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THE CONTRACEPTION MANDATE DEBATE: ACHIEVING A SENSIBLE BALANCE

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A slew of secular for-profit businesses have sued seeking exemptions from the contraception mandate and many have succeeded in obtaining preliminary injunctions. This Essay explains why courts have found these claims credible under the Religious Freedom Restoration Act but contends that the Act's underlying purpose is best served by denying these entities an accommodation.

INTRODUCTION

One might have thought that the contraception mandate war would be settled by now.[1] After all, the Obama Administration has already made important concessions to religious objectors. Early in the rulemaking

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1. In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.). "The ACA requires non-exempt [employers] to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration ('HRSA') . . . ." Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356). The guidelines subsequently developed by the HRSA require employers to provide coverage for all FDA-approved contraceptive methods and sterilization procedures for women with reproductive capacity. Id. This requirement is typically referred to as the "contraception mandate." Id. Non-exempt employers can choose to provide no health insurance for their employees, but this will subject them to a tax and could place them at a competitive disadvantage in recruiting and retaining employees. See, e.g., Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1140–41 (10th Cir. 2013) (en banc) (noting plaintiff employers could opt to provide no health insurance for their employees but this would subject them to annual tax of about $26 million and put them at competitive disadvantage), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354).

process, the Administration exempted core religious institutions, like churches, synagogues, and mosques, from having to comply with the mandate's requirement that employers provide employees with insurance coverage for contraceptive care.[2] And later in the process, after a barrage of complaints from religious nonprofits (such as Catholic hospitals and universities), the Administration created a workaround so that the employees of these institutions would receive contraceptive care without their employers paying for it.[3]

But while these concessions eased tensions on some fronts, the battle shifted to others. Most notable are the objections of for-profit employers that refuse to comply with the mandate. Such entities have filed a flurry of lawsuits claiming that either the Free Exercise Clause[4] or the Religious Freedom Restoration Act (RFRA)[5] requires that they be exempted from the mandate.[6]

As the summer of 2013 progressed, it became evident that this battle had been joined. Early in the summer, the Tenth Circuit issued an en banc decision finding that two closely held family businesses were likely to succeed on their claims for an exemption under RFRA.[7] The following week, the Departments of Treasury, Labor, and Health and Human Services reached the opposite conclusion: They refused to give any exemptions to for-profit employers in their final regulations on the contraception mandate.[8] Three weeks later, the Third Circuit bolstered the Departments' position, while splitting with the Tenth Circuit, when it held that secular for-profit corporations lacked any cognizable free exercise rights under either the Constitution or RFRA.[9] And on September 17th, as the summer was coming to a close, the Sixth Circuit

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2. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (to be codified at 45 C.F.R. pts. 147, 156) [hereinafter Final Rules].

3. Id. at 39,871, 39,874–75.

4. U.S. Const. amend. I.

5. 42 U.S.C. § 2000bb (2006).

6. The Becket Fund maintains an updated list of these cases. HHS Mandate Information Central, The Becket Fund for Religious Liberty, http://becketfund.org/hhsinformationcentral/ (on file with the *Columbia Law Review*) (last visited Oct. 19, 2013).

7. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354); see also Korte v. Sebelius, 735 F.3d 654, 659 (7th Cir. 2013) (holding closely held corporations and their owners could challenge contraception mandate under RFRA and were "very likely" to succeed on their claims).

8. Final Rules, supra note 2, at 39,875. A statement accompanying the regulations said that "[t]he Departments [were] unaware of any court granting a religious exemption to a for-profit organization" and that they were unwilling to create one. Id.

9. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356).

agreed with the Third in finding that for-profit corporations were not "persons" capable of "free exercise" under RFRA.[10]

The Supreme Court finally joined the fray in late November by granting certiorari in both the Third and Tenth Circuit cases.[11] The Court is now poised to resolve the contraception mandate debate. But how should it rule?

Opponents of the mandate characterize it as needless government imposition on religion. Why, they wonder, is the government forcing religious employers to facilitate actions that their religion considers abhorrent?[12] This argument is made all the more salient by the fact that some of the FDA-approved contraceptives covered by the mandate, in particular ella, Plan B, and intrauterine devices, are, or at least might be, abortifacients, which terminate pregnancies after an egg has been fertilized.[13]

Opponents don't deny the right of their female employees to use these contraceptives. The employees may buy them with their own money, or the government can subsidize the products if the employees cannot afford them.[14] But there is no reason, opponents say, to place the

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10. Autocam Corp. v. Sebelius, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482). Shortly before this Essay was published, the Court of Appeals for the District of Columbia Circuit issued a decision that similarly found that two secular for-profit corporations did not have free exercise rights that could be asserted under RFRA. Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1212–15 (D.C. Cir. 2013). Nevertheless, the court held that the shareholder/owners of these closely held companies could bring RFRA claims in their individual capacities. Id. at 1216–19. The court said that these claims were not barred by the shareholder standing rule because the owners had been "'injured in a way that is separate and distinct from an injury to the corporation.'" Id. at 1216 (quoting Crosby v. Beam, 548 N.E.2d 217, 219 (Ohio 1989)). It reasoned that, if the corporations lack free exercise rights, the rights must necessarily belong to the shareholder/owners and are consequently "separate and distinct" from the corporations' rights. Id. The Third and Sixth Circuits reached the opposite conclusion. They ruled that shareholder/owners lacked standing to bring individual claims because the contraception mandate applies only to the corporations and not to the shareholders. *Autocam*, 2013 U.S. App. LEXIS 19152, at *16 ("The decision to comply with the mandate falls on Autocam, not the Kennedys."); *Conestoga*, 724 F.3d at 389 ("The Mandate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga.").

11. Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356, 2013 WL 5297800 (U.S. Nov. 26, 2013) (order granting certiorari); Sebelius v. Hobby Lobby Stores, Inc., No. 13-354, 2013 WL 5297798 (U.S. Nov. 26, 2013) (order granting certiorari).

12. See, e.g., *Conestoga*, 724 F.3d at 382 (noting appellants' complaint alleged it was "immoral and sinful for Appellants to intentionally participate in, pay for, facilitate, or otherwise support" purchase of certain contraceptives covered by mandate).

13. See id. at 391 n.1 (Jordan, J., dissenting) (discussing "ongoing debate" as to whether some contraceptives operate as abortifacients).

14. See Steven D. Smith, Opening Statement: The Hard and Easy Case of the Contraception Mandate, 161 U. Pa. L. Rev. Online 261, 265 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (on file with the *Columbia Law Review*) ("One obvious and 'less restrictive means' would be for government itself to pay for the coverage instead of forcing other people to pay for it.").

burden of providing access to these products on parties who equate the products' use with the killing of a "newly-formed human life."[15]

Mandate proponents say that the mandate has nothing to do with burdening employer religion. After all, the mandate does not require the employers to use the offending products.[16] Nor does the mandate prevent employers from preaching about the evils of such products.[17]

All the mandate does is require employers to provide health insurance for their employees, a part of which covers contraceptives. The decisions to use the contraceptives are made independently by the employees, whose actions cannot logically be attributed to the employers.[18] Indeed, proponents say employer objections are more about employers imposing their religion on employees than about government imposing its secular values on employers.[19]

So who's right? Are proponents using government to oppress religion or are opponents using religion to oppress women?

This Essay asserts that the latter characterization is more apt. It therefore contends that neither the Free Exercise Clause nor RFRA should require the government to grant accommodations to for-profit employers. This argument is not meant to diminish the genuine concerns of religious parties who object to the mandate. It is simply to contend that the most sensible balance between the interests of religious employers and the societal interests in women's healthcare and gender equality allows the societal interests to prevail.

I. FREE EXERCISE CLAUSE: HITTING, NOT TARGETING

Under the Supreme Court's current free exercise jurisprudence, laws are subject to strict scrutiny only if they discriminate against a

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15. Mark L. Rienzi, Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases, 99 Va. L. Rev. Online 10, 16 (2013) [hereinafter Rienzi, Unequal Treatment], http://www.virginialawreview.org/sites/virginialawreview.org/files/Rienzi.pdf (on file with the *Columbia Law Review*).

16. Caroline Mala Corbin, The Contraception Mandate, 107 Nw. U. L. Rev. Colloquy 151 (2012), reprinted in 107 Nw. U. L. Rev. 1469, 1476–77 (2013) [hereinafter Corbin, Contraception Mandate] (noting no religious individual or entity is "forced to use" contraceptives).

17. O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (noting employers "remain free" to exercise their religion "by discouraging employees from using contraceptives").

18. See Corbin, Contraception Mandate, supra note 16, at 1478 ("[T]he conduct at issue . . . is attributable to the private individual, not the entity furnishing the voucher or insurance.").

19. See, e.g., id. at 1481 (arguing employers impose religion on employees via exclusion from contraception mandate).

religious practice.[20] By contrast, neutral laws of general applicability—laws that do not target religious practices but incidentally burden them—do not raise constitutional concerns, and the government is not required to offer religious claimants an exemption or "accommodation" from these laws.[21]

Given this jurisprudence, mandate opponents face the uphill battle of showing that the contraception mandate is not a neutral law of general applicability. To do so, they focus on the large number of employers that are exempt from the Affordable Care Act (ACA), including the Act's contraception mandate provisions.[22] These exemptions—for small employers with fewer than fifty employees and for large employers that had existing employee healthcare plans in place ("grandfathered" plans)—apply to thousands of companies with millions of employees.[23] Mandate opponents say these gaping holes make the mandate not "generally applicable"[24] and consequently subject to strict scrutiny, which they say it could not survive.[25]

The problem for mandate opponents, however, is that laws can have exemptions and still be neutral laws of general applicability. Indeed, the Supreme Court has recognized that "[a]ll laws are selective to some extent."[26] A law loses its status as a neutral law of general applicability only if its "object" is to target religious conduct.[27] This occurs when the

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20. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (holding laws infringing upon or restricting religious practices "because of their religious motivation" are subject to strict scrutiny).

21. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding Oregon statute of general applicability incidentally burdening religious peyote users consistent with Free Exercise Clause).

22. See, e.g., Conestoga Wood Specialities Corp. v. Sebelius [sic], 917 F. Supp. 2d 394, 409 (E.D. Pa. 2013) (discussing plaintiff's argument regarding underinclusiveness of mandate), aff'd on other grounds sub nom. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356); *O'Brien*, 894 F. Supp. 2d at 1161 (addressing plaintiffs' argument that exemptions for grandfathered plans, religious employers, and certain nonprofits make mandate not generally applicable).

23. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123–24 (10th Cir. 2013) (en banc) (discussing breadth of mandate exemptions), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354).

24. Smith, supra note 14, at 261 (contending Act's "substantial exceptions" make it not generally applicable, but conceding this is "hard case" because of "doctrinal squishiness").

25. Id. at 265–66.

26. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

27. Id. at 533.

exemptions are so broad that the government is pursuing its interests "only against conduct with a religious motivation."[28]

That is certainly not the case with the Affordable Care Act or its contraception mandate. The ACA may have grandfathering provisions and exemptions for small employers, but these exemptions are hardly so expansive as to make the Act applicable only to religious employers.[29] Moreover, the grandfathering provisions are expected to be temporary as employers make the transition into the new regime.[30] And the Act, while not requiring small employers to provide health insurance for their employees, encourages them to do so and requires those that do to provide contraceptive coverage.[31]

So while the Affordable Care Act might incidentally hit religious practices, it does not target them.[32] To the contrary, the Act and the contraception mandate are quintessential neutral laws of general applicability. Consequently, they do not raise any constitutional concerns under the Supreme Court's free exercise jurisprudence.[33]

II. RELIGIOUS FREEDOM RESTORATION ACT: ACHIEVING A "SENSIBLE BALANCE"

The rule just discussed—that neutral laws of general applicability do not offend the Free Exercise Clause—was announced by the Supreme Court in *Employment Division, Department of Human Resources v. Smith* in

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28. Id. at 543; see also O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1162 (E.D. Mo. 2012) (stating "exemptions undermining 'general applicability' are those tending to suggest disfavor of religion").

29. See *O'Brien*, 894 F. Supp. 2d at 1162 (noting mandate applies "to all employers not falling under an exemption, regardless of those employers' personal religious inclinations"); see also Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012) (noting ACA applies to all nonexempt plans, "regardless of employers' religious persuasions," and "this is enough to create a neutral law of general application"), aff'd, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482).

30. Final Rules, supra note 2, at 39,887 n.49 (stating ACA's "grandfathering provision is only transitional in effect" and that "it is expected that a majority of plans will lose their grandfathered status by the end of 2013").

31. Id.

32. See *O'Brien*, 894 F. Supp. 2d at 1161 (noting mandate regulations were passed, "not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs"); see also Mersino Mgmt. Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702, at *9 (E.D. Mich. July 11, 2013) (finding mandate to be neutral law of general applicability).

33. See Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding statute of general applicability incidentally burdening religious practice consistent with Free Exercise Clause).

1990.[34] Prior to *Smith*, even neutral laws were subject to strict scrutiny if they substantially burdened a party's free exercise rights.[35]

After *Smith* was decided, there was an outcry from religious groups on the right and civil liberties groups on the left, both of which wanted greater protection for religious liberties from neutral laws of general applicability.[36] Congress responded by enacting the Religious Freedom Restoration Act, which statutorily revived the strict scrutiny standard whenever neutral laws substantially burdened a party's religious practice.[37] Though the Supreme Court subsequently held that Congress exceeded its Fourteenth Amendment enforcement power in applying RFRA to state and local governments,[38] the Act still applies to the federal government and therefore to the contraception mandate.[39]

RFRA provides that the government may "substantially burden" a person's free exercise rights only if the government's action is in furtherance of a "compelling governmental interest" and the government uses the "least restrictive means of furthering that . . . interest."[40] When this test is applied to the contraception mandate, sticky questions arise at every turn.

First, does the RFRA analysis even apply to for-profit corporations? (Do such artificial entities have free exercise rights that can be burdened by government action?) Second, even if these entities have free exercise rights, does the mandate place a "substantial" burden on those rights? Third, if the mandate does substantially burden those rights, does the mandate nevertheless serve a "compelling" governmental interest? And fourth, has the government used the "least restrictive means" to further that interest?

Each of these questions is explored below. As this Essay will demonstrate, good arguments can be made on both sides of every issue. The Essay therefore suggests that courts get beyond this thicket of individual issues and instead focus on RFRA's broader purpose of finding sensible balances between government interests and religious liberties.

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34. Id.

35. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013) (en banc) (discussing heightened scrutiny prior to *Smith*), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354).

36. See Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 157 (2010) (discussing public outcry following *Smith*).

37. See *Hobby Lobby*, 723 F.3d at 1133 (discussing enactment of RFRA in response to *Smith*).

38. City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997) (holding RFRA inapplicable to states).

39. See *Hobby Lobby*, 723 F.3d at 1133 (noting "RFRA still constrains the federal government").

40. 42 U.S.C. § 2000bb (2006).

A. *No Soul to Damn, No Body to Kick, but a Conscience to Burden?*

Corporate law scholars are fond of an eighteenth-century quote which insists that corporations lack a conscience: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"[41] So it might come as a surprise that litigants are now claiming, with considerable success, that corporations have free exercise rights.[42]

Those who are skeptical of these claims point out that corporations "do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion."[43] Corporations "do not pray, worship, [or] observe sacraments."[44] Corporations are also legally separate entities from their owners and employees.[45] Indeed, the primary benefit of incorporating is to limit the liability of these other parties for the actions of the corporation.[46] So why should these parties, who would fiercely oppose piercing the corporate veil in any other context, be able to take advantage of ignoring the corporation's separate identity when it comes to free exercise rights?[47]

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41. See, e.g., John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 386 (1981) (attributing quote to Edward, First Baron Thurlow, 1731–1806).

42. In early October, the Becket Fund reported that thirty for-profit entities had secured injunctive relief against the enforcement of the contraception mandate and only five had been unsuccessful in obtaining injunctive relief. HHS Mandate Information Central, supra note 6.

43. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), rev'd and remanded, 723 F.3d 1114 (10th Cir. 2013) (en banc), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354); see also Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion."), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356).

44. *Hobby Lobby*, 870 F. Supp. 2d at 1291.

45. "[I]ncorporation's basic purpose," the Supreme Court has said, "is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, and whom it employs." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). Based on this principle, the Third Circuit refused to adopt a Ninth Circuit "pass through" theory in which a corporation could assert the free exercise claims of its owners. *Conestoga*, 724 F.3d at 382–88. The court said that the pass through theory ignores the distinction between the rights and responsibilities of a corporation and those of its owners. Id. at 388.

46. Grote v. Sebelius, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) (describing limited liability as "primary and 'invaluable privilege' conferred by the corporate form" (quoting Torco Oil Co. v. Innovative Thermal Corp., 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation))).

47. Caroline Mala Corbin, Closing Statement: Sincere Is Not Substantial and a Corporation Is Not an Orchestra, 161 U. Pa. L. Rev. Online 278, 280 (2013) [hereinafter, Corbin, Closing Statement], http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (on file with the *Columbia Law Review*) (noting "corporation's money is not the owner's money" and "owners who treat corporate funds as their own would find

The logic behind these arguments is persuasive. But so is the logic of those who think corporations can have free exercise rights. That logic was on vivid display in the Tenth Circuit's en banc decision.

The court first noted that free exercise rights, like free speech rights, must necessarily include a right of association.[48] This means that individuals not only have a right to practice their religion by themselves, but also a right to do so collectively with others.[49] This right of association necessarily includes the right to form churches.[50] And surely that right is not lost merely because the members set up their churches as corporations.[51] Indeed, the government readily conceded this point, which it essentially had to do since the Supreme Court's leading decision on RFRA recognized the free exercise rights of a religious nonprofit corporation.[52]

The split between the Tenth Circuit and the government arose only when it came to for-profit corporations.[53] The government contended that Congress did not intend for RFRA to apply to such organizations; the Tenth Circuit ruled otherwise.

The problem for the government was that the Supreme Court's free exercise jurisprudence seemed to preclude the argument that profit-making barred a party from making a free exercise claim.[54] In *United States v. Lee*, the Court considered the free exercise claim of an Amish

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themselves in a great deal of trouble"); see also Mersino Mgmt. Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702, at *13 (E.D. Mich. July 11, 2013) (stating "'law protects that separation between the corporation and its owners for many worthwhile purposes'" and the law cannot "'ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion'" (quoting Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), aff'd, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482))). But see Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *10 (M.D. Fla. June 25, 2013) (noting concept of limited liability was not well developed at time of First Amendment's adoption and therefore concluding it is unsound to assume "individuals bartered for the privilege of limited personal liability in exchange for the relinquishment of their free exercise rights").

48. *Hobby Lobby*, 723 F.3d at 1133.

49. Id.

50. Id.

51. Id.

52. Id. at 1129, 1134 (noting Supreme Court "has affirmed the RFRA rights of corporate claimants" and noting government did not disagree with this characterization of free exercise rights (citing O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (per curiam) (recognizing free exercise rights of New Mexican nonprofit corporation), aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal [sic], 546 U.S. 418 (2006))).

53. Id. at 1129.

54. For a fuller treatment of this issue, see generally Mark L. Rienzi, God and the Profits: Is There Religious Liberty for Money-Makers?, 21 Geo. Mason L. Rev. 59 (2013) (considering relationship between profit making and religious liberty and arguing earning money and engaging in protected religious exercise are not mutually exclusive).

employer who refused to pay Social Security taxes for his employees.[55] The employer lost his claim for an accommodation, but it was not because he was engaged in profit-making.[56] The same was true in *Braunfeld v. Brown*, where Jewish merchants said that their businesses were harmed by Sunday closing laws.[57] Here, too, the claimants lost their free exercise argument, but the Court did not reject their claim because they were engaged in business.[58]

This led the Tenth Circuit to a seemingly syllogistic conclusion: If individuals can incorporate for religious purposes and not lose their free exercise rights, and if individuals can also pursue profits without losing their free exercise rights, then surely individuals can both incorporate and pursue profits while preserving their free exercise rights.[59] To hammer this point home, the court asked rhetorically: "Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?"[60]

And lest there be any doubt about the soundness of this conclusion, the court also drew upon the logic of the Supreme Court's recent decision in *Citizens United v. FEC*,[61] which reaffirmed that corporations, including for-profit corporations, have free speech rights.[62] "We see no reason," the Tenth Circuit explained, that "the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."[63]

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55. 455 U.S. 252 (1982). This case was discussed in *Hobby Lobby*, 723 F.3d at 1139.

56. *Lee*, 455 U.S. at 257–61 (stating "mandatory participation is indispensable to the fiscal vitality of the social security system" and "tax system could not function" if religious claimants were exempted from system whenever tax money was spent in manner violating their faith).

57. 366 U.S. 599 (1961) (plurality opinion). *Braunfeld* was also cited in *Hobby Lobby*, 723 F.3d at 1148.

58. *Braunfeld*, 366 U.S. at 600–09 (plurality opinion) (emphasizing law created only indirect economic burden on claimants and did not directly conflict with their religious practice of observing Sabbath on Saturdays).

59. *Hobby Lobby*, 723 F.3d at 1135–36; see also Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (order granting injunction pending appeal) (stating, "[t]hat the Kortes operate their business in the corporate form is not dispositive of their [RFRA] claim").

60. *Hobby Lobby*, 723 F.3d at 1135.

61. 130 S. Ct. 876 (2010).

62. *Hobby Lobby*, 723 F.3d at 1135 (citing *Citizens United*, 130 S. Ct. at 899–908).

63. Id. But see Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384–87 (3d Cir. 2013) (finding history of courts protecting corporations' free speech rights but no comparable history of courts protecting corporations' free exercise rights), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356); Mersino Mgmt. Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702, at *12 (E.D. Mich. July 11, 2013) (finding protections of Free Exercise Clause to be "more 'purely personal'" in nature than free speech rights and therefore "'unavailable to a secular, for-profit corporation'" (quoting Conestoga Wood Specialities Corp. v. Sebelius

The Tenth Circuit's reasoning may seem cogent, but it failed to persuade either the Third or Sixth Circuit. The Third Circuit found the analogy between free speech rights and free exercise rights inapt. It noted that there was a long list of Supreme Court cases recognizing the free speech rights of for-profit corporations but no cases recognizing free exercise rights.[64] To the contrary, the court found the jurisprudence strongly suggested that free exercise rights are "'purely personal'" and can only be claimed by individuals.[65] The Sixth Circuit reached a similar conclusion after parsing RFRA and its legislative history. It found no indication that Congress intended for secular for-profit corporations to be "persons" under RFRA or that these entities are capable of "religious exercise."[66]

But even if one assumes that the Tenth Circuit has the better argument, there is still the question of how a court can identify a for-profit corporation's religious beliefs. Does it look to the corporation's charter or bylaws?[67] Can only a small, privately held family corporation have religious beliefs, or can a large, publicly held company?[68] Does the Board of Directors, the CEO, or the shareholders holding a majority of the stock decide what the corporation's religious values are?[69]

Professor Caroline Mala Corbin pointed out this problem of "whose conscience" controls in the context of religious nonprofits such as Catholic hospitals or universities.[70] Should courts in those instances look to the Pope, the Board of Trustees, or the employees of these

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[sic], 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013), aff'd on other grounds sub nom. *Conestoga*, 724 F.3d 377, cert. granted, 82 U.S.L.W. 3328 (No. 13-356))).

64. *Conestoga*, 724 F.3d at 384–87.

65. Id. at 383–84 (quoting United States v. White, 322 U.S. 694, 698–701 (1944)).

66. Autocam Corp. v. Sebelius, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20–*26 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482).

67. See, e.g., *Hobby Lobby*, 723 F.3d at 1165 (Briscoe, C.J., dissenting) (noting "there is not a single reference to religion" in the certificate of incorporation for either corporate plaintiff).

68. The Tenth Circuit recognized the problems that could arise in identifying the beliefs of a large, publicly held company, but said that it did not have to reach that issue because the companies involved in the *Hobby Lobby* case were closely held family businesses. Id. at 1137 (majority opinion). Professor Stephen Bainbridge has suggested that courts could use the reverse veil piercing doctrine from corporate law to identify when a court should ignore a corporation's separate legal identity and allow the corporation to assert the free exercise rights of its shareholders. Stephen M. Bainbridge, Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers, 16 Green Bag 2d 235, 236–37 (2013), available at http://www.greenbag.org/v16n3/v16n3_articles_bainbridge.pdf (on file with *the Columbia Law Review*) ("My thesis is that the law of veil piercing provides the analytical framework currently missing in these cases.").

69. See, e.g., Monaghan v. Sebelius, 931 F. Supp. 2d 794, 801 (E.D. Mich. 2013) (finding case for recognizing corporation's free exercise rights particularly compelling when single religious individual is "*sole* shareholder, director, and decision-maker").

70. Corbin, Contraception Mandate, supra note 16, at 1475–76.

organizations? These tricky issues are likely to be even more complicated when it comes to organizations whose avowed purpose is not educational or charitable, either of which is a common pursuit of religious groups, but is instead profit maximization.[71]

B. *Does "Substantial" Mean Anything?*

Even if for-profit corporations can have free exercise rights, RFRA is still not violated unless the government has "substantially" burdened those rights. So does the contraception mandate do so? Once again, the two sides have articulated widely differing perspectives, each of which depends upon how the right being burdened is defined.

The temptation for mandate proponents is to define the right as narrowly as possible: specifically, a right not to be forced to personally use contraceptives.[72] Such a narrow interpretation would make the contraception mandate lawful in virtually every context, even if it were applied to church employers.[73] After all, the employers are not the ones who will be using the contraceptives; the employees are. So, under this definition, the employers' free exercise rights are not even implicated, let alone substantially burdened. This would be even truer for corporations, which, last anyone checked, are not capable of using contraceptives.

Mandate opponents, however, define the right much more broadly: namely, the right not to facilitate anyone's use of contraceptives, especially abortifacients.[74] Here, the offense to religious liberty comes from playing a part in a causal chain that could lead to contraceptive use.[75]

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71. *Hobby Lobby*, 723 F.3d at 1174 (Briscoe, C.J., dissenting) (criticizing majority opinion for dodging questions about "whether a corporation can 'believe' at all," "how courts are to go about determining a for-profit corporation's religious beliefs," and "whether a for-profit corporation has 'cognizable religious liberties independent of the people who animate' it" (quoting Grote v. Sebelius, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting))).

72. O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (stating "plaintiffs remain free to exercise their religion, by not using contraceptives").

73. See Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 411 (3d Cir. 2013) (Jordan, J., dissenting) (noting "if the indirectness of the ultimate decision to use contraceptives truly rendered insubstantial the harm to an employer, then no exemptions to the Mandate would be necessary," including for Catholic Church), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-356).

74. See *Hobby Lobby*, 723 F.3d at 1125 (stating plaintiffs believed "they would be facilitating harms against human beings" if their company were forced to cover certain contraceptive methods).

75. See Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *15 (M.D. Fla. June 25, 2013) ("[T]he plaintiffs . . . are faced with the impossible choice of either complying with the contraceptive mandate . . . or staying true to the tenets of their faith and facing substantial fines . . . ."); Monaghan v. Sebelius, 931 F. Supp. 2d 794, 805 (E.D. Mich. 2013) (stating burden on plaintiff "'inheres in the *coerced coverage*' of the Preventive Services, '*not*—or perhaps more precisely, *not only*—in the later purchase or use

Mandate proponents respond that, even if one accepts this definition of an employer's free exercise right, the imposition on that right is still too attenuated to constitute a "substantial" burden.[76] The links in the causal chain are too many and the number of intervening factors too great.

A Pennsylvania district court judge captured this reasoning when he rejected a RFRA claim brought by a for-profit corporation, Conestoga, and the family members who made up its shareholders and management:

> We also find that any burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services (and a wide range of other health care services); the abortifacients must be made available to Conestoga employees through a pharmacy or other healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to avail themselves to these services.[77]

The judge was fully aware that the plaintiffs thought it was objectionable simply to purchase insurance which could be used to "'pay for, facilitate, or otherwise support abortifacient drugs.'"[78] He claimed to "fully appreciate" this concern and to "in no way dispute or denigrate its legitimacy."[79] But he said that "a line must be drawn delineating when the burden on a plaintiff's religious exercise becomes 'substantial,'" and his conclusion was that this line "does not extend to the speculative 'conduct of third parties with whom plaintiffs have only a commercial relationship.'"[80]

Critics of this reasoning say that it is wholly inappropriate for a judge to second-guess religious believers' assertions about when a law imposes a

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of contraception or related services'" (quoting Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (order granting injunction pending appeal))); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 123 (D.D.C. 2012) (noting "it is the coverage, not just the use, of the contraceptives . . . to which the plaintiffs object"), appeal dismissed, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

76. Corbin, Closing Statement, supra note 47, at 278–80.

77. Conestoga Wood Specialities Corp. v. Sebelius [sic], 917 F. Supp. 2d 394, 414–15 (E.D. Pa. 2013), aff'd on other grounds sub nom. *Conestoga*, 724 F.3d 377, cert. granted, 82 U.S.L.W. 3328 (No. 13-356); see also *O'Brien*, 894 F. Supp. 2d at 1158–60 (finding burden on religious objectors "too attenuated" when decision to use contraceptives depends upon independent decisions of third parties).

78. *Conestoga*, 917 F. Supp. 2d at 416 (quoting amended complaint).

79. Id.

80. Id. (quoting Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (order denying injunction pending appeal)).

substantial burden on their free exercise rights.[81] After all, who is the judge to tell the believers that they are mistaken about their own religious beliefs?

Surely this critique has merit. If a Sikh says that the military is substantially burdening his free exercise rights by not allowing him to wear a turban, a judge shouldn't correct the Sikh by telling him that wearing a turban is really not so important for Sikhs. If the Sikh says it is important and his assertion is sincere, it is wholly inappropriate for a judge to question it.[82]

Professor Steven Smith says that "[n]o other position is compatible with a meaningful commitment to religious freedom."[83] Second-guessing sincerely held statements of faith, he says, comes perilously close to doing what medieval prosecutors of heresy and apostasy did when they accused believers of being mistaken about their own faiths.[84]

In the contraception mandate context, this means that a court should not second-guess an employer's assertion that forcing it to facilitate an employee's use of contraceptives is a substantial burden on the employer's religious practice. The court should not be characterizing the burden as minimal merely because it is the employee, not the employer, who uses the contraceptives. If the employer sincerely asserts that facilitating an employee's use is a serious burden on its religious beliefs, the judge has no choice but to accept this assertion at face value.

That, at least, was the position taken by the Tenth Circuit. When the government urged the court to find no substantial burden because "'an employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer,'" the court balked.[85] Such a position, the court said, "is fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of

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81. See, e.g., Smith, supra note 14, at 263–64 (noting opponents embrace "idea that persons or associations can determine for themselves what they believe, and that it is no business of the state (or the courts) to correct their supposed errors"); see also Rienzi, Unequal Treatment, supra note 15, at 11 ("Once a sincere religious exercise is established, the only appropriate question for the substantial burden inquiry is whether the government is coercing the believer to give up that exercise.").

82. Cf., e.g., United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument Social Security taxes "will not threaten the integrity of the Amish religious belief" by stating "[i]t is not within 'the judicial function and judicial competence[]' . . . to determine [which party] has the proper interpretation of the Amish faith" because "'[c]ourts are not arbiters of scriptural interpretation'" (third alteration in *Lee*) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981))).

83. Smith, supra note 14, at 263.

84. Id. at 263–64.

85. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc) (quoting Brief for Appellees at 13, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294)), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354).

the belief in question."[86] The court instead said its job was merely "to determine whether the claimant's belief is sincere" and if the government is burdening that belief.[87]

Mandate supporters think such blanket deference robs RFRA of its meaning. RFRA, after all, requires strict scrutiny only when a government action "substantially" burdens an individual's religious practice. "To simply assume a substantial burden whenever someone claims one exists," as Professor Corbin points out, "essentially reads out [this] requirement."[88]

Indeed, it is odd to ignore the difference between forcing people to use contraceptives and forcing people to buy insurance that others might use for contraceptives. Surely, the latter is a more attenuated burden on religious liberty than the former. Yet mandate opponents say courts are precluded from relying on this distinction.

But if courts cannot second-guess a claimant's assertion of what constitutes a substantial burden, then even the most seemingly attenuated burdens could trigger RFRA's strict scrutiny requirement. As Professor Corbin points out, minimum wage laws could be said to "facilitate" the use of contraceptives because they result in employees having more discretionary money with which to purchase contraceptives.[89] The causation may be indirect, but how can one question an employer's claim that even this indirect facilitation is a substantial burden on its faith?

The potential for such attenuated claims seems boundless.[90] Can Christian Scientists say that they won't pay for insurance that covers blood transfusions? Can evangelical college students refuse to pay student fees that subsidize a gay student newspaper? Can Catholics refuse to pay taxes that might be used to fund an "unjust" war?

Indeed, one might wonder if there are any limits as to what parties could sincerely claim constitutes a substantial burden on their free exercise rights. Could a Muslim claimant say that his religion forbids him to obey any law other than Sharia law and requiring him to comply with any secular law would be a substantial burden on his religious practice? Would this mean that the government would have to show a compelling interest to enforce each and every secular law against the objector?

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86. Id.

87. Id.

88. Corbin, Closing Statement, supra note 47, at 279.

89. Corbin, Contraception Mandate, supra note 16, at 1479.

90. See, e.g., Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (contending barring courts from looking beyond sincerely held beliefs of religious objectors "would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA" and would "subject virtually every government action to a potential private veto"), aff'd, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482).

Perhaps the only proper response is to treat all of these claims as substantial burdens under RFRA. After all, any other approach might amount to judicial second-guessing of a believer's faith. This wouldn't mean that the claimants would always receive an accommodation. It would just mean that the government's actions would have to pass strict scrutiny.

But strict scrutiny is a high hurdle.[91] It may not always be "fatal in fact," but it often is. Unless RFRA was meant to provide accommodations in the vast bulk of these situations, courts will have to find some way to limit its reach. That could happen by putting teeth into RFRA's requirement that the burden on religious exercise be "substantial" or by extracting the teeth from the strict scrutiny test. But something has to give if RFRA is not to make each religion "a law unto itself."[92]

C. *What Makes an Interest "Compelling"?*

Even if the contraception mandate substantially burdens a for-profit corporation's free exercise rights, it could still be permissible if it furthers a compelling governmental interest. But what makes a governmental interest "compelling"?

While Supreme Court jurisprudence places considerable importance on whether an interest is "compelling," "important," or "legitimate," the jurisprudence offers little guidance for distinguishing one level of interest from another. To the contrary, it seems more a matter of ipse dixit: An interest is "compelling" if the Court says it is.

Fortunately, in the contraception mandate context, even mandate opponents acknowledge the tremendous importance of the two governmental interests at stake: the interests in providing women's healthcare and in ensuring women's equality in the work force.[93]

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91. See Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (order granting injunction pending appeal) (describing strict scrutiny as "exacting standard" and noting "government bears the burden of satisfying it").

92. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

93. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc) (acknowledging importance of government interests in "'[1] public health and [2] gender equality'" (quoting appellee brief)), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354); see also Geneva Coll. v. Sebelius, No. 2:12-cv-00207, 2013 WL 1703871, at *9 (W.D. Pa. Apr. 19, 2013) (noting plaintiffs "do not appear to seriously dispute that public health and gender equality can, in certain circumstances, be compelling government interests"). By contrast, the majority in *Gilardi* expressed serious doubts about the sufficiency of the alleged governmental interests in public health, women's autonomy, and gender equality because the government had done "little to demonstrate a nexus between this array of issues and the mandate." Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1220 (D.C. Cir. 2013). A dissenting judge, however, concluded that the mandate "obviously serves the compelling interests of promoting public health, welfare, and gender equality." Id. at 1239 (Edwards, J., concurring in part and dissenting in part).

Consequently, the battle is not over whether these interests are compelling but over whether the government treats them as such. Mandate opponents say the government has undermined its claim that these interests are compelling by providing such broad exemptions to the mandate.[94] In other words, if the mandate is so important, why does the government allow so many not to abide by it?

The Supreme Court has in fact recognized just such an argument. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, it noted that "'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[95]

The central question, then, is whether the ACA's exemptions for small employers and grandfathered plans, which admittedly leave millions of employees uncovered by the contraception mandate, is evidence of Congress's lack of commitment to the interests underlying the mandate. Some courts have concluded that to be the case.[96] But their reasoning seems misguided.

Rather than reflecting congressional ambivalence about its interests, the exemptions merely provide reasonable accommodations for small businesses, which might find it difficult to comply with the Affordable Care Act, and for companies with preexisting health plans, which might need time to transition into the new regime.[97] As noted previously, it is expected that most employers covered by the grandfathering provisions will soon be governed by the contraception mandate, and while the Act exempts small employers, it creates an incentive for them to provide

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94. See *Hobby Lobby*, 723 F.3d at 1143–44 (asserting breadth of exemptions undermine government's compelling interest argument because "they would leave unprotected all women who work for exempted business entities"); see also Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) ("[C]onsidering the myriad of exemptions to the contraceptive coverage mandate already granted by the government, the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."), appeal dismissed, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); *Geneva Coll.*, 2013 WL 1703871, at *10 (contending fact that "tens of millions of individuals . . . remain unaffected by the mandate's requirements contradict[s] any notion that the government's interests are as compelling as defendants argue"); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) ("The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." (footnote omitted)), aff'd, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

95. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

96. See supra note 94 (identifying courts which found government's compelling interest claims unpersuasive in light of breadth of exemptions).

97. Final Rules, supra note 2, at 39,887 n.49 (explaining why various exemptions do not undermine government's claim that interests behind mandate are compelling).

health insurance for their employees and requires those that do to provide contraceptive coverage.[98]

Thus, the exemptions hardly suggest that the government thinks the ACA or the contraception mandate is unimportant. To the contrary, they simply reflect the complexity of getting employers to adjust to the most significant healthcare reform in a generation.[99] Indeed, the Obama Administration's recent decision to extend by one year the time when employers must comply with the ACA reflects the inevitable bumps along the road as the government and private parties try to implement the new law.[100]

The other stumbling block concerning the compelling interest requirement is that the government must show it has a compelling interest in having the specific religious objector comply with the law.[101] It is not enough for the government to offer "broadly formulated interests justifying the general applicability of government mandates."[102] It must show how its interests would be undermined by "granting specific exemptions to particular religious claimants."[103]

The significance of this rule was made evident in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, where the Supreme Court announced it.[104] In that case, a small religious group consisting of about 130 members sought an exemption from the federal Controlled Substances Act to use a hallucinogenic plant in sacramental tea.[105] There, it was not enough for the government merely to assert its general interests in enforcing the Controlled Substances Act. It instead needed to show how its interests in enforcement would be undermined by an exemption for this tiny group's limited religious use.[106]

But should this rule be applied in the contraception mandate context? Surely, the government's interest in enforcing the mandate would not be undermined by an accommodation for any one midsized company. Yet if the government has a compelling interest in protecting

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98. See supra notes 30–31 and accompanying text.

99. See Legatus v. Sebelius, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) (noting gradual implementation of ACA is not "indicative of how important the Government considers the interests of regulating public health and furthering gender equality" but rather reflects "reasonable plan for instituting an incredibly complex health care law").

100. Jackie Calmes & Robert Pear, Crucial Mandate Delayed a Year for Health Law, N.Y. Times, July 3, 2013, at A1.

101. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal [sic], 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate 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.").

102. Id. at 431.

103. Id.

104. Id. at 433.

105. Id. at 425–26.

106. Id. at 433.

the health and equality of women generally, doesn't it also have a compelling interest in protecting the health and equality of women working for each specific employer?

The Tenth Circuit didn't seem to think so. In one paragraph it directly acknowledged the importance of the government's interests in protecting public health and furthering gender equality.[107] But in the very next paragraph it said that the government failed to meet the *O Centro* standard because it offered "almost no justification" for not giving the two businesses in the case an accommodation.[108] Yet why wasn't the government's interest in protecting the health and equality of the women working in these businesses enough?

Indeed, the *O Centro* analogy seems inapposite to the contraception mandate debate. In *O Centro*, there was a natural limit to the exemption the Supreme Court was considering: At its broadest, it was likely to apply to about 130 people. But if courts allow some businesses to be exempt from the contraception mandate, they would presumably have to grant exemptions to all of the other comparable businesses seeking one. Yet that would poke a gaping hole in the government's program, not just the pinprick created by the *O Centro* exemption.

D. *Can a Private Mandate Ever Be the Least Restrictive Alternative if the Government Could Act on Its Own?*

Even if the government has a compelling interest, it would still have to offer an accommodation under RFRA if it was not using the least restrictive means of furthering that interest. In other words, the government would have to accommodate a religious claimant if there was some other way to accomplish the government's interest without burdening the claimant's religious practice.

The least restrictive means requirement is a familiar aspect of strict scrutiny analysis. But there is considerable confusion over how the test should be applied to the contraception mandate.

Professor Smith says there is an "obvious" less restrictive means for the government to further its interests in giving women access to contraceptives: The government could pay for the contraceptives itself.[109] That, of course, would place no burden on religious practice. And some courts have used this logic to rule against the government.[110]

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107. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), cert. granted, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354).

108. Id.

109. Smith, supra note 14, at 265.

110. See, e.g., Monaghan v. Sebelius, 931 F. Supp. 2d 794, 807–08 (E.D. Mich. 2013) (finding government had failed to meet its burden of showing it could not provide free birth control to women); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1297–99 (D. Colo. 2012) (same), aff'd, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). But see Legatus v. Sebelius, 901 F. Supp. 2d 980, 997 (E.D. Mich. 2012) (finding government

Professor Corbin thinks this is not a proper application of the least restrictive means test. She suggests this approach would call into question a wide range of laws.[111] Imagine, she says, a public accommodation that refused to provide medical services to Hispanics or an employer that refused to give benefits to Asians. Could these parties escape liability under antidiscrimination laws by simply claiming that a less restrictive means of protecting the disadvantaged groups is for the government to provide them with the services and benefits?[112]

Of course, the defendants in these examples appear to have no explanation for their actions other than a desire to discriminate. But the claimants seeking exemptions to the contraception mandate do have legitimate religious liberty interests. So while a court might look unfavorably upon the government-can-just-pay argument in the antidiscrimination law context, it might not do so when evaluating the contraception mandate.

Perhaps a larger problem with the government-can-just-pay argument is that it considers the contraception mandate regime outside of the context in which it was adopted. The idea that government could provide health insurance for Americans was seriously considered in the debates leading up to the Affordable Care Act and strongly supported by the Obama Administration.[113] But Congress rejected a public option and preferred to stick with the existing scheme of employer-provided coverage obtained through private insurance companies.[114]

In light of this history, it would seem cavalier for courts to dismiss the government's claim that employers should provide contraception insurance by simply saying the government could do so itself. Can judges so easily ignore the background behind the ACA that led to the preservation of employer-based health insurance? And can they be equally oblivious to the current political climate in Washington that would make it highly unlikely Congress would authorize new appropriations to pay for women's contraceptive care?

E. *Stepping Back to Find a Way Forward*

As the prior sections indicate, a RFRA analysis does not yield a definitive answer. There are good arguments on both sides of virtually every issue. One might think that for-profit corporations would not have

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could possibly sustain its burden of showing it could not create new agency to distribute free birth control).

111. Caroline Mala Corbin, Rebuttal: Two Easy Cases: Nonprofit and For-Profit Corporate Challenges to the Contraception Mandate, 161 U. Pa. L. Rev. Online 268, 273 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (on file with the *Columbia Law Review*).

112. Id.

113. Sheryl Gay Stolberg, 'Public Option' in Health Plan May be Dropped, N.Y. Times, Aug. 17, 2009, at A1.

114. Id.

free exercise rights, but reasonable arguments can be made that they should. One might similarly think that requiring an employer to provide insurance that others could use to obtain contraceptives would not burden the employer's religious liberty. Yet it also seems inappropriate for courts to second-guess an employer's assertion that merely facilitating another's contraceptive use is offensive. Nor do things get any clearer when one gets to the strict scrutiny aspects of RFRA since both the compelling interest requirement and the least restrictive means test can be manipulated to favor either side of the debate.

That a RFRA analysis provides more darkness than light is hardly surprising. Indeed, it was just such confusion that prompted the Supreme Court in *Smith* to announce that the Court was withdrawing from the business of weighing religious interests against government interests.

Justice Antonin Scalia, who authored *Smith*, was well aware of the intractable problem of trying to second-guess a religious believer's assertion of what constitutes a substantial burden on his faith. "What principle of law or logic," he openly wondered, "can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[115] And he also recognized the problem of subjecting every law to strict scrutiny whenever a believer sincerely objects. "[I]f 'compelling interest' really means what it says," he noted, then "many laws will not meet the test."[116] But such a system, he warned, would be "courting anarchy," a danger that would increase "in direct proportion to the society's diversity of religious beliefs."[117]

Scalia reasoned that judges could either generously award exemptions to every law that "does not protect an interest of the highest order" or water down the strict scrutiny test and engage in ad hoc balancing of the apples of religious liberties against the oranges of government interests.[118] But he concluded that this was not required by the Free Exercise Clause, which, in the decision's seminal holding, he said did not require exemptions from neutral laws of general applicability.[119] Scalia realized this would burden the religious practice of those who could not convince their legislators to give them an exemption, but he said that such a system must be "preferred to a system in which each conscience is a law unto itself or in which judges weigh the

115. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990).

116. Id. at 888.

117. Id.

118. Id.

119. See id. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . .").

social importance of all laws against the centrality of all religious beliefs."[120]

Congress, of course, meant to overturn the result of *Smith* when it enacted RFRA, but it does not appear that it meant to revive the strict scrutiny standard with such rigor that every conscience would become "a law unto itself."[121] Instead, Congress indicated that it wanted courts to use the compelling interest analysis to find "sensible balances between religious liberty and competing prior governmental interests."[122] Such an approach seems to suggest, as Scalia predicted, a watered-down version of strict scrutiny. But that is perfectly consistent with what the Supreme Court actually did in its free exercise jurisprudence prior to *Smith*. In case after case, the Court gave lip service to the strict scrutiny standard but often found in favor of the government.[123] Its "heightened scrutiny" proved to be "quite deferential in fact."[124]

Still, the search for a "sensible balance" between religious liberty interests and governmental interests is, as Scalia realized, a messy process. Since the interests on either side are not capable of being quantified, judges must revert to their discretion and common sense. But that, of course, is what judges often do, and Congress apparently thought that this was better than categorically denying believers any prospect for an accommodation other than through a majoritarian legislative process.

So what is the "sensible balance" between religious liberty and governmental interests in the contraception mandate context? As already noted, an issue-by-issue application of RFRA doesn't definitively answer that question. But stepping back from these individual factors and focusing on the broader question is more enlightening.

Indeed, when one does this, it quickly becomes apparent that the balance weighs in favor of denying an accommodation. The harm to

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120. Id.

121. Id.

122. See 42 U.S.C. § 2000bb(a)(5) (2006) (stating congressional findings and declaration of purposes).

123. See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988) (holding Free Exercise Clause did not "prohibit[] the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes"); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (holding prison regulations preventing prisoners from attending weekly Islamic religious service did not violate Free Exercise Clause); Bowen v. Roy, 476 U.S. 693, 701 (1986) (rejecting claim brought under Free Exercise Clause for injunction against use of Social Security number in processing benefit applications); Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (rejecting Free Exercise Clause challenge to Air Force regulation prohibiting Orthodox Jew from wearing yarmulke); United States v. Lee, 455 U.S. 252, 254 (1982) (rejecting Free Exercise Clause objection to payment of Social Security tax by Amish farmer).

124. Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 1300 (17th ed. 2010).

religious liberty interests is simply too indirect, and the harm to women too immediate, for the balance to come out any other way.

Let's start with the harm to religious objectors. These objectors might be right to claim that for-profit entities can sometimes have free exercise rights. They might also be right that judges should not second-guess a believer's assertion about what constitutes a substantial burden on his or her faith. But through the logic of these arguments, the mandate opponents have built a Rube Goldberg-like system in which the religious liberty of an individual is substantially burdened when a legally separate artificial entity puts money into an insurance pool that might be used, at the discretion of a third party, to obtain contraceptives.

By contrast, when women employees are denied insurance for contraceptive care, they are directly and immediately harmed. They will have to pay for the care themselves if their insurance doesn't cover it. And, for many low-wage-earning women, the anticipated $1,000-a-year cost is a major obstacle.[125] They can either bear this cost, which puts them at an economic disadvantage with their male counterparts whose medical costs are lower,[126] or they can forgo purchasing the contraceptives and take the risk of unwanted pregnancies with the more expensive and invasive option of terminating these pregnancies with an abortion.

When this very direct impact on women is compared to the more abstract and indirect burden on employers' religious liberties, it becomes clear that the "sensible balance" is to deny the employers an accommodation. This is not to dismiss the deeply held and sincere beliefs of employers who find it abhorrent to do anything that facilitates contraceptive use. But these employers operate in a society in which women have a right to choose, and it is impossible for them to avoid any action that facilitates the use of abortifacients. Even if an employer doesn't buy insurance for contraceptives, its employees could still use wages from the employer to buy the very same products.[127] And even if

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125. Corbin, Contraception Mandate, supra note 16, at 1479 (citing Ctr. for Am. Progress, The High Costs of Birth Control: It's Not as Affordable as You Think 1–2 (2012)); see also Comm. on Preventive Servs. for Women, Bd. on Population Health and Pub. Health Practice, Inst. of Med. of the Nat'l Acads., Clinical Preventive Services for Women: Closing the Gaps 108–09 (2011) (discussing financial barriers to contraceptive use); Guttmacher Inst., Testimony of Guttmacher Institute: Submitted to the Committee on Preventive Services for Women, Institute of Medicine, January 12, 2011, at 7–10 (2011), available at www.guttmacher.org/pubs/CPSW-testimony.pdf (on file with the *Columbia Law Review*) (same).

126. Legatus v. Sebelius, 901 F. Supp. 2d 980, 992 (E.D. Mich. 2012) (noting women of reproductive age spend sixty-eight percent more on out-of-pocket health care costs than men (citing Ann Kurth et al., Reproductive and Sexual Health in Private Health Insurance Plans in Washington State, 33 Fam. Plan. Persp. 153, 153 (2001))).

127. Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012) (finding no obvious moral distinction between employer paying directly for contraceptive care and paying indirectly for care through wages or health

the government were to buy the contraceptives, the employers' tax payments could end up subsidizing these purchases.

CONCLUSION

Professor Steven Smith describes those who favor the mandate as being like medieval prosecutors of apostasy and heresy.[128] Like those earlier prosecutors, mandate proponents are in effect telling religious objectors that they are mistaken about how much of a burden the mandate imposes on their faith.[129]

But the mandate controversy is more Taliban than Torquemada. It has more to do with religious employers foisting their religion on female employees than with government foisting its secular values on religious employers.[130]

Indeed, it's hard to separate the opposition to the contraception mandate from the larger campaign currently being waged against women's right to choose. This campaign is evident in Republican-controlled state legislatures that have eagerly enacted increasingly more restrictive abortion laws.[131] It is also present in numerous mergers between Catholic and secular hospitals, which have produced institutions that refuse to provide abortion or contraceptive services.[132]

Unless the right recognized in *Roe v. Wade*[133] and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[134] was meant to be a right in theory but not in practice, these efforts to make abortions a practical impossibility must be resisted. An appropriate place to start would be for courts to find that an artificial entity's religious liberty is not violated when it purchases contraceptive coverage that others, in their own discretion, might decide to use.

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saving accounts), aff'd, No. 12-2673, 2013 U.S. App. LEXIS 19152, at *20 (6th Cir. Sept. 17, 2013), petition for cert. filed, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482).

128. See Smith, supra note 14, at 263–64.

129. Id.

130. See O'Brien v. U.S. Dep't of Health and Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (describing RFRA as "a shield, not a sword" and noting "it is not a means to force one's religious practices upon others").

131. See Jeremy W. Peters, Unfazed by 2012, G.O.P. Is Seeking Abortion Limits, N.Y. Times, June 18, 2013, at A1 (discussing recent abortion restriction measures introduced and enacted in state legislatures); see also Guttmacher Inst., State Policies in Brief: An Overview of State Abortion Law, available at www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (on file with the *Columbia Law Review*) (last updated Nov. 1, 2013) (providing overview of state abortion laws).

132. See Kirk Johnson, Hospital Mergers Reset Abortion-Access Battle, N.Y. Times, May 13, 2013, at A10 (describing limits on abortion access resulting from hospital mergers); Editorial, Women's Health Care at Risk, N.Y. Times, Feb. 29, 2012, at A26 (noting religious restrictions on contraception and abortion imposed by Catholic hospitals postmerger).

133. 410 U.S. 113 (1973).

134. 505 U.S. 833 (1992).

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