism, the religious motivation definition is looked on favorably as a test that "reflects an appreciation for the origins of the [RFRA], protects minority groups that would remain vulnerable in the political process, and remains faithful to the requirements of the Constitution."[154] However, the religious motivation test has distinct disadvantages when considered within a regulatory context. The primary benefit of the religious motivation test is it "allows followers of any religion to utilize the [RFRA] when the government infringes upon the exercise of religion."[155] However, this broad definition of the RFRA's substantial burden standard, when coupled with the compelling interest standard announced in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[156] poses a serious danger to the government's ability to administer key programs.

In *Gonzales*, the Supreme Court defined the government's compelling interest burden as "demonstrat[ing] that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[157] This lenient threshold for religious injury and high burden of proof for the government is compounded even further by the judiciary's

149. Brandon v. Bd. of Educ., 635 F.2d 971 (2d Cir. 1980), *superseded by statute*, Equal Access Act of 1984, Pub. L. No. 98-3771, 98 Stat. 1302, *as recognized in* Donovan *ex rel.* Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003).

150. *Id.* at 977.

151. *Id.*

152. *See Seeger*, *supra* note 34, at 1501.

153. *Id.* at 1504.

154. *Id.* at 1506.

155. *Id.* at 1505.

156. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

157. *Id.* at 420.

"refus[al] to make judgments regarding theological issues."[158] Time and time again, the Supreme Court has reinforced the rule that "[c]ourts are not arbiters of scriptural interpretation."[159]

Therefore, under current RFRA standards, the government is open to suit from any religious individual who feels that a government program has infringed upon any aspect of his religion, and the government can only avoid this presumption by either demonstrating that the program is not burdensome or that a compelling governmental purpose is served by having that specific religious claimant comply with the challenged law. While the RFRA had "broad remedial purposes,"[160] this statutory scheme seriously threatens the government's ability to create and administer key social programs. Future religious plaintiffs, like Conestoga and Hobby Lobby, will argue that the government cannot meet its compelling interest burden when a regulatory program already has other broad categories of exceptions. These administration problems should dissuade courts from utilizing the religious motivation definition of substantial burden in RFRA litigation.

Additionally, while uniformity of application may serve as a judicially recognized compelling government interest for certain regulatory systems,[161] this uniformity argument has limited applicability because modern regulatory schemes come prebuilt with foundational exceptions. If courts continue to use the religious motivation test, such usage would leave legislators in the unenviable position of either trying to construct strictly uniform regulatory programs or knowingly exposing their regulatory program to RFRA suits.

Thus, because of the administration problems of the religious motivation test and the majoritarian difficulties associated with the compulsion definition, courts should utilize the centrality definition when analyzing RFRA cases. However, the centrality test has its faults. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Supreme Court adamantly rebuked the centrality test and the dissent's support for the test.[162] The majority in *Lyng* found that the centrality test "would require [the Court] to rule that some religious adherents misunderstand their own religious beliefs . . . [and to do so] would cast the Judiciary in a role that we were never intended to play."[163]

Yet, the majority left some play in the joints for a modified centrality test. During its analysis of the centrality test in *Lyng*, the majority hinted in

158. *See Seeger*, *supra* note 34, at 1511.
159. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981).
160. *See Seeger*, *supra* note 34, at 1500.
161. *See Gonzales*, 546 U.S. at 435.
162. 485 U.S. 439, 457–58 (1988).
163. *Id.* at 457–58.

dicta that a centrality test, which "is nothing but an assertion of centrality," may pass constitutional muster.[164] While this sort of "toothless" centrality test may not have any perceived value from the perspective of the judiciary, this modified centrality standard could have a demonstrated effect on religious claimants. By forcing the religious claimant to examine his religious views for centrality before filing, this type of modified centrality test could screen out many of the weak RFRA claims that courts utilizing the religious motivation definition routinely allow. Though the centrality test would be rigorous in name only, this judicial scheme should be preferred to the alternatives, the religious motivation and compulsion definitions, which offer standards that are either unconstitutional or serve as a severe burden to government ingenuity and efficiency.

Not only does the modified centrality standard serve the purposes of the RFRA while preserving judicial economy, other considerations support the use of the modified centrality standard in contraceptive mandate cases. The primary policy benefit is that the modified centrality standard will preserve regulatory efficiency. As stated above, in *Gonzales*, the Supreme Court found that the requirement that the government must demonstrate a compelling government interest is served by having the specific individual claimant comply with the regulatory system.[165] This extraordinarily high burden for the government necessitates a higher threshold injury to the religious claimant. Otherwise, religious plaintiffs claiming certain regulatory programs violate the claimant's own interpretation of his religion will subject new or controversial programs to be repeated, withering RFRA attacks. By utilizing the modified centrality test, courts will be able to heighten the RFRA's threshold inquiry without running afoul of free exercise precedent, thereby concurrently serving the purposes of the RFRA and protecting government programs and legislative flexibility.

Additionally, the rise of corporate religious rights further compounds the need for a modified centrality test. When the RFRA was originally proposed, its proponents focused on its religious protections for individual persons and likened the RFRA to the Voting Rights Act.[166] However, it is unlikely that lawmakers or RFRA proponents considered the RFRA's potential application to corporate free exercise claims. Thus, a statute designed to enhance the constitutional rights of oppressed minorities may be co-opted by national corporations in order to enhance those corporations' economic status. Other scholars, like Professor Michael Dorf,

164. *Id.* at 457.

165. *Gonzales*, 546 U.S. at 418.

166. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 897 (1994).

argue the substantiality threshold alone will protect individuals' free exercise rights while preserving government ingenuity.[167] However, Professor Dorf's argument presupposes that individual religious rights will be confined to human persons. Without a limitation on the entities entitled to free exercise rights, the substantiality threshold will not protect government regulatory programs from withering RFRA challenges. Therefore, a cautious Supreme Court should support a narrower substantial burden standard, the modified centrality standard, to rebut against this statutory quagmire.

IX. EVALUATION OF SUBSTANTIAL BURDEN ANALYSES IN THE CONTRACEPTIVE MANDATE CASES

A. Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health & Human Services

The majority in *Conestoga* did not discuss the issue of whether the contraceptive mandate imposed a substantial burden on the corporation because the majority found that "since Conestoga cannot exercise religion, it cannot assert a RFRA claim."[168] However, Circuit Judge Jordan's dissent offers a substantial burden analysis that mimics the majority opinion in Hobby Lobby.[169] Judge Jordan found that the substantial burden standard is satisfied if "a rule . . . prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim."[170]

Utilizing the religious motivation definition of substantial burden, Judge Jordan ultimately concluded that the contraceptive mandate imposed a substantial burden on Conestoga.[171] Though applying the modified "name only" centrality test to the facts in *Conestoga* would not drastically change the outcome, utilizing the modified centrality test would result in a greater emphasis on the religious claimant's duty to examine his own religious beliefs. While courts should be careful not to become "arbiters of

167. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1251 (1996).

168. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't. of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

169. *Compare Conestoga*, 724 F.3d at 408–12 (Jordan, J., dissenting) (finding that the plaintiffs "face the 'inescapable choice' between facilitating the provision of 'drugs and services that they believe are immoral' . . . or 'suffer[ing] severe penalties for non-compliance with the Mandate.'"), *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137–1141 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (stating that Hobby Lobby was faced with a "Hobson's choice" of either adhering to its religious beliefs and paying substantial fines or violating its religious beliefs and conforming with the requirements of the Mandate).

170. *Conestoga*, 724 F.3d at 408 (Jordan, J., dissenting).

171. *Id.* at 411–12.

scripture,"[172] a lower court's use of a modified centrality test, coupled with persuasive language explaining the religious claimant's duty, could cause religious claimants to reevaluate the centrality of their claims. In turn, this emphasis on religious reevaluation may result in fewer attenuated religious claims under RFRA thereby preserving both government and judicial efficiency.

B. Hobby Lobby Stores, Inc. v. Sebelius

In *Hobby Lobby*, the majority of the Tenth Circuit, like Judge Jordan, found that the PPACA's contraceptive mandate imposed a substantial burden on the Hobby Lobby corporation because the mandate forced Hobby Lobby to "[1] compromise their religious beliefs, [2] pay $475 million more in taxes every year, or [3] pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees."[173] Using the religious motivation standard, the Tenth Circuit found that this type of "Hobson's choice" scenario imposed a substantial burden on Hobby Lobby's free exercise rights.[174]

However, the Tenth Circuit's discussion of the religious beliefs in question is noticeably brief. The court relegates its discussion of Hobby Lobby's religious beliefs to a footnote, which describes Hobby Lobby's belief that it is "[m]oral[ly] culpa[ble] for enabling a third party's supposedly immoral act."[175] Again, while courts are barred from inquiring into the religious views of claimants, a more pronounced identification of the religious belief in question would provide greater focus to the legal issue. A benefit of the modified centrality approach is that this focus on the religious belief in question would be at the forefront of the analysis. Furthermore, use of the modified centrality approach would push Hobby Lobby and the Greens to evaluate their own religious views before filing suit. Thus, the modified centrality test, while not changing the ultimate outcome in *Hobby Lobby* or *Conestoga*, should have been used by the circuit courts in order to create a more focused inquiry on the belief in question while simultaneously serving the broad, remedial purposes of the RFRA.

172. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981).
173. *Hobby Lobby*, 723 F.3d at 1141.
174. *Id.*
175. *Id.* at 1140 n.15.

X. CONCLUSION

The current RFRA judicial regime, with its emphasis on proving a compelling interest "to the person" and use of the religious motivation test,[176] poses too great a risk to government social programs and judicial efficiency. Using the modified centrality test, courts can properly allocate the evidentiary burdens between the religious claimant demanding accommodation and the government's interest in compliance. This reallocation of burdens should result in the allowance of truly needed religious accommodations while preserving the vitality of existing government programs. The modified centrality standard also avoids the unconstitutional inquiries mandated by the compulsion standard and provides a stricter standard than the "anything goes" regime of the religious motivation test.

Furthermore, the modified centrality standard does not impose any additional burdens on courts. Because the modified centrality test only requires the religious claimant to "assert" that the law imposes a substantial burden on the claimant's religion, the judiciary is not obligated to conduct any substantial inquiry into the claimant's religion. Instead, the judiciary need only reemphasize the religious claimant's evaluation duty within the language of the opinion. The "work" of the modified centrality test is accomplished through its internal, psychological pressure on the religious claimant. By pressuring the religious claimant to internally evaluate his own religion, the modified centrality test redistributes the RFRA's evidentiary burden without unconstitutionally intertwining government and religion.

Thus, because of the significant policy considerations and judicial precedent, courts should utilize the modified centrality standard when deciding issues under the RFRA. While the modified centrality standard would not drastically change the outcomes in the PPACA contraceptive mandate cases, the use of the modified centrality standard will better serve the purposes of the RFRA and provide greater legal clarity for future religious claimants.

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176. *See id.* at 1126, 1140.

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