B DOCUMENT ANALYSIS CONTINUUM

Directions: List each document under the column that indicates where it belongs on the continuum.

Limits free exercise of religion under the First Amendment.	Neither limits nor supports free exercise of religion under the First Amendment.	Supports free exercise of religion under the First Amendment.
		

DOCUMENT A

UNITED STATES CONSTITUTION, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

critical THINKING

1. What did the Founders mean by "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"?
2. Why did the Founders deem free exercise of religion and of speech so vital to self-government?
3. List a variety of ways you see Americans freely expressing their religion.

DOCUMENT B

EXCERPTS FROM JAMES MADISON, *ON PROPERTY*, MARCH 29, 1792

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and *which leaves to everyone else the like advantage*.

In the former sense, a man's land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

…If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence [inference?] will have been anticipated, that such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other

critical THINKING

1. How did Madison define property? Is it a natural right?
2. What did Madison call "the most sacred of all property"?
3. Madison notes that when "an excess of power" exists no property of any sort is safe, including in his opinions. Explain how that applies to the "property" of one's conscience and religious beliefs.
4. In Madison's view, how will the United States earn respect as a just government? How does this apply to respect for its citizens' opinions and beliefs?

DOCUMENT C

EXCERPTS FROM THE RELIGIOUS FREEDOM ACT OF 1993

Nov. 16, 1993 [H.R. 1308] An Act to protect the free exercise of religion.

SEC. 2. The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in 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

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

PURPOSES. The purposes of this Act are to restore the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION. 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.

(c) JUDICIAL RELIEF. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

SEC. 5. DEFINITIONS. As used in this Act –

(1) the term "government" includes a branch, department, agency, instrumentality, and official … of the United States, a State, or a subdivision of a State …

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

critical THINKING

1. What is the purpose of the statement in Section 2? Write a one-sentence paraphrase of it.
2. What are the stated purposes of this Act? How does it relate to the United States Constitution?
3. Three requirements must be met in order to provide the government with an exception to religious protection: "substantial burden", "compelling governmental interest," and "least restrictive means." What do these words or phrases mean?
4. Why are "definitions" included in the text of the Act? How is "government" defined? How is "exercise of religion" defined?

Document D

SHERBERT V. VERNER (1963) AND *WISCONSIN V. YODER* (1972)

Sherbert v. Verner (1963)

Case Background

Adell Sherbert, a member of the Seventh-Day Adventist Church, was fired by her employer because she would not work on the Sabbath Day of her faith, Saturday. Unable to secure another job because she would not work on Saturday, she filed a claim for South Carolina unemployment compensation benefits. South Carolina law provided that a person filing for these benefits was ineligible if he or she had, without good reason, rejected available suitable work. Ms. Sherbert's application was denied on the ground that she would not accept suitable work when offered. The Supreme Court heard the case, addressing the question of whether the denial of unemployment compensation violated the First and Fourteenth Amendments. The Court held that South Carolina's eligibility restrictions did impose a significant burden on Sherbert's ability to exercise her faith freely. It also found that there was no compelling state interest that justified the substantial burden on Sherbert's First Amendment right.

Excerpts from the Majority Opinion (Justice Brennan), *Sherbert v. Verner* (1963)

As so applied, the South Carolina statute abridged appellant's right to the free exercise of her religion, in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment.

Disqualification of appellant for unemployment compensation benefits, solely because of her refusal to accept employment in which she would have to work on Saturday contrary to her religious belief, imposes an unconstitutional burden on the free exercise of her religion.

There is no compelling state interest enforced in the eligibility provisions of the South Carolina statute which justifies the substantial infringement of appellant's right to religious freedom under the First Amendment.

This decision does not foster the "establishment" of the Seventh-Day Adventist religion in South Carolina contrary to the First Amendment.

critical THINKING

1. Summarize what the Court held regarding Sherbert's free exercise of her religion. How, according to the opinion, had South Carolina restricted that right?
2. What is the relationship of the Fourteenth Amendment to the case?
3. What is meant by "unconstitutional burden"?
4. What does "compelling state interest" mean? Why was it mentioned in this opinion?

Wisconsin v. Yoder (1972)

Case Background

Wisconsin law required all children to attend public schools until age 16. Jonas Yoder and Wallace Miller, Old Order Amish, and Adin Yutzy, a Conservative Amish Mennonite, refused to send their children to such schools after the eighth grade, arguing that high school attendance was contrary to their religious beliefs. The evidence showed that the Amish did provide informal vocational education to their children after eighth grade; that Yoder, Miller, and Yutzy sincerely believed that high school attendance was contrary to their religion; and that they believed the law endangered their own salvation and that of their children. They were prosecuted under the Wisconsin mandatory attendance law. The Court held, in a unanimous decision, that an individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade.

Excerpts from the Majority Opinion (Chief Justice Burger), *Wisconsin v. Yoder* (1972)

The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.

Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs.

…The State's claim that it is empowered, as ***parens patriae***, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free exercise… forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child… or in any other way materially detract from the welfare of society.

PARENS PATRIAE
state authority to act as guardian of disabled people, or of children under the age of 18, whose welfare is jeopardized [Latin: parent of the country]

critical THINKING

1. What does the Chief Justice say holds equal, or more, weight to the government's interest in universal education?
2. If the Wisconsin law had been enforced on the Yoder, Miller, and Yutzy families, what effect would it have had on their First Amendment religious rights?
3. What does the Chief Justice hold regarding the government's claim about its claim of *parens patriae*? Why?

Document E

AFFORDABLE CARE ACT OF 2010 AND HRSA GUIDELINES

Excerpts from the Affordable Care Act of 2010, Section 2713, paragraph 1

SEC. 2713. Coverage of Preventive Health Services

(a) IN GENERAL.—A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum, provide coverage for and shall not impose any cost sharing requirements— …

… (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

Health Resources and Services Administration (HRSA) Women's Preventive Services Guidelines

Under the Affordable Care Act, women's preventive health care … generally must be covered by health plans with no cost sharing.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS [Health and Human Services] commissioned an IOM study to review what preventive services are necessary for women's health and well-being … HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women.

Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.	As prescribed.

*** The guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.*

Institute of Medicine (IOM) a congressionally-chartered non-profit organization that advises the government on science, health, and medical issues

critical THINKING

1. Does the language of the Affordable Care Act of 2010 directly require employers to provide coverage for birth control and abortifacients?
2. What is the relationship of the HRSA Guidelines to the ACA?
3. What is the stated purpose of the HRSA Guidelines?

DOCUMENT F

EXCERPTS FROM THE MAJORITY OPINION (JUSTICE ALITO), *BURWELL V. HOBBY LOBBY* (2013)

We must decide … whether the Religious Freedom Restoration Act of 1993 (RFRA) … permits the United States Department of Health and Human Services (HHS) to demand that … closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

ABORTIFACIENT
an agent, such as a drug, the induces abortion

… we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

… under RFRA … enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

critical THINKING

1. How does the Court's decision address the question of whether RFRA protections apply to for-profit businesses?
2. Explain what the Court held with regard to the following three requirements that, under RFRA, must be met in order for the government to deny First Amendment religious protections:
   a. substantial burden
   b. compelling governmental interest
   c. least restrictive means
3. Summarize what the Court stated was the effect of the ACA and the HHS contraceptive mandate on the Green family's sincerely-held religious beliefs.

DOCUMENT G

EXCERPTS FROM THE DISSENT (JUSTICE GINSBURG), *BURWELL V. HOBBY LOBBY* (2013)

In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.

…Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.

…The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations … Indeed, until today, religious exemptions had never been extended to any entity operating in "the commercial, profit-making world."

…Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community…The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight.

…I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.

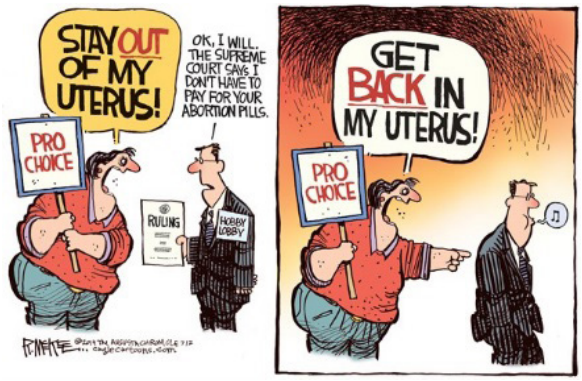
…Even if Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well-being.

critical THINKING

1. Does Justice Ginsburg hold that for-profit corporations enjoy protection of religious freedom under RFRA? Why or why not?
2. What does this opinion state regarding the RFRA "substantial burden" test? (see Document C)
3. What does this opinion state regarding compelling governmental interest?
4. What language in HRSA guidelines comes into direct conflict with the issues raised by RFRA and *Burwell v. Hobby Lobby*?

H POLITICAL CARTOONS ABOUT *HOBBY LOBBY*

"Workers' Cross to Bear" By permission of Adam Zyglis



"Hobby Lobby Ruling" By permission of PoliticalCartoons.com

"Birth Control: Not My Boss's Business" By permission Chip Bok and Creators Syndicate, Inc.

critical THINKING

1. What specific workers is the cartoonist depicting? Describe the way the cartoonist is representing them.
2. What assumptions does the cartoonist seem to be making about these workers?
3. Is the three-part RFRA "test" RFRA (see Document C) referenced in any way? If so, how? If not, why might the cartoonist not have referenced it?

critical THINKING

1. Both of these cartoonists employed a two-panel format. Why? How does this format help them to make their point?
2. What viewpoint is being expressed in the first panel of each?
3. How does the second panel relate to the first panel of each?
4. Write a sentence describing the statement(s) being made by the cartoonists.