# STRIKING THE HARMONIOUS CHORD FOR CORPORATE SOCIAL RESPONSIBILITY AND INDIVIDUALS: AFFIRMING CLOSELY HELD CORPORATIONS' RELIGIOUS OBJECTIONS TO THE HHS MANDATE

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## I. INTRODUCTION

Reverence for religious freedom in the United States of America is an anomaly to modernity. More often than not, the more developed a nation becomes, the lower its accommodation for religious beliefs.[1] Nevertheless, this anomaly is not a mistake; it is a liberty under law that Americans have cherished for centuries. As Joe Biden's 1993 Senate Judiciary Committee's Report made clear, "[m]any of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American."[2]

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1. John Mikhail, *The Free Exercise of Religion: An American Perspective*, *in* 39 EIN NEUER KAMPF DER RELIGIONEN? 271, 273 (Matthias Mahlmann & Hubert Rottleuthner eds., Duncker & Humblot GmbH 2006).

2. S. REP. NO. 103-111, at 4 (1993). *See also* Dwight G. Duncan, *Religious Freedom: Use It or Lose It*, WITHERSPOON INST. (June 26, 2012), http://www.thepublicdiscourse.com/2012/06/5754/ ("[A]s a practical matter no one can force someone to *believe* or not to believe something. The free exercise of religion means the ability to *act* on those beliefs. To practice our religion in private or in public. To proclaim our religion to others, if we wish. To spend our money in furtherance of our own religion, and not in the furtherance of anyone else's. To promote what we think is moral, and not to promote anything we think is immoral. These are all necessary

For individuals, religious liberty is a well-established personal freedom. But does that liberty extend to individuals' involvement in corporations? Corporations enjoy varying protections afforded by the Bill of Rights, but the issue of protecting corporate religious freedom has yet to be completely unraveled.[3] On June 30, 2014, the Supreme Court exempted religious owners of closely held, for-profit corporations from a Department of Health and Human Services (HHS) mandate.[4] The mandate required group health plans and health insurance issuers to provide all contraceptive services approved by the Food and Drug Administration (FDA).[5] With corporate social responsibility (CSR) gaining commercial and judicial support, these HHS mandate cases recognized that the complexities of a closely held corporation are a proper context to protect individual free exercise rights under the Religious Freedom Restoration Act (RFRA).[6]

This Note makes several observations in order to determine the correct balance for this precarious issue. Part II chronologically examines the foundations of American religious liberty in light of the Free Exercise Clause, Supreme Court interpretations of religious protections' fundamental nature, and RFRA's strict scrutiny standard. Part III reviews principles of corporate law and demonstrates the differences between closely held and publicly traded corporations that constitutional law does not readily recognize. Part IV provides a brief overview of the HHS mandate and resulting regulations. Part V discusses the five major cases that defined the circuit split, paying close attention to *Burwell v. Hobby Lobby Stores, Inc.* (*Hobby Lobby*) and *Conestoga Wood Specialties Corp. v. Sebelius*. Part VI reviews Justice Alito's majority opinion affirming the Tenth Circuit's *Hobby Lobby* decision, Justice Ginsburg's dissent, and Justice Kennedy's concurrence. Finally, Part VII advocates for closely held corporations' religious exemption as a means of fostering corporations' duties of responsibility and accountability.

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consequences of the idea of religious freedom. But law without practice is a dead letter. . . . When it comes to our precious heritage of religious freedom, we must either use it or lose it.").

3. Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY L. REV. 1, 24–26 (2014).

4. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

5. *Id.*; 42 U.S.C. § 300gg-13 (2012).

6. *See generally* Stephen Brammer et al., *Religion and Attitudes to Corporate Social Responsibility in a Large Cross-Country Sample*, 71 J. BUS. ETHICS 229 (2007).

## II. FREE EXERCISE JURISPRUDENCE: A PROTECTION FOR INDIVIDUALS

Faced with the task of persuading the states to ratify the Constitution, the American framers designed the Bill of Rights to protect citizens from government officials overstepping their boundaries.[7] Once ratified, the list of protections seemed nevertheless "more talk than substance."[8] In the First Amendment context, "the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling."[9] However, as America developed as a nation and state-established churches disappeared, free exercise became a valuable gem.

### *A. To Believe and to Act:* Cantwell

In a 1940 speech case, *Cantwell v. Connecticut*, the Supreme Court began applying the Free Exercise Clause to states through the Fourteenth Amendment.[10] Holding that Connecticut's public solicitation statute violated a Jehovah's Witness's Due Process right, the Court explained that the First Amendment's two religious freedom clauses embraced the "freedom to believe and [the] freedom to act."[11] Unlike belief, which was beyond the state's power of regulation, action had limits.[12] Although laws could not absolutely prohibit dissemination of particular religious beliefs, generally applicable laws could potentially pass Due Process requirements when regulating solicitation, meeting places, and other aspects of the police power.[13] Connecticut's delegation of authority to the secretary of the public welfare in approving certificates to solicit was "a forbidden burden upon the exercise of liberty protected by the Constitution."[14] *Cantwell*'s close look at the state's procedure for solicitation certification exemplifies free exercise as a "liberty right" as

7. George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 667 (1992).
8. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109 (1990).
9. *Id.* at 1110.
10. Cantwell v. Connecticut, 310 U.S. 296 (1940).
11. *Id.* at 303.
12. *Id.* at 304.
13. *Id.*
14. *Id.* at 307.

opposed to an "equality right."[15] Free exercise requires protection from "regulation . . . imposed by the secular state."[16] *Cantwell* steered American jurisprudence toward religious accommodation that would be defined and applied for the next half century.[17]

### *B. The Creation and Half-Cremation of Strict Scrutiny*

#### 1. Articulating a Standard: *Sherbert* and *Yoder*

Consistent with *Cantwell*'s expansive interpretation of free exercise, the Supreme Court articulated a strict scrutiny standard in *Sherbert v. Verner*.[18] South Carolina denied unemployment compensation to Adell Sherbert after she was fired for refusing to work on Saturdays in accordance with her Seventh Day Adventist beliefs.[19] The Court held that the state's unemployment statute substantially infringed on Sherbert's religious beliefs, "effectively penaliz[ing] the free exercise of her constitutional liberties."[20] The state could only enforce this law against a "highly sensitive constitutional area"; even then, the circumstances needed to demonstrate that religious liberty represented "the gravest abuses, endangering paramount interests."[21] This case, the Court promptly concluded, presented no such abuse.[22]

Having resolved the issue, Justice Brennan contrasted Sherbert's circumstances with those in *Braunfeld v. Brown*, decided two years earlier. In *Braunfeld*, the Court refused to exempt Jewish merchants from a Pennsylvania statute that prohibited certain businesses from opening on Sunday.[23] *Braunfeld* determined that the statute imposed only an indirect

15. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 885–86 (1994).
16. *Id.* Enumerated constitutional protections for religion seem to indicate that the balance should swing in favor of religious, not secular, protections. *See* Shadee Ashtari, *Antonin Scalia Says Constitution Permits Court to "Favor Religion Over Non-Religion," Politics*, HUFFINGTON POST (Oct. 2, 2014, 5:34 PM), http://www.huffingtonpost.com/2014/10/02/antonin-scalia-religion-government_n_5922944.html.
17. Mikhail, *supra* note 1, at 279.
18. Sherbert v. Verner, 374 U.S. 398 (1963).
19. *Id.* at 399–401.
20. *Id.* at 406.
21. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
22. *Id.* at 407.
23. *Id.* at 408–09.

burden because it did not outlaw any religious practices.[24] Instead, allowing business owners to allocate a different day of the week to rest and remain open on Sunday could present a "competitive advantage," an incentive to claim insincere religious beliefs for economic benefit.[25] The *Sherbert* majority established that any competitive advantage was completely absent in Ms. Sherbert's circumstances.[26]

Nearly a decade later, *Wisconsin v. Yoder* relied upon *Sherbert*'s test in exempting members of the Old Order Amish religion and the Conservative Amish Mennonite Church from Wisconsin's generally applicable mandate requiring children between the ages of 7 and 16 to attend school.[27] The Court reviewed Amish history and beliefs in affirming that the parents' objections were "firmly grounded in . . . central religious concepts."[28] The state's interest in public education was not absolute and would need to outweigh the parents' religious interest with "sufficient magnitude."[29] The Court emphasized that the protected interest needed to be religious, not merely philosophical.[30] Even though state regulation would inevitably impinge on religious liberty, some religious conduct will lie "beyond the power of the State to control, even under regulations of general applicability."[31]

No inconsistencies emerged by comparing the ends achieved by Amish education with the state's compelling interests in equipping "self-

24. Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961). *Braunfeld* placed a caveat on this reasoning, stating paradoxically: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Id.* at 607.

25. *Id*. at 609. Justice Brennan actually rejected this reasoning in his *Braunfeld* concurrence: The state's compelling interest was

> not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

*Id.* at 614 (Brennan, J., concurring in the judgment and dissenting in part).

26. *Sherbert*, 374 U.S. at 408–09.

27. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

28. *Id.* at 210. In support of their claims, the Amish defendants presented an extensive history of their beliefs and the impact of those beliefs on their children's education. *Id.* at 210–12.

29. *Id.* at 214–15.

30. *Id.* at 216.

31. *Id.* at 220.

reliant and self-sufficient participants in society."[32] The Court concluded that "[w]hatever their idiosyncrasies as seen by the majority," the Amish parents were not requesting an exemption from Wisconsin's compulsory education law that would threaten the children's well-being.[33] Even the state's leading precedent, *Pierce v. Society of Sisters*, provided "a charter of the rights of parents to direct the religious upbringing of their children."[34]

2. Evolution or Erosion? *Lee*, *Bowen*, and *Lyng*

For nearly two decades, *Sherbert* and *Yoder* were the foundations of an imperfect mold for free exercise jurisprudence. Subsequent cases, such as *United States v. Lee*, began to retract *Sherbert*'s broad application.[35] *Lee* reversed an Amish plaintiff's exemption from withholding and paying his employees' social security taxes.[36] Relying on *Braunfeld*'s observation that American society was "made up of people of almost every conceivable religious preference," the *Lee* Court determined that the social security exemption was an unjustifiable accommodation because of the compelling government interest in "a sound tax system."[37] Congress's existing exemption recognized religious protections for self-employed Amish workers but did not reach Amish employees.[38]

After *Lee*, the Court did not always find an exemption necessary when a federal law conflicted with a person's religious beliefs. In *Bowen v. Roy*, the Court held that the continued use of an already administered Social Security number was not detrimental to Stephen Roy's Native American "belief that control over one's life is essential to spiritual purity and indispensable to 'becoming a holy person.'"[39] Citing Justice Douglas's concurrence in *Sherbert*, Chief Justice Burger clarified that the Free Exercise Clause acted as a bar on government action, not as an

32. *Id.* at 221.
33. *Id.* at 222, 230.
34. *Id.* at 233 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (upholding an injunction on behalf of Catholic and private schools against Oregon's compulsory education attendance statute in the 1920s)).
35. *See* United States v. Lee, 455 U.S. 252 (1982).
36. *Id.* at 254.
37. *Id.* at 259–60 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).
38. *Id.* at 261.
39. Bowen v. Roy, 476 U.S. 693, 696 (1986).

endorsement for individual religious beliefs.[40] Recognizing the significance of denying a religious objection, the Court stated that strict scrutiny was not applicable to laws that were "facially neutral and uniformly applicable."[41]

Building on *Bowen*, the Court further curbed free exercise in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[42] In *Lyng*, the Court considered the free exercise implications of paving a federal road through a forest held sacred by the Yurok, Karok, and Toloway Indian Tribes.[43] The Tribes argued that unlike *Roy*, where religious exercise was only minimally affected, this federal road would "physically destroy the environmental conditions and the privacy without which the [religious] practices cannot be conducted."[44] Nevertheless, the Court asserted that the government was not bound to endorse others' religious exercise and was free to use its own land as it saw fit: "[I]ncidental effects of government programs . . . [without coercion do not] require government to bring forward a compelling justification for its otherwise lawful actions."[45]

Though inconsistent and somewhat shaded by the *Lee* line of cases, the lower courts steadfastly applied *Sherbert*'s strict scrutiny. For instance, in *Int'l Society for Krishna Consciousness, Inc. v. Barber*, the Second Circuit held that a New York state-fair regulation requiring vendors to stay at their booths impermissibly impeded a Hare Krishna sect's free exercise of religious sankirtan practice.[46] The group's

40. *Id.* at 700.
41. *Id.* at 707.
42. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
43. *Id*. at 442.
44. *Id.* at 449.
45. *Id.* at 450–51.
46. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981). Sankirtan is an abbreviated form of "sankirtana":

> The word sankirtana has a twofold meaning, indicated by two distinct translations of its root. The Sanskrit verb kirt, from which the word kirtana derives, means on the one hand "to praise" or "to glorify" and on the other "to tell" or "to call." Thus the act of kirtana is meant to praise or glorify God while telling or calling man to participate in this glorification. Kirtana always takes place in a congregation of saintly people, as indicated by the prefix sam, meaning "all together," or "congregationally." The prefix sam may also act as an intensive, connoting "perfect" or "complete" kirtana. Therefore sankirtana carries the sense that when kirtana is performed congregationally, the glorification of God and the calling of man is perfect or complete.

sankirtan fell within the ambit of free exercise protections,[47] and the booth rule proscribing the religious practice substantially infringed the group's free exercise.[48] The court held the booth rule was not the least restrictive means for the state to prevent fraud.[49]

Courts relied on strict scrutiny to uphold free exercise in a variety of areas, including waiver of jury trial,[50] refusal to comply with a driver's license color-photo requirement,[51] unconstitutionality of a state statute prohibiting ministers from holding elective office,[52] and unconstitutional encroachment of federal law in regulating a minister's employment.[53] The *Sherbert* test thus "occupie[d] a preferred position" in safeguarding "religious liberty . . . [as] an independent liberty."[54] Nevertheless, critics labeled the Court's stance as morphing into a strange animal, half "strict separationist" and half "zealous accommodationist."[55]

### *C. Stripping* Sherbert*:* Smith *and the Reinstatement of Rational Basis*

On April 17, 1990, *Employment Division, Department of Human Resources v. Smith* replaced *Sherbert*'s standard with rational basis.[56] Oregon's Employment Division denied unemployment benefits to two former drug counselors who were fired for ingesting peyote during a ceremony of the Native American Church.[57] The Oregon Supreme Court recognized that the use of peyote for Native American religious purposes stretched back several centuries and that Congress intended the use of

Garuda Dasa, *The Phenomenon of Sankirtana*, KRISHNA.COM, http://www.krishna.com/phenomenon-sankirtana (last visited Jan. 26, 2014).

47. *Barber*, 650 F.2d at 443.

48. *Id.*

49. *Id.* at 446–47. The three other means the court noted were (1) enforcement of existing sankirtan conditions that the group and fair officials agreed upon in the first place; (2) using the fair's liaison system of enforcing conditions and dealing with complaints; and (3) criminal penalties for prohibited conduct. *Id.*

50. United States v. Lewis, 638 F. Supp. 573 (W.D. Mich. 1986).

51. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

52. Kirkley v. Maryland, 381 F. Supp. 327 (D. Md. 1974).

53. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

54. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring in the judgment and dissenting in part).

55. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 115 (1992).

56. *See generally Smith*, 494 U.S. 872.

57. *Id.* at 874 (noting that possessing peyote, a Schedule I hallucinogen under the Federal Controlled Substances Act, is prohibited under state statute).

ceremonial peyote to be protected by the First Amendment.[58] The Oregon Court held that while the state law prohibited the absolute use, federal law and Congress "unmistakably" believed that "the use of peyote in the Native American Church is the kind of free exercise of religion that the First Amendment protects."[59]

The Supreme Court reviewed the case only to determine whether the exemption was "permissible."[60] Upon finding that the two men were denied unemployment based on misconduct instead of on a violation of the state statute, the Court recast the scope of free exercise.[61] The indirect effect under a generally applicable law prohibiting a religious practice does not disturb First Amendment guarantees; one's religious beliefs cannot be the primary basis for an exemption from a generally applicable law.[62] The Court concluded that such exemptions were only appropriate either in "hybrid" cases, where the Free Exercise Clause merges with independent constitutional rights, or in challenges against statutes providing "a system of individual exemptions."[63] Religious exemptions to laws of general applicability, argued Justice Scalia, would be applicable to "civic obligations of almost every conceivable kind" and uncontainable.[64]

Concurring in the judgment, Justice O'Connor delivered a stinging dissent against the Court's deliberate disregard of free exercise jurisprudence.[65] Strict scrutiny shouldered the difficulty of distinguishing religious belief from action.[66] *Sherbert*'s intrinsic value "effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty" except against the highest compelling governmental interests.[67] Justice Blackmun agreed, noting that after such "painstaking development," the demise of strict scrutiny

58. Smith v. Emp't Div., 763 P.2d 146, 148 (Or. 1988); 111 CONG. REC. 15977 (1965).

59. *Smith*, 763 P.2d at 149.

60. *Smith*, 494 U.S. at 895.

61. *Id.* at 891 (O'Connor, J., concurring in the judgment and dissenting in part).

62. *Id.* at 878–79 (majority opinion).

63. *Id.* at 881–82, 884. That is, in the face of other individual exemptions, the government could not deny a religious exemption that was otherwise valid.

64. *Id.* at 888.

65. *Id.* at 892 (O'Connor, J., concurring in the judgment and dissenting in part).

66. *Id.* at 894.

67. *Id.* at 895.

meant "a wholesale overturning of settled [free exercise] law."[68] After *Smith*, confusion and disapproval rippled through the federal court system, requiring multiple courts to reconsider pending cases that would otherwise have prevailed under *Sherbert*.[69] As strict scrutiny slipped into the sunset, Congress sought to rescue religious protections from disappearing completely.

### *D. Restoring Strict Scrutiny: The Religious Freedom Restoration Act of 1993 and Its Implications*

*Smith* outraged Americans as a whole. Three months after the *Smith* decision, a bipartisan Congress introduced its first RFRA bill; in September, Congress began RFRA hearings.[70] For the next three years, Congress deliberately shaped RFRA into a statutory reimplementation of the *Sherbert* test and constructed the unprecedented statement that "free exercise of religion is a substantive civil liberty, that the religious minorities among us get to practice their faith and not merely to think about it or to believe in it."[71]

RFRA was a rare case of nearly unanimous support.[72] In November 1993, it passed the House unanimously and the Senate with only three

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68. *Id.* at 907–08 (Blackmun, J., concurring in the judgment and dissenting in part).

69. *See, e.g.*, United States v. Phila. Yearly Meeting of Religious Soc'y. of Friends, 753 F. Supp. 1300, 1306 (E.D. Pa. 1990). The court discussed how the Quaker organization seeking exemption from the enforcement of tax levies on conscientious objectors would have prevailed under *Sherbert*. Expressing its bitter disagreement, the court concluded:

> It is ironic that here in Pennsylvania, the woods to which Penn led the Religious Society of Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so.

*Id.*

70. Religious Freedom Restoration Act of 1990, H.R. 5377, 101st Cong. (1990); *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. i (1990).

71. Laycock, *supra* note 15, at 895. *See also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 173 (1995); *but see* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 117 (1996) (expressing disapproval with RFRA's expansion of free exercise).

72. *Religious Freedom Restoration Act: Hearing Before the Comm. on the Judiciary of the United States S.*, 102d Cong. 5, 148 (1992) (statements of William Nouyi Yang, Legislative Counsel, American Civil Liberties Union, and Michael P. Farris, President,

nay votes.[73] The overwhelming support behind RFRA illustrates individuals' "unalienable right" to religious free exercise.[74] RFRA affirmed "that no substantial burden should be placed on a religious practice without a compelling interest."[75] As guidance, the Court could look to statutory parallels, legislative history, and *Sherbert*-era decisions to determine practical boundaries of RFRA's strict scrutiny standard.[76]

As a statutory reinforcement of free exercise in response to *Smith*, RFRA's construction—with religious protections for "persons"—sweeps wider than the First Amendment.[77] Whereas the Free Exercise Clause only limited regulation, RFRA affirmatively allows persons to use religious exercise as a claim or defense and provides relief not only where a law directly conflicts with religious exercise but also where a law indirectly conflicts through general applicability.[78] Before *Hobby Lobby*, RFRA seemed limited only to individuals and nonprofit organizations as persons, with applications to any kind of for-profit corporations unsettled.[79] As a Supreme Court review of *Hobby Lobby* and *Conestoga* became unavoidable, principles of corporate theory

Home School Legal Defense Association); *see also* 102 CONG. REC. S2822–24 (daily ed. Mar. 11, 1993) (statement of Sen. Ted Kennedy).

73. Lupu, *supra* note 71, at 173–75. *Cf.* Noah Feldman, *Gays Have Rights, the Pill Doesn't*, BLOOMBERGVIEW (July 10, 2014, 12:17 PM), http://www.bloombergview.com /articles/2014-07-10/gays-have-rights-the-pill-doesn-t ("The law may be bad policy, but it was enacted by a unanimous House and a near-unanimous Senate, and it stands for a defensible moral choice in favor of religion and against the majoritarian preferences of the political moment.").

74. 42 U.S.C. § 2000bb (2012).

75. Laycock, *supra* note 15, at 897.

76. Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 150–51 (1995). In response to *Smith*'s narrow holding, RFRA casts a wide net. For instance, a law eliciting a RFRA claim or defense does not have to burden "conduct . . . compelled by religion" but conduct in which "religion has to be the dominant or the principal motivation." *Id.* at 151.

77. 42 U.S.C. § 2000bb-1 (2012). The Court has held that the statute's broad language is not congruent with or proportionate to any remedial power granted to Congress under the Fourteenth Amendment and therefore unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507, 530, 532 (1997). Many states, however, have passed their own RFRA statutes.

78. 42 U.S.C. § 2000bb-1 (2012). *See also* Michael Barone, Jr., Comment, *Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate*, 29 TOURO L. REV. 795, 817 (2013) (stating that "RFRA is actually stricter than the *Sherbert* test").

79. Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012); *see also* Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724 F.3d 377, 3810 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

seemed either to collide or merge with constitutional protections meant for individuals.[80]

## III. SOME PRINCIPLES OF CORPORATE THEORY

Since ancient times, humans have sought to solve problems together instead of on their own.[81] This communal nature makes incorporation a favorable form of business that has become deeply embedded into our system of law. Well-settled law, as *Trustees of Dartmouth College v. Woodward* illustrates, identifies the American concept of incorporation:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.[82]

Unlike human beings, corporations are "immortal."[83] Their existence begins once their articles of incorporation are filed in a selected state,[84] and their primary purpose remains commercial, even in nonprofit

80. After the Supreme Court's grant of certiorari to Hobby Lobby and Conestoga, as well as its *Burwell* decision, an abundance of legal scholarship began reviewing the permissibility of for-profit corporations to assert RFRA claims. *See, e.g.*, Christopher S. Ross, Note, *Shall Businesses Profit if Their Owners Lose Their Souls? Examining Whether Closely Held Corporations May Seek Exemptions from the Contraceptive Mandate*, 82 FORDHAM L. REV. 1951 (2014) (providing for a renewed framework for statutory and constitutional interpretation of corporate free exercise).

81. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 4 (3d ed. 1983).

82. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

83. Rutledge, *supra* note 3, at 28 n.133 (quoting Sutton's Hospital, 10 Coke's Rep. 1, 32 (1613)). Criminal liability for corporations, for example, remains a subject of controversy. *See generally* David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378 (1988) (stating that "criminal law has followed an erratic and often unreasoned path from the proposition that a corporation could not commit any crime, to the modern notion that a corporation is capable of manslaughter"); Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919 (1990) (elaborating on corporate penalties through fines, probation, adverse publicity, quarantine, and dissolution).

84. Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 278–79 (2008).

status.[85] For example, churches incorporate to commercially participate, obtain title to property, or otherwise act as a formal entity.[86]

### *A. Roles of Corporations*

A corporate formation represents a re-organization of rights, not an elimination of them.[87] With "enormous flexibility," the corporate charter establishes limitations and capabilities by contract; throughout its existence, the corporation retains only what it has been granted—no more, no less.[88] The board of directors controls business operations—just as owners would any other business organization—but with liability limited to the corporation.[89] As this corporeal body, the corporation plays numerous roles with varying responsibilities.

85. Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 157 (2012) (stating that "shareholder value maximization places an alleged legal duty on corporations and the directors that control them to focus relentlessly on increasing share price" (quoting LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 24 (2012))); *The Purpose of the Corporation*, ASPEN INST., http://www.aspeninstitute.org/policy-work/business-society/purpose-of-corporation (last visited Jan. 25, 2014).

86. *Cf.* Daniel R. Suhr, *On the Freedom of a Congregation: Legal Considerations When Lutherans Look to Change Denominational Affiliation*, 13 TEX. REV. L. & POL. 365 (2009) (discussing property title issues for churches that switch denominations based on theological disagreements); Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 440 (1995) (stating that "statutes for not-for-profit corporations often mirror the state statutes for general for-profit business corporations").

87. Eugene Volokh, Hobby Lobby*, the Employer Mandate, and Religious Exemptions*, VOLOKH CONSPIRACY (Dec. 2, 2013, 12:40 AM), http://www.volokh.com/2013/12/02/hobby-lobby-employer-mandate-religious-exemptions/ (urging that corporations are not only legal fictions, whose rights only extend as far as the human rights they aim to protect, but also "useful legal fictions" because of their very protective nature).

88. Alan J. Meese & Nathan B. Oman, Hobby Lobby*, Corporate Law, and the Theory of the Firm*: *Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 277 (2014). *See* Gilardi v. U.S. Dep't of HHS, 733 F.3d 1208, 1218 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014); Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1355–56 (2013) (discussing justifications of a for-profit corporation's religious exercise based on similarities with a nonprofit organization).

89. HENN & ALEXANDER, *supra* note 81, §§ 71, 73; Meese & Oman, *supra* note 88, at 77.

1. Corporations as "Persons"

Under the Dictionary Act, the term "person" in a given statute presumes to include corporations and many other business organizations, not just individuals.[90] Only statutory context may rebut this presumption.[91] To determine whether the presumption has been rebutted, the Court will apply the "purely personal" rights test articulated in a footnote in *First Nat'l Bank of Boston v. Bellotti*, a free speech case.[92] In *Bellotti*, the Court noted that there are purely personal rights that corporations cannot claim because, given the rights' "nature, history, and purpose," such rights only apply to individuals.[93] As later discussed, the Supreme Court now recognizes that a closely held for-profit corporation may claim RFRA protections as a person.[94]

2. Corporations as Trustees

Today, the public is incensed by corporate violations of not only law but also ethical obligations.[95] Outcry against Enron Corporation produced the Sarbanes-Oxley Act of 2002, which reformed financial disclosure requirements and independent oversight to prevent corporate corruption.[96] Such regulation is intended to create transparency and trust that will "reward compliance and deter transgression."[97]

Despite this now-embarrassing imprint of corruption, corporate officers have long been held to principles of fiduciary duty and ethics in

90. 1 U.S.C. § 1 (2012); Meese & Oman, *supra* note 88, at 275–76.

91. Meese & Oman, *supra* note 88, at 276.

92. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

93. *Id.*

94. *See infra* Part VII; *cf.* Ross, *supra* note 80, at 1993–94 ("Regardless of how broadly courts construe RFRA's 'context,' corporations arguably fall within RFRA's reach.").

95. For example, "Enron" has become a household name for corporate ethical violations and their effects on society. *See* Skilling v. United States, 130 S. Ct. 2896, 2912 (2010) (denying an appeal for Jeffrey Skilling, a former Enron executive arguing that his trial in Houston was marred by "the community passion aroused by Enron's collapse and the vitriolic media treatment aimed at him" (internal quotation marks omitted)).

96. Hannah Buxbaum, *Regulating Corporations: Who's Making the Rules*, AM. SOC'Y INT'L L. PROC., Apr. 2003, at 269, 269.

97. Frances Meadows, *Recurring Themes: Corporate Governance and Corruption*, 5 INT'L L. F. DU DROIT INT'L 97, 98 (2003).

their roles as trustees.[98] These principles emerge from the close parallels between corporations and trusts.[99] Corporate fiduciary relationships demonstrate the confidence, reliance, and dependence shareholders place in corporate officers to perform entrusted responsibilities: "The relation between man and man entails a responsibility of the one towards the other."[100] To beneficiaries extends the duty of loyalty, which has been called the "fulfillment of the whole moral law"; a director mirrors such a relationship with stewardship of corporate assets.[101] Violations of such duties naturally meet public outcry.[102]

### 3. Corporations as Members of Society

As persons and trustees of commercial enterprise, corporations play a unique role in society.[103] With a corporation's vast grant of economic power comes a compelling responsibility to give back and leave a beneficial business legacy.[104] Though the role of corporations is primarily commercial, this social responsibility has become a vital

98. DAVID COWAN BAYNE, THE PHILOSOPHY OF CORPORATE CONTROL: A TREATISE ON THE LAW OF FIDUCIARY DUTY 24 (1986).

99. *See id.* at 32–33 (extending the parallelism associated with the corporate controller and the trustee).

100. *Id.* at 44–45.

101. *Id.* at 55 (quoting JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 15 (1915)); *see* Nicholas San Fillipo IV & Liwayway A. Reilly, *What Shareholders Should Know About Their Duties to Other Shareholders*, PROF. INS. AGENTS 2 (Apr. 2005), http://www.lowenstein.com/ (follow "Publications" hyperlink; then search "Publications Search" for "What Shareholders Should Know") ("[I]f it would look, sound[,] or feel bad, if it smacks of unfairness or, if it could be considered self-serving, there is a good chance that any such action could be found to be in breach of a fiduciary duty.").

102. *See* Robert J. Pile & Thomas G. Douglass, Jr., *Ethical and Professional Issues for Lawyers in the Post-Enron World*, SUTHERLAND ASBILL & BRENNAN LLP (Sept. 19, 2002), *available at* http://www.sutherland.com//portalresource/lookup/poid/Z1tOl9NpluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuW3Dn0!/fileUpload.name=/EthicalandProfessionalIssuesPostEnron101402.pdf.

103. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 708–10 (2002).

104. *See* John Hood, *Do Corporations Have Social Responsibilities?*, *The Freeman*, FOUND. FOR ECON. EDUC. (Nov. 1, 1998), http://www.fee.org/the_freeman/detail/do-corporations-have-social-responsibilities. Henry Ford famously defended this principle in the seminal case *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (1919): "'My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.'"

focus.[105] Religion plays a natural part in many corporations' morals and values.[106] This is hardly a new approach; from the time of the Renaissance, businesses around the world have flourished under religious beliefs.[107] For example, recent studies demonstrate that "when the degree of religious piety is beyond a certain threshold," religion has a "positive effect . . . on [corporate social responsibilities]" of financial disclosure, litigation, and corporate governance.[108]

### *B. Closely Held or Publicly Traded: Effects and Distinctions*

The term "closely held corporation" denotes a corporation owned by only a few shareholders, often family members.[109] Closely held corporations appeared before publicly traded corporations,[110] with the two kinds of business organizations demonstrating cognizable

105. Knowledge@Wharton, *See Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 28, 2012), http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/; *Why Socially Responsible Companies Get More Business*, TRUiST BLOG (Jan. 6, 2014), http://truist.com/why-socially-responsible-companies-get-more-business/.

106. Seamus P. Finn, *The Power of Religion to Influence Corporate Responsibility*, HUFFINGTON POST (July 16, 2011, 1:32 PM), http://www.huffingtonpost.com/rev-seamus-p-finn-omi/religion-corporate-responsibility_b_897715.html.

> Historically, it can be demonstrated that the impact of faith on the social responsibility of any given corporation can be traced directly to the religion and character of the owner or CEO and how he/she integrated their value system into the corporation's identity and operations. It was generally assumed that the decisions and actions of the business leader directing the corporation were significantly influenced by the religious principles at the foundation of their personal lives.

*Id. See also infra* Part V (discussing the religious influence on corporations bringing challenges to the HHS Mandate).

107. David Miller & Timothy Ewest, *Rethinking the Impact of Religion on Business Values: Understanding Its Reemergence and Measuring Its Manifestations*, J. INT'L BUS. ETHICS, Jan. 2010, at 49, 50–53, *available at* https://www.princeton.edu/faithandwork/tib/research/beijing ("[P]eople of all levels and profiles increasingly desire to live a holistic life, which includes among other things their faith, and a desire to integrate faith and work.").

108. Pattanaporn Chatjuthamard-Kitsabunnarat et al., *Does Religious Piety Inspire Corporate Social Responsibility (CSR)? Evidence from Historical Religious Identification*, 21 APPLIED ECON. LETTERS 1128, 1132–33 (2014), *available at* http://www.tandfonline.com/doi/pdf/10.1080/13504851.2014.912032.

109. 3 TREATISE ON THE LAW OF CORPORATIONS § 14:1 (3d ed. 2013).

110. Wells, *supra* note 84, at 272–73 (stating that the original close corporations acted as "self-perpetuating oligarchies" rather than as business organizations).

differences in management, communication, and shareholder interest.[111] Unique to closely held corporations, the few shareholders often act as managers of corporate affairs.[112] In addition, it is not uncommon for employees of closely held corporations to double as shareholders—acting to keep shares within few hands and deriving a substantial amount of their own income from the corporation's profits.[113] Thus, voting power exercised by minority shareholders has a greater impact on the closely held corporation than the publicly traded corporation, where one shareholder vote will hardly sway a corporate decision.[114] With the close relationship comes a tighter duty to the corporation: "Relationships among shareholders of closely-held corporations have been held to a higher fiduciary standard than is recognized in other corporations."[115]

Despite the closely held corporations' distinctions and judges' willingness to enforce the entities' agreements although they may not conform with "statutory norms,"[116] constitutional law (and, consequently, interpretation of federal statutes based on constitutional law) tends to treat all corporations the same.[117] *Bellotti*'s purely personal rights test fails to account for individuals' rights in a closely held corporation.[118] In such corporations, the owners' goals translate into company goals and may include a nonprofit mission, such as the furtherance of religion, amid a for-profit business structure.[119] While corporate law seeks to

111. Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 41–42 (2001).

112. Wells, *supra* note 84, at 274.

113. *Id.* at 275.

114. *Id.* at 275, 286.

115. HENN & ALEXANDER, *supra* note 81, § 268.

116. Wells, *supra* note 84, at 306–09 (explaining the rise of judicial lenience toward close corporations' need for flexibility, especially in stock transfer restrictions, rather than the rigid structure imposed by state statutes favoring transferability).

117. Joo, *supra* note 111, at 39 (observing that the *Bellotti* Court "analyzed [the corporations] as generic corporations . . . . neither consider[ing] nor mention[ing] whether they were small enterprises or large, publicly traded corporations").

118. *Id.* at 40.

119. *Compare* JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 6 (2008) ("[Some] corporations appear to be following . . . [the nonprofit mission] model of blending the efficiency of the for-profit corporation paradigm with different mixes of the social and community ideals of the not-for-profit sector. This hybrid model has not met with success outside of the closely held corporation setting because when share ownership becomes too widely dispersed it becomes practically impossible for the shareholders to agree on any goals beyond simple profit maximization."), *with* LYNN A. STOUT, GOVERNANCE STUDIES AT BROOKINGS INST., THE PROBLEM OF CORPORATE PURPOSE 2 (2012) (stating that before publicly traded

ensure that business management flows responsibly and accountably, constitutional law and statutory interpretation must recognize and protect the rights of individuals involved in the close corporation.[120] Where this involvement includes the exercise of religious principles, protections must be even more robust to uphold that centuries-old "treasured birthright."[121]

## IV. THE RELIGIOUS OBSTACLE: CONTRACEPTIVE COVERAGE UNDER THE HHS MANDATE

The conflict between individuals' religious influence on their companies and government regulation appeared in the objections of several closely held corporations regarding the contraceptive mandate promulgated under the Patient Protection and Affordable Care Act (PPACA). The PPACA's Coverage of Preventive Health Services provision requires all group health plans, insurance issuers, and individual coverage plans to provide, without cost sharing, minimum coverage of all preventive care and screenings approved by the Health Resources and Services Administration (HRSA), an agency of HHS.[122] In detailing what preventive services demonstrate "strong scientific evidence of their health benefits," the HRSA commissioned the Institute of Medicine (IOM) to conduct a study and create guidelines ensuring "that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible."[123] In July 2011, IOM's Recommendation 3.5 included "[t]he full range of . . . [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive

companies became popular, "[t]he question of corporate purpose [for close corporations] wasn't really on the table, because the company's purpose was whatever its controlling shareholder or shareholders wanted it to be. Some controlling shareholders might care only about profits, but others worried about the welfare of their employees, consumers, and communities, and about the growth and health of the business itself.").

120. *Id.* at 67.

121. S. REP. NO. 103-111, at 4 (1993); *see also infra* Part VII.

122. 42 U.S.C. § 300gg-13 (2012).

123. *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Oct. 18, 2014).

capacity."[124] Backed by the Departments of Revenue and Labor, HHS integrated these recommendations into the final regulations.[125]

The codified regulations require coverage for all "evidence-informed preventive care and screenings" for women and delegate to HRSA authority to establish exemptions.[126] Under the Failure to Meet Certain Group Health Plan Requirements provision of the Internal Revenue Code, noncompliant health plans are taxed at $100 per day per affected individual until the plan is compliant.[127] Under the Shared Responsibility for Employers Regarding Health Coverage provision, "large employers" who fail to offer minimum essential coverage to full-time employees are also fined under a specific formula.[128] The regulations provide exemptions for "religious employers" and "[e]ligible organizations."[129] Although the regulations authorize the HHS Secretary to create more exemptions, past-Secretary Kathleen Sebelius made it clear that these

124. *Recommendations for Preventive Services for Women That Should Be Considered by HHS*, INST. MED. NAT'L ACAD. (July 19, 2011), http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Recommendations.aspx.

125. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–27 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

126. 45 C.F.R. § 147.130 (2013).

127. 26 U.S.C. § 4980D (2012).

128. 26 U.S.C. § 4980H. This formula is defined as "an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month." *Id.*

129. 45 C.F.R. § 147.130–.131. To qualify as a "religious employer," entities originally needed to meet the regulation's four criteria: (1) religious values must be the central focus of the organization; (2) organization employees share these religious values; (3) those served by the organization must also share these religious values; and (4) the organization must be nonprofit. HHS later amended the regulation, leaving only the fourth "nonprofit" requirement. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8460–62 (Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, 156). This change, however, was not designed to broaden the exemption's scope but to ensure that it only applied to nonprofit organizations. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874 (July 2, 2013) (to be codified at 45 C.F.R. pts. 147, 156); *see also* Tan, *supra* note 88, at 1312. The second exemption, an "eligible organization," also has four requirements: (1) based on religious reasons, the organization opposes providing contraceptive services in some form; (2) the organization is nonprofit; (3) the organization purports to be religious; and (4) the organization "self-certifies" adherence to requirements (1) through (3) of the eligible organization exemption in accordance with the form and manner prescribed by the HHS Secretary. 45 C.F.R. § 147.131.

two exemptions were the final carve-outs.[130] For-profit corporations categorically fell under neither of these two exemptions and thus remained subject to the mandate.

Prior to the passage of the PPACA, healthcare insurance issuers were not required to provide coverage for contraceptives, and concerns regarding increasing costs of women's preventative health services prompted the IOM to place the burden on employers.[131] The contraceptive coverage mandate is also highly regarded as a signature achievement in expanding women's reproductive rights,[132] but the breadth of this expansion created religious concerns for many, including owners of closely held corporations that clearly remained subject to the mandate.

## V. THE CIRCUIT SPLIT

Religious owners of for-profit, nonreligious corporations believed that the contraception mandate attacked their sincerely held religious beliefs by coercing them to pay for something they believe destroys human life.[133] Much of the difficulty, however, lay in the novel question not yet answered by the Supreme Court: Can a for-profit corporation, which claims no special religious status, assert religious objections under RFRA in order to escape a federal mandate?[134] Prior to *Burwell*, each

130. Press Release, Secretary Kathleen Sebelius, U.S. Dep't of Health & Human Servs. (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

131. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122–23 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); INST. MED. NAT'L ACAD., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (2011).

132. *See generally* Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade*, 1973–1980,* 87 CHI.-KENT L. REV. 571 (2012) (viewing *Roe v. Wade* as a decisive factor in enabling compromises on contraception); Chad Brooker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169 (2012) (approving the refusal to extend the HHS mandate's religious exemption).

133. *See, e.g.*, Autocam Corp. v. Sebelius, 730 F.3d 618, 620–21 (6th Cir. 2013), *vacated sub nom.* Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014) (arguing that compliance with the mandate requires plaintiffs to violate their Catholic beliefs).

134. Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012); *see also* Robert Barnes, *Contraceptive Mandate Divides Appeals Courts*, *Politics*, WASH. POST (July 26, 2013), http://www.washingtonpost.com/politics/contraceptive-mandate-divides-appeals-courts/2013/07/26/a83269ec-f630-11e2-9434-

federal court approached the issue differently—investigating standing, interpreting "person" under RFRA, or analyzing whether corporations can assert religious freedom under the First Amendment.[135] On November 26, 2013, the Supreme Court granted certiorari to the two cases that created the initial circuit split: *Hobby Lobby Stores, Inc. v. Sebelius* and *Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS*.[136] Meanwhile, three other circuits, relying in some part on these two initial decisions, added their own variations.

### *A. Corporations as RFRA Persons:* Hobby Lobby

The Greens, an evangelical Christian family from Oklahoma City, own Hobby Lobby, a nationwide arts and crafts store, and Mardel, a Christian bookstore.[137] The Greens operate both stores through a family trust, with each member signing a commitment to run the companies "according to their faith and to use all assets to 'create, support, and leverage the efforts of Christian ministries.'"[138] Consistent with this commitment, Hobby Lobby represents itself as a corporation operating in accordance with "biblical principles" and "[h]onoring the Lord."[139] The company states: "We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust

60440856fadf_story.html (noting that the Supreme Court has deferred the question in the past, expressly refusing to provide a clear answer).

135. Barnes, *supra* note 134.

136. Mary Pat Dwyer, *Petition of the Day*, SCOTUSBLOG (Nov. 7, 2013, 10:07 AM), http://www.scotusblog.com/2013/11/petition-of-the-day-501/. The issue presented was:

> Whether the Religious Freedom Restoration Act of 1993 (RFRA), which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

*Id.* (citation omitted). The language of the issue focused on RFRA's substantial burden and least restrictive means prongs, assuming the government's compelling interest in contraception. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

137. *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited Jan. 23, 2014); *Welcome to Mardel*, MARDEL CHRISTIAN & EDUC., http://www.mardel.com/ (last visited Jan. 23, 2014).

138. Supplemental Brief of Appellants at 1, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294).

139. *Our Company*, *supra* note 137.

Him for our future."[140] In addition, the company endeavors to establish a workplace atmosphere that "build[s] character, strengthen[s] individuals and nurture[s] families."[141] Mardel operates as a faith-based company whose products provide "spiritual and intellectual needs."[142] In accordance with its Christian mission, Mardel donates ten percent of its pre-tax profits to another private company that translates Bibles into different languages.[143] Neither Hobby Lobby nor Mardel are open on Sundays.[144]

The Greens hold a sincere religious belief that life begins at conception and, thus, do not "provid[e] access to, pay[] for, train[] others to engage in, or otherwise support[] abortion-causing drugs and devices."[145] However, under the mandate's broad scope, the Greens' insurance plan must cover four contraceptives that prevent fertilized eggs from being implanted in the uterus.[146] Although the Greens already provided some contraceptive coverage, they objected to providing coverage for those four contraceptives because of their pro-life religious beliefs.[147] If they chose to follow their beliefs, the Greens faced two possible monetary penalties for Hobby Lobby alone: (1) an estimated total of $475 million per year, or $1.3 million per day, for refusal to comply with the mandate; or (2) a tax of $26 million per year if the corporation declined to provide health insurance coverage at all.[148]

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140. *Id.*
141. *Id.*
142. *About Us*, MARDEL CHRISTIAN & EDUC., http://www.mardel.com/about/ (last visited Jan. 23, 2014). Mardel also quotes *Ephesians* 4:12 (NAS) as part of its mission: "For the equipping of the saints for the work of service, to the building up of the body of Christ; until we all attain to the unity of the faith, and of the knowledge of the Son of God." *About Us: Mission Statement*, MARDEL CHRISTIAN & EDUC., http://www.mardel.com/about/mission.aspx (last visited Sept. 19, 2014).
143. *About Us: Ministries*, MARDEL CHRISTIAN & EDUC., http://www.mardel.com/about/ministries.aspx (last visited Sept. 19, 2014).
144. *Our Company*, *supra* note 137.
145. Verified Complaint Jury Demanded at 2, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2013) (No. 12-1000); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124–25 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); David Green, *Column: Christian Companies Can't Bow to Sinful Mandate*, USA TODAY (Sept. 12, 2012, 11:17 AM), http://usatoday30.usatoday.com/news/_opinion/forum/story/2012-09-12/hhs-mandate-birth-control-sue-hobby-lobby/57759226/1.
146. *Hobby Lobby*, 723 F.3d at 1123.
147. *Id.*
148. *Id.* at 1125.

On September 12, 2012, the Greens filed for injunctive relief against the mandate in the Western District of Oklahoma, asserting rights under RFRA.[149] Citing the existing exemptions, the Greens and their corporations argued that the law was not generally applicable.[150] When the IOM established the mandate guidelines, it failed to invite input from any religious groups or any other groups opposed to the mandate and its underlying policies.[151] As a result, the mandate was "nothing other than a deliberate attack on the religious beliefs of the Greens and millions of other Americans."[152] Amici for Hobby Lobby, including members of Congress who supported RFRA from its early beginnings in the 1990s, urged that RFRA's language was broadly drafted "to prevent those charged with implementing the law from picking and choosing whose exercise of religion is protected and whose is not" and to ensure that RFRA would remain the "single standard for all."[153]

The government argued that *United States v. Lee* spoke otherwise: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[154] Using *Lee*'s framework, the government premised Hobby Lobby and Mardel as "for-profit secular [corporations]" devoid of any religious purpose or connection to a "formally religious entity such as a church."[155] Instead, the companies' own "choice to enter into a commercial activity" was the only burden sustained on religious freedom; the contraceptive mandate was merely a legitimate exercise of the government's regulation of commerce.[156]

149. Verified Complaint Jury Demanded, *supra* note 145, at 4–5.
150. *Id.* at 15–19.
151. *Id.* at 20–21.
152. *Id.* at 5.
153. Brief of Amici Curiae Senators Orrin G. Hatch et al. at 2–3, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294).
154. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 2, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 12-1000) (quoting United States v. Lee, 455 U.S. 252, 261 (1982)).
155. *Id.* at 13–15.
156. *Id.* at 17 (quoting Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994)).

1. Standing: Corporations as Channels for Individuals' Religious Beliefs

The for-profit, secular distinction formed the basis for the trial court's decision for HHS.[157] The court concluded that RFRA's context could not allow such a corporation to claim personhood.[158] Similarly, under a constitutional inquiry, the court found that general business corporations could not be a conduit for exercising religion, unlike churches, which have been upheld as proper avenues for practicing *Bellotti*'s purely personal rights.[159] HHS supporters noted that corporations, as artificial persons, "lack a spiritual element [and thus] have no soul" and that the mandate's burden, if any, was not substantial.[160]

On appeal, however, Hobby Lobby's critics lost. The Tenth Circuit Court of Appeals held "that Hobby Lobby and Mardel [were] entitled to bring claims under RFRA."[161] Rejecting the for-profit, secular distinction, the court established that individual freedom could not be protected "unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[162] Thus, the question of religious freedom under the HHS mandate hinges not on whether a corporation can generally assert religious exercise on its own (either constitutionally or statutorily) but on whether the corporation could be a channel for individuals' First Amendment freedoms of "speech, assembly, petition

157. *Hobby Lobby*, 870 F. Supp. 2d at 1285 (conceding that Hobby Lobby and Mardel operate according to Christian principles but nonetheless beginning the inquiry into the Greens' religious effects on the businesses with the introductory phrase "[a]lthough Hobby Lobby and Mardel are for-profit, *secular* corporations" (emphasis added)).
158. *Id.* at 1291; *see* 1 U.S.C. § 1 (2012).
159. *Hobby Lobby*, 870 F. Supp. 2d at 1291 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012)).
160. Rutledge, *supra* note 3, at 28 (quoting Tipling v. Pexall, 2 Bulst. 233 (1613); Sutton's Hospital, 10 Coke's Rep. 1, 32 (1613); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 477 (3d ed. 2003); 1 JOHN POYNDER, LITERARY EXTRACTS FROM ENGLISH AND OTHER WORKS 268 (1844); Arthur W. Mechen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 253 (1911)). *See also* Imani Gandy, *Orrin Hatch's Amicus Brief in the Hobby Lawsuit: All Bark, No Bite*, RH REALITY CHECK (Mar. 8, 2013, 8:55 AM), http://rhrealitycheck.org/article/2013/03/08/orrin-hatchs-amicus-brief-in-the-hobby-lobby-lawsuit-all-bark-no-bite/.
161. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
162. *Id.* at 1133 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984)).

for the redress of grievances, and the *exercise of religion*."[163] For-profit businesses already lay at the heart of several free exercise Supreme Court cases, including *Braunfeld* and *Lee*; in these cases, free exercise rights were never extinguished, only limited.[164]

Profit-making and the corporate form are pseudo-distinctions for deciding the extent of free exercise.[165] Defining the for-profit nature as an exclusively secular characteristic ignores any business's religious nature and presents a worrisome quandary for free exercise. If tax law were somehow to dissolve the corporate identity of "nonprofit" and "for-profit," would free exercise then extend to all corporations or dissolve with the distinction?[166] The government had no good answer. Free exercise, reasoned the court, is not a "bright-line rule" between a profit-making enterprise and a nonprofit organization.[167] Furthermore, congressional statutes recognize religious organizations without reference to a profit motive.[168]

In holding for Hobby Lobby and Mardel, the court primarily focused on protecting the Greens' religious freedom.[169] The government "raise[d] the specter" of large publicly traded corporations asserting RFRA protections, but this hypothetical was simply absent from the circumstances.[170] Hobby Lobby and Mardel are closely held corporations, and the Greens run those businesses according to religious convictions. To "[h]onor[] the Lord in all we do by operating the company in a manner consistent with Biblical principles" does more to show the corporations' religious natures than the for-profit motive does in demonstrating their secular enterprises.[171]

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163. *Id.* Churches and nonprofit organizations are examples of such channels. *Id.* at 1133–34 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993)).

164. *Id.* at 1134–35; United States v. Lee, 455 U.S. 252 (1982); Braunfeld v. Brown, 366 U.S. 599 (1961).

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

166. *Id.*

167. *Id.* at 1136.

168. *Id*.

169. *Id.* at 1137.

170. *Id.* at 1136; *see* Meese & Oman, *supra* note 88, at 289 ("[P]ublicly held firms that do invoke RFRA in an effort to avoid regulation may face more obstacles than closely held corporations. . . . [such as demonstrating] that the asserted religious belief is sincere or that the challenged imposition is a substantial burden on the exercise of that belief.").

171. *Hobby Lobby*, 723 F.3d at 1122 (internal quotation marks omitted); *see also* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO.

2. Substantial Burdens, Insufficient Interests, and False Disparity

Concluding that Hobby Lobby and Mardel could assert religious freedom under RFRA, the Tenth Circuit waded into strict scrutiny, beginning with the substantial burden analysis.[172] Substantial burden under RFRA does not disappear when a third party uses contraception.[173] The burden results from the "intensity of the coercion" on a person to violate his or her sincere religious belief.[174] The belief itself must only be sincere, not "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection[s]."[175] Mandating contraceptive coverage was clearly substantial, and the options of either corporation violating its religious convictions or paying hefty fines were a "Hobson's choice."[176] The government had the burden to show why the new contraceptive requirements should disturb the plaintiffs' peace.[177]

In the end, the government's public health and gender equality interests were insufficient to overcome the corporations' RFRA claims.[178] Exempting Hobby Lobby and Mardel would barely add to the millions of women already exempt from the mandate.[179] The government also raised the issue of negative religious externalities, the imposition of

MASON L. REV. 59, 63 (2013) (asserting "that profit-making businesses and their owners are capable of engaging in protected religious exercise under federal law").

172. *Hobby Lobby*, 723 F.3d at 1137.

173. *Id.*

174. *Id.*

175. *Id.* at 1139 (quoting Thomas v. Review Bd. Emp't Sec. Div., 450 U.S. 707, 714 (1981)). Some debate has developed over whether the four contraceptives at issue in *Hobby Lobby* amount to abortion (hence their characterization as abortifacients, or abortion-inducing drugs). *See* Sherry F. Colb, *What Counts as an Abortion, and Does It Matter?*, *Verdict: Legal Analysis and Commentary from Justia*, JUSTIA (July 23, 2014), http://verdict.justia.com/2014/07/23/counts-abortion-matter. Nevertheless, the debate focuses more on philosophical implications about life beginning at conception and that basis as a sincere religious belief; in fact, no HHS mandate case argued the sincerity of belief. *Compare Hobby Lobby*, 1123 F.3d at 1137, *and* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial."), *with* Brian Honermann, *The Supreme Court Deals a Blow to the Affordable Care Act and Access to Contraceptives*, O'NEILL INST. FOR NAT'L & GLOBAL HEALTH L. (June 30, 2014), http://www.oneillinstituteblog.org/health-human-services-et-al-vs-hobby-lobby-et-al/ ("[A] growing body of scientific evidence calls into question this supposed abortifacient effect.").

176. *Id.* at 1140–41. "Hobson's choice" refers to "a choice between what is offered and nothing at all." MICROSOFT ENCARTA COLLEGE DICTIONARY 684 (2001).

177. *Hobby Lobby*, 723 F.3d at 1142–43.

178. *Id.* at 1143–44.

179. *Id.* at 1143.

the corporations' religious beliefs on the employees.[180] Had HHS not approved any exemptions, the government may have won.[181] But the mandate's existing religious exemptions eviscerated any argument of disparity—allowing an exemption here could not be characterized as unjust.[182]

*Hobby Lobby*'s emphasis on corporations as religious persons is telling. The court never decided whether the Greens themselves were substantially burdened—their injury was redressed when the court held the corporations to be RFRA persons.[183] Indeed, the case tested the extent of religious conduct and its intersection with corporate law.[184] The Greens never claimed a special right of their corporations to have independent religious beliefs. Instead, their argument centered on the relationship of corporate owners' religious beliefs and the effects of those beliefs on a closely held corporation.[185] Corporations may very well "[have] no soul,"[186] but any guidance they do have depends on the people that operate them.[187] If religious freedom is to continue occupying the preferred position it did in 1993, emphasis in the corporate context must be placed on protecting the free exercise of individuals.

180. *Id.* at 1144–45; *see* Brief for the Appellees at 30, 46, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294).

181. *Hobby Lobby*, 723 F.3d at 1144–45; *see* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 343, 363 (2014) (characterizing religious exemptions from the mandate as permissive and arguing that such "accommodation[s] [may] not impose material [costs] on third parties" because "cost-shifting accommodations grant a privilege to those who engage in the accommodated practice at the expense of unbelievers and other nonadherents who do not").

182. *Hobby Lobby*, 723 F.3d at 1144–45.

183. *Id.* at 1121.

184. Richard W. Garnett, *The Righteousness in Hobby Lobby's Cause*, L.A. TIMES (Dec. 5, 2013), http://articles.latimes.com/2013/dec/05/opinion/la-oe-garnett-obamacare-contraception-surpreme-cou-20131205.

185. *Id.* (observing that the Greens have conducted business in this manner "for nearly 40 years").

186. Rutledge, *supra* note 3, at 28.

187. Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 634 (2014).

### *B. No Passing Through:* Conestoga Wood Specialties Corp.

In Pennsylvania, *Conestoga* presented the same issues as *Hobby Lobby*.[188] Fifty years ago, Conestoga Wood Specialties began as a small garage business in the township of East Earl.[189] Today, the company operates five facilities in three states and employs over 1,000 employees in its kitchen cabinet manufacturing business.[190] As Conestoga's owners, the Hahn family commits to "the highest ethical, moral, and Christian principles" and operates their family-owned business based on their Mennonite beliefs.[191] One of those beliefs is "that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable."[192] As a result, the Hahns provide "generous" health insurance coverage to all employees but specifically omit abortifacient drugs and contraception they believe has an abortifacient effect.[193] On October 31, 2012, Conestoga's Board of Directors passed "The Hahn Family Statement on the Sanctity of Human Life," quoting "[y]ou shall not kill" and a passage from Psalm 139, acknowledging God as Creator.[194] The statement concludes with an affirmation against "the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life."[195]

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188. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

189. *Our Story*, *About Conestoga*, CONESTOGA WOOD SPECIALTIES CORP., http://www.conestogawood.com/about-conestoga/ (last visited Oct. 20, 2014).

190. *About Us*, *About Conestoga*, CONESTOGA WOOD SPECIALTIES CORP., http://www.conestogawood.com/about-conestoga/ (last visited Oct. 23, 2014).

191. Verified Complaint at 8, *Conestoga Wood*, 917 F. Supp. 2d 394 (No. 12-6744).

192. *Id.*

193. *Id.* at 9.

194. *Id.* at 17.

195. *Id.* at 17–18. The statement, in its entirety provides:

> The Hahn family believes that the Bible is the inspired, infallible and authoritative written Word of God, the one and only eternal God.
>
> Found in the Bible, Exodus 20:13 (NIV) as one of the "Ten Commandments[,"] God commands, "You shall not kill."
>
> Found in the Bible, Psalms, 139:13–16 (NIV), the writer acknowledges God in how he was made and says . . . "For you created my inmost being; you knit me together in my mother's womb. I will praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My

On December 4, 2012, the Hahns filed a complaint in the Eastern District of Pennsylvania on behalf of themselves and their corporation asserting violations under RFRA and Free Exercise, disputing the constitutionality of the HHS mandate, and seeking injunctive relief before the January 1, 2013, insurance coverage deadline.[196] The complaint specifically addressed emergency contraception—the "morning after" pill and ella—and cited the restrictive nature of the mandate exemptions.[197] Three days later, the Hahns filed for a preliminary injunction.[198] In asserting a burden on the corporation's beliefs, the motion argued for less restrictive means of implementing the contraceptive scheme and suggested subsidizing such services.[199]

### 1. Starting at the District Court

At trial, Conestoga heavily relied on *Citizens United v. Federal Election Commission* in asserting that speech and free exercise were inseparable and belonged to corporations.[200] The court, however, relying

> frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth. Your eyes saw my unformed body; all the days obtained for me were written in your book before one of them came to be."
>
> The Hahn family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.

*Id.* at 17–18 (footnotes omitted).

196. *Id.* at 5, 18, 19, 25.

197. *Id.* at 10–11.

198. *Id.* at 2.

199. *Id.* at 15; *see* Katherine Lepard, Comment, *Standing Their Ground: Corporations' Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH. L. REV. 1041, 1069–71 (2013) (citing Newland v. Sebelius, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012)) (suggesting that subsidies could take one of four forms: "(1) creating a contraception insurance plan with free enrollment; (2) directly compensating contraception and sterilization providers; (3) creating a tax credit or deduction for contraception purchasers; or (4) imposing a mandate on the pharmaceutical companies or physicians to give away contraceptive items for free and sponsor education about the products"). Subsidization may sidestep a mandate on corporations but face religious objections from hospitals, physicians, and other health care providers.

200. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724

on *Bellotti*'s purely personal test, sought for a reason in "nature, history, and purpose" for free exercise to apply to corporations.[201] Finding none, the court rejected Conestoga's argument as a "significant leap."[202] Like the *Hobby Lobby* trial court, *Conestoga* embraced the distinction between religious organizations and for-profit, secular corporations.[203] In the court's view, for-profit corporations are per se secular because they cannot practice religion—they cannot pray, worship, or observe sacraments—and are thus inadequate channels for "[r]eligious belief . . . within the minds and hearts of individuals."[204]

In response, Conestoga argued that the closely held company acted as the owner's "alter ego."[205] The alter ego doctrine had recently won in *Tyndale House Publishers, Inc. v. Sebelius*, another mandate case in the D.C. District Court, which held that "the beliefs of a closely held corporation and its owners are [indistinguishable]."[206] The *Conestoga* trial court rejected this argument, observing that *Tyndale* represented a clearer circumstance of alter ego because the Christian book company held weekly chapel services and was 96.5% owned by a nonprofit religious organization.[207] In Conestoga's case, "the substantial overlap of faith and business . . . [was] simply not present."[208] The court concluded that "the corporate form shields the individual members of the corporation from personal liability."[209] Religious belief was an illegitimate basis for piercing the corporate veil.[210]

F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

201. *Id.*

202. *Id.* at 407.

203. *Id.*

204. *Id.* at 407–08.

205. *Id.* at 408.

206. Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116–17 (D.D.C. 2012).

207. *Conestoga Wood*, 917 F. Supp. 2d at 408 n.11.

208. *Id.*

209. *Id.* at 408 (quoting Kellytown Co. v. Williams, 426 A.2d 663, 668 (1981)).

210. *Id.* Professor Rutledge argues that mandate challenges based on piercing the corporate veil falter as abuses of veil piercing doctrine. Rutledge, *supra* note 3, at 43–45. Insider reverse pierce arguments under the mandate do "not . . . take on a benefit [or asset] of the entity but rather [one of its] burden[s], and then . . . object to the 'imposition' of [the] burden." *Id.* at 45. Professor Bainbridge, however, urges that insider reverse veil pierce arguments specifically apply to close corporations and are an entirely proper means of protecting religious freedom. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN

The Hahns argued that the mandate could not be generally applicable because it provided exemptions for nonreligious conduct but failed to provide broader exemptions for religious conduct.[211] Based on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* and *Employment Division, Department of Human Resources. v. Smith*, however, the court held that the HHS mandate was generally applicable to "all health plans 'not falling under an exemption, regardless of those employers' . . . religious inclinations.'"[212] The government's religious exemptions simply stopped short of the Hahns.[213]

The court also denied Conestoga's religious protection claims as persons under RFRA for the same reasons a corporation cannot have religious freedom under free exercise.[214] The court concluded that any burden on the Hahns' religious belief was not substantial because the choice to use contraceptives belongs to the employees.[215] Any link between the Hahns' belief and their employees' use was "too attenuated" and could "not extend to the speculative 'conduct of third parties.'"[216]

2. Upheld at the Third Circuit Court of Appeals

The Third Circuit Court affirmed the lower court's decision, expanding every aspect, especially its rejection of the alter ego, or "passing through," theory.[217] Arising out of the Ninth Circuit's *EEOC v. Townley Engineering & Manufacturing Co.*, the pass-through theory provides that in certain circumstances, a corporation becomes the "mere[] . . . instrument" through which the corporate owners exercise religious freedom.[218] Consistent with their Christian beliefs, the

BAG 2d 235, 242–48 (2013), *available at* http://www.greenbag.org/v16n3/v16n3_articles_bainbridge.pdf.

211. *Conestoga Wood*, 917 F. Supp. 2d at 409.

212. *Id.* (quoting O'Brien v. U.S. Dep't of HHS, 894 F. Supp. 2d 1149, 1162 (E.D. Mo. 2012)) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990)).

213. *Id.* at 410.

214. *Id.* at 411.

215. *Id.* at 414–15.

216. *Id.* at 414–16.

217. Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724 F.3d 377, 387–89 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

218. *Id.* at 387 (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988)).

Townleys enclosed Gospel tracts in each of their company's mailings, printed Bible verses on company documents, donated money to missionaries and churches, and held devotional services during work hours.[219] New employees signed an agreement to abide by the handbook's requirements, which included a requirement to attend paid chapel services.[220] Before determining that the corporation needed to accommodate atheist beliefs, the court concluded the corporation was "merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs."[221] The court chose to take this approach rather than decide "whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers."[222] The court stated that the corporation "presents no rights of its own different from or greater than its owners' rights."[223]

In *Conestoga*, the Third Circuit rejected the Ninth Circuit's idea that a corporation could assert its owners' free exercise rights.[224] Fundamentally, corporations are distinct, legal entities "with legal rights, obligations, powers, and privileges different from those of the natural individuals who created [them]."[225] Conestoga was legally distinct from the Hahns, and any rights belonging to the Hahns could not magically transfer to the corporation.[226] As a result, the HHS mandate required the Hahns to do absolutely nothing in providing contraceptive coverage.[227] Conestoga, the corporation, had the responsibility to provide requisite coverage; any perceived religious oppression was simply based on feelings.[228] The court urged that the real problem was that corporate owners forget that their corporations—even closely held corporations—are separate, and deference must be paid to the distinction and not the

219. *Townley*, 859 F.2d at 612.
220. *Id.*
221. *Id.* at 619.
222. *Id.* at 619–20.
223. *Id.* at 620.
224. Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724 F.3d 377, 387 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
225. *Id.* (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)) (internal quotation marks omitted).
226. *Id.* at 387–88.
227. *Id.* at 388.
228. *Id.*

ignorant impulse.[229] The RFRA conclusion was simple: it did not apply.[230]

Judge Kent Jordan criticized the majority's "rabbit hole where religious rights are determined by the tax code . . . . Meanwhile, up on the surface, where people try to live lives of integrity and purpose, [the for-profit, secular] division sounds as hollow as it truly is."[231] Judge Jordan pointed out that churches are corporate entities through which their members assert religious freedom.[232] Indeed, the majority recognized churches' rights and their relationship to their members but simultaneously rejected the idea that corporate owners could assert religious freedom through the corporate entity.[233] The only real distinction between a church and a business corporation is profit-making, not the corporate entity.[234] If *Conestoga*'s rigid corporate distinction was to be consistent, it must have an effect on churches: "[W]hile one can certainly *say* that religious organizations are special, the (necessary) recognition that religious corporations have Free Exercise rights destroys the reasoning that the court had previously given for saying corporations don't have rights."[235] If the corporate distinction rings true, then all groups are "left in the cold," including churches and traditional religious organizations.[236]

Judge Jordan's response to the mandate's for-profit distinction was twofold. First, he admitted that authority for corporate free exercise is scarce because "there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the Mandate."[237] Second, rather than affirmatively rejecting religious liberty interests for profit-making corporations, the Supreme Court has simply

229. *Id.* (quoting Grote v. Sebelius, 708 F.3d 850, 857–58 (7th Cir. 2013) (Rovner, J., dissenting)).
230. *Id.* at 388–89.
231. *Id.* at 389–90 (Jordan, J., dissenting).
232. *Id.* at 398–99.
233. *Id.* at 385 (majority opinion).
234. *Id.* at 399 (Jordan, J., dissenting). The majority agreed that this was the primary difference. *Id.* at 385 (majority opinion).
235. Will Baude, *Skepticism About the Third Circuit's Rejection of Organizational Free Exercise Claims*, VOLOKH CONSPIRACY (July 26, 2013, 9:41 PM), http://www.volokh.com/2013/07/26/skepticism-about-the-third-circuits-rejection-of-organizational-free-exercise-claims/.
236. *Conestoga*, 724 F.3d at 399 (Jordan, J., dissenting).
237. *Id.* at 399 & n.15 (citing Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, at 1).

deferred the question to the future.[238] Essentially, religious liberties become the smallest fraction in the First Amendment, for "[a]ll groups can enjoy secular free expression and rights to assembly, but only 'religious organizations' have a right to religious liberty."[239] If the Supreme Court had affirmed *Conestoga*, the decision would have severely curtailed religious freedom, not only for individuals but also for all organizations that seek religious ends.

### *C. Prudential Standing and Shareholders:* Autocam Corps.

While *Conestoga* and *Hobby Lobby* took an interest in the corporate free exercise claims and the relationship between corporate owners and their businesses, later cases decided those same issues on rather different footing. In 2013, *Autocam Corp. v. Sebelius* followed *Conestoga* in affirming the district court's preliminary injunction denial and remanding for want of jurisdiction.[240] The Kennedys and their corporations, Autocam Automotive and Autocam Medical, believed that "directly paying for the purchase" of contraceptives through their health plan would violate their Catholic convictions against sinful "material cooperation."[241] Unlike the Hahns in *Conestoga* or the Greens in *Hobby Lobby*, where the families owned all the company shares, the Kennedys owned only a controlling interest in their corporations.[242]

In addressing the Kennedys' standing, the court rejected the pass-through theory like *Conestoga* and invoked the prudential shareholder-standing rule.[243] The Kennedys claimed that the rule did not apply because RFRA stated that "[s]tanding to assert a claim or defense . . . shall be governed by the general rules of standing under article III of the Constitution."[244] Relying on the analysis in *Jackson v. District of Columbia* and the concurrence in *Hobby Lobby*, the court concluded that

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238. *Id.*
239. *Id.* at 401 (quoting Brief for the Appellees at 17, *Conestoga*, 724 F.3d 377 (No. 13-1144)).
240. Autocam Corp. v. Sebelius, 730 F.3d 618, 628 (6th Cir. 2013), *vacated sub nom.* Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014).
241. *Id.* at 621.
242. *Id.* at 620.
243. *Id.* at 622 (citing Franchise Tax Bd. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990); Canderm Pharmacal, Ltd. v. Elder Pharm., Inc., 862 F.2d 597, 602–03 (6th Cir. 1988)).
244. *Id.* (alteration in original); 42 U.S.C. § 2000bb-1(c) (2012).

RFRA never intended to slough off prudential requirements.[245] When the Kennedys claimed the exception to the shareholder-standing rule—that by virtue of their "direct, personal interest" they suffered a "cognizable injury . . . distinct from the harm suffered by [the corporation]"[246]—the court concluded that the supposed religious harm was borne by the Kennedys' corporate leadership, not their involvement as separate persons.[247]

The court then turned to the corporations' personhood qualification under RFRA.[248] Finding no explicit statutory grant of free exercise to for-profit corporations, the court felt that affording personhood status to the corporations "would lead to a significant expansion of the scope of the rights the Free Exercise Clause protected prior to *Smith*."[249] Under this interpretation, only *Citizens United*'s free speech protections, and not religious liberty, extended to corporations as well as individuals.[250]

### *D. It's the Individuals, Not the Corporations:* Gilardi

The D.C. Circuit flipped *Hobby Lobby* upside down. In *Gilardi v. U.S. Dep't of HHS*, the court held that the corporate owners, not the corporations, had standing to assert religious freedom under free exercise.[251] Finding RFRA's "person" term ambiguous, the court looked to ordinary meaning and legislative history to recognize "no basis for concluding a secular organization can exercise religion."[252] Like the Tenth Circuit, the *Gilardi* court "decline[d] to give credence to the notion

245. *Autocam*, 730 F.3d at 623. *See* Jackson v. District of Columbia, 254 F.3d 262, 266–67 (D.C. Cir. 2001) (relying on legislative history to conclude that "RFRA should not 'have [the] unintended consequence[]' of 'unsettl[ing]' standing law" (alteration in original)); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1163 (10th Cir. 2013) (Bacharach, J., concurring) ("[T]he Greens' injury stemming from the Affordable Care Act is purely derivative of the corporations' injury. . . . [T]he obligation falls solely on the corporations."), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

246. *Autocam*, 730 F.3d at 623 (alteration in original) (quoting Potthoff v. Morin, 245 F.3d 710, 718 (8th Cir. 2001)).

247. *Id.*

248. *Id.* at 625. The court and the parties agreed that Autocam had standing. *Id.* at 622.

249. *Id.* at 626.

250. *Id.* at 627–28 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

251. Gilardi v. U.S. Dep't of HHS, 733 F.3d 1208, 1215–16 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014).

252. *Id.* at 1215.

that the for-profit/nonprofit distinction is dispositive."[253] Instead, the court began with the understanding that religious free exercise included believers and "communit[ies] of believers."[254] The court relied on "decades of Supreme Court jurisprudence"[255] and found religious protection applied only to individuals, religious entities and organizations, religious sects and congregations, and religious schools.[256] No cases allowed a secular company to assert standing for religious freedom: "[P]erhaps the novelty of a secular corporation bringing a free-exercise challenge was *too* novel."[257] As far as the pass-through theory went, "dogma does not dictate justiciability" and *Townley*'s conclusion respecting corporations law was at best "dubious."[258]

The Gilardis, however, stood squarely under RFRA's protections—if the nonreligious corporation could not carry the claim, the Gilardis could invoke religious injury separate from their corporate involvement.[259] Contrary to *Conestoga* and *Autocam*, the court characterized the Gilardis' substantial burden as the time at which "a company's owners

253. *Id.* at 1214.

254. *Id.* at 1213 (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1490 (1990)).

255. *Id.* at 1214.

256. *Id.* at 1213 (citing Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 381 (1990); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292 (1985); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 100 (1952); Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 699 (2012); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 425 (2006); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993); Bob Jones Univ. v. United States, 461 U.S. 574, 579–80 (1983)).

257. *Id.*

258. *Id.* at 1215. The court held a short discussion on Catholic theology: *James* 2:26, asserting that "faith without works is dead," made *Townley* a favorable prospect, and amicus briefs submitted by Catholic theologians and the Archdiocese of Cincinnati reinforced the idea that "the Mandate thrusts Catholic employers into a 'perfect storm' of moral complicity in the forbidden actions." *Id.* (quoting Brief of 28 Catholic Theologians and Ethicists as *Amici* Curiae Supporting Plaintiffs–Appellants and Urging Reversal of the District Court at 5, *Gilardi*, 733 F.3d 1208 (No. 13-5069)). The Third Circuit, too, explained the difference between legal and religious impacts, clarifying that the decision was "in no way intended to marginalize the Hahns' commitment to the Mennonite faith" and accepted the Hahns' sincere belief that "it would be a sin to pay for or contribute to the use of contraceptives." Conestoga Wood Specialties Corp. v. U.S. Dep't of HHS, 724 F.3d 377, 389 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

259. *Gilardi*, 733 F.3d at 1218.

fill the basket of goods and services that constitute a healthcare plan."[260] The HHS mandate created an unreasonable expectation: "[O]wners like the Gilardis [must] meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have."[261] While this seemed justified under the separate entity constraints of corporate theory, the Gilardis' choice itself was a substantial burden—either violate religious conviction or pay millions in violation fines.[262]

Recasting the corporate veil bargain, Judge Janice Rogers Brown reasoned that shareholders exchange their own "distinct legal . . . rights, obligations, powers, and privileges" for a corporate "analogue."[263] With no such analogue in this bargain, religious liberties would simply "disappear into the ether,"[264] and sole proprietors, as persons under RFRA, would lose all religious rights when they incorporate.[265] But history has deemed this cost to be too great to place "on the manner in which an individual operates his businesses."[266]

Finding the Gilardis' burden substantial under RFRA, the court deemed the government's interests to be "too broadly formulated," "nebulous[]," "debatable," and, most importantly, not "*compelling*."[267] "[S]afeguarding the public health," though found to be a compelling interest in other cases,[268] could not act as a "talismanic . . . . capacious formula."[269] "[C]ompelled subsidization of a woman's procreative practices" undermined even "a woman's compelling interest in autonomy."[270] Moreover, the World Health Organization's rejection of some FDA-approved contraceptives cast tremendous doubt on whether the mandate truly protected the health and safety of a woman and her fetus.[271] The contraception availability issue ultimately focused on medical "resource parity," a right to which even the Supreme Court

260. *Id.* at 1217.
261. *Id.* at 1217–18.
262. *Id.* at 1218.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 1220–21.
268. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1993).
269. *Gilardi*, 733 F.3d at 1220.
270. *Id.* at 1220–21.
271. *Id.* at 1221.

rejected.[272] Even if a compelling interest emerged, the mandate was not the least restrictive means, because the Gilardis' specifically objected to contraceptives, not the rest of the mandated services.[273]

### *E. Granting a Full Preliminary Injunction:* Korte

One week after *Gilardi*, the Seventh Circuit, faced a consolidated appeal of two Catholic families and their corporations.[274] *Korte*, unlike the other HHS mandate cases, explicitly held that both corporate owners, the Kortes and the Grotes, and their respective corporations had standing under RFRA.[275] The corporations' imminent injuries stemmed from the financial consequences of disregarding the mandate.[276] The Grotes' and Kortes' injuries each had two parts. First, the closely held nature of the corporations drastically affected the families' finances should the violation fines be enforced.[277] Second, acting as agents of the closely held corporations, the families were compelled to violate their religious beliefs by carrying out a federal mandate.[278]

Under RFRA, the court held that for-profit corporations reasonably fell within the scope of persons as corporations.[279] Like *Hobby Lobby*, the court rejected the for-profit, secular distinction.[280] The court concluded that Congress intended for RFRA to be broad; the government's reliance on Title VII of the Civil Rights Act of 1964 had no restrictive effect on RFRA but rather drew exceptions to the relationship between the separate spheres of religious autonomy and government regulation.[281] Similar to *Lee* and *Braunfeld*, profit-making did not make a difference, because the Court's free exercise decisions relating to business ventures did not hinge on the commercial nature of

272. *Id.* (citing Harris v. McRae, 448 U.S. 297, 317–18 (1980)).
273. *Id.* at 1223–24.
274. Korte v. Sebelius, 735 F.3d 654, 667 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (2014).
275. *Id.*; Lyle Denniston, *Broad Bar to Birth-Control Mandate,* SCOTUSBLOG (Nov. 9, 2013, 12:50 AM), http://www.scotusblog.com/2013/11/broad-bar-to-birth-control-mandate/.
276. *Korte*, 735 F.3d at 667.
277. *Id.* at 667–68.
278. *Id.* at 668 (citing Reich v. Sea Sprite Boat Co., 50 F.3d 413, 417 (7th Cir. 1995) (stating that "[a]n order issued to a corporation is identical to an order issued to its officers, for incorporeal abstractions act through agents")).
279. *Id.* at 674.
280. *Id.* at 675.
281. *Id.* at 676–79.

the businesses.[282] Instead, the judicial silence for a limitation on for-profit corporations' rights to assert religious freedom was more evidence that such a limitation did not exist.[283]

Evaluating the substantial burden on the plaintiffs' religious beliefs, the court agreed with the Tenth Circuit's focus on the nature of government coercion and noted the "ruinous fines" that would be imposed for noncompliance.[284] As in *Conestoga* and *Autocam*, the government argued that the burden was too attenuated from an employee's choice to use contraceptives.[285] However, this argument failed twice. First, there was no objection to contraceptive use.[286] Second, the attenuation between one person's belief and another's action was not the issue.[287]

The government could not generate a compelling interest to surmount the plaintiffs' substantial burden.[288] Regarding RFRA's strict scrutiny test, the court noted the need of "a substantial congruity . . . between the governmental interest and the means chosen to further that interest."[289] By their sweeping applicability, "public health" and "gender equality" only established a guarantee "that the mandate will flunk the test."[290]

282. *Id.* at 680.
283. *Id.* at 682.
284. *Id.* at 683–84.
285. *Id.* at 684.
286. *Id.* at 684–85. Although the insured employee could choose to use contraceptives, the employers' religious belief was that providing coverage was a religious violation. *Id.* The government's position inquired into the logical substance, not the sincerity, of the Kortes' and Grotes' beliefs. *Id.* Beliefs, as understood since *Cantwell,* are beyond the power of state regulation. *Id.*; *see also supra* Part II.A.
287. *Id.* at 685. Like a Jeopardy contestant, the court identified the actual question the government sought to answer: "Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Id.* The court aptly re-answered, "No civil authority can decide that question." *Id.*
288. *Id.* at 685–87.
289. *Id.* at 686.
290. *Id.*

## VI. DÉNOUEMENT: *BURWELL V. HOBBY LOBBY STORES, INC.*

### *A. Justice Alito's Majority: Owners Have Rights, Too*

> *An established body of law specifies the rights and obligations of the* people . . . . *When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.*[291]

*Burwell v. Hobby Lobby Stores, Inc.* was a win for corporations when Chief Justice John G. Roberts, Jr., opened the court session with "Justice Alito has the opinions of the Court in our two remaining cases this morning."[292] The opinion tailored its scope to the closely held entities of Hobby Lobby, Mardel, and Conestoga, allowing them to claim RFRA protections under their owners' beliefs.[293] The HHS mandate, concluded the Court, failed RFRA's test as the least restrictive means of furthering the government's compelling interest in employer-paid contraception.[294]

#### 1. Closely Held Corporations Fall Within RFRA's Scope

From its onset, Justice Alito's majority opinion couched the issue in statutory interpretation and evaded the constitutional question of permissible accommodations under Free Exercise.[295] The Court vindicated the owners' RFRA protections, maintaining that RFRA did not distinguish between corporate owners and other business owners.[296]

291. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

292. Mark Walsh, *A "View" from the Court: Justice Alito Has His Day in Finale*, SCOTUSBLOG (June 30, 2014, 5:08 PM), http://www.scotusblog.com/2014/06/a-view-from-the-court-justice-alito-has-his-day-in-finale/.

293. *Burwell*, 134 S. Ct. at 2774.

294. *Id.* at 2780.

295. *Id.* at 2759 ("We must decide . . . whether [RFRA] *permits* the United States Department of Health and Human Services (HHS) *to demand* that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." (emphasis added)).

296. *Id.* Nearly a decade earlier, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) extended RFRA's "exercise of religion" to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* at 2761–62. *See* 42 U.S.C. § 2000bb-2(4) (2012) (cross-referencing to the definition of "religious exercise" in § 2000cc-5(7)); *see also* Brief of Christian Legal Society et al. as Amici Curiae Supporting Hobby Lobby et al. at 31–32, *Burwell*, 134 S. Ct. 2751 (No. 13-

Additionally, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.* reserved the corporation's standing issue on the basis of free exercise.[297] Relying on *Braunfeld*, the Court held that corporations' nonindividual status did not disqualify them from being persons under RFRA.[298] RFRA meant to provide "protection for human beings" that are the heart and soul of the soulless, fictional corporate entity;[299] the statute's broad language should not be interpreted to exclude corporate entities.[300] The corporations' for-profit status also failed to effect de facto removal from RFRA's scope because noncorporate, for-profit entities fell well within its ambit.[301]

At this juncture, the Court explored CSR as a foundation of incorporation, a theme flowing through numerous modern corporations worldwide, and as a positive reason to shelter closely held corporations from the mandate.[302] In addition to making profits and investing in the

354) (stating that RLUIPA's amendment to RFRA bolstered "the section that everyone agreed already protected for-profit corporations even before it was strengthened").

297. *Burwell*, 134 S. Ct. at 2772–73 (citing Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617, 631 (1961)).

298. *Id.* at 2767–68. *See* Brief for the Respondents at 19–20, *Burwell*, 134 S. Ct. 2751 (No. 13-354) ("[T]here is no reason to believe that Congress intended to exempt for-profit corporations from neutral and generally applicable laws regulating their commercial activity, on the theory that such exemptions would be required to protect the free-exercise rights of individuals associated with the corporation."); *contra* Reply Brief for the Petitioners at 8, *Burwell*, 134 S. Ct. 2751 (No. 13-354) ("[F]or-profit corporations have never been regarded under the Religion Clauses, or in our societal and legal traditions, as institutions with their own freestanding religious identity.").

299. *Burwell*, 134 S. Ct. at 2768.

300. 1 U.S.C. § 1 (2012); *see also* Ross, *supra* note 80, at 1993 (arguing that "[r]egardless of how broadly courts construe RFRA's context, corporations arguably fall within RFRA's reach" (internal quotation marks omitted)).

301. *Burwell*, 134 S. Ct. at 2769–70 (noting that individuals, partnerships, and sole proprietorships concededly had standing).

302. *Id.* at 2771–72. Companies increasingly pride themselves in the causes they support, the societies they improve, and the partnerships they create with other entities. Andrew Swinand, *Corporate Social Responsibility Is Millennials' New Religion*, CRAIN'S CHI. BUS. (Mar. 25, 2014), http://www.chicagobusiness.com/article/20140325/OPINION/140329895/corporate-social-responsibility-is-millennials-new-religion#; *see also* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 3 (2011) ("CSR offers a set of values on which to build a more cohesive society and on which to base the transition to a sustainable economic system.").

> [I]t is useful to distinguish between two different versions of CSR. The first, "weak" version allows managers to pursue policies that reduce profits, so long as shareholders expressly agree. Under this approach altruistic shareholders may authorize managers to divert corporate profits to charity, thereby

economy, corporations nurture duties to act responsibly and accountably that strengthen the case for allowing religious constructs—and, as a result, their moral foundations—to form the backbone of how they conduct business.[303] Corporate theory merged with social responsibility to produce a new understanding by states that corporations can "achieve both a benefit for the public and a profit for [their] owners."[304] Discouraging corporations from orienting their structure around the religious beliefs of the owners would simply be incongruous with widely held business goals.[305]

2. The HHS Mandate Failed to Meet RFRA's "Least Restrictive Means" Prong

Noting the millions of dollars Hobby Lobby would owe in violation fines, the Court concluded that the regulation substantially burdened the corporate owners' religious beliefs.[306] Aligning with *Korte*'s reasoning, the majority rejected the attenuation argument because no ruling can dictate that a party's "beliefs are flawed."[307] Finding the compelling interest in contraception already established, the Court held that the

> enhancing shareholder welfare. Such an approach treats shareholder welfare, not profit, as the proper corporate maximand and thus furthers the shareholder primacy norm. The second "strong" brand contemplates that managers can pursue policies that reduce profits so as to improve the overall welfare of society, to the detriment of shareholder welfare if necessary. . . .
>
> *Hobby Lobby*'s discussion of corporate purposes apparently embraces the weak version of CSR. . . . Hobby Lobby's shareholders, some of whom also manage the firm, "agreed" with and "approved" the firm's religious exercise, even when such exercise reduced profits. . . . Indeed, the whole point to the Court's opinion on corporate personhood and religious exercise is that, in closely held corporations, *shareholders*, as owners, may induce the corporation to adopt practices that reflect *shareholders'* personal religious beliefs. . . . Shareholder primacy, not any notion of greater social good, is the animating principle here.

Alan Meese, *Hobby Lobby and Corporate Social Responsibility: A View from the Right*, CONGLOMERATE (July 16, 2014), http://www.theconglomerate.org/2014/07/hobby-lobby-and-corporate-social-responsibility-a-view-from-the-right.html.

303. *Burwell*, 134 S. Ct. at 2771; MACEY, *supra* note 119, at 6.

304. *Burwell*, 134 S. Ct. at 2771 (citing the "benefit corporation" statutes of Virginia and South Carolina).

305. *Id.* at 2771–72.

306. *Id.* at 2775–76.

307. *Id.* at 2778.

mandate stopped short of the least restrictive means ruler required by RFRA.[308]

Simply put, the mandate lost because HHS failed to show "that it lacks other means of achieving its desired goal."[309] The Court pointed to government subsidization as a means of providing contraception, which "would be minor when compared with the overall cost of [the PPACA]."[310] For nonprofit organizations opposing the mandate on religious grounds, HHS had already provided an accommodation accomplishing the same goals of providing "contraceptive coverage without cost sharing for all FDA-approved contraceptives" and with "minimal logistical and administrative obstacles" shifting the burden from corporations to insurers.[311]

The majority narrowed the RFRA application to closely held companies and observed that other compelling government interests would shield against floodgates of claims brought by large, publicly traded corporations or claims premised on a multitude of other religiously motivated objections to federal law.[312] Since Congress almost unanimously passed RFRA despite its broad language, the concern of "forcing the federal courts to apply RFRA to a host of claims . . . [against] generally applicable laws" was simply the pill the judiciary had to swallow in following the clear guidance of the citizens' representatives.[313] Closely held corporations are not barred from RFRA, and the government may not trample on the religious beliefs they represent.[314]

308. *Id.* at 2780.
309. *Id.*
310. *Id.* at 2781.
311. *Id.* at 2782 (internal quotation marks omitted). The Court implied that other religious issues may arise when applying the existing accommodation to for-profit entities but noted that the issue was not at hand. *Id.* ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.").
312. *Id.* at 2783. Such objections could include "a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions," but like its failure to demonstrate a least restrictive means, HHS simply had no proof "to substantiate this prediction." *Id.*
313. *Id.* at 2784–85.
314. *Id.*

*B. Justice Ginsburg's Dissent: "Startling Breadth"*

Though respecting the owners' sincere beliefs, Justice Ruth Bader Ginsburg dissented.[315] RFRA, she asserted, was not as expansive as the majority suggested; instead it sought only to re-establish pre-*Smith* jurisprudence.[316] If corporations had no claims under free exercise before RFRA, they had no rights after.[317] Implicitly drawing on the for-profit, secular distinction, Ginsburg's dissent urged that for-profit corporations will never be able to play on the same level as religious organizations: "religious organizations . . . serve a community of believers . . . . For-profit corporations do not fit that bill."[318]

Focusing foremost on women's reproductive rights,[319] Justice Ginsburg's primary concern lay in the availability of contraception to women and not completely on the viability of a corporate claim.[320] Relying on the longstanding belief that health decisions should remain between a woman and her physician, the dissent shunned the idea that contraception coverage could substantially burden the employer's religious convictions.[321] Echoing *Autocam* and *Conestoga*, the dissent argued that the employers' beliefs and the employees' decisions were too attenuated.[322]

Under Justice Ginsburg's interpretation of least restrictive means, women should not have to obtain contraception by wading through requirements for other government programs.[323] Based on the for-profit, secular distinction concerns, the dissent believed that a broadened

315. *Id.* at 2787 (Ginsburg, J., dissenting).
316. *Id.* at 2791–92.
317. *Id.* at 2792.
318. *Id.* at 2795–97. Justices Breyer and Kagan together did not join Justice Ginsburg's dissent to the extent it denied the viability of a corporation's RFRA claim. *Id.* at 2806 (Breyer, J., and Kagan, J., dissenting).
319. *Id.* at 2787–88 (Ginsburg, J., dissenting) ("The 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 lives." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992))).
320. *Id.* at 2800; *see also* Liz Goodwin, *Exclusive: Ruth Bader Ginsburg on Hobby Lobby Dissent*, YAHOO NEWS (July 31, 2014), https://news.yahoo.com/katie-couric-interviews-ruth-bader-ginsburg-185027624.html ("I should stress that my *Hobby Lobby* dissent really didn't turn on the difference between a corporation and a sole proprietorship. My point was that no employer whatever the business form should be able to transfer that employer's religious belief onto people who do not share that belief.").
321. *Burwell*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).
322. *Id.*
323. *Id.* at 2802.

accommodation, like that afforded to nonprofit organizations, was untenable.[324] A reversion to the pre-PPACA status quo could only burden women who could not afford the high costs of contraception.[325] Affirming the Tenth Circuit, Justice Ginsburg warned, would open doors for parties to claim countless religious objections to generally applicable laws,[326] despite the majority's attempt to narrow the effects to closely held corporations.[327]

### *C. Justice Kennedy's Concurrence: It's Not So Bad*

To soften Justice Ginsburg's concerns, Justice Kennedy aptly pointed out that the issue was not whether religious freedom trumps the rights of women but rather whether the government failed to adequately account for religious belief in crafting its mandate.[328] Pointing to *Cantwell*'s recognition that free exercise encompasses more than just freedom of belief, the concurrence explained that "in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult."[329] In providing accommodations for some entities but not others, the government inconsistently and arbitrarily applied an imbalance of religious freedom and negative religious externalities.[330] In an age when religious beliefs are so diverse, such inconsistency cannot stand.[331]

324. *Id.* at 2802–03.
325. *Id.* at 2803.
326. *Id.* at 2805.
327. *Id.* at 2774 (majority opinion).
328. *Id.* at 2785 (Kennedy, J., concurring); *see also* Eric Posner, *Alito's Hobby Lobby Argument Is Stronger Than Ginsburg's*, *Supreme Court Breakfast Table*, SLATE (June 30, 2014, 12:44 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_hobby_lobby_decision_alito_s_argument_is_stronger_than_ginsburg.html ("[Justice Ginsburg] sets up *Hobby Lobby* as a clash between women's rights and religious rights. It's not an entirely fair characterization of this case, since regulators tried to balance these rights by granting an exemption to nonprofits, and in that light the court's holding—extending the exemption to religious for-profits—seems incremental rather than radical.").
329. *Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring).
330. *Id.* at 2786.
331. *Id.*

## VII. THE HARMONIOUS CHORD: INDIVIDUAL FREEDOM IN CLOSELY HELD CORPORATIONS

Firmly rooted in American history is a recognition of religious liberty as an inalienable right and a dedication to religious protections.[332] Modern religious protections acknowledge the separateness of belief and action but also account for their intricate connections, especially in times when religious issues may seem to conflict with cultural changes.[333] At the time of *Smith*'s evisceration of religious protections that permeated federal law since *Cantwell*, many religious liberty advocates were criticizing *Sherbert*'s case-by-case effect and its often inconsistent results.[334] Yet RFRA's response to *Smith* indicated that all Americans agreed on at least one basis with regard to religious freedom: It must be protected.[335]

### *A. Closely Held Corporations May Mingle Beliefs and Business*

Given that a close corporation may have "more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year,"[336] it is

332. McConnell, *supra* note 254, at 1437 (tracing American traditions of religious freedom as opposed to state-established churches back to the 1780s).

333. *See generally* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) (advocating for liberty interests to be recognized by all sides in political debate).

334. McConnell, *supra* note 55, at 115. However, even as a religious freedom advocate, Professor Gedicks has questioned the constitutional basis for *Sherbert*-sponsored religious exemptions. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 556 (1998); Gedicks & Van Tassell, *supra* note 181, at 348.

335. *Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring); *see also Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary H. R.*, 102d Cong. 63 (1992) (statement of Nadine Strossen, President, National Board of Directors, American Civil Liberties Union) (stating that RFRA was "hardly a radical proposal to restore religious freedom . . . . [T]he only radical thing at issue here is the Supreme Court's decision in the *Smith* case which took religious freedom effectively out of the Constitution").

336. *Entities*, IRS, http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5 (last visited Aug. 27, 2014). At the time of this Note's submission, HHS has submitted a definition of "Closely Held For-Profit Entities" for public comment. Press Release, U.S. Dep't of HHS, Administration Takes Steps to Ensure Women's Continued Access to Contraception Coverage, While Respecting Religious-Based Objections (Aug. 22, 2014), *available at*

unsurprising that corporate owners' beliefs can be tightly tied to the corporation's operations. Whether or not courts formally accept the alter ego theory advocated by the Ninth Circuit, closely held corporations realistically do operate as an extension of their owners.[337] The actions and representations that created the foundational circuit split demonstrated an outspoken support for religious beliefs allocable to corporate owners.[338] A religious exemption clarifies the respect law has held for religious practice in managing businesses.

### *B. Business Structure Cannot Evaporate Fundamental Rights*

The fact that corporations are not entitled to all constitutional and statutory protections afforded to individuals implies that some rights are nontransferable; especially in closely held corporations, fundamental individual rights do not simply "disappear[] into the ether."[339] Apart from the people that pass a corporation's resolutions, represent the corporation in court, and otherwise carry out the corporation's business, "[c]orporations . . . cannot do anything at all."[340] True, corporations cannot independently exercise religion; but no one would say RFRA protections do not exist for a church, which is a corporate entity.[341] As one scholar has clarified, "effort[s] to imply that the corporation's legal personhood is something approaching absolute or inviolate is simply wrong."[342] Indeed, the closely held context justifies recognizing owners' personal freedoms as would be accorded to non-corporate entity owners.

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http://www.hhs.gov/news/press/2014pres/08/20140822a.html; *see also* Lisa Klinger, *Recent HHS Guidance on Contraceptive Coverage and Employers with Religious-Based Objections*, LEAVITT GROUP (Sept. 8, 2014), https://news.leavitt.com/health-care-reform/recent-hhs-guidance-contraceptive-coverage-employers-religious-based-objections/.

337. Lepard, *supra* note 199, at 1061.

338. *See supra* Parts V.A–B.

339. Gilardi v. U.S. Dep't of HHS, 733 F.3d 1208, 1218 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014).

340. *Burwell*, 134 S. Ct. at 2768 (majority opinion).

341. *Compare id.* at 2795 (Ginsburg, J., dissenting) (stating that "[r]eligious organizations exist to foster the interests of *persons* subscribing to the same religious faith" (emphasis added)), *with* Posner, *supra* note 328 (stating that Justice Ginsburg's admission that "exercise of religion is characteristic of natural persons, not artificial [persons]" dismantles the claim that RFRA cannot apply to for-profit corporations because "[a] church is an artificial legal entity" that RFRA protects).

342. Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in* Hobby Lobby *and* Conestoga Wood, 100 VA. L. REV. ONLINE 1, 7 (2014).

### *C. Corporate Social Responsibility Applies the Fundamental Rights of Individuals in a Corporate Context*

Owners of closely held corporations often run their businesses in accordance with religious principles as a distinct exercise of CSR.[343] Denying this opportunity nullifies any corporate advocacy for virtuous endeavors for fear they could be religiously motivated.[344] As *Hobby Lobby* and *Korte* demonstrated and the Supreme Court recognized in *Burwell*, acknowledging religious protections for closely held corporations fosters their duty to be accountable to society and to maintain a stable moral compass.[345]

Human beings will always face conflict, especially in a commercial and cultural context. But as Justice Kennedy's concurrence explains:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.[346]

Hampering corporate development when accommodations are available is suspicious at best. While an independent right of corporations to assert a religious belief remains in doubt, the effect of individual owners' religious beliefs in closely held corporations merits judicial recognition. In allowing these corporations to be treated as persons under RFRA, the Court strikes a harmonious balance for individual religious freedom and the furtherance of CSR.

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343. MACEY, *supra* note 119, at 6; Meese, *supra* note 302.

344. *See* Keith Paul Bishop, *44 Law Professors Make a Case Against Corporate Social Responsibility*, *California Corporate & Securities Law*, ALLEN MATKINS (Feb. 10, 2014), http://calcorporatelaw.com/2014/02/44-law-professors-make-a-case-against-corporate-social-responsibility/ ("If corporations can't have religious beliefs, then it follows that they can't believe in climate change, sustainable investment or any other beliefs embraced by the corporate social responsibility movement.").

345. *See supra* Parts V, VI.

346. *Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring).