MORE THAN HUMAN: MODERN EXPANSION OF CORPORATE PERSONHOOD RIGHTS IN HOBBY LOBBY

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ABSTRACT

This Note examines the expansion of corporate personhood through the lens of *Hobby Lobby Stores, Inc. v. Sebelius*. This groundbreaking case stands for the proposition that corporations may have religious beliefs that entitle them to First Amendment protection. This protection of corporate religion even extends to the tax code, an area where individuals have previously failed to obtain similar rights. Further, this Note juxtaposes the current expansions in corporate social responsibility and corporate religion.

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* I would like to thank my mom, Naomi Tinsley and my sister, Erika Walker, for their brilliance and support. Further, I would like to thank professors Edward Kleinbard, Michael Chasalow, and Nomi Stolzenberg for their guidance.

I. INTRODUCTION

In 1970, David Green began fashioning picture frames in his Oklahoma City garage.[1] Within two years, this entrepreneurial adventure grew into Hobby Lobby Stores, Inc. ("Hobby Lobby"), an arts and crafts shop with a three hundred–square foot storefront.[2] Today, David Green, his wife Barbara, and their three children (collectively the "Greens"), along with related Christian bookseller Mardel Inc., own and operate the Hobby Lobby powerhouse, which has nearly six hundred locations and is recognized as a top private corporation by *Forbes* and *Fortune*.[3] Under David Green's leadership as the Founder and Chief Executive Officer, Hobby Lobby is operated "in a manner consistent with biblical principles."[4] By closing on Sundays, purchasing advertisements celebrating religious holidays, calling on the general public to know Jesus, and offering faith-based spiritual and financial counseling to employees, the Greens allow their Christian faith to inform the operation of their business.[5]

The Patient Protection and Affordable Care Act ("ACA") requires

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[1] *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our company/.

[2] *Id.*

[3] *Id.*; Brief for Appellants at 1, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2012) (No. 12-6294).

[4] *Our Company*, *supra* note 1.

[5] Brief for Appellants, *supra* note 3, at 1–2.

some private employers to provide their employees with insurance that includes coverage for contraceptive and abortive methods (the "Employer Mandate"). Naturally, the Greens faced an unbearable choice.[6] As shareholder-owners of Hobby Lobby and Mardel, the Greens had to decide between providing coverage for abortions and failing to operate their businesses in accordance with the tenets of their Christian faith, or refusing to comply with the Employer Mandate, and paying nearly $30 million annually for noncompliance.[7]

As a response, the Greens, Hobby Lobby, and Mardel filed a complaint challenging the Employer Mandate under the Free Exercise Clause of the First Amendment[8] and the Religious Freedom Restoration Act ("RFRA").[9] They argued that the Employer Mandate infringes on the free exercise rights[10] of the individual shareholder-owners as well as the free exercise rights of the corporations.[11] The district court denied their request for a preliminary injunction against the Employer Mandate, finding that Hobby Lobby and Mardel did not have a substantial likelihood of succeeding on the merits of their claim given that constitutional free exercise rights are "purely personal," and thus unavailable to corporations.[12] Further, the district court held that corporations are not entitled to protection under RFRA, as corporations are not persons for such purposes.[13] Finally, the district court found that

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[6] *Id.* at 3.

[7] *Id.*

[8] U.S. CONST. amend. I.

[9] 42 U.S.C. § 2000bb-1 (2012). RFRA provides that:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
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> (1) is in furtherance of a compelling governmental interest; and
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> (2) is the least restrictive means of furthering that compelling governmental interest.
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> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim of defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

[10] The term "free exercise rights" is used throughout this Note to refer to the rights granted under both RFRA and the United States Constitution.

[11] Brief for Appellants, *supra* note 3, at 3.

[12] Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287–88, 1292 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2012).

[13] *Id.* at 1296.

the Greens did not show the requisite likelihood of success necessary to justify granting a preliminary injunction given that the Employer Mandate is neutral on its face and would not "substantially burden" their religious practice.[14] On appeal, the Court of Appeals for the Tenth Circuit reversed the decision of the district court, finding that Hobby Lobby and Mardel, as corporations, are to be considered persons under RFRA[15] and showed the requisite likelihood of success, remanding the case back to the district court.[16] The district court then granted Hobby Lobby and Mardel a preliminary injunction against the enforcement of the Employer Mandate.[17]

For-profit corporations that claim personhood rights, under the Free Exercise Clause and RFRA, will have their rights violated if they are forced to comply with the Employer Mandate.[18] These corporations brought more than seventy-fives cases in federal court, which were adjudicated in several circuit courts with various, sometimes contradictory, outcomes.[19] These cases brought together two doctrinal traditions in American legal history: corporate personhood rights and religious free exercise exemptions.[20] In November 2014, the United States Supreme Court agreed to hear *Hobby Lobby Stores, Inc. v. Burwell* and another case bringing similar challenges to the Employer Mandate, *Conestoga Wood Specialties Corp v. Secretary of the United States HHS*.[21]

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[14] *Id.*

[15] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2012).

[16] *Id.* at 1121.

[17] Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE, 2013 WL 3869832, at *2 (W.D. Okla. July 19, 2013).

[18] Greg Clary, *Appeals Court Strikes Down Obamacare Birth Control Mandate*, CNN, (Nov. 2, 2013), http://politicalticker.blogs.cnn.com/2013/11/02/appeals-court-strikes-down-obamacare-birth-control-mandate/.

[19] *Compare* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1214 (D.C. Cir. 2013) (using a pass-through theory of corporate standing, allowing the owner-shareholder's claims to pass through to the for-profit corporation), *with* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013) (finding, as a threshold issue, that for-profit corporations have no rights under the Free Exercise Clause as they are not capable of religious exercise), *and* Korte v. Sebelius, 735 F.3d 654, 673–75, 686 (7th Cir. 2013) (using the Dictionary Act to find that corporations are persons under RFRA and granting a preliminary injunction from the enforcement of the Employer Mandate).

[20] The cases also implicate further legal questions including the classification of the Employer Mandate as a "tax" as well as some socio-cultural concerns such as the public policy regarding modesty, the right not to kill, corporate power and corruption, equal access to preventative care and women's rights. The impact of these cases will likely extend far past the individual parties and the narrow legal doctrines.

[21] Adam Liptak, *Justices to Hear Contraception Cases Challenging Health Law*, N.Y. TIMES,

These cases gave the Supreme Court the opportunity to resolve the growing circuit court spilt over whether a for-profit corporation has free exercise rights and, if so, whether a for-profit corporation's free exercise right allows it to claim a religious exemption from the Employer Mandate.[22] On June 30, 2014, the Supreme Court ruled, 5-4, in favor of Hobby Lobby and Conestoga Wood Specialties Corp., extending statutory free exercise rights under RFRA to for-profit, closely held corporations.[23]

The goal of this Note is two-fold. First, it provides a framework for the expansion of corporate personhood under *Hobby Lobby*, arguing that what began as a convenient shorthand has grown into a complex legal fiction with real consequences, allowing corporations rights where natural persons have failed to procure similar protection. Second, it addresses the corporate social responsibility movement through the lens of corporate religion, juxtaposing "Cause Companies"[24] with companies which seek to uphold religious tenants. Part II provides a brief introduction to the relevant provisions of and controversies over the ACA. Parts III and IV trace the development of legal theories and case law surrounding religious exemptions and corporate personhood rights throughout American legal history up to the present day doctrines that underpin the Employer Mandate cases. Part V evaluates the Supreme Court's reasoning regarding the important distinctions between non-profit and for-profit corporations with regards to the Employer Mandate and taxes. Part VI considers the expansion of corporate social responsibility and the law's role in facilitating corporate citizenship while protecting shareholders, employees and individuals.

II. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Signed into law on March 23, 2010 by President Barack Obama,[25] The ACA has been controversial.[26] Challenges to the ACA that questioned

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Nov. 26, 2013, at A13. *See Hobby Lobby*, 723 F.3d at 1179 (stating that the extension of free exercise rights to for-profit corporations is a question of first impression).

[22] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1114 (10th Cir. 2012); *Conestoga Wood*, 724 F.3d at 380; Liptak, *supra* note 21.

[23] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[24] "Cause Companies" are for-profit companies that seek to address a particular social or humanitarian cause independent of any religious doctrine.

[25] Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 and 26 U.S.C.)

[26] Adam Liptak, *Supreme Court Upholds Healthcare Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 29, 2012, at A1.

the extent of congressional power were brought before the United States Supreme Court within two years of its enactment.[27] Ultimately, the Supreme Court upheld most of the ACA, finding that the contentious provision instituting a fine for most uninsured Americans (the "Individual Mandate") was a constitutionally sound exercise of the congressional power to levy taxes.[28] Taking a functional approach to distinguish a tax from a regulation or a penalty,[29] the Court agreed with the government that the Individual Mandate can reasonably be read as simply imposing a tax on uninsured Americans when considering several factors, including the amount paid and the collection procedures of the fine.[30]

The ACA's Employer Mandate requires that employers with fifty or more full time employees provide minimum medical insurance coverage for all employees. This mandate includes all Food and Drug Administration approved contraceptive and abortive methods, as well as counseling.[31] Should a qualifying employer choose not to offer the appropriate coverage, the employer may be levied an "assessable payment."[32] Assessable payments are to be paid to the Secretary of Treasury and are to be "assessed and collected in the same manner as taxes."[33] In a case brought by a Christian university with nearly five thousand full-time employees on the very day the ACA was signed into law, the Court of Appeals for the Fourth Circuit upheld the constitutionality of both the Individual and Employer Mandates, finding them to be appropriate exercises of the congressional taxing power.[34]

There were some exemptions to the Employer Mandate embedded in the ACA.[35] One exemption is from the preventative services portion of the Employer Mandate (which includes coverage for immunizations, contraceptive, and abortive methods), which is reserved for religious employers.[36] To be considered a religious employer for the exemption, the

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[27] *Id.*; Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[28] Liptak, *supra* note 26.

[29] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595.

[30] *Id.* at 2594–96.

[31] 26 U.S.C. § 4980H(c)(2)(A) (2012).

[32] 26 U.S.C. § 4980H(a)–(b).

[33] 26 U.S.C. § 6671(a) (2012).

[34] Liberty Univ. v. Lew, 733 F.3d 72 (2013).

[35] 26 C.F.R. § 54.9815-1251T (2015) (exempting temporarily some "grandfathered" plans); 45 C.F.R. § 147.131 (2015) (providing a "safe harbor" period for some non-profit organizations); *see also* Gilardi v. Sebelius, 926 F. Supp. 2d 273 (D.D.C. 2013) (explaining such exemptions).

[36] 45 C.F.R. § 147.130 (2015).

employer must have non-profit status under Section 501(c)(3) of the Internal Revenue Code.[37] On February 3, 2012, Representative Steve Chabot sponsored the Religious Freedom Restoration Act of 2012, a bill that would amend the ACA to broaden the exemptions to the Employer Mandate.[38] This bill would modify the ACA such that the ACA would not compel "any individual or entity" to comply with the Employer Mandate if that individual or entity is opposed to the provision of coverage for contraceptive or sterilization methods and that opposition is grounded in religious beliefs.[39] This bill was sent to the House Energy and Commerce Committee where it died.[40] Further legislation attempted to repeal the Employer Mandate,[41] and the debate continues.[42]

The Supreme Court's decision to grant certiorari for *Hobby Lobby* and *Conestoga Wood Specialties Corp.* brought revitalized challenges to the Employer Mandate.[43] *Hobby Lobby* and *Conestoga Wood Specialties Corp.* emerged from a circuit split. In *Conestoga*, the Third Circuit denied a preliminary injunction against the Employer Mandate, finding that for-profit corporations could not engage in religious exercise, and therefore had no right to free exercise.[44] On the other hand, in *Hobby Lobby*, the Tenth circuit granted a preliminary injunction preventing the enforcement of the Employer Mandate, finding that for-profit corporation could engage in religious exercise (or at least their shareholders could) and then argued that the Employer Mandate was a penalty instead of a tax.[45] Similar courts argued that the Employer Mandate should be understood as penalty for noncompliance as the charge was "regulatory and punitive rather than

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[37] *Id.*

[38] H.R. 3897, 112th Cong. (2012)

[39] *Id.*

[40] *See id.*

[41] *Sen. Moran Cosponsors Bill to Repeal Affordable Care Act Employer Mandate*, JERRY MORAN (Mar. 8, 2013), *available at* http://www.moran.senate.gov/public/index.cfm/news-releases?ID=536aa7d4-8545-4e58-a059-0690d5b3cd6a.

[42] Ginger Gibson & Catherine Dunn, *Fight to Repeal Obamacare Begins—Again* (Jan. 8, 2015), *available at* http://www.ibtimes.com/fight-repeal-obamacare-begins-again-1776374.

[43] Liptak, *supra* note 21.

[44] *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013) (finding that corporations do not have free exercise rights); *see also* Eden Foods, Inc. v. Sebelius, 733 F.3d 626 (6th Cir. 2013) (joining the Third Circuit in finding that corporations do not have free exercise rights); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) (same).

[45] *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 669–71 (7th Cir. 2013) (ruling, that for the purposes of the Anti-Injunction Act, the Employer Mandate is a penalty and not a tax regardless of Congress' designation of the Act as a tax).

revenue raising."[46]

The challenges to the Employer Mandate under RFRA and the Free Exercise Clause brought by for-profit, closely held corporations tied together the concepts of corporate personhood rights and religious exemptions for the first time.[47] In ruling for Hobby Lobby and Conestoga, the Supreme Court held that for-profit, closely held corporations are entitled to religious exemptions under RFRA, and that the Employer Mandate, as it applies to for-profit, closely held corporations, is a violation of RFRA.[48]

III. A HISTORY OF RELIGIOUS EXEMPTIONS

For-profit corporations seeking religious exemptions from the Employer Mandate based their claims in the Free Exercise Clause and RFRA.[49] For over a century, jurists and commentators have debated whether the Free Exercise Clause, properly interpreted, supports a right to religious accommodations.[50] Beginning with the 1963 *Sherbert v. Verner* decision, the United States Supreme Court adopted the position that the Free Exercise Clause provides a right to an exemption from laws that burden the free exercise of religion unless the state interest is so compelling that it outweighs that right.[51] In its 1990 decision in *Employment Division v. Smith*, the Supreme Court largely repudiated that approach.[52] In an attempt to reinstate the *Sherbert* pro-exemption doctrine, Congress passed RFRA in 1993.[53] This section traces the development of the pro-exemption doctrine enshrined in *Sherbert* and RFRA from its roots in American legal history to the present day. This section will also consider the doctrine that opposes the existence of a right to religious exemptions guaranteed by the principle of free exercise. The clash

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[46] *Id.* at 670.

[47] Liptak, *supra* note 21.

[48] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

[49] *See, e.g., Conestoga Wood*, 724 F.3d at 380; Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012);

[50] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise and Religion*, 103 HARV. L. REV. 1409 (1990) (compiling multiple viewpoints on the subject from colonial America to modern day legal scholarship).

[51] *See* Sherbert v. Verner, 374 U.S. 398, 403–07 (1963) (establishing a balancing test in the common law).

[52] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

[53] Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal, 546 U.S. 418, 424 (2006); 42 U.S.C. § 2000bb (2012).

between these two positions is not directly implicated in the controversy over whether the right to religious free exemptions extends to for-profit corporations, given that the current controversy accepts the premise that a right to religious exemptions exists. However, it is impossible to determine whether for-profit corporations are the type of entity, or "person," endowed with the right to religious exemptions without understanding the basic rationale for granting such a right to any entity or "person." Although the Court did not rule on the First Amendment arguments in *Hobby Lobby*, the history of RFRA is deeply connected to the history of the First Amendment Free Exercise Clause.

A. FREE EXERCISE AT THE FRAMING OF THE UNITED STATES CONSTITUTION

The American colonies experienced an unprecedented level of religious diversity and experimentation with church-state relations.[54] Such religious diversity and structural flexibility set the stage for the debate over the role of religion in the United States Constitution. The framers included two protections against religious exclusion from government office in the original Constitution of 1787: a ban on religious tests for office, and a provision for affirmations of office rather than oaths.[55] Beyond these two safeguards, the Federalist proponents of the Constitution argued that no further constitutional protections were necessary.[56] They asserted that because the federal government had limited powers and would be controlled by the religiously diverse citizens of the country, it would not be able to trample individuals' right to worship as they pleased.[57] However, these arguments did not sway every religious sect operating in the new country from pushing for a free exercise clause. The fear was not of direct religious oppression executed by a tyranny of the majority, but rather of the oppressive effects of the externalities of legislation.[58] Several states drafted proposals for the protection of individual religious freedom against government encroachment they hoped would be included in the Bill of Rights.[59] These proposals ranged in

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[54] McConnell, *supra* note 50, at 1421.

[55] *Id.* at 1473.

[56] *Id.* at 1475.

[57] *Id.* at 1476–79.

[58] *Id.* at 1480.

[59] *See id.* (stating that five of the seven states drafting proposed amendments included further protections for individual religious freedom).

expansiveness, from one that would guarantee an equal and inalienable right to the free exercise of religion, to one ensuring that "Congress shall make no laws . . . to infringe on conscience."[60] Eventually, the framers ratified the First Amendment, which reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[61]

It is unclear whether the framers of the Constitution understood the text of the First Amendment's Establishment Clause to mandate or even allow for religious exemptions to otherwise valid federal laws.[62] The notion that the First Amendment supports religious accommodation is rooted in primary documents showing that the meaning of freedom of religion was contentious: advocates maintained that conscience should be protected when it would not prohibit the operation of a peaceful society.[63] However, some critics feared that it could lead to a virtually lawless society and some state constitutions expressly limited the freedom of religion, removing the right to accommodation altogether.[64] This argument highlights early understandings of freedom of religion as encompassing religious accommodation.[65] On the other hand, this evidence may not be sufficient to support the contention that eighteenth century Americans viewed religious accommodation as a necessary or proper extension of freedom of religion.[66] Further, it is possible that a right to pass laws infringing upon the free exercise of religion may have even been seen as a "law respecting religion."[67] The debate over whether the Free Exercise Clause creates a framework for religious exemptions is far from resolved. Opinions remain divided as to whether the Framers' intent was to create a right to religious exemption in the First Amendment.[68] The Free Exercise

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[60] *Id.* at 1481 (quoting the New Hampshire proposal for a Federal Bill of Rights).

[61] U.S. CONST. amend. I

[62] *See* Michael W. McConnell, *Symposium: Reflections on* City of Boerne v. Flores*: Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 825 (1998) (arguing that historical evidence suggests that some early eighteenth-century American activists asserted such an interpretation). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that eighteenth-century America did not interpret the Free Exercise Clause to provide for religious exemptions).

[63] McConnell, *supra* note 62, at 825–26.

[64] *Id.*

[65] *Id.* at 826.

[66] Hamburger, *supra* note 62, at 918–32.

[67] *Id.* at 932–33.

[68] *See id.* (arguing the positions as recently as 1992).

Clause has been subjected to continuous reinterpretation by the judicial and legislative branches, as described in the following subsections.

B. JUDICIAL INTERPRETATION OF THE FREE EXERCISE CLAUSE

The Supreme Court first considered the appropriateness of religious exemptions in 1878 in *Reynolds v. United States*.[69] Reynolds, a member of the Mormon Church, was charged with and convicted of polygamy after taking a second wife in violation of a statute prohibiting multiple marriages.[70] The Supreme Court upheld Reynolds' conviction despite his contention that his religious beliefs required him to take a second wife, and he should, therefore, be exempted from the statute in question.[71] Absent an exemption, his First Amendment right to free exercise would be violated.[72] In delivering the opinion of the court, Chief Justice Waite wrote that the question implicated in this case was "as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong."[73] To resolve the issue, the Court needed to decide whether the religious practice of polygamy exempted the practitioner from the state law."[74] Here, the Court drew a distinction between religious beliefs, which are constitutionally protected, and religious practices, which are subject to government regulation, even if it is prohibitive.[75] Underpinning this stratified approach was the belief that allowing religious exemptions to behavioral regulations (particularly those of a criminal nature) would jeopardize the entire government, leaving it powerless.[76]

By the next century this distinction became arcane, as the sphere of civil governance grew more expansive.[77] In *Cantwell v. Connecticut*, reversing the conviction of a Jehovah's Witness charged with breaching the peace while soliciting donations, the Court introduced a balancing test for when government regulations could impede religious speech.[78] The

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[69] Reynolds v. United States, 98 U.S. 145 (1878).

[70] *Id.* at 160.

[71] *Id.* at 161.

[72] *Id.*

[73] *Id.* at 162.

[74] *Id.* at 166.

[75] *Id.* at 166–67.

[76] *Id.* at 167.

[77] MCCONNELL, GARVEY & BERG, RELIGION AND THE CONSTITUTION 123–24 (2nd ed. 2006).

[78] Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

individual right to hold unchallenged religious convictions remained absolute.[79]

In 1963, the Supreme Court took the opportunity to adjust the framework of religious exemptions under the Free Exercise Clause.[80] The Court in *Sherbert v. Verner* first reiterated the doctrine that, under no circumstances, could the government impinge upon religious beliefs.[81] The Court then turned its attention to religious practices, establishing a test for granting religious exemptions.[82] This analysis began by evaluating whether a statute that required the plaintiff to take a job where she had to work on the Sabbath in order to receive unemployment benefits violated a Seventh-Day Adventist's right to free exercise.[83] The Court weighed this concern against the state's interest, which it held must be "compelling" in order to deny the exemption.[84] The Court argued that its past refusal to allow for religious exemptions in cases like *Reynolds* was based on a distinction between religious actions that offended the public health or safety and those that did not.[85] Despite this theoretical expansion of the doctrine there was still uncertainty regarding the practical application and extent of accommodations under the Free Exercise Clause.

In 1990, *Employment Division v. Smith*, gave the Supreme Court the opportunity to revisit mandatory religious exemptions.[86] Revamping the framework established in *Sherbert, Reynolds*, and *Cantwell*, the Court decided that the distinction between beliefs and actions meant that government regulations forbidding or requiring actions will only be considered unconstitutional under the Free Exercise Clause if they are specifically targeted towards an inherently religious practice.[87] Laws and regulations that are neutral on their face would only violate the Free Exercise Clause rights of an individual in the event that they are otherwise constitutionally unsound, even if they happen to suppress religious

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[79] *Id.*

[80] *See generally* Sherbert v. Verner, 374 U.S. 398 (1963) (ruling that a Seventh-Day Adventist was entitled to unemployment benefits despite her refusal to take work which would require her to work on the Sabbath).

[81] *Id.* at 402.

[82] *Id.* at 403.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that state laws restricting the use of sacramental peyote did not violate the Free Exercise Clause and therefore did not have to extend unemployment benefits to those who lost their work by violating such provisions).

[87] *Id.* at 878.

practices.[88] Here, the Court distinguished this case from *Sherbet* (which required a "compelling government interest" to implement regulation that "substantially burdens" a religious practice), arguing that the unemployment framework in question in *Sherbert* was not neutral on its face because it had a mechanism for implementing exemptions.[89] The Court further reasoned that the *Sherbert* test should only be applied in cases where the law or regulation in question already has an administrative system in place to grant exemptions.[90] In such cases, the question is not whether to grant an exemption, but instead whether it is constitutional to refuse to accommodate those requesting exemptions on the basis of religion while granting exemptions for non-religious purposes.[91] Writing for the majority, Justice Antonin Scalia noted that if the Court were to read First Amendment as allowing religious exemptions to otherwise valid laws, it "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[92]

C. THE RELIGIOUS FREEDOM RESTORATION ACT

As a response to the decision in *Smith*, Congress passed RFRA in 1993.[93] This act created a parallel statutory free exercise protection to supplement the constitutional one found in the First Amendment.[94] RFRA reinstituted the doctrine rejected in *Smith*, mandating that the government "shall not substantially burden a person's exercise of religion," even if the law or regulation in question is neutral on its face, unless there is a compelling state interest and the law or regulation in question is the "least restrictive means" of advancing that "compelling government interest."[95,96] The goal of enacting RFRA was two-fold; first, to reinstate the compelling interest test established in *Sherbert* and *Yoder* for every forthcoming free exercise case or controversy, and second, to provide recourse for those whose religious exercise is substantially burdened by government

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[88] *Id.*

[89] *Id.* at 884.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 888.

[93] Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418, 424 (2006); 42 U.S.C. § 2000bb (2012).

[94] *Id.*

[95] 42 U.S.C. § 2000bb-1(b).

[96] 42 U.S.C. § 2000bb-1.

regulation.[97]

D. FREE EXERCISE AND PROFITS

Some of the seminal free exercise cases already discussed touch upon the interplay between individual free exercise and governmental regulation of labor.[98] *Smith* and *Sherbert* both explored the argument that unemployment statutes forced the complainants to choose between their right to unemployment benefits and their free exercise right to lead a life congruent with their religious tenets.[99] *Braunfeld v. Brown*, in which Jewish merchants challenged a law requiring businesses to close on Sundays, illuminated the relationship between individual free exercise and government labor regulation.[100] In *Braunfeld*, the Court refused to grant a religious exemption to the merchants who claimed that the Sunday closing laws put their businesses at an unfair disadvantage.[101] In stating that, "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions," the Court reasoned that the Sunday closing law did not make a religious practice illegal, just more expensive.[102]

E. RELIGIOUS CHALLENGES TO TAXES

The relationship between free exercise and profit-making is further developed in the jurisprudence on income taxes. Individuals have brought several religious-based challenges to federal income taxes, sales taxes, use taxes, and license taxes under the Free Exercise Clause of the First Amendment of the United States Constitution.[103] These challenges have been overwhelmingly unsuccessful.[104]

In 1982, the Supreme Court held that individuals are not exempt from income taxes under the Free Exercise Clause because the preservation of

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[97] 42 U.S.C. § 2000bb.

[98] *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990) (discussing how unemployment laws affect free exercise); Sherbert v. Verner, 374 U.S. 398 (1963) (same).

[99] *Smith*, 494 U.S. at 872; *Sherbert*, 374 U.S. at 398.

[100] Braunfeld v. Brown, 366 U.S. 599, 600–02 (1961).

[101] *Id.* at 608–09.

[102] *Id.* at 605.

[103] INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 22–23 (2014).

[104] *Id.*

the tax system is of the utmost importance.[105] In *United States v. Lee*, an Amish farmer contended that the requirement that he withhold Social Security taxes for his employees violated his First Amendment Free Exercise right because his religion requires believers to care for their own elderly and infirm.[106] While the Court ruled that forced participation in the Social Security system did violate the Free Exercise rights of the Amish, it found that the public interest in preserving the tax system outweighed the individual's objection to the collection of Social Security taxes.[107] The Court noted that the entire tax system could be jeopardized if religious exemptions were granted to individuals.[108] Further, the Court of Appeals for the Second Circuit has held that individuals cannot claim religious exemptions from income taxes under the Free Exercise Clause because the collection of taxes for purposes that oppose the religious beliefs of taxpayers does not violate the Clause.[109] Here, the court noted that, according to precedent, it is "well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons."[110]

In 1990, the Court upheld California's "generally applicable" sales and use taxes when challenged by Jimmy Swaggart Ministries, a Louisiana religious organization, recognized by the Internal Revenue Service as a 501(c)(3) exempt organization.[111] Jimmy Swaggart Ministries argued that the first amendment entitled the ministry to an exemption for state sales and use taxes in California.[112] The Court required Jimmy Swaggart Ministries to pay the California sales and use taxes, distinguishing the sales and use taxes from license taxes (which had successfully been challenged by religious actors) on the grounds that the license taxes were flat taxes, not apportioned, functioning as a prior restraint to a protected activity.[113]

In a sense, this history of failed religious challenges to the tax code underscores a judicial consensus that the tax code occupies a sainted place in United States law. The law was clear that religious accommodation must end where the tax code begins.

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[105] United States v. Lee, 455 U.S. 252, 260 (1982).

[106] *Id.* at 255–56.

[107] *Id.* at 257, 260.

[108] *Id.* at 260.

[109] Jenkins v. Commissioner, 483 F.3d 90 (2d Cir. 2007).

[110] *Id.* at 92.

[111] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 381 (1990).

[112] *Id.* at 384.

[113] *Id.* at 387–88.

F. INSTITUTIONAL FREE EXERCISE

There is a history of extending the protections of the Free Exercise Clause beyond individual citizens to institutional actors; however, such actors have typically been non-profit, inherently religious actors, such as churches.[114] Recognizing the communal nature of many religions, Justice Brennan asserted that religious "organizations must be protected by the clause."[115]

IV. A HISTORY OF CORPORATE PERSONHOOD

Since its inception in American law, the corporate form has been viewed through many different and sometimes conflicting theories.[116] The word corporation never appears in the United States Constitution.[117] This absence leaves room for interpretation as to what, if any, Constitutional rights should be afforded to corporations. There is a long-standing trend of cases treating corporations as persons under the law, endowing them with limited rights.[118] This section traces the evolution of theories concerning the existence and societal role of American corporations and their status as fictional legal persons endowed with certain rights and responsibilities.

A. THEORIES OF CORPORATE EXISTENCE THROUGHOUT AMERICAN LEGAL HISTORY

The predominate conception of corporate existence in the late eighteenth and early nineteenth centuries was concessionary theory, viewing corporations as state (or government, in the case of the Crown) created "legal fictions" endowed with whatever purposes and rights their

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[114] Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d. Cir. 2013).

[115] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring).

[116] *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 434 (1989) (tracing the evolution of American conceptions of the corporate form); Susanna K. Ripken, *Corporations are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106–74 (2009) (summarizing legal, philosophical, political, economic and psychological theories of the corporate form).

[117] *See* U.S. CONST. (noting that the word "corporation" does not appear).

[118] *See* Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (granting corporations the right to enter into and enforce contracts); Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886); Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181 (1886) (extending the Equal Protection Clause of the Fourteenth Amendment to corporations).

state of incorporation gave them at creation and no more.[119] Under this view, corporations derive their limited existence from the law, generally from specific charters.[120] Governments had the ability to create, dissolve and regulate corporations, which had no existence independent of their government issued charters.[121] Corporate personification was not a theory of the expansiveness of corporate existence so much as convenient shorthand used to extend to corporations the rights that they needed to facilitate the business for which they had received their charter of incorporation.[122] Such charters were doled out with the utmost care and generally reserved for business ventures that would benefit the public.[123] However, this structure began to decline as early as 1811 when states began to enact general incorporation statutes, which increased access to the corporate form while decreasing the state regulation of corporate existence.[124] As the intimate bond between corporations and state governments began to decay, the popularity of the concessionary theory declined as well.[125]

While the process of establishment for corporations was changing in the twentieth century, so too was the nature of business firms with management corporations proliferating and shifting operational control from shareholders to management.[126] General incorporation statutes replaced special incorporation charters, broadening access to the corporate form and loosening state control over corporate rights and responsibilities.[127] Furthermore, general incorporation statutes made incorporation an individual action, rather than a legislative one, by changing the process from handing down a legislative charger to filing

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[119] Bratton, *supra* note 116, at 434; Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 225 (2011); *see also Dartmouth Coll.*, 17 U.S. at 636 (stating that the corporation is an artificial entity endowed with only the rights enumerated in its corporate charter). Delaware General Corporation Law § 122 enumerates the rights endowed to the entities incorporated under it including the right to make charitable donations, to sue and be sued and to become contractually bound and contractually bind other parties. DEL. CODE ANN. tit. 8, § 122 (2015). It is an interesting question whether, under such a theory, a state would be empowered to create a corporation endowed with cognizable free exercise of religion rights to be recognized by federal courts as requiring religious exemptions.

[120] Ripken, *supra* note 116, at 106–07.

[121] Marcantel, *supra* note 119, at 224–25.

[122] Ripken, *supra* note 116, at 106–07.

[123] *Id.* at 108.

[124] Marcantel, *supra* note 119, at 227.

[125] *Id.* at 227–28.

[126] Bratton, *supra* note 116, at 424; Marcantel, *supra* note 119, at 228.

[127] Ripken, *supra* note 116, at 109.

incorporation papers.[128] With these changes in corporate formation and organization, legal realists began to advocate for a view of the corporation that recognized that it had social and economic importance beyond its simple construction as a legal fiction with no legal importance, the "real entity theory."[129] On the other hand, corporate law at the time viewed business firms as either independent entities with their own goals, or as collections of shareholders, using fact-based, context-specific investigations to sort corporations into these two groups.[130]

Theoretical opposition to the real entity theory of corporate organization began to gain traction.[131] Opponents argued that corporations are collections of individual parts and actors, and any corporate behavior is simply the collection of individual human actions and beliefs.[132] This anti-realist theory of corporations recognized the use of personhood language in the discourse on corporations as simply a convenient measure, not a signal that firms had an independent presence.[133]

Corporations began to grow in unprecedented ways, creating more distance between investor-shareholders and corporate governance officers.[134] An emerging economic theory of business entities viewed firms as legal fictions designed to facilitate contractual relationships for production.[135] This made way for the natural entity theory of corporate existence, which granted corporations independence from the state and the individual natural humans that collectively form the corporate body.[136] Enacted in 1948, the Dictionary Act articulates that, in "any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations."[137] The enactment of the Dictionary Act suggests that corporations should be considered natural persons, unless explicitly stated otherwise, when establishing their rights and regulations as proscribed by Congress.

Modern corporate law requires that corporations be kept entirely separate from their owner-shareholders, or they run the risk of losing their

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[128] *Id.*

[129] *Id.* at 424–25.

[130] *Id.* at 426.

[131] *Id.*

[132] *Id.* at 425.

[133] *Id.*

[134] Ripken, *supra* note 116, at 111–12.

[135] Bratton, *supra* note 116, at 415.

[136] Ripken, *supra* note 116, at 112.

[137] 1 U.S.C. § 1 (2012).

privilege of limited liability.[138] This shows that, although the law has evolved to consider corporations as more independent from the state, they are not considered simple extensions of their owner-shareholders, but rather as completely separate entities. These are the underpinnings of the burgeoning real entity theory of corporate existence.[139] The real entity theory recognizes that the corporation is an artificial creation, but it argues that a corporation is still a real and independent actor with goals and actions separate from the individuals composing it.[140] This view treats corporations similarly to natural human persons because it recognizes that corporations have their own personalities when they interact with society, which are greater than the simple sum of each individual component.[141]

B. CORPORATE PERSONHOOD RIGHTS THROUGHOUT AMERICAN LEGAL HISTORY

Dating back to the early nineteenth century, American courts have recognized that corporations have some legal rights. In the iconic case *Dartmouth College v. Woodward*, the Supreme Court ruled that corporations have the right to enter into and enforce contracts just like individual citizens.[142] Then, building on this jurisprudence, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment applies to corporations as it applies to individual citizens.[143] Building on the real entity theory conceptualization of corporations as independent bodies with goals separate from those of their organizers, shareholders, and employees, courts have granted corporations constitutional rights under the Fourth, Fifth, Sixth, Seventh, and Fourteenth Amendments.[144]

While some constitutional rights have been extended to corporations, others are considered "purely personal" and are not extended to corporations.[145] Rights are considered "purely personal" when their

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[138] Van Dorn Co. v. Future Chem. and Oil Corp., 753 F.2d 565 (7th Cir. 1985); Associated Vendors, Inc., v. Oakland Meat Co., 26 Cal. Rptr. 806, 813 (Cal. Ct. App. 1962).

[139] Ripken, *supra* note 116, at 112.

[140] *Id.*

[141] *Id.* at 112–14.

[142] Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[143] Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 189 (1886).

[144] *See* Marcantel, *supra* note 119, at 228 (listing cases extending such rights to corporations under the real entity theory).

[145] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (citing United States v. White, 322 U.S. 694, 698–701 (1944)).

"historic function" was simply to protect individuals.[146] For example, the Supreme Court has refused to extend the same privacy rights to corporations as it has to individuals.[147]

While corporate personhood rights to the free exercise of religion may be a novel question, courts have extended First Amendment's Free Speech rights to corporations.[148] Two courts have even held that corporations should be endowed First Amendment Free Speech rights based on a "pass through" theory.[149] In these cases, the Free Speech protections of individual owner-shareholders pass through to the closely held, for-profit corporations from the owner-shareholders.[150]

Recently, in the groundbreaking case, *Citizens United*, the Supreme Court took up the issue of extending First Amendment rights to corporations.[151] Citizens United is a non-profit corporation that filed for injunctive relief from a federal law prohibiting the use of corporate funds for the production and distribution of election-related communications.[152] To uphold the proposition that the government may not restrict speech based on the identity of the speaker, the Court traced the history of cases extending First Amendment protection to corporate speakers in both political and nonpolitical circumstances.[153] This history shows that the Court had decided not to subject speech to more government restriction solely because the speaker is not a "natural person."[154]

While corporate personification has always been a controversial theory, the contentious decision in *Citizens United* drew staunch criticism nearly immediately.[155] Americans across the country spoke out in

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[146] *Id.*

[147] United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes.").

[148] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (granting First Amendment free speech rights to the publication of all statements in a newspaper); *see also Belotti*, 435 U.S. at 792 (granting corporations the right to make campaign contributions based on a theory of corporate free speech rights).

[149] Equal Emp't Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (1988); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009).

[150] *Townley*, 859 F.2d at 623; *Stormans*, 586 F.3d at 1130.

[151] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[152] *See id.* at 318–21.

[153] *See id.* at 342–43.

[154] *See id.* at 343.

[155] *See* Susanna Ripken, *Corporate First Amendment Rights After* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. BUS. L. 209, 211 (2011) (describing groups opposed to the decision).

opposition against the Supreme Court expanding the personhood rights of corporations.[156] The outrage generated by the decision sparked a movement to amend the Constitution of the United States to declare that individual, natural humans are the only ones entitled to constitutional rights, forever closing the door to corporate personhood giving way to constitutional rights for corporations.[157] Such activists argue that the legal doctrine of corporate personhood leads to the extension of constitutional rights that were originally, and should remain, individual rights to corporations.[158]

V. CURRENT CHALLENGES TO THE EMPLOYER MANDATE

A. CORPORATE STRUCTURE AND PERSONHOOD RIGHTS

Hobby Lobby and *Conestoga Wood Specialties Corp.* represent opposite ends of the spectrum of the circuit split on whether to grant for-profit, closely held corporations religious exemptions to the Employer Mandate. The Supreme Court held that RFRA protects for-profit, closely held corporations.[159] Underpinning the decision were three key areas of tension regarding corporate structure: (1) the personhood, (2) the profit-making status, and (3) the holding structure of corporate plaintiffs. While the academic instinct may be to analyze each of these issues separately, it was the gestalt of the analysis that lead to the Court's decision.

In *Hobby Lobby*, the government asserted that the corporate plaintiffs are not persons under the protective scope of RFRA.[160] While the government conceded that the legal construct of "person" can encompass corporations and that established legal precedent extends some First Amendment rights to for-profit, secular corporations,[161] it argued that religious associations[162] are the only organizations entitled to

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[156] *Id.*

[157] *Id.* at 212.

[158] *Id.* at 214–15.

[159] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[160] Brief for Appellees at 17, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2012) (No. 12-6294).

[161] *Id.* at 18.

[162] Hobby Lobby argues that it is a religious association, which calls into question the definition of a "religious association." Can for-profit corporations legally be religious associations? Does it make sense to consider them as religious associations? These are fascinating questions, which regrettably cannot be answered within this Note. It is clear that to some extent for-profit corporations can take actions that appear to have a religious intent such as Hobby Lobby's

constitutional or statutory free exercise rights.[163] Furthermore, the government contended that Congress has embodied this theory in several pieces of legislation including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), and the National Labor Relations Act ("NLRA").[164] These acts each include exemptions for religious employers allowing them to refuse to comply with federal regulations to eliminate discrimination.[165] The government also relied on case law to show that the only corporations able to claim such exemptions have been non-profit, religious corporations, suggesting that courts and Congress depend on an association's profit-making structure to extend rights to deserving associations.[166] It is this interpretive context that the government argued should be used to frame interpretations of RFRA, therefore requiring corporations to have non-profit status before claiming RFRA's protection.[167] According to the government, this reasoning compelled the conclusion that "Hobby Lobby is not a religious organization, and it therefore must afford its secular workforce the employee benefits that are required by federal law."[168]

On the other hand, Hobby Lobby and Mardel argued that they are entitled to challenge the Employer Mandate under the Constitution and RFRA.[169] Pointing to the text of RFRA, in conjunction with the Dictionary Act, the plaintiffs contended that corporations are entitled to RFRA protection because they are not explicitly excluded, and that under the

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Easter Advertisements calling the general public to know Jesus. Further, for-profit corporations today seem to be taking more actions incentivized by desires beyond making profit. For example, CVS has refused to sell cigarettes due to their negative health effects; and Chipotle has threatened to stop selling guacamole in order to push shareholders to focus their resources and time towards climate change solutions. Such actions are intriguing, and it is important to consider whether such corporate actions for social change are violations of the fiduciary duty to maximize profits and whether shareholders may have recourse for such violations. If for-profit corporations have the right to engage in social change activities, and those activities are protected by religious exemptions, should that accommodation be subject to the shareholders' right to have the corporation maximize profits? Here, however, the for-profit corporation in consideration is a closely held company whose shareholders would likely not bring such a suit. Further, Hobby Lobby's past religious actions are simply being offered to show that it is a religious actor, despite being organized as a for-profit corporation.

[163] Brief for Appellees, *supra* note 160, at 18.

[164] *Id.* at 18–19.

[165] *Id.*

[166] *Id.* at 19–20.

[167] *Id.* at 22.

[168] *Id.* at 23.

[169] Brief for Appellants, *supra* note 3, at 16.

Dictionary Act, "persons" includes corporations.[170] Furthermore, the plaintiffs maintained that an organization under a corporate form, regardless of its profit-making status, does not inhibit religious exercise.[171] The plaintiffs relied on case law that extends free exercise rights to non-profit, religious corporations to show that associations can exercise religion within the corporate form.[172] They argued that regardless of the corporation's profit-making structure, it is not able to act except through the actions of its shareholders and directors.[173] Therefore, it is illogical to rely on a for-profit/non-profit distinction to validate a corporation's exercise of religion, given that non-profit and for-profit corporations both take religious actions in the same manner.[174]

The Court of Appeals for the Tenth Circuit, and eventually the Supreme Court, agreed with the plaintiffs, finding that Hobby Lobby and Mardel, as closely held, for-profit corporations, were entitled to RFRA protection.[175] The Court approached the question as to whether the corporate plaintiffs had free exercise rights by first interpreting RFRA to apply to corporations.[176] Because RFRA does not include a specialized definition of the word "person," the Court relied on the Dictionary Act to find that corporations, like the corporate plaintiffs, are protected by RFRA.[177] To bolster this finding, the Court relied on precedent to show that it has refused to allow the corporate form to foreclose on a religious association's right to bring a claim under RFRA.[178] In addressing the government's argument that because Title VII, the ADA, and the NLRA each include exemptions for religious employers, and therefore a for-profit/non-profit distinction should be read into RFRA, the Court reasoned that such statutes actually show that Congress was capable of drafting a "corporate religious exemption" when it enacted RFRA, but choose otherwise.[179] Therefore, RFRA applies to corporations.[180]

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[170] *Id.* at 37.

[171] *Id.* at 37.

[172] *Id.*

[173] *Id.* at 38.

[174] *Id.*

[175] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2012); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[176] *Hobby Lobby*, 134 S.Ct. at 2751.

[177] *Id.*

[178] *Id.* at 2762.

[179] *Id.* at 2773.

[180] *Id.* at 2774.

Then, turning to the government's assertion that case law proves that the profit-making structure of a corporation is the deciding factor of its status as a religious organization, the Court reasoned that the profit-making status of a corporation is but one factor to consider in such an analysis.[181] The Court noted that, regardless of for-profit or non-profit status, advancing the religious freedom of the corporation advanced the religious freedom of the individual owners or directors of the corporation.[182] However, if the Court were truly seeking to protect the religious rights of the owner-shareholders of the corporate plaintiffs, it would have been more appropriate to rule in their favor on a pass-through theory. This would have allowed the Court to further the religious freedom of the owner-shareholders, allowing them to evade the penalty assessed under the Employer Mandate, while preserving the distinction between the corporation and the persons holding the corporation, as well as the distinction between closely held and public corporations.

Further, the Court relied on case law, which has allowed sole proprietors to bring free exercise claims when regulations impact their business.[183] Relying on readings of *Lee*, where an Amish employer could not claim a religious exemption to social security taxes given the importance of the integrity of the taxation system, and *Braunfield*, where Jewish merchants were allowed to challenge a Sunday closing law, the Court shows that precedent supports the contention that profit makers have been allowed to make free exercise claims.[184] Rather than, as the government asserted, depending on a bright line distinction between non-profit companies and profit makers, courts have historically entertained the free exercise claims of sole proprietor–profit makers, therefore, in the Court's opinion, invalidating the government's argument in favor of a for-profit/non-profit distinction.[185] To make this analysis clear the Court asked, "If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free exercise claim, why can't Hobby Lobby, Conestoga and Mardel do the same?"[186]

The corporate plaintiffs should not have been allowed to do the same because the historical distinction between for-profit and non-profit corporations who engage in religion cannot be conflated with a distinction

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[181] *Id.* at 2769.

[182] *Id.* at 2796.

[183] *Id.*

[184] *Id.* at 2769.

[185] *Id.*

[186] *Id.* at 2770.

between profit makers and those who do not earn profits. The non-profit/for-profit distinction is not simply a distinction separating profit makers from those who do not earn profits given that both corporations earn revenue. Rather, the distinction lies in the goal of the corporation; for-profit entities seek to earn profits, while non-profit associations attempt to produce some greater societal good. An association organizing under the non-profit corporate form does not do so because it has no desire to earn a profit, but rather, because it intends to pursue a mission that will not benefit its organizers, managers and shareholders with revenue, but instead will benefit society with some moral good or improvement.[187] Under the Internal Revenue Code, tax exempt status is extended to certain types of entities including government organizations, civic leagues, labor organizations and corporations "organized and operated exclusively for" limited purposes.[188] In *Hobby Lobby*, the Court points out that for-profit corporations may "support a wide variety of charitable causes" and asserts that religion is a natural, logical extension of these charitable contributions.[189] While such charitable contributions may be an externality of running a conventional for-profit corporation, they are not, and cannot, be the goal of the corporation.[190]

Furthermore, non-profit corporations must comply with regulations and restrictions on activity. For example, they must ensure that their net earnings do not benefit individuals or private shareholders, and they cannot engage in lobbying.[191] It is these fundamental organizational differences between non-profit and for-profit corporations that likely characterize their convergent treatment under the law, not the presence of a revenue stream. Justice Alito himself argued this when he wrote in

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[187] *Exemption Requirements—Section 501(c)(3) Organizations*, INTERNAL REVENUE SERV. (Sep. 3, 2013), http://www.irs.gov/Charities-%26-Non-Profits/Charitable-Organizations/Exemption-Requirements-Section-501(c)(3)-Organizations; *Exempt Purposes—Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERV. (Oct. 30, 2013), http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Purposes-Internal-Revenue-Code-Section-501(c)(3).

[188] 26 U.S.C. § 501(c) (2012).

[189] *Hobby Lobby*, 134 S.Ct. at 2770.

[190] There are modern corporations seeking more and more to expand the role that these external causes play in forming and organizing entities and the corporate law, in several jurisdictions, is being expanded to allow this flexibility. This will be discussed in greater detail in section VII of the article and deserves further scholarly and legal attention. However, the existence of this movement and the requirement that corporate laws be modified to allow for such external pursuits further highlights that while owners and mangers may have goals other than the generation of profit, the goal of the business, at least traditionally, is profit and managers have a fiduciary duty to shareholders to maximize profit.

[191] 26 U.S.C. § 501(c)(3).

Hobby Lobby that, "not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates . . . ."[192] It is clear that the differences between non-profit corporations and for-profit corporations extends past merely making money—the differences extend into the fabric of the entity. There is a balance between the legal privileges and constraints that govern non-profit corporations. The fact that courts have extended free exercise rights to corporations when they are organized as non-profits, and to individuals who earn profits, does not mean that they must also extend these rights to for-profit corporations as such corporations are inherently different from non-profits and individuals, regardless of profit-making status.

B. TAXES AND THE EMPLOYER MANDATE

After finding that RFRA applies to closely held, for-profit corporations, the Court then moved to an analysis of the Employer Mandate.[193] For a federal regulation to comply with RFRA it must be the least restrictive means of attaining a compelling government interest.[194] Several interests could be advanced to protect the Employer Mandate, including public health, gender equality, and access to contraceptives.[195] All of these are weighty interests deserving consideration,[196] but this section will focus on the government's interest in preserving the integrity of its sound taxation system. Here, the Court not only extended RFRA protection to for-profit corporations, but the Court expanded the right to religious accommodation to encompass exemptions to a federal tax.[197]

In *Hobby Lobby*, the government argued that allowing a religious exemption to the Employer Mandate for for-profit companies would damage the comprehensiveness of the ACA.[198] In prior tax cases, such as

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[192] *Hobby Lobby*, 134 S.Ct. at 2771.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] Of particular importance and interest is the Court's willingness to dismiss the great weight of access to contraceptive methods despite agreeing that other public health issues (for example, the spread of infectious disease) may be so compelling that the court would reach a different conclusion.

[197] *Hobby Lobby*, 134 S.Ct. at 2771.

[198] *Id.*

United States v. Lee, the Supreme Court has denied religious accommodations in order to preserve the integrity of the national tax system.[199] In *Lee*, the Court found that forced participation in Social Security burdened an Amish farmer's exercise of religion.[200] However, the Court further found that the public interest in preserving the tax system outweighed the burden on religious exercise.[201] Several cases arising after the enactment of RFRA followed suit, building an established body of precedent respecting the importance of a sound tax system.[202] The entire tax system would be jeopardized if religious exemptions were granted to individuals.[203]

In *Hobby Lobby* the Court continued to respect this precedent, stating "it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular government expenditures."[204] Yet, the Court was willing to extend such an exemption to for-profit corporations.[205] The Court distinguished *Hobby Lobby* from this body of precedent, arguing that other taxes funnel into an undifferentiated pool but the Employer Mandate requires employers to purchase healthcare for their employees.[206]

While these facts are true, the Court neglected to frame the issue at hand in *Hobby Lobby* correctly. Here, the plaintiffs already had the option to not purchase the contraceptives for their employees.[207] What the plaintiffs were seeking, and eventually were granted, was an exemption from the requirement that they pay the tax excised for that option.[208] The tax in question was not the money to be spent purchasing employee health care plans but was actually the assessable payment to be "paid upon notice

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[199] *Id.*

[200] United States v. Lee, 455 U.S. 252, 260 (1982).

[201] *Id.* at 257, 260.

[202] *See* Wall v. United States, 756 F.2d 52 (8th Cir. 1985) (finding that the importance of a sound taxation system through which to collect revenue outweighs the intrusion on the taxpayer's religious exercise); *see also* Jenkins v. Commissioner, 483 F.3d 90, 92 (2d Cir. 2007), *cert. denied*, 552 U.S. 821 (2007) (finding that the collection of taxes for purposes in opposition to the taxpayer's religious beliefs did not violate the constitutional or statutory free exercise rights of the taxpayer); Adams v. Commissioner, 170 F.3d 173, 175–82 (3d Cir. 1999) (finding that RFRA does not require courts to accommodate for tax collection).

[203] *Lee*, 455 U.S. at 260.

[204] *Hobby Lobby*, 134 S.Ct. at 2783.

[205] *Id.* at 2783–84.

[206] *Id.*

[207] Brief for Appellants at 3; Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2012) (No. 12-6294).

[208] *Id.*

and demand by the Secretary, and . . . assessed and collected in the same manner as taxes."[209] The issue was truly whether an exemption to the assessed penalty would threaten the comprehensiveness of the ACA. This suggests that *Hobby Lobby* was much more similar to the precedential tax cases denying a religious exemption than the Court appears to reason.[210] In this way, not only does *Hobby Lobby* stand for the proposition that corporations have been afforded a new personhood right, it shows that corporations have more expansive religious rights than natural persons ever have.

VI. EXPANSIVE CORPORATE RIGHTS AND GLOBAL CITIZENSHIP

The ruling in *Hobby Lobby* signals a continuation of a trend toward expansive corporate rights and social participation. After ruling in *Citizens United* that corporations have first amendment free speech rights, the Court found that at least some corporations are also protected under RFRA, even against taxes, where individuals have historically failed to procure similar religious accommodation. While corporate personification may have originated as a convenient short hand, it has become an integral part of American thinking. Societal and cultural participation seem more and more expected from corporations large and small. For example, recent changes to reporting laws have even required large, publicly held corporations to take humanitarian and altruistic actions to stop armed conflict in the Democratic Republic of Congo through disclosures regarding the purchase and use of conflict minerals.[211] Several corporations clearly have moral, philosophical, and ethical beliefs, which may serve as impetuses beyond mere profit making for corporate action.[212]

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[209] 26 U.S.C. § 6671(a) (2012).

[210] Though there are still some differences, as with any case of first-impression. Namely, there can be no parallel between *Hobby Lobby* and individual tax challenges given than individuals are exempted from the Employer Mandate. It is also a noted departure from Braunfeld in which the Court reasoned that a Sunday closing law was constitutionally sound given that it did not make a religious practice illegal, just more expensive. Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

[211] *See* 17 C.F.R. § 240, 249B (requiring public reporting companies to take steps to mitigate the risk of their use of "conflict minerals" from the Democratic Republic of Congo).

[212] *See, e.g.*, *CVS Quits for Good*, CVS, http://info.cvscaremark.com/cvs-insights/cvs-quits (last visited Feb. 13, 2015); *Our Core Values*, WHOLE FOODS, http://www.wholefoodsmarket.com/mission-values/core-values (last visited Feb. 13, 2015); *Save Lives While Saving Money with the WB Games Humble Bundle*, DC COMICS (Nov. 11, 2013), http://www.dccomics.com/blog/2013/11/05/save-lives-while-saving-money-with-the-wb-games-humble-bundle. These are just a few companies with outspoken commitments to causes beyond profit making. Of course, such

Across industries, corporate structures and causes, American companies have been dedicated to supporting social initiatives[213] and one would be hard pressed to argue that such actions should be stifled because corporations simply exist as money-making vehicles. Further, there has been a recent proliferation of for-profit entities whose dedication to humanitarian and social causes is equal to or greater than their profit making goals.[214] These Cause Companies occupy an interesting space between conventional for-profit entities and non-profit associations. The law is beginning to address this trend of capitalist philanthropy by amending corporate codes to include business formations that facilitate the pursuit of social causes and protect organizations seeking to profit while they impact.[215] In *Hobby Lobby*, Justice Alito noted this trend writing that "for-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives."[216] He further stated that, "If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well."[217] However, the culture of corporate social responsibility should be distinguished from the newfound corporate freedom of religion. While they may both signal the expansion of corporate activity beyond mere profit making and personification beyond mere shorthand, there are

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commitments may be steps towards improving the bottom line of these companies as consumers who care about such causes will be more likely to become clients. Similarly, a company's advertised religion may be an attempt to secure more clients seeking to purchase from a religious organization. Regardless of the sincerity of such actions, the trend is towards corporations taking more expansive actions than the bare minimum to yield profits.

[213] *See, e.g.*, *A Commitment to Ending Domestic Violence*, MARY KAY, http://www.marykay.com/en-US/About-Mary-Kay/SocialResponsibility/Pages/Local-Market-Initiatives.aspx (last visited Feb. 13, 2015); *Education*, TARGET, https://corporate.target.com/corporate-responsibility/education (last visited Feb. 13, 2015); *Garment Collecting*, H&M, http://about.hm.com/en/About/sustainability/commitments/ reduce-waste/garment-collecting.html (last visited Feb. 13, 2015).

[214] *See Sevenly Hopes to Change the World One T-shirt at a Time*, RICARDO LOPEZ (Jan. 25, 2012), *available at* http://articles.latimes.com/2012/jan/25/business/la-fi-charity-firm-20120125 (profiling one company in "a recent trend in business models—for-profit firms that donate a major percentage of their revenue to charitable causes.").

[215] *See, e.g.*, Cal. Corp Code §§14600-14631 (codifying the 2012 addition of benefit corporations to the California Corporations Code); Cal. Corp Code §§ 2500-3503 (codifying the 2012 addition of flexible corporations to the California Corporations Code); WASH. REV. CODE §§ 23B.25.005–23B.25.150 (codifying Washington State's new corporate form, the Social Purpose Corporation, allowing such entities to simultaneously pursue profit and social reform). The scholarly, comparative study of these endeavors is worthwhile but more than can be addressed here.

[216] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

[217] *Hobby Lobby*, 134 S.Ct. at 2771.

marked differences between humanitarian action and religious action. Humanitarian actions are taken with a primary focus on the betterment of all mankind. On the other hand, religious actions are taken to follow the actor's chosen doctrine and can even include actions destructive to human welfare, such as restrictions on access to healthcare and abstention from vaccination. Justice Ginsberg illuminated this difference in her dissent when she wrote that "the exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employee and covered dependants."[218, 219] Of course, in practice this is more complex given that any person, natural or otherwise, can choose to act on a multiplicity of impulses. In some, if not most, instances an action is driven by several motivations. Consider a corporation donating monetary and human capital to a local shelter. Such a donation could be simultaneously impacted by humanitarian, religious, employee satisfaction, and public appearance goals. In this case, a commendable outcome is served by an interest convergence of four different motivations. Further, humanitarian motivations may not always yield a positive consequence. For example, in attempting to defund armed terror cells in the Democratic Republic of Congo, corporations refusing to purchase conflict minerals may end up withdrawing crucial economic stimulation from an already distressed area, aggravating the situation further. Cause Companies run the risk of promoting arm chair activism to the detriment of hands-on participation while advancing harmful socialized imbedded Western savior attitudes and perpetuating the pervasive first-world/third-world dichotomy. Finally, there may be room for debate over what constitutes a humanitarian action. Put simply, while there is a distinction to be drawn between humanitarian and religious actions found in the underlying motivations of the actor, it would be an error to assume that such a distinction is a simplicity. Yet, the distinction is strong enough to challenge Justice Alito's assertion that the pursuit of religious objectives naturally follows the pursuit of humanitarian goals and therefore should be a legally protected pursuit.

The growing trend towards corporate social responsibility and participation can be a powerful tool. Therefore, the law should seek to give corporations the space to pursue such humanitarian and moral goals while ensuring that the rights of individuals and shareholders are

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[218] *Id.* at 2790.

[219] Of course, it's possible that the all male majority of the Court simply ruled in favor of Hobby Lobby Stores, Inc. because they were just unconvinced that denying female employees access to healthcare is not a form of harm or perhaps just not a serious enough form of harm.

protected. By including religious actions in this scheme, the Court has given for-profit, closely held corporations privileged status to take protected actions that can harm others. By using the Free Exercise Clause to allow Hobby Lobby Stores, Inc. to withhold healthcare without penalty, the Court went a step too far in the expansion of corporate rights. Therefore, Congress should take action to ensure that corporate religious freedom does not allow corporations to avail themselves of religious accommodation by amending RFRA to define person as exclusively natural persons. This would allow corporations with religious beliefs to continue taking religious actions with a humanitarian result alongside the growing trend of corporate social responsibility while ensuring that they cannot be excused from laws enacted to protect the general populous.

VII. CONCLUSION

Hobby Lobby resolved the circuit court split on whether for-profit corporations can claim free exercise exemptions to the Employer Mandate of the ACA. In light of the distinction between non-profit and for-profit corporations, the Supreme Court should have found that the law has treated the two forms differently, and refused to extend RFRA protection to for-profit corporations. Further, the Court should have found that a penalty under the Employer Mandate does not violate the religious beliefs of the corporation because the preservation of the taxation system is a compelling government interest of the highest order. This decision not only expanded RFRA protection to for-profit corporations, but it also expanded RFRA protection past its historical limits to encompass religious exemptions to taxes. *Hobby Lobby* leaves an uncertain legacy in the Court's precedent regarding corporate personhood rights and religious accommodations.