MARKETS IN EVERYTHING AND ANOTHER VIEW OF THE CATHEDRAL: RELIGIOUS FREEDOM AND COASIAN BARGAINING

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Despite the word "free" in the First Amendment's Free Exercise Clause, the free exercise of religion is not always free: as illustrated in Burwell v. Hobby Lobby Stores, Inc.*, the plaintiffs' psychic cost of violating their religious beliefs by providing contraceptive coverage to their employees was pitted against the costs to their employees and society of not having it. Using* Hobby Lobby *as a springboard, this Article first illuminates an underexplored area of the Free Exercise Clause: there are actually two types of religious exercise claims—individuals versus the government and individuals against not just the government, but also against the fundamental rights of other individuals.*

Under current jurisprudence, free exercise claims—be they individuals versus the government or individuals versus other individuals—win if the government "substantially burdens" religious practice unless the government's interest is "compelling" and is pursued by the "least restrictive means." These terms, though key to the current free exercise analysis, are relatively standardless: case law does not define them, but instead uses the common law's argument by analogy to glean their boundaries.

Instead, this Article proposes that we should use the Coase Theorem as an objective test for both types of free exercise challenges: the individuals versus the government and individuals versus other individuals. For the first category, Coasian analysis helps us decide if the government's means are in fact the least restrictive: for hard free exercise cases, we can avoid the intellectual thicket of defining "compelling government interest" and "substantial religious burden." And, Coasian bargains can resolve free exercise disputes that pit individuals' religious practice against the rights of other individuals: the law should favor outcomes that best approximate a Coasian bargain, and, for those cases that lack a clear Coasian bargain, they should be resolved in favor of the party who is not the cheapest cost avoider. Because this new Coasian test anchors free exercise

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disputes to a clear objective standard, its outcomes will be more correct and principled than the existing jurisprudence.

INTRODUCTION

Religion is the first freedom protected by the Bill of Rights, which it divides into two guarantees: neither the federal nor state governments may "establish[]" a religion (the "Establishment Clause"), nor may they "prohibit[] the free exercise thereof" (the "Free Exercise Clause").[1] These guarantees, particularly the right to freely practice one's religion, are often pressed against other rights and social aims, such as: if society thinks it's bad to use psychoactive drugs, may the government criminalize the religious use of peyote?[2] Or, if the ever-diminishing runs of king salmon to their spawning grounds threaten their long-term viability as a species, may the government flatly ban the fishing of king salmon, even by Alaska Natives for whom this fishing is an integral part of their religious beliefs and practice?[3] And, may the government require corporations, including those that are closely held by religiously observant individuals, to provide health insurance coverage that their employees may use to buy contraceptives?[4]

Insofar as these questions share a common root—what are the perimeters of the free exercise right when pitted against other important social goals?—their answers should similarly share a common theoretical thread. This Article tries to stitch that string and to contribute three new ideas to free exercise law.

First, we can use the Coase Theorem to analyze free exercise cases: we can understand the majority opinion in *Burwell v. Hobby Lobby Stores, Inc*.[5] as imposing a Coasian bargain[6] on the two sides, the religious employers and their employees who want their health insurance to include no-cost contraceptive coverage. Similarly, we can use this Coasian lens to view the Alaska Free Exercise case of *Alaska v. Ivan*,[7] a prosecution of Alaska Natives for their

1. U.S. CONST. amend. I, cl. 1. The Fourteenth Amendment incorporated the Establishment and Free Exercise Clauses against the States. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

3. *See* Alaska v. Ivan, No. 4BE-12-00627CR (Alaska Dist. Ct. 2013), *aff'd sub nom*. Phillip v. Alaska, 347 P.3d 128 (Alaska Ct. App. 2015). The ACLU of Alaska filed amicus briefs with the district court and court of appeals in support of the fisher defendants.

4. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

5. *Id*.

6. True Coasian bargains are voluntary; imposed Coasian bargains are outcomes that are forced on the parties and that approximate what they would have voluntarily bargained to (1) in the absence of transaction costs and (2) if they had each acted as dispassionate "Homo economicus." *See* Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384 (1999) ("[A]crimony between the parties was an important obstacle to bargaining.").

7. *Ivan*, No. 4BE-12-00627CR. The Alaska Free Exercise Clause is ALASKA CONST. art. I, § 4 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.").

allegedly illegal fishing of religiously significant king salmon: the defendants' free exercise defense illustrates a possible Coasian bargain.

Second, with *Ivan* and *Employment Division, Department of Human Resources of Oregon v. Smith*[8] on one side and with *Hobby Lobby* and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[9] on the other, the Article argues that we can divide free exercise claims into two categories: those that seek an exemption from a purely governmental interest compared to those that also impinge upon the private right of other individuals.

Third, we can use Coasian analysis to decide which side should win in free exercise challenges. In the first category of individuals versus the government, the Coase Theorem helps to illuminate if the government used the least restrictive means to limit the religious expression: it is a litmus test that can resolve otherwise analytically thorny free exercise cases. And, for free exercise challenges in the individuals versus individuals category, the Article concludes that we should use the Coase Theorem to resolve them: first, decide if the vying parties could have reached a Coasian bargain and if so, the decision should emulate that bargain; if not, the prevailing side should be the one who is not the cheapest cost avoider.

I. IMPOSED AND IMPLICIT COASIAN BARGAINS IN FREE EXERCISE CASES

A. Hobby Lobby *As an Imposed Coasian Bargain*

The Patient Protection and Affordable Care Act of 2010,[10] colloquially known as "Obamacare," generally requires employers with at least fifty full-time employees[11] to "offer . . . minimum essential coverage,"[12] including "preventative care and screenings,"[13] such as all FDA-approved contraceptives,[14] at no cost to women. Recognizing that contraception is religiously objectionable to some, the government offered nonprofit religious employers an exemption from this contraceptive mandate:[15] the employees still have contraceptive coverage at no cost, but the insurance issuer pays for it—it may not charge the employees or the religiously exempted employer for that coverage.[16] (This saves the insurance companies money: it is less expensive to cover contraceptives than to pay for the pregnancies and medical complications

8. 494 U.S. 872 (1990).

9. 132 S. Ct. 694 (2012).

10. Pub. L. No. 111-148, 124 Stat. 119 (2010).

11. I.R.C. § 4980H(c)(2)(A) (2013).

12. *Id.* § 4980H(a)(1).

13. 42 U.S.C. § 300gg-13(a)(4) (West, Westlaw through 2014).

14. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725 (Feb. 15, 2012).

15. 45 C.F.R. § 147.131(a) (West, Westlaw through 2015).

16. 45 C.F.R. § 147.131(c)(2) (West, Westlaw through 2015); Treas. Reg. § 54.9815-2713A(c)(2) (West, Westlaw through 2015)).

of women who lack it.[17]) This exemption, however, was limited to nonprofits; for-profit employers with at least fifty full-time employees were not exempt from the contraceptive mandate, even if contraception was anathema to the employer's sincere religious belief.[18]

Three closely held for-profit corporations, Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation, and their owners[19] sued, arguing that the requirement to pay for health insurance that covered four specific contraceptives (two morning-after pills, Ella and Plan B, and two types of intrauterine devices[20]) violated their free exercise rights under the Constitution and the Religious Freedom Restoration Act ("RFRA"),[21] which Congress passed to rescind *Employment Division, Department of Human Resources of Oregon v. Smith*'s[22] rejection of the *Sherbert v. Verner*[23] test that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[24]

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17. Coverage of Certain Preventive Services Under the ACA, 78 Fed. Reg. 39870, 39877. Third party administrators that "provide or arrange payments for contraceptive services" may have those costs reimbursed by the federal government. Treas. Reg. § 54.9815-2713AT(b)(3) (West, Westlaw through 2015).

18. Of course, this presumes that a corporation can have a religious belief. While an individual, whether as an employer or as an owner of a corporation, can certainly believe in a religion, an axiom of corporations law is that the corporation has a personhood distinct from its individual owners. If, at least in terms of limiting liability, a corporation is separate from its individual owners, does it track that its owners' religious beliefs can transmute to the corporation? Exploring this question, though interesting, is outside the scope of this Article; for a discussion, see Part III of the *Hobby Lobby* majority opinion, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014), and Part III-C-1 of Justice Ginsburg's dissent, 134 S. Ct. at 2793-97.

19. Hobby Lobby and Mardel are owned by David and Barbara Green and their three children, Mart Green, Steve Green, and Darsee Lett. Conestoga Wood is owned by Norman and Elizabeth Hahn and their three sons, Norman Lemar, Anthony Hahn, and Kevin Hahn.

20. Brief for Respondents on Petition for Writ of Certiorari at 4, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354); *Hobby Lobby*, 134 S. Ct. at 2766 ("[The Hobby Lobby plaintiffs] specifically object to the same four contraceptive methods as the [Conestoga Wood plaintiffs].").

21. 42 U.S.C. § 2000bb *et seq* (West, Westlaw through 2014). The Court concluded that the free exercise right protected by the Religious Freedom Restoration Act is broader than what the Constitution protects. *Hobby Lobby*, 134 S. Ct. at 2761 n.3. *But see id*. at 2791 (Ginsburg, J., dissenting) (arguing that RFRA did not create any new right but rather protects only what the First Amendment guaranteed before *Employment Division v. Smith*, 494 U.S. 872 (1990)). The plaintiffs also asserted claims under the Fifth Amendment (Conestoga Wood plaintiffs) and the Administrative Procedures Act, 5 U.S.C. § 553, (*Conestoga Woo*d and *Hobby Lobby* plaintiffs) but the Court did not reach those issues.

22. 494 U.S. 872 (1990).

23. 374 U.S. 398 (1963).

24. *Smith*, 494 U.S. at 883. Of course, Congress cannot, by statute, modify a Supreme Court decision about the meaning and requirements of the Constitution. Rather, the Religious Freedom Restoration Act ring-fenced the Free Exercise Clause and put statutory limits on the government's future ability to infringe that right. 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a

Using the RFRA standard, the Court concluded that the contraceptive mandate, as applied to religious closely held corporations, violated RFRA.[25] But, rather than simply exempting them from the contraceptive mandate, the Court squared the plaintiffs' free exercise right with the compelling government interest of cost-free access to all FDA-approved contraceptives by grafting their accommodation onto the existing religious nonprofits' one: employees at those religious for-profits would receive contraceptive coverage in the same way as employees at religious nonprofits.[26]

This judicially created accommodation can be viewed as a forced Coasian bargain: forced, because the Court imposed it on the parties (the *Hobby Lobby* plaintiffs wanted the Court to strike down the contraceptive mandate and the government wanted their challenge dismissed),[27] and Coasian because viewed from behind a Rawlsian veil of ignorance, the parties might have independently reached that same accommodation.[28]

Independent bargaining is the heart of the Coase Theorem. In the absence of transaction costs, parties will bargain to the same outcome independent of the initial allocation of rights: the initial allocation doesn't matter and everyone wins.[29] To illustrate, assume that a physician's office is next to a factory, and its loud noise prevents the physician from comfortably examining her patients. There are two ways to fix this problem: either the factory can pay the physician to be noisy or she can pay the factory to be quiet.

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compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."); *see also id*. at §§ 2000bb(a)(4) ("[I]n *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."") and 2000bb(b) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

25. *Hobby Lobby*, 134 S. Ct. at 2785.

26. *Id*. at 2782.

27. While Hobby Lobby and Conestoga mentioned this religious accommodation in their briefs and at oral argument, it was only to illustrate that, in their view, there was a less restrictive way than the mandate to insure contraceptives—the religious accommodation—but no one argued that the Court should resolve the case by grafting religious nonprofits' insurance scheme onto religious for-profits: Hobby Lobby and Conestoga asked the Court to strike down the mandate while the United States asked the Court to upload it.

28. *See* JOHN RAWLS, A THEORY OF JUSTICE 136 (1971). To the extent that some proponents and opponents of the Affordable Care Act and the contraceptive mandate acted cynically as part of a political strategy, this accommodation might have been reached if their partisan vitriol had been drained, even absent a veil of ignorance. For more about this uncommon combination of Rawls and Coase, see Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 315-16 (1998) (proposing that both parties to a bargain would have complete, perfect knowledge except that they would not know on which side of the bargain they will be).

29. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1, 15 (1960).

As with the two solutions, there are two possible initial legal rules. If the physician can sue the factory for being noisy, then the initial legal rule favors her: she can either prevent the factory from making noise at all (through an injunction) or unless it pays her (through money damages).[30] If she cannot sue, the initial legal rule favors the factory.

In the Coasian world of no barriers to bargaining, if the physician has the legal right to stop the factory, she will let the factory continue to make noise if it pays her. The final price will be when the marginal value to the factory of being noisy equals her marginal cost of enduring it; once her marginal costs reach the factory's marginal value, it will not pay for any increase in noise—the parties would have reached their Coasian bargain. Alternatively, if the factory has the legal right to make noise, the physician will pay it to be softer until her marginal value of silence reaches the factory's marginal cost of being quiet.

To simplify this concept and put numbers on it, assume the factory normally closes at 4 p.m., but though its workers are less productive as the night wears on, it can stay open and make noise until 5 p.m., 6 p.m., and 7 p.m. So, it can make

4 to 5 p.m.: $300 more ($300 total)

5 to 6 p.m.: $200 more ($500 total)

6 to 7 p.m.: $100 more ($600 total)

From the physician's view, assume that her patients like to come after work, so she loses

4 to 5 p.m.: $100 more ($100 total)

5 to 6 p.m.: $200 more ($300 total)

6 to 7 p.m.: $300 more ($600 total)

If the physician has the initial legal right, she can get a court order that stops the factory from making any noise after 4 p.m., but she will let it be noisy if it compensates her for the lost patients. So, with her initial legal right, we have

4 to 5 p.m.: Factory pays physician $100 for $200 profit; open until 5 p.m.

5 to 6 p.m.: Factory pays physician $300 for a $200 profit; open until 6 p.m.

6 to 7 p.m.: Factory would break even paying $600 so it does not pay to stay open for this extra hour and instead closes at 6 p.m.

If the factory has the initial legal right, the physician cannot stop it from being noisy. The factory wants to maximize its money, so it plans to be open

30. *See infra* Part IV for more on this idea. An injunction gives her an absolute veto, so she can unilaterally pick how much the factory must pay her to refrain from enforcing the injunction. If all she can win is damages, however, the factory's price to make noise is objectively set by the court—what is the harm to the physician?—rather than being subjectively set by her. In the language of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972), an injunction is a "property rule" and damages are a "liability rule."

until 7 p.m., but it is willing to close earlier if the physician compensates it for its lost income. Under the factory's initial legal right, we have

7 to 6 p.m.: Physician pays $100 for $200 profit; the factory closes an hour earlier at 6 p.m.

6 to 5 p.m.: Physician would break even paying $300 so she does not pay and the factory stays open until 6 p.m.

In either scenario, no matter who has the initial right to stop or allow the other's behavior, the factory will close at 6 p.m., which is when the factory and physician's marginal values and costs are equal at $200.[31] "No matter the default rule, the parties will bargain their way to a result that is both efficient and the same."[32] And, this bargaining away from the initial position is a compromise, not a binary winner-take-all outcome: whether the factory is noisier or softer, there is an exchange of money and both it and the physician are better off; moving away from the initial position improves both parties.

So, how can one respect the *Hobby Lobby* plaintiffs' conviction that contraceptive coverage violates their sincere religious beliefs while simultaneously achieving the government's compelling aim of ensuring widespread, no-cost access to contraceptives? A possible compromise, bargained to in a world of minimal transaction costs (political and otherwise), would be for the plaintiffs' employees to receive contraceptive coverage in a way that does not force the plaintiffs to violate their religious beliefs by paying for it, for example, in the same way as the employees of religious nonprofits. The insurance company would not charge the employees or employers for that coverage because it is cheaper for the insurer to pay for contraceptives than for it to pay for pregnancies and other risks to women's health,[33] so it wants this coverage to be widespread. This compromise does not impose negative externalities on others[34] and is the same as *Hobby Lobby*'s judicially crafted accommodation.[35]

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31. For the inspiration of this example, *see* Coase *supra* note 29, at 8-10.

32. Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 111-12 (2002).

33. Coverage of Certain Preventive Services Under the ACA, 78 Fed. Reg. 39877 ("The Departments continue to believe, and have evidence to support, that . . . providing payments for contraceptive services is cost neutral for issuers. Several studies have estimated that the costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health.") (citations omitted).

34. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring) ("In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government."). Negative externalities are when an activity's costs, such as pollution from a factory, are not borne solely by the actor but also by the broader society; efficient bargaining under the Coase Theorem requires these costs to be captured by the parties to the bargain. *See* Coase, *supra* note 29, at 5 (analyzing the outcome "if the cattle-raiser is liable for damage caused"); *id*. at 27 ("What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.").

35. *Hobby Lobby*, 134 S. Ct. at 2782.

Now that we see that the *Hobby Lobby* resolution approximates a possible Coasian bargain, let us examine another possible Coasian bargain in a state-level free exercise case.

B. *Salmon Fishing in the Kuskokwim: The Free Exercise of Alaska Native Fishers*

Alaska's economy is a three-legged stool: one-third of its jobs are from the federal government, one-third comes from the petroleum industry, and the remaining third are predominantly from export industries, such as seafood, mining, and timber.[36] Within this last third, seafood is the largest industry: "Alaska is among the world's top seafood producers; only eight countries produce more wild seafood,"[37] and if Alaska were an independent country, "it would have placed 14th among seafood producing countries in 2008."[38]

Because of the seafood industry's primacy to Alaska, diminishing runs of king, or Chinook, salmon concern the government and individual Alaskans alike.[39] "King salmon, one of Alaska's most-prized fish, have been declining in rivers statewide for several years, prompting fishery managers to balance conservation of the run for future generations against the needs of people who must have food today."[40] In June 2012, because of a reduced king salmon run on the Lower Kuskokwim River, the Alaska Department of Fish and Game issued emergency orders that closed the river to subsistence fishing of king salmon.[41]

Subsistence fishing is one of four types of fishing in Alaska[42] and is limited to "an area or community where dependence upon subsistence is . . . a principal characteristic of the economy, culture, and way of life of the area or

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36. Scott Goldsmith, University of Alaska, *What Drives the Alaska Economy?* UA RES. SUMMARY 1, Dec. 2008, *available at* http://www.iser.uaa.alaska.edu/Publications/researchsumm/UA_RS_13.pdf.

37. *Id*. at 3.

38. MARINE CONSERVATION ALLIANCE, THE SEAFOOD INDUSTRY IN ALASKA'S ECONOMY 2, *available at* http://www.marineconservationalliance.org/wp-content/uploads/2011/02/SIAE_Feb2011a.pdf.

39. King salmon, like all five Pacific salmon species, are anadromous: they hatch in freshwater rivers, migrate to the saltwater ocean to live their lives, and then return to the freshwater river of their birth to spawn and die. *Chinook Salmon: Species Profile—Life History*, ALASKA DEP'T FISH & GAME, http://www.adfg.alaska.gov/index.cfm?adfg=chinook.printerfriendly (last visited May 4, 2015). This return to the rivers is called a "run," and if not enough salmon return to spawn, the species will eventually be extinct.

40. Jill Burke, *Judge to Decide Alaska Native Religious Defense in Fishing Trials*, ALASKA DISPATCH (May 19, 2013), http://www.adn.com/article/20130519/judge-decide-alaska-native-religious-defense-fishing-trials.

41. ALASKA ADMIN. CODE tit. 5, § 01.270(n) (2014); Kyle Hopkins, *Nets, Salmon Seized During Kuskokwim Subsistence Closure*, ANCHORAGE DAILY NEWS (June 21, 2012), http://www.adn.com/article/20120621/nets-salmon-seized-during-kuskokwim-subsistence-closure.

42. The four types are commercial, sport, subsistence, and personal use.

community,"[43] and subsistence fishers are "traditionally the last group of fisherman to lose access when restrictions are deemed necessary."[44] Urban centers, such as Anchorage, Fairbanks, and Juneau are not subsistence areas; the Lower Kuskokwim region, an indigenous home to the Yup'ik people, is.[45]

The summer 2012 closure of the Lower Kuskokwim did not go well: subsistence fishers continued to fish for king salmon, some because they "claimed they didn't know they were breaking the law,"[46] some as an act of civil disobedience,[47] some as a "'frantic search for food,'" rooted in a genuine fear "'of facing a winter without sufficient food,'"[48] and some as an exercise of their religious beliefs.[49] Alaska prosecuted the fishers for violating the river closure regulations, and about two dozen claimed that the Free Exercise Clause protected their fishing.[50]

To mount this defense under the Alaska Free Exercise Clause,[51] the fishers must prove (1) "there is a religion involved," (2) their "conduct . . . is religiously based," and (3) they are "sincere."[52] If there is sincere religious conduct, Alaska courts must then decide if the state's interest is compelling and, if so, "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."[53] This test is the same as the pre-*Smith* analysis of the Federal Free Exercise Clause;[54] Alaska

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43. ALASKA STAT. § 16.05.258(c) (West, Westlaw through 2015 1st Reg. Sess.).

44. Burke, *supra* note 40.

45. ALASKA ADMIN. CODE tit. 5, § 01.250 (2014).

46. Jill Burke, *Trials of Native Fishermen Begin in Bethel*, ALASKA DISPATCH (Oct. 29, 2012), http://www.adn.com/article/trials-native-fishermen-begin-bethel.

47. Burke, *supra* note 40.

48. Jill Burke, *Trio of Native Kuskokwim Salmon Fishermen on Trial Found Guilty*, ALASKA DISPATCH (Oct. 30, 2012), http://www.adn.com/article/trio-native-kuskokwim-salmon-fishermen-trial-found-guilty.

49. Alaska v. Ivan, No. 4BE-12-00627CR, slip op. at 2 (Alaska Dist. Ct. May 20, 2013), *available at* http://www.acluak.org/issues/docs/Alaska-v-Ivan.Trial-Courts-Decision.pdf, *aff'd sub nom*. Phillip v. Alaska, 347 P.3d 128 (Alaska Ct. App. 2015). The Alaska Court of Appeals affirmed the fishers' conviction, and as of this writing in mid-April 2015, the fishers have roughly one week left in their thirty-day window to petition the Alaska Supreme Court for discretionary review. ALASKA R. APP. P. 303(a)(1) (West, Westlaw through March 1, 2015). The ACLU of Alaska supported the fisher defendants with amicus briefs to the Alaska District Court and the Alaska Court of Appeals.

50. *Id*.

51. ALASKA CONST. art. I, § 4 ("No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.").

52. Frank v. Alaska, 604 P.2d 1068, 1071 (Alaska 1979) (citing Wisconsin v. Yoder, 406 U.S. 205, 215, 216 (1972)).

53. *Frank*, 604 P.2d at 1073.

54. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014) (noting that the pre-*Smith* Free Exercise analysis "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest"); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 (Alaska 1994) ("In *Frank v. State*, we adopted the *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] test to determine whether the Free Exercise Clause of the Alaska Constitution requires an exemption to a facially neutral law.").

declined to use *Smith* for its free exercise jurisprudence, choosing instead to keep the pre-*Smith* framework.[55]

The fishers' "Yupik cosmology which defines the relationship between a person and all other living things through the conduct of the person is inseparably connected to the Yupik subsistence way of life."[56] Part of that belief is that "Ellam Yua," the maker, "provides all of the food sources that [the Yup'ik people] survive on . . . [a]nd then if [they] don't harvest them, . . . then he will not be pleased."[57] Successful fishing, in this belief system, is "not a question of numbers of fish in absolute terms, it's whether the fish are making themselves available."[58] If the Yup'ik people do not fish for king salmon, Ellam Yua will express its displeasure by diminishing the fish's population.[59] In the Yup'ik view of the world, fishing for king salmon is a prerequisite for universal harmony and for the fish's annual presence in the river; not fishing for king salmon will not let the species recover, rather, it will make the problem worse: "if [the Yup'ik people] don't try to catch them, Ellam Yua will be unhappy[.]"[60]

Though the fishers proved that their fishing was sincere religious conduct, animated by their genuine conception of the world, the trial court rejected their free exercise defense. It concluded that "unfettered taking of Chinook salmon under the religious free exercise exception through subsistence harvest urged by the defendants would result in precisely the opposite of what the *Frank* court deemed a non-issue, that is the decimation of the species by overfishing,"[61] and that this concern was a "compelling reason for the limitations placed . . . on the subsistence taking of Chinook salmon,"[62] which trumped the fishers' free exercise claim. The court convicted the fishers, thirteen of whom appealed to the Alaska Court of Appeals.[63]

But, just as in *Hobby Lobby*, are these parties locked into a zero-sum dynamic? Are their positions binary, or is there room for compromise? Such a compromise is indeed possible. The fishers proposed a rationing system for king salmon fishing that "wouldn't be a great fit, but it wouldn't be the worst

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55. *Swanner*, 874 P.2d at 280-81.

56. Alaska v. Ivan, No. 4BE-12-00627CR, slip op. at 5 (Alaska Dist. Ct. May 20, 2013), *available at* http://www.acluak.org/issues/docs/Alaska-v-Ivan.Trial-Courts-Decision.pdf.

57. 1 Trial Transcript at 204, *Ivan*, No. 4BE-12-00627CR (Apr. 16, 2013) (on file with author).

58. *Id*. at 30 (Apr. 15, 2013).

59. *Id*. at 214-15 (Apr. 16, 2013).

60. *Id*. at 215 (April 16, 2013).

61. *Ivan*, No. 4BE-12-00627CR, slip op. at 7. In *Frank v. Alaska*, Carlos Frank illegally hunted and killed a moose, which he needed for a Central Alaskan Athabascan funeral potlatch. The Alaska Supreme Court ruled that Frank's hunting was protected by the Federal and Alaska Free Exercise Clauses, 604 P.2d at 1070, and that the State did not show that the religious hunting of moose would threaten their population, *id*. at 1074.

62. *Ivan*, No. 4BE-12-00627CR, slip op. at 6.

63. Phillip v. Alaska, 347 P.3d 128 (Alaska Ct. App. 2015).

fit" with Yup'ik cosmology;[64] they did not seek "*unfettered* taking of Chinook salmon."[65] Nor did Alaska arrive at its flat, inflexible ban through a careful, nuanced consideration of less than unfettered, or token, Yup'ik subsistence fishing: the idea of letting each village catch just five to ten fish, according to the area management biologist for the Alaska Department of Fish and Game's Division of Commercial Fisheries, was "thinking way outside the box, so [Alaska] didn't consider that."[66] And, while Alaska prohibited subsistence king salmon fishing on the Lower Kuskokwim, it simultaneously opened the commercial fishery at the river's mouth, which it predicted would catch king salmon that would have otherwise entered the river as subsistence stock.[67]

So, a Coasian bargain would have left both sides, the observant Yup'ik fishers and the general salmon conservationists, better off. Limited or token fishing, as proposed by the fisher defendants, would have allowed them to exercise their religious beliefs, albeit imperfectly, and if Alaska had permitted that limited religious fishing instead of allowing the commercial fishers to catch king salmon at the mouth of Kuskokwim,[68] the Yup'ik fishers' religious practice would have left future generations of king salmon no worse off.[69]

C. *Coasian Bargains, Not Generic Settlements*

A critique of this Article could be that the *Hobby Lobby* and *Ivan* Coasian bargains are just ordinary possible settlements, which are possible in every lawsuit and are neither innovative nor significant. There are two types of free exercise challenges, individuals versus the government, and individuals versus other individuals; Coasian bargains—as opposed to settlements generally—streamline the analysis of each and suggest outcomes that are both efficient, and since the parties are each better off, equitable.

Before discussing the two categories of free exercise challenges, we must first clarify the distinction between a Coasian bargain and an ordinary settlement. Coasian bargains are settlements that leave both parties better off than the status quo, and their bargaining, if unimpeded by transaction costs or other obstacles,[70] will reach Pareto efficiency.[71] By definition, a Coasian

64. 1 Trial Transcript at 61, *Ivan*, No. 4BE-12-00627CR (Apr. 15, 2013) (on file with author); *Ivan*, Trial Tr. vol. 1, 61, Apr. 15, 2013.

65. *See Ivan*, No. 4BE-12-00627CR, slip op. at 7 (emphasis added).

66. 1 Trial Transcript at 323, *Ivan*, No. 4BE-12-00627CR (Apr. 17, 2013) (on file with author).

67. *Id*. at 301.

68. Alaska has an affirmative "duty of accommodation" of free exercise rights, *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 (Alaska 1982), and must prioritize subsistence fishing over competing uses, such as commercial fishing, ALASKA STAT. § 16.05.258(b) (West, Westlaw through 2015 1st Reg. Sess.).

69. And, if the Yup'ik belief is factually correct, it might have improved future king salmon runs.

70. Such as "acrimony between the parties." Farnsworth, *supra* note 6, at 384.

bargain is so ideal that the parties, if allowed to bargain freely, will organically reach it independent of their initial legal rights.

While Coasian bargains are subsets of regular settlements, generic settlements are not typically so sanguine: whereas two parties inexorably reach a Coasian bargain (assuming low transaction costs), settlements in lawsuits are rarely arrived at automatically but instead are birthed through detailed and repeated negotiation, and are not always Pareto efficient.

Parties settle suits for myriad reasons. Unlike arriving naturally at a Coasian bargain, parties reach a settlement not because it is the best out of an infinite universe of outcomes, but instead because it is the least bad out of a set of even worse options: perhaps it is cheaper to settle than to exhaust more money on the suit or perhaps, when faced with a raft of litigation defeats—selecting an unfriendly jury, pretrial motions, poor witness testimony, et cetera—the certain partial harm of a settlement is less than the likely harm of a complete loss in court. And, litigants decide whether to settle not through a sterile, unbiased cost-benefit analysis, but through a calculus that is often clouded by emotion[72] and an appetite for risk that turns on whether one is the plaintiff who stands to win money (and is thus more risk-seeking) or the risk-adverse defendant.[73]

So, while generic non-Coasian settlements can be Pareto optimal, not all of them are: because of these handicaps, the parties may not have bargained to the best result. Coasian settlements, in contrast, are always Pareto efficient: neither party wishes to move away from it.

II. TWO FREE EXERCISE CHALLENGES: INDIVIDUALS VS. THE GOVERNMENT AND INDIVIDUALS VS. INDIVIDUALS

Though the Free Exercise Clause formally binds just the government,[74] we can conceive of some free exercise challenges as pitting discrete groups of individuals against other individuals, rather than individuals against the government or society in general. Let us look at the possible winners and losers in four cases, two that are individuals versus the government and two that are individuals versus individuals.

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71. Pareto efficiency is the optimum state where no party can improve her condition without making the other worse off. *See* Swygert & Yanes, *supra* note 28, at 267 n.80.

72. Farnsworth, *supra* note 6, at 384.

73. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118-19 (1996).

74. The Thirteenth Amendment's prohibition on slavery and involuntary servitude is the only extant constitutional amendment that binds individuals; all other amendments inhibit only the government.

A. *Individuals vs. the Government: Two Examples*

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[75] Alfred Smith and Galen Black, both members of the Native American Church, were fired for "ingest[ing] peyote for sacramental purposes at a [church] ceremony."[76] Consuming peyote was illegal in Oregon and Smith and Black were refused unemployment compensation because, according to the Oregon Employment Division, "they had been discharged for work-related 'misconduct.'"[77] Though their employer's unemployment insurance rates would have gone up if Smith and Black had received unemployment compensation, the countervailing interest to their free exercise claim was Oregon's interest in enforcing generally applicable laws about controlled substances and unemployment benefits;[78] this interest did not accrue to a discrete subset of Oregon society.

Similarly, in the earlier Lower Kuskokwim fishing case of *Alaska v. Ivan*, the fishers' free exercise right was balanced against Alaska's general, and socially diffuse, desire to ensure the viability of future king salmon runs.[79]

B. *Individuals vs. Individuals: Two More Examples*

In contrast, we can conceive the *Hobby Lobby* parties as two groups of individuals: the plaintiffs, whose religious beliefs were offended by contraceptive coverage, and their employees, who would be denied easy, no-cost access to contraceptives. Though the United States government, not those employees, was the defendant, its desire to uphold a law of general applicability was buttressed by the employees' concrete and discrete interest to eliminate "the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing,"[80] for "'[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive

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

76. *Id*. at 874.

77. *Id*. at 874-75. Generally, one is ineligible for unemployment compensation if one quits a job without good cause connected to work or if one is fired for work-related misconduct. So, while one can receive unemployment benefits for quitting to escape sexual harassment by the boss or because one was laid off due to a down economy, one cannot receive unemployment compensation for quitting due to not liking the job or for being fired for incompetence.

78. *See id*. at 878.

79. Alaska v. Ivan, No. 4BE-12-00627CR, slip op. at 7 (Alaska Dist. Ct. May 20, 2013), *available at* http://www.acluak.org/issues/docs/Alaska-v-Ivan.Trial-Courts-Decision.pdf at 7; *see* Alaska Const. art. VIII, § 3 (reserving natural resources "to the people for common use").

80. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2789 (2014) (Ginsburg, J., dissenting).

lives.'"[81] While the cost of denying the *Hobby Lobby* plaintiffs' challenge is denying their religious dignity, the cost of upholding it is "overrid[ing] significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the [Affordable Care Act] would otherwise secure."[82] Properly framed, the tension between the vying *Hobby Lobby* interests is, "[i]n sum, with respect to free exercise claims no less than free speech claims, '[y]our right to swing your arms ends just where the other man's nose begins.'"[83]

Individuals' dueling arms and noses were the (metaphorical) core of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[84] in which the Court asked where the line between churches' freedom to govern their religious officials and their obligation to obey generally applicable non-discrimination laws is.

Hosanna-Tabor ran a "Christ-centered" school with its teachers divided into two categories: "called" teachers, who both "are regarded as having been called to their vocation by God through a congregation," and met the "called" prerequisite of having completed a program of formal Lutheran theological study, and "'lay' or 'contract' teachers" who "are not required to be trained by the Synod or even to be Lutheran."[85] Called teachers enjoyed tenure: they "serve[] for an open-ended term" and "a call could be rescinded only for cause and by a supermajority vote of the congregation."[86] Lay teachers did not: "they were appointed by the school board, without a vote of the congregation, to one-year renewable terms."[87]

Cheryl Perich taught at Hosanna-Tabor, first as a lay teacher and then as a called teacher. She became ill with narcolepsy and was on disability leave at the beginning of the 2004-2005 school year; in January 2005, however, she told Hosanna-Tabor that she could resume her job in February. The school, which had filled her position with a lay teacher, declined to have her return to work; it fired her.[88]

Perich complained to the Equal Employment Opportunity Commission, asserting that Hosanna-Tabor violated the Americans with Disabilities Act[89] when it fired her. On Perich's behalf, the EEOC sued Hosanna-Tabor, which defended using the "ministerial exception," which prohibits the government

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81. *Id*. at 2787 (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

82. *Id*. at 2790.

83. *Id*. at 2791 (second alteration in original and internal quotation omitted).

84. 132 S. Ct. 694 (2012).

85. *Id*. at 699.

86. *Id*.

87. *Id*. at 699-700.

88. *Id*. at 700.

89. 104 Stat. 327 (codified at 42 U.S.C. § 12101 (West, Westlaw through 2014 P.L. 113-296)).

from interfering with the employment relationship between a church and its ministers.[90] The Supreme Court unanimously dismissed the suit, ruling that the Establishment and Free Exercise Clauses prohibited the EEOC and Perich from challenging Hosanna-Tabor's decision to fire her.[91]

Just as in *Hobby Lobby*, *Hosanna-Tabor* can be viewed as a free exercise contest between two individuals: Hosanna-Tabor's right to "choos[e] who will preach [its] beliefs, teach [its] faith, and carry out [its] mission,"[92] against not just the government's general interest in eliminating employment discrimination, but also against Perich's specifically personal desire not to be discriminated against.

With the Free Exercise Clause divided into these two categories of cases—individuals versus the government and individuals versus other individuals—we now use the Coase Theorem to evaluate each.

III. THE COASE THEOREM APPLIED TO FREE EXERCISE CLAIMS

As a first principle, one cannot apply the Coase Theorem, or force a Coasian bargain, to change the scope of the free exercise right, but a Coasian analysis can clarify the right when it is otherwise unclear and, in the individuals versus individuals cases, it can suggest an efficient, and thus hopefully fair, outcome that is the product of dispassionate, fixed rules instead of a subjective value-laden, looser test.

A. *Coasian Bargains: An Acid Test for Least Restrictive Means*

Whether a free exercise challenge is of the individuals versus the government or the individuals versus other individuals variety, the free exercise right exempts "substantial[] burdens" on "a person's exercise of religion," unless "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.'"[93] Or, rephrased for the individuals versus individuals context: "no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[94]

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90. *Hosanna-Tabor*, 132 S. Ct. 694, 701 (2012).

91. *Id*. at 710.

92. *Id*.

93. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) (quoting the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (West, Westlaw through 2014 P.L. 113-296)).

94. *Id*. at 2786-87 (Kennedy, J., concurring).

One analytic knot of free exercise cases is the least restrictive means test: while courts can determine the sincerity of professed religious beliefs,[95] and while some[96] government interests are compelling, the heaviness of the government's hand in achieving those ends is what causes many free exercise claims to rise or fall.

To quickly determine if those means were the least restrictive, one should ask if the parties, in the absence of transaction costs, would have reached a Coasian bargain. Then, compare that bargain against the government's means: since the parties in a frictionless Coasian bargain are at Pareto efficiency, any change will leave one party worse off, thus, the Coasian settlement is, if possible in the real world, the least restrictive way of achieving the bargain.

Put another way, recall our example of the quiet-loving physician and her neighboring noisy factory. In a Coasian world, they will continue to negotiate—the factory paying the physician for the right to make noise or the physician paying the factory to be quiet—until the marginal benefit of extra silence or noise equals the marginal cost of paying for it.[97] If the ultimate Coasian bargain, say the factory paying the physician $300 total at a marginal rate of $200 for additional silence, is different than the government regulation—perhaps the government forces the physician to pay the factory $550 for silence—then we know that this regulation is not the least restrictive means of achieving the same outcome.

Applying this to *Hobby Lobby*, if we accept the proposition that Hobby Lobby and Conestoga Wood, absent transaction costs, would have bargained with the United States government (and their own employees) to graft their contraceptive coverage onto the program for religious nonprofits, then vetting the government's initial means against this Coasian bargain yields the conclusion, shared by the *Hobby Lobby* majority, that it was not the least restrictive.

B. *Weighing Individuals vs. Individuals' Free Exercise Claims with the Coase Theorem*

Apart from their procedural use—testing the government's means to see if they are the least restrictive—can the Coase Theorem screen the substantive value of free exercise outcomes? Only imperfectly in the individuals versus

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95. *Id.* at 2774 (majority opinion).

96. For instance, easy access to no-cost contraceptives, *id.* at 2780 (assumed to be compelling), ending employment discrimination, *Hosanna-Tabor*, 132 S. Ct. 694, 710 (2012) ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important."), and preventing the "decimation" of king salmon "by overfishing," Alaska v. Ivan, No. 4BE-12-00627CR, slip op. at 7 (Alaska Dist. Ct. May 20, 2013). *But see* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990) ("Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.").

97. *See* Coase, *supra* note 29, at 3.

government category. The Coasian world assumes no transaction costs and that the negotiating parties will equally place the same value on the final bargain: that is why the bargain is the same no matter the initial legal rule. But the Constitution, by design, limits the government. The Free Exercise Clause weighs the scales in favor of individuals practicing their religion without government hindrance: much like how endowment effects can warp an ultimate Coasian bargain,[98] so too does the Constitution: it is a social norm that skews the ultimate bargain in favor of religious practice and away from other aims.[99]

But this problem is attenuated in free exercise contests between individuals: while there is still a background constitutional preference for religious freedom, the Free Exercise Clause only cuts against the government; the Constitution does not command you to curtail your own personal rights to accommodate another's religious practice. "Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. *Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling*."[100] "In sum, with respect to free exercise claims no less than free speech claims, '[y]our right to swing your arms ends just where the other man's nose begins.'"[101] Thus, with the constitutional weight on the scale removed, this second category of free exercise challenges becomes closer to private law[102] and we can use the Coase Theorem to evaluate the individuals' competing claims.

So, how can the Coase Theorem vet those disputes? Much as in our above analysis of *Hobby Lobby* and *Ivan*, one should ask, if the parties had no transaction costs, acrimony, or other barriers to bargaining, in the absence of litigation, would they have settled on a mutually agreeable outcome? If yes, the suit's resolution should approximate that Coasian bargain. And why? Because of personal autonomy: that bargain best expresses the parties' wishes.

To see how, remember that a Coasian bargain is Pareto optimal—the parties would have continued negotiating, each improving one's position, until finally a suggested improvement to party A would make party B worse off. At that point, party B would reject the proposed change and the equilibrium would rest and be Pareto efficient. Assuming that the parties could freely negotiate,

98. *See* Sunstein, *supra* note 32, at 111-12; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 941-45 (1996).

99. Even though statutes are presumptively constitutional, Rostker v. Goldberg, 453 U.S. 57, 64 (1981), the Constitution is designed to limit the government's power and actions.

100. *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring) (emphasis added).

101. *Id*. at 2791 (Ginsburg, J., dissenting) (second alteration in original and internal quotation omitted).

102. "Private law" is the relationship between private persons versus "public law," which encompasses people's relationship with the government. *See* Swygert & Yanes, *supra* note 28, at 261.

that their negotiation captured all relevant externalities,[103] and that "individuals know best what is best for them,"[104] that Coasian bargain reflects the parties' freely negotiated desires.

C. *The Limits of the Coase Theorem*

Coase himself "emphasize[d], the ideas that became known as the Coase Theorem were not meant to represent the real world."[105] The imagined Coasian world was founded on six assumptions: (1) "two agents to each externality (and bargain)," (2) costless bargaining with perfect knowledge of the costs and benefits, to oneself and the other party, of each decision, (3) "competitive markets" that firms can freely enter and exit with none that have monopoly power, (4) "profit-maximizing producers and expected utility-maximizing consumers," (5) "no wealth effects," and (6) agreements to "mutually advantageous bargains in the absence of transaction costs."[106]

Those assumptions are particularly false in free exercise cases, which bring their own challenges, chiefly that religious beliefs and practices are usually not granular: many practices are all or nothing[107] and cannot be increased or attenuated through a negotiated bargain. Even the Yup'ik fishers, who were open to a token religious practice, had an expert testify that this modification "wouldn't be a great fit, but it wouldn't be the worst fit" within their belief system.[108]

Relatedly, religious practices are hard to value and compare: apart from the possible philosophical and theological problem of rendering them unto Caesar, it is hard to monetize them. What is the dollar value of consecrating, or not, a Hindu wedding with a fire, or of allowing, or not, Catholics to confidentially confess their sins to a priest? The Coase Theorem works because it distills individual preferences into dollars and cents: parties negotiate in a common medium, not across an incomparable idiosyncratic void. Yet, this difficulty does not mean that it is impossible to analyze or compare religious practice.

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103. This criterion is particularly important where, as in the *Hobby Lobby* case, the United States was, in a sense, also representing the preferences of the women employees who wanted contraceptive coverage; these employees were not a party to the suit, so any real, assumed, or imposed Coasian bargain needed to incorporate their wishes.

104. Calabresi & Melamed, *supra* note 30, at 1094 n.10 ("Most versions of Pareto optimality are based on the premise that individuals know best what is best for them.").

105. Swygert & Yanes, *supra* note 28, at 270.

106. *Id*.

107. For example, circumcising one's child or not, consuming wine at Catholic mass or not, and fasting or refraining from work on religious holidays or not. For an example of religious practice that is not all or nothing, see *Holt v. Hobbs*, 135 S. Ct. 853 (2015), in which the religious dispute about the length Holt's beard was not hirsute versus clean shaven, but was one-half inch (what Holt wanted) versus one-quarter inch (what the Arkansas Department of Correction wanted).

108. 1 Trial Transcript at 61, *Ivan*, No. 4BE-12-00627CR (Apr. 16, 2013) (on file with author).

IV. IDENTIFYING THE CHEAPEST COST AVOIDER IS A BETTER WAY TO SOLVE INDIVIDUALS VS. INDIVIDUALS FREE EXERCISE CLAIMS

The Coase Theorem posits that the initial allocation of rights among parties will not affect how they are ultimately arranged. Though this is not perfectly true in practice,[109] there are nevertheless two ways to move rights away from their initial allocation: a property rule, which requires the buyer of the right to pay a seller-determined (and thus subjective) price, or a liability rule, which requires the buyer to pay a price that was objectively set by society.[110] The property rule can be expressed by an injunction. It gives the rightsholder, or seller, a veto: he can subjectively and unilaterally set an astronomical price that unless paid, will block the other side. Not so under a liability rule, which is equivalent to damages: the non-rights holder can buy the right if she pays the objective, or court-determined, price; though that price "may be what it is thought the original holder of the entitlement would have sold it for. . . . [T]he holder's complaint that he would have demanded more will not avail him once the objectively determined value is set."[111] Unlike property rules, which permit holdouts, liability rules do not.

While the law, because of the Constitution's restraint on the government, prefers the free exercise of religion over other government interests, we should not have a background preference when one individual's religious right is pitted against another's non-religious right;[112] we should be initially agnostic about who should win and who should lose. A liability rule is the best way to express this agnosticism: if we allow the holdouts that a property rule permits, we make the rights sticky and we make it harder for the individual without the right to bargain for it.[113] But a liability rule requires a court or other third-party to assign a value to the right; while courts can and do value many individual rights—that is, after all, what damage awards are—valuing religious rights is trickier because the First Amendment prevents courts from evaluating or deciding how "central" one's religious beliefs are.[114] Deciding the value of one's religious right seems too close to impermissibly deciding how central the right is to that person, because rights that are more central will be valued higher than rights that are more peripheral; though a liability rule would be analytically superior, the Constitution requires us to use a property rule.

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109. Sunstein, *supra* note 32, at 111-12; Calabresi & Melamed, *supra* note 30, at 1095-96.

110. Calabresi & Melamed, *supra* note 30, at 1092.

111. *Id*.

112. Because two individuals' rights are tested against each other, the presumption of constitutionality in favor of one should not apply. *See Morrison v. Olson*, 487 U.S. 654, 704 (Scalia, J., dissenting) (arguing that the presumption of constitutionality when one part of the government is pitted against another in a separation of powers argument "does not apply").

113. *See* Calabresi & Melamed, *supra* note 30, at 1110 (discussing why to pick a liability rule over a property rule).

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

True, there is a risk that placing free exercise rights under a property rule will let religious practice unilaterally trump all other interests, "open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,"[115] and "permitting him, by virtue of his beliefs, to become a law unto himself."[116] This is contrary to Justice Kennedy's concurrence that the free exercise right may not automatically "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling,"[117] but because it is not clear that the Constitution allows courts and policymakers to assign a value, or liability rule, to individual religious beliefs, it looks like at least the religious part of this dyad will be under a property rule. While a court could use a liability rule if it finds for the party with the non-religious right—for example, the employer has to provide contraceptive coverage or pay a court-determined amount of money to the employees—a property rule decision in favor of the religious party will be tantamount to a flat statement that the party wins; the religious party could hold out—the court will not set a price, or damage award, that the other side can pay to assert its non-religious right over the religious one.

We want to decide these challenges correctly: that is, in each case, we want the person asserting the more deeply held, and thus more important, right to win.[118] But, these cases are both hard and close, which means the decisions will sometimes be wrong and there may not be a Coasian bargain to impose. So, particularly because these cases concern important rights, we should make it as easy as possible for the parties to correct a judge's mistake by bargaining after the decision:[119] if the religious employer incorrectly won the right to not offer contraceptive coverage, and if the employees want the coverage more deeply than the employer wants to practice religion by refusing to provide it, we want the employees to be able to pay the employer to decline to exercise its right—and court order—so that they can instead exercise theirs.

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115. *Id*. at 888.

116. *Id*. at 885.

117. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring).

118. Remember, we are weighing one individual's important religious right against another individual's important secular right and we are initially agnostic about which right should win. If we do not initially care about the substance—religious or secular—of the winner's right, then from both logical and welfare maximization standpoints, it's sensible that we should want the more important right to win; we can define which right is more important by asking who feels more deeply about it. Otherwise, to say *a priori* that some rights, e.g., religion, are more important than others, e.g., being free from discrimination, is to abandon our initial agnosticism.

119. *See* Farnsworth, *supra* note 6, at 375-76 ("[I]f a court fails to award the rights in a case to the party willing to pay the most for them, that party will be interested in buying the rights from the winner so long as bargaining is feasible (or, to be precise, so long as the gains from trade exceed the costs of arranging a trade). . . . [T]he court's goal, perhaps, should be to devise remedies that will make bargaining after judgment as cheap as possible.").

"As easy as possible" does not necessarily mean that it will be easy: the parties' generic transaction costs may be compounded by a general objection to bargaining, "because they detest each other, because they are laboring under various norms about appropriate exchanges of cash, or because they have attitudes toward their rights that make them awkward subjects for cash exchanges."[120]

The chance of deciding the free exercise challenge wrongly is largely because we are uncertain whether the benefits of A's right trumping B's right, or vice versa, are "worth [their] costs," so "the cost should be put on the party or activity best located to make such a cost-benefit analysis," which "suggests putting costs on the party or activity which can most cheaply avoid them."[121] Ruling against the cheapest cost avoider best increases the chance for post-judgment bargaining because it "can with the lowest transaction costs act in the market to correct an error in entitlements by inducing the party who can avoid social costs most cheaply to do so," that is, it is the side that can most easily "bring us closer to the Pareto optimal result the 'perfect' market would reach."[122]

The identity of the cheapest cost avoider will change each time: when the religiously observant person is the cheapest cost avoider, he will not block the other side's right; if he wants his religious practice to trump the other's right, he will have to pay the other side. When he is not the cheapest cost avoider, he will either be paid to refrain from practicing his religion or, if the other does not want to pay, he will practice it for free.

A. *Objections*

An objection to this, of course, is that we do not ordinarily make the exercise of constitutional or other fundamental rights (such the right to be free from discrimination) contingent upon one's ability to pay: by deciding cases in favor of the cheapest cost avoider and thus monetizing rights by allowing people to bargain for them, one may complain that this new Coasian test in fact makes rights a function of wealth. If true, this has the real potential to harm those who cannot afford to pay and, contrary to the balanced scales of blind Lady Justice, to explicitly bias judges' decisions in favor of the rich.

True, the wealthy have advantages in how they litigate cases—they can more easily afford the costs of attorneys, experts, and discovery—but their advantages do not seep into the substance of the case. The merits of a case are not skewed in favor of, or against, the wealthy simply because they are

120. *Id*. at 405. One of the "attitudes toward their rights that make them awkward subjects for cash exchanges," might be the (perfectly reasonable) belief that one should not reduce one's own religious convictions to cash and bargain them away. *See* Calabresi & Melamed, *supra* note 30, at 1102 n.30 (arguing that it is hard to compensate individuals for giving up their "religious or transcendental" rights).

121. Calabresi & Melamed, *supra* note 30, at 1096-97.

122. *Id*. at 1097.

wealthy: the First Amendment is as likely to protect a pauper's speech—or not—as a rich man's.

Will this blindness to wealth remain true if we start to award rights to the party who is not the cheapest cost avoider? Yes, because parties' relative wealth is not a direct proxy for who is the cheapest cost avoider. While money is a factor in enabling one to "most cheaply avoid" the test's court-imposed costs,[123] identifying the cheapest cost avoider is more than comparing pocketbooks. Rather, we compare transaction costs, which is nothing more than evaluating the parties' relative ability to bargain and change their initial positions, an analysis that is both particularized and independent of who is wealthier and who holds the religious or secular right. In our earlier example, the factory may have lower transaction costs because it is a single actor that only has to bargain with the physician, while the physician must negotiate both with the factory and with all of her individual patients as she decides whether to close early or stay open late. Or, if it is hard for the factory to start its machines and shut them down once running, the physician may be more easily able to move away from the (initial or court-ordered) status quo. None of these variables are directly affected by the parties' relative wealth.

Wealth may matter in how we assess which party holds her right more deeply. One's ability to pay affects one's willingness to pay,[124] and we risk that one's thinner wallet may cause us to undervalue her right. But this Coasian test does not directly assess who values the right more, instead, it first asks if a Coasian bargain can be imposed and if not, then it asks who is the cheapest cost avoider. As long as we do not use poverty to discount the possible Coasian settlement (by assuming, for example, that the lower-income party could not bargain to it) and as long as it remains true that the cheapest cost avoider does not directly turn on the parties' relative wealth, the test elides this wealth concern.

The true wealth problem may be that if the poorer person is the cheapest cost avoider, she may lack the means to bargain to exercise her right. Though unfortunate, this is not as fatal to the test as it first appears. Whether one is wealthy does not predict whether one will assert a religious or secular right or whether one will be the cheapest cost avoider: wealth is orthogonal to both, so while the poorer party may be disadvantaged if she is the cheapest cost avoider, whether she is and which right she asserts will be random. Looking at these two factors, the religious or secular right and the cheapest cost avoider, this Coasian test is not structurally biased against the poor. Insofar as low-income individuals already have a hard time in the American system,[125] they will not

123. *Id*.

124. *Id*. at 1095

125. In 2013, 14.5% of Americans, or 45,318,000 individuals, lived below the poverty line. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013 13 (2014), *available at* http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf. For an overview of the problems they face, see LEGAL SERVICES CORPORATION, 2013

have a rougher time of it in this analysis. And, just as there are charities to vindicate the rights of the poor *qua* poor as well as constitutional and other fundamental rights, we can imagine that existing and new charities may help low-income people assert their religious and secular rights and bargain with the non-cheapest cost avoiders.

But, before we identify a possible Coasian bargain and the cheapest cost avoider, we need to ensure that both sides are sincere, and that they are not acting strategically to avoid their obligations. This is particularly true for the religious rights: they "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,"[126] and the Constitution protects them even if the believer is "'struggling' with his beliefs" and cannot "articulate" them "with the clarity and precision that a more sophisticated person might employ."[127] Because religious rights can be idiosyncratic, it can be difficult on first gloss to determine if their adherent is genuine or lying. But courts already do this: though "[t]he distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine . . . and one that courts are capable of making."[128] We should trust that just as courts separate sincerity from pretext now, they will continue to do so under this new test.

If we are concerned about insincere claims by individuals, one may also argue that we should worry about new restrictions that governments will impose not to sincerely regulate activity but instead to generate revenue for itself or an ally.[129] First, the restriction will be difficult to craft: the government must make it broad enough to be a law of general applicability[130] but not too broad that its widespread burden is too unpopular.

Even assuming the restriction is well-drafted, the extortion will still be difficult: in order for it to work, the government would need to know—when it imposes the restriction, and not later—who will eventually be the cheapest cost avoider, for in the absence of an imposed Coasian bargain, it is the cheapest cost avoider who will pay to exercise her right. But, identifying the cheapest cost avoider is a highly particularized inquiry that directly turns on who the other party is: Alice may be the cheapest cost avoider vis-à-vis Bob, but when Alice is pitted against Charles, he may be the cheapest cost avoider instead. While the government may know who one of the parties will be (itself or its

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ANNUAL REPORT 22, *available at* http://www.lsc.gov/sites/lsc.gov/files/LSC/Publications/AnnualReport2013/LSC2013AnnualReportW.pdf (describing problems with family law, housing, consumer issues, government benefits, and natural disasters).

126. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

127. *Id*. at 715.

128. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 907 (O'Connor, J., concurring in judgment).

129. Such as an important campaign donor or a politically popular group.

130. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) ("[L]aws burdening religious practice must be of general applicability.").

ally), it will be hard to predict, at the time it issues the new restriction, the identity of the other side.

If we assume that the distribution of cheapest cost avoiders is random (i.e., that in any given pairing, each side has an equal chance of being the cheapest cost avoider), then *at best* the extortion will generate revenue about half the time, but in practice, the net effect will be worse, because the ally—if it wants to exercise its right—will have to pay when it is the cheapest cost avoider. If the distribution of cheapest cost avoiders and bargaining prices are completely random, then the extortion washes out: the dollars the ally receives is netted against the dollars it pays. But, if the distribution is not random, the extortion may *cost* money instead of raising it, with the ally paying more money and exercising its right less frequently than if the government had never imposed the pretextual restriction in the first place. This uncertainty and fair chance of shooting oneself in the foot should be enough to dissuade most forms of strategic restrictions, but failing that, minority and politically unpopular groups will continue to be able to challenge restrictions under the Equal Protection[131] and Due Process Clauses.[132]

The Equal Protection and Due Process Clauses of the Fourteenth Amendment inform the type of society in which we wish to live: we outlaw discrimination and check government power not just because it's good policy, but because more fundamentally, prejudice is un-American. So if this new test is aimed on the Coasian interaction between two private parties, does that focus ignore society's broader interest that "it is always in the public interest to prevent the violation of a party's constitutional [or fundamental] rights"?[133]

No: although this Article proposes a test that turns on the parties' private, Coasian position, it simply weighs one constitutional right (religion) against another right that is equally fundamental. When two core rights must be balanced, the public does not have an ex ante interest in vindicating one right over another but instead has an interest in getting the balance right. Not only does this test offer an objective, principled way to do so, it recognizes that because these cases are hard and close, we will sometimes get the balance wrong. Its advantage is that by identifying and then siding with party who is not the cheapest cost avoider, the parties—and society as a whole—have the best chance to bargain to correct balance.

One final critique, touched on in Part III.C above, is that this Coasian analysis will work better on rights that fall on a continuum and can be compromised, such as the length of one's beard[134] or limited fishing by the

131. Romer v. Evans, 517 U.S. 620 (1996).

132. Lawrence v. Texas, 539 U.S. 558 (2003).

133. G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994); United States v. Berks Cnty., Pa., 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (finding a public interest in vindicating fundamental rights, such as voting, even though the right to vote is not guaranteed by the Constitution).

134. *See* Holt v. Hobbs, 135 S. Ct. 853, 861 (2015).

Yup'ik individuals on the Lower Kuskokwim,[135] instead of rights that are all-or-nothing, such as circumcising one's child or ritually sacrificing an animal.[136] While true, we should not let the perfect be the enemy of the good and we must evaluate this Coasian test and its objections not in a utopian vacuum but against the existing free exercise test.

B. Critique of the Current Free Exercise Test

If we want to be "a government of laws, and not of men,"[137] then we want outcomes to turn on objective rules instead of the people who wield them. For all of its faults, the lens of Coasian bargaining and the cheapest cost avoider is objective; it is hard for a policymaker to, intentionally or not, pour her personal policy preferences into that test and skew the outcome. That is the problem with the current test for free exercise claims: it is subjective and its decisions are based in part on who decides them.

Smith defines the current federal Free Exercise Clause but its reach has been cabined: the federal government's actions are instead analyzed under RFRA,[138] and some states do not use *Smith* to interpret their state free exercise clauses[139] but instead use the more rights-protective *Sherbert* test.[140] "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest,"[141] which is similar to RFRA: "Government may substantially burden a person's exercise of religion only if it 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."[142]

The terms "compelling governmental interest" and "substantially burdens" make these tests particularly subjective. First, to decide if an interest is "compelling" requires one to subjectively assess the interest's worth, and second, the subjectiveness is exacerbated by the failure of the Supreme Court and Congress to define what "compelling governmental interest" means[143]—aside from being an "interest of the highest order,"[144] the term is standardless.

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135. *See* 1 Trial Transcript at 61, *Ivan*, No. 4BE-12-00627CR (Apr. 16, 2013) (on file with author).

136. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

137. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting Part the First, Article XXX, of the Massachusetts Constitution of 1780).

138. RFRA does not bind the states. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

139. *See* Open Door Baptist Church v. Clark Cnty., 995 P.2d 33 (Wash. 2000).

140. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994).

141. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990).

142. 42 U.S.C. § 2000bb-1(b) (West, Westlaw through 2014 P.L. 113-296).

143. Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 194 (2009).

144. *Smith*, 494 U.S. at 888.

Similarly, the definition of "'substantial burden' has varied over time,"[145] moving between the inconsistent definitions of "substantial pressure on an adherent to modify his behavior and to violate his beliefs"[146] while excluding "programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs[.]"[147]

In order to decide the legal questions of if an interest is compelling or if a burden is substantial, this subjective test forces judges to "act[] more as fact-finders than as expositors of the law,"[148] who, lacking a definition or a more objective test, are unconstrained from "indulg[ing]" their "political or policy preferences,"[149] even if unintentionally, to answer a politically-freighted and, to many, deeply personal question: what is the role and scope of religion and God in America?

I assume that all judges answer that question by honestly asking what the Constitution commands, and even if no one's political or policy preferences unconsciously colors their analysis, the lack of a firm, objective rule makes it harder for judges to render politically unpopular opinions,[150] and if those opinions, especially those that "stand up to what is generally supreme in a democracy: the popular will,"[151] carry a subjective gloss ("I believe this interest seems compelling" or "this burden seems substantial") instead of an objective skeleton ("the law's clear, firm, and preexisting guidelines compel this outcome"), those opinions and the courts will seem less legitimate to the public. Instead, the "*Rule* of Law, the law of *rules*," such as this Article's objective Coasian test, should "be extended as far as the nature of the question allows."[152]

CONCLUSION

This Article does not advocate for a particular result in individuals versus individuals free exercise claims—say, more religious practice or less—but rather it suggests *how* to objectively evaluate them. By linking the test to parties' objective and anodyne aspects—is there a possible Coasian bargain and, if not, then who is the cheapest cost avoider?—and not the subjective and more politically loaded substance of their asserted right—for example, for instance birth control, freedom from discrimination, and religious practice and

145. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) (citing cases).

146. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)..

147. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

148. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

149. *Id*. at 1179.

150. *Id*. at 1180.

151. *Id*.

152. *Id*. at 1187.

belief—the analysis is less likely to be warped by policymakers' preferences and can dispassionately answer hard, unclear free exercise questions.

This new test is also timely: more individuals versus individuals free exercise challenges are on the horizon. Three days after issuing its *Hobby Lobby* decision, the Supreme Court ordered that the contraceptive mandate could not be applied to Wheaton College, a small religious school in Illinois;[153] other free exercise versus contraceptives cases are percolating in the courts,[154] and Congress has weighed a legislative response.[155] And as courts, legislators, and other policymakers examine the scope of nondiscrimination laws, particularly those that protect lesbian, gay, bisexual, transgender, and questioning persons, they must engage and answer religious objections to those laws.[156] This Article offers a way how.

153. On Application for Injunction, Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014).

154. *See, e.g.*, Annex Med., Inc. v. Burwell, No. 13-1118, 2014 WL 4378763 (8th Cir. Sept. 5, 2014); Brandt v. Burwell, No. 14-CV-0681, 2014 WL 4170671 (W.D. Pa. Aug. 20, 2014); Louisiana Coll. v. Sebelius, No. 12-0463, 2014 WL 3970038 (W.D. La. Aug. 13, 2014).

155. Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Cong. (2014).

156. *See, e.g.*, Indiana Religious Freedom Restoration Act, Ind. Code § 34-13-9 (2015) (exempting natural and artificial persons from laws of general applicability, such as nondiscrimination laws, if they "substantially burden a person's exercise of religion" and allowing them to sue for damages and declaratory and injunctive relief against the government for current or "likely" substantial burdens); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (determining that wedding photographer may not use a lesbian couple's sexual orientation as a reason to refuse to photograph their commitment ceremony).