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Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions

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Introduction

One of the main questions before the Supreme Court in *Sebelius v. Hobby Lobby Stores, Inc.*[1] and *Conestoga Wood Specialties Corp. v. Sebelius*[2] is whether large for-profit corporations are entitled to religious exemptions under the Free Exercise Clause or the Religious Freedom Restoration Act. In particular, the plaintiffs seek religious exemptions from the Affordable Care Act's so-called "contraception mandate."[3]

Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp. are closely-held, for-profit corporations. Earning roughly $3 billion in annual revenue, Hobby Lobby operates a nationwide chain of arts and crafts stores with over 13,000 full-time employees. Conestoga Wood manufactures wood cabinets and employs around 950 people. As large for-profit corporations, they are required by the Affordable Care Act to provide health insurance to their employees, and that health insurance must cover preventive care without any cost sharing from those employees.[4] For women, preventive care includes access to FDA-approved contraception, including morning-after pills such as Plan B.

The owners of Hobby Lobby and Conestoga Wood, the Green family and the Hahn family, respectively, oppose abortion on religious grounds, viewing it as an "intrinsic evil and a sin against God to which they are held accountable."[5] The lawsuits name themselves and their corporations as plaintiffs. That is, they first argue that the contraception mandate violates their religious conscience as individuals because owning a company whose health insurance plan must cover morning-after pills forces them to facilitate abortion.[6] This question has been discussed

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* Professor of Law, University of Miami School of Law. Several arguments are based on an earlier piece, *Corporate Religious Liberty* (August 2013) (available on SSRN).

[1] 134 S. Ct. 678 (Mem) (2013) (granting petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit).

[2] 134 S. Ct. 678 (Mem) (2013) (granting petition for writ of certiorari to the United States Court of Appeals for the Third Circuit).

[3] The circuits have split, with the Seventh and Tenth Circuit Courts of Appeals holding that for-profit corporations can bring religious liberty claims, and the Third, Sixth, and D.C. Courts of Appeals holding that they cannot.

[4] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of Titles 26 and 42 of the U.S. Code).

[5] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013).

[6] In fact, there is no burden on religious conscience. Both Hobby Lobby's Green family and Conestoga's Hahn family object to abortion rather than contraception. Accordingly, they limit their opposition to morning-after pills like Plan B, which they believe kill fertilized eggs. They are wrong. Morning-after pills prevent ovulation. *See, e.g.*, International Federation of Gynecology and Obstetrics (FIGO), *Mechanism of Action: How Do Levonorgestrel-Only Emergency Contraception Pills (LNG ECPs) Prevent Pregnancy*, March 2011, *available at* http://www.figo.org/files/figo-corp/MOA_FINAL_2011_ENG.pdf (last accessed Jan. 13, 2013) (summarizing studies); Kristina Gemzell-Danielsson et al., Review Article: *Emergency Contraception – Mechanisms of Action*, 87 Contraception 300, 301 (2013). Consequently, there actually is no clash between plaintiffs' religious obligations and

elsewhere, and is not addressed here.[7] Rather, this issue brief focuses on the corporate plaintiffs and the claim that the contraception mandate violates the religious conscience of the corporation qua corporation, and that the corporation is therefore entitled to a religious exemption.

This is an entirely novel claim. It is also without merit. The Free Exercise Clause and the Religious Freedom Restoration Act protect the religious practices of individuals and churches. They do not, and should not, extend to the for-profit corporate form for at least three reasons. First, corporate religious liberty makes no sense as free exercise is understood to (a) protect an individual's relationship with the divine and (b) respect the inherent dignity of the individual. Furthermore, *Citizens United v. Federal Election Commission*[8] provides no theoretical foundation for corporate religious liberty. The justifications for extending free speech protection to for-profit corporations do not translate into the free exercise context. Second, there is no precedent for the claim that for-profit corporations are entitled to religious liberty exemptions; on the contrary, precedent such as *United States v. Lee*[9] points in the other direction. Third, recognizing corporate religious liberty will benefit employers at the expense of their employees, who risk losing protection of the employment laws as well as their own free exercise rights.

I. The Illogic of Corporate Religious Liberty

Whether a constitutional provision's shelter should extend to corporations depends not on whether corporations are "persons" but on what that clause is meant to protect. At its heart, religious liberty protects the religious conscience of human beings. Sometimes people practice their faith individually, sometimes communally in voluntary religious associations. But what the Free Exercise Clause unquestionably protects are uniquely human attributes: a person's relationship with the divine or a person's inherent dignity. Corporations do not have a relationship with God or other divinity. Nor do they possess inherent dignity such that we must respect the exercise of their beliefs. Consequently, while religious liberty protects religious individuals and their churches, synagogues, mosques, temples, and other houses of worship, it makes no sense to extend religious liberty to for-profit corporations.

A. The Free Exercise Clause Protects Religious Conscience

Whether a for-profit corporation is considered a "person" is not dispositive. Although the Supreme Court has held that corporations are "persons" for some constitutional provisions,[10] that recognition simply means that the Court has decided that it makes sense to apply those particular

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the contraception mandate. *See generally* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. (forthcoming 2014).

[7] *See, e.g.*, Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013); Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, ACS Law and Policy Issue Brief (2012).

[8] 558 U.S. 310 (2010).

[9] 455 U.S. 252 (1982).

[10] For example, the Supreme Court has held that corporations are persons protected by the Fourteenth Amendment's guarantee of equal protection and procedural due process. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (equal protection); Covington & L. Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) (procedural due process).

clauses to corporations. The Court has also held that various clauses do not apply to corporations.[11] Thus, the real question is whether it is logical to extend the Free Exercise Clause, and consequently, the Religious Freedom Restoration Act (RFRA), to for-profit corporations.[12] It is not.

1. Protection of Individuals

Religious liberty is meant to protect religious individuals and their voluntary religious associations. People may disagree as to why, but no one disputes that the Free Exercise Clause protects individual religious conscience. Those religiously inclined might argue, as did James Madison in his Memorial and Remonstrance Against Religious Assessments, that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[13] Accordingly, the state should not hinder anyone from meeting her religious obligations. As Justice Souter explained, "the [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God."[14]

A more secular reason to protect religious practice focuses on individual autonomy and dignity, a touchstone of constitutional rights. One need not agree with someone's religious beliefs in order to conclude that there is value in respecting her decision to follow them. The Free Exercise Clause furthers individual autonomy and dignity by recognizing people's right to make decisions about their spirituality. Accordingly, the state should not demean people by forcing them to act contrary to their conscience. The underlying assumption is that people possess inherent dignity. "This dignity gives man an intrinsic worth, a value *sui generis* that is 'above all price and admits of no equivalent.'"[15] While the relationship between conscience, autonomy, and dignity is not straightforward, the three are inextricably linked, and the bottom line is that respecting religious autonomy/conscience is very much about respecting the inviolable dignity of the human person.

It should be fairly apparent that neither the religion-based nor the dignity-based justification for protecting individual religious conscience translates to corporations. As for the religious justification, corporations, unlike natural people, do not have a relationship with God. They do not feel shame or sorrow for failing to fulfill their religious duties. There is no point in

[11] For example, the Supreme Court has declined to grant corporations full Fourth Amendment privacy rights, United States v. Morton Salt Co., 338 U.S. 632, 650-52 (1950), and any Fifth Amendment right against self-incrimination. Hale v. Henkel, 201 U.S. 43, 74-75 (1906). It has also held that corporations are not persons for purposes of the Privileges and Immunities Clause of the Fourteenth Amendment. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869).

[12] There is no indication, and the plaintiffs do not argue, that the exercise of religion for purposes here differs under the Free Exercise Clause and RFRA.

[13] James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 1, *as reprinted in* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, app. at 64 (1947).

[14] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 575-76 (1993) (Souter, J., concurring) (adding the caveat "unless those activities threatened the rights of others or the serious needs of the State").

[15] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE ix (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797).

excommunicating them because they have no soul.[16] As for the dignity justification, corporations, unlike natural people, possess no inherent dignity. They are not ends in themselves. On the contrary, corporations are a means to an end—artificial entities designed to facilitate economic growth. That is not a criticism, but a description of their intended purpose. In short, the Free Exercise Clause is designed to protect human attributes that, as insentient and instrumental entities, for-profit corporations lack. Consequently, for-profit corporations should not be entitled to Free Exercise Clause protection.

2. Protection of Churches

Free Exercise Clause protection also extends to churches, synagogues, mosques, temples, and other houses of worship ("churches" for short). Protecting churches facilitates individual religious practice. After all, while religious practice may be a solitary endeavor for some, for others it is a group activity. As the Supreme Court has noted, "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community."[17] To fully protect individual religious conscience, it is necessary to protect associations of religious individuals.

Proponents of corporate religious liberty argue that because nonprofit religious corporations like churches are protected by the Free Exercise Clause, then for-profit religious corporations ought likewise be protected since they are the same in all important respects. They both take the corporate form, and they both are institutions through which people exercise their religion. Nonetheless, the reasons we protect churches do not ultimately apply to corporations.

Actually, the justifications and appropriate scope of free exercise protection for churches is hotly contested. This disagreement takes place along various dimensions. One issue relevant to corporate religious liberty is whether the Free Exercise Clause protects churches as a proxy for the individuals associated with them or protects churches qua churches.[18] In other words, can churches be rights-holders separate and apart from the individuals that compose them?

One approach argues that we protect religious institutions only because we protect religious individuals, and any protection for churches is derived from protection of its individual members. This approach offers little support to for-profit corporate religious liberty claims, which focus on corporate "conscience" rather than individual conscience. In any event, as

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[16] Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 251 (2006) ("[Sir Edward] Coke famously proclaimed that corporations 'have no souls'. . . ."); *cf.* John Coffee, Jr., *"No Soul to Damn, No Body to Kick:" An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 n.2 (1981) ("In the thirteenth century Pope Innocent IV forbade the practice of excommunicating corporations on the unassailable logic that, since the corporation had no soul, it could not lose one.").

[17] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987).

[18] *Compare, e.g.*, Richard C. Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) *with* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) *and* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009). The former argue that any free exercise protection for churches is derived from its members while the latter argue that churches qua churches are entitled to free exercise protection.

discussed below, the corporation cannot be said to merely represent an aggregation of its individual members.

Another approach argues that churches are entitled to free exercise protection separate and apart from their members. Under this approach, churches qua churches are religiously significant. Churches further religious liberty not only because people worship communally but also because religious liberty "depended historically on the freedom of the Church as an independent spiritual authority."[19] For example, interfering with church autonomy "may disrupt 'the free development of religious doctrine.'"[20] In addition, many view their church as a sacred entity: "[T]he church is the institutional expression of what is other-worldly, holy, entitled to reverence."[21]

The logic of this churches-qua-churches approach falters when confronted by for-profit corporations. There are several significant differences between churches and for-profit corporations. The most obvious one is that the practice and promulgation of religion is the overriding purpose of a church. Even assuming that an arts-and-crafts store or wood cabinet business is capable of exercising religion—itself a debatable proposition[22]—it is unlikely to be its principal goal. By definition, for-profit corporations exist to make money; otherwise they would be nonprofit.

Second, for-profit corporations do not share the unique qualities that have been cited to justify churches' preferential treatment. In the eyes of their followers, churches are sacred houses established by God. For-profit corporations are not. Churches are the source of theological truth. For-profit corporations are not. Indeed, to argue that the two are indistinguishable would negate the reasons to treat churches as entitled to special autonomy in the first place.

Third, both approaches envision the church as an association of voluntary members. As with other associations, a church is a group of people who voluntarily join together to pursue common interests or goals. In the case of churches, the interests and goals are religious. Under the churches-as-proxy approach, the church is essentially the sum of the individuals who belong to it. Under the churches-qua-churches approach, the sum may be greater than its parts, but its parts are still people who voluntarily choose to associate with it.

This assumption is highlighted in the sole Free Exercise Clause case where the Supreme Court granted a religious exemption to an entity rather than individuals, the relatively recent

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[19] Richard W. Garnett, *The Freedom of the Church*, 4 J. Catholic Soc. Thought 59, 81 (2007) (citation omitted).

[20] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392 (1981) (citation omitted).

[21] Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 514 (2007).

[22] *Conestoga*, 724 F.3d at 385 (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F.Supp.2d 1278, 1291 (W.D. Okla. 2012), *rev'd and remanded*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013)) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.").

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.[23] This decision could be viewed as endorsing the churches-qua-churches approach rather than churches-as-proxy approach, as the Supreme Court sided with the institution against an individual member and held that the religion clauses required a "ministerial exception" that spares churches from discrimination suits by their ministers. In addition to scattered language describing churches as voluntary associations,[24] the Court justified the exemption by emphasizing the voluntary nature of the minister's association: It is permissible to exclude ministers from anti-discrimination law's protection because they have consented to the church's rather than the court's adjudication of their employment disputes. As the Supreme Court noted, "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."[25] In other words, the association is exempt from otherwise applicable laws because all who are affected by the exemption have consented to it. Thus, to the extent that there is free exercise protection for churches, it is free exercise protection for voluntary religious associations.

For-profit corporations, however, are not voluntary religious associations. One of the main characteristics of the modern corporation, limited liability, precludes that conclusion.[26] An association is understood to be the alter-ego of its members. So, for example, an association has standing only if, among other things, its individual members would have standing to sue in their own right.[27] The point of limited liability, however, is to create a legal entity that is separate from its owners. Limited liability ensures that corporate owners are liable only for the amount they have invested. The corporation's debts are not the owners' debts, and vice-versa. So while an association assumes the association and its members are essentially one and the same, limited liability insists that the corporations and its owners are not. To equate the two, as the Third Circuit recently observed in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, "would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners."[28] Thus, even closely held corporations, where the owners (or at least some of them) are also the managers, cannot qualify as associations. When the owners are not the managers, the associational argument, already implausible, becomes absurd.

Once employees are factored into the analysis, it becomes more obvious than ever that a for-profit corporation cannot be described as a voluntary association. Cashiers, clerks, and other employees simply are not members of Hobby Lobby Stores, Inc. the way they are members of their church or other voluntary association. People join associations because "they are persuaded

[23] 132 S.Ct. 694 (2012).

[24] For example, the concurrence starts its discussion by observing that "[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations . . . ." *Id.* at 712 (Alito, J., concurring). In explaining why church autonomy includes the power to remove unwanted ministers, it refers to the rights of "voluntary religious associations," *Id.* at 713; and relies on the Court's pre-eminent (if controversial) freedom of expressive association case. *Id.* at 712 (citing Boys Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

[25] *Hosanna-Tabor*, 132 S.Ct. at 713 (Alito, J., concurring) (citation omitted).

[26] The modern corporation's other features, like perpetual life, further undermine an association view since corporations potentially last forever while the people that compose them do not.

[27] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

[28] 724 F.3d at 389.

by the principles of the association."[29] People take jobs because they have to. They need the paycheck. One response might be that while employment itself may be an economic necessity, employment at these particular corporations may be voluntarily chosen precisely because of their religious principles. This claim is neither empirically supported nor is it likely to be: with 13,000 employees nationwide and Title VII's bar on religious discrimination, Hobby Lobby Stores, Inc. is bound to be religiously diverse.[30] The assumption that employees are always able to choose employers whose values match their own also relies on a Lochner era view of employment opportunities.

For-profit corporations are not just like churches. For-profit corporations are not voluntary associations that serve as a proxy for their members, so that it cannot be argued that protecting a corporation is essentially protecting its members. Nor do for-profit corporations share the distinguishing features that arguably justify granting churches-qua-churches free exercise protection. In short, the theoretical justifications for free exercise protection for individuals and their churches do not extend to for-profit corporations.

B. *Citizens United* Is Inapposite

Nor does *Citizens United v. Federal Election Commission*[31] provide a justification for corporate religious liberty. Citing *Citizens United*, the Tenth Circuit Court of Appeals reasoned that since corporations have First Amendment free speech rights, it necessarily followed that corporations have First Amendment free exercise rights: "We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not for its religious expression."[32] In fact, there is a very good reason to distinguish the two.

It is widely understood that the Free Speech Clause protects the free flow of speech in order to promote: (1) a marketplace of ideas, (2) democratic self-government, and (3) individual autonomy, self-expression, and self-realization. Notably, audiences are as important as speakers in free speech theory. The marketplace of ideas benefits those who receive the information. Likewise, access to political criticism, opinion, and reporting helps recipients of that information monitor their elected representatives and vote wisely. Thus, while there is a tendency to focus on the free speech rights of speakers, the free speech rights of audiences are central in free speech jurisprudence.

In *Citizens United* and its major precursor in the corporate political speech realm, *First National Bank of Boston v. Bellotti*,[33] the Supreme Court emphasized that the Free Speech Clause reached the political speech of corporations not because corporations have the right to speak, but because audiences have the right to hear that political speech. The Supreme Court first underscored speech's role in participatory democracy: "It is inherent in the nature of the

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[29] Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 745 (2002) ("The members of a voluntary association join, and remain members, because they are persuaded by the principles of the association . . . rather than because of motivations of money or the threat of state sanctions.").

[30] The career page of the company's website states that "Hobby Lobby is an Equal Opportunity Employer." CAREERS: HOBBY LOBBY, http://www.hobbylobby.com/careers (last visited Jan. 5, 2014).

[31] 558 U.S. 310 (2010).

[32] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013).

[33] 435 U.S. 765 (1978).

political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[34] The Court then explained that audiences have the right to political speech even if its source is a corporation. Corporations, after all, "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[35] It is for this reason, and this reason only, that "the Court has . . . rejected the argument that political speech of corporations . . . should be treated differently [than the speech of natural persons] under the First Amendment."[36]

In short, corporate political speech is protected because of audiences' free speech right to receive political information rather than corporations' free speech right to speak. Consequently, while their political speech may be protected, corporations are not actual free speech rights-holders even under *Citizens United*. Furthermore, the audience-focused free speech justification for protecting corporate speech has no counterpart in free exercise jurisprudence. Thus, *Citizen United* provides neither theoretical nor precedential support for corporate religious liberty.

II. The Lack of Precedent for Corporate Religious Liberty

Not surprisingly, Supreme Court precedent is consistent with a view of the Free Exercise Clause that does not include corporate religious liberty. Indeed, the Supreme Court has never recognized for-profit corporations' right to religious liberty, and as acknowledged by the D.C. Circuit Court of Appeals, "ha[s] expressed strong doubts about that proposition."[37] Nonetheless, plaintiffs invoke two lines of cases. The first involves non-profit corporations and the second involves individuals who operated businesses. As it turns out, however, the plaintiffs in the first are essentially churches, while the plaintiffs in the second are individuals. As already discussed, protection for churches and individuals does not lead to protection for for-profit corporations.[38]

A. Nonprofit Corporation Cases Brought by Churches

The argument that the Supreme Court has already recognized the free exercise rights of nonprofit corporations, and therefore free exercise rights for for-profit corporations naturally follow, is unavailing for several reasons. First, all but one of the cases actually involved churches. Second, as discussed above, churches hold a distinctive place in religion clause jurisprudence. Third, the non-profit corporation cases actually reflect a healthy degree of skepticism towards corporate religious liberty.

Although plaintiffs argue that it is well-established that the Free Exercise Clause covers nonprofit corporations, they are unable to cite to more than a handful of cases.[39] Of these cases, all but one involve churches. The only non-church plaintiffs, the religious schools in *Bob Jones*

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[34] *Citizens United*, 558 U.S. at 341.
[35] *Id.* at 342 (quoting *Bellotti*, 435 U.S. at 783).
[36] *Citizens United*, 558 U.S. at 342 (quoting *Bellotti*, 435 U.S. at 776).
[37] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1213-14 (D.C. Cir. 2013).
[38] *Cf. Id.* at 1214 ("When it comes to the free exercise of religion . . . the [Supreme] Court has only indicated that people and churches worship.").
[39] *Hosanna-Tabor*, 132 S. Ct. 694 (2012); Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520 (1993); Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

University v. United States, saw their free exercise challenge summarily rejected.[40] The schools asserted that they should be exempt from the IRS's anti-discrimination requirements because the regulations clashed with their biblically-based religious beliefs.[41] The Supreme Court assumed without deciding that the schools' religious liberty was at stake, and then held that the state's compelling interest overrode whatever religious burden might exist.[42] The Supreme Court devoted only a few sentences to dismissing the free exercise claim.[43] Given its ambiguous treatment of the schools' religious interests and its unambiguous rejection of the schools' suits, *Bob Jones* is too thin a reed upon which to build expansive claims about religious liberty for all incorporated entities.

Furthermore, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[44] the Court suggested that any concern for the religious liberty of religious organizations probably does not extend to for-profit corporations. In upholding a statutory exemption that allowed religious organizations to discriminate based upon religion in employment,[45] the concurrences emphasized that the holding is limited to nonprofit organizations[46] pursuing nonprofit activities.[47]

In short, Supreme Court cases involving religious corporations have been non-profit churches with one exception in which the Court summarily rejected the free exercise claim. When the Supreme Court has specifically mentioned for-profit corporations, it was to distinguish them from nonprofit religious corporations.

B. Business Cases Brought by Individuals

Plaintiffs next claim the Supreme Court is poised to recognize free exercise claims of for-profit corporations because it has already recognized the free exercise claims of businesses in *United States v. Lee*[48] and *Braunfeld v. Brown.*[49] Neither case supports the religious exemptions sought by Hobby Lobby or Conestoga Wood. First, the plaintiffs in these cases were natural people, not corporations. Second, the Supreme Court expressed great discomfort with religious exemptions for employers that burden their employees.

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[40] 461 U.S. 574 (1983).
[41] *Id.* at 602-03.
[42] *Id.* at 604 (holding that "whatever burden denial of tax benefits [imposed] on petitioners' exercise of their religious beliefs," the state's compelling interest in eliminating discrimination overrode it).
[43] *Id.*
[44] 483 U.S. 327 (1987).
[45] *Id.* at 339.
[46] *Id.* at 340 (Brennan, J., concurring) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a nonprofit organization.").
[47] *Id.* at 348-49 (O'Connor, J., concurring) (noting that the holding is limited to the nonprofit activities of a religious organization and emphasizing that "the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open").
[48] 455 U.S. 252 (1982).
[49] 366 U.S. 599 (1961).

In *United States v. Lee*, an Amish employer sought an exemption from social security taxes on the grounds that they undermined Amish beliefs about taking care of their own.[50] Just like plaintiffs opposing the contraception mandate, the plaintiff here believed complying with a government-mandated insurance program would be sinful.[51] Unlike the mandate cases, however, the plaintiff was a person, Edwin D. Lee, not a for-profit corporation. The same was true in *Braunfeld v. Brown*.[52] In *Braunfeld*, Orthodox Jewish shop owners who closed their shops on Saturday, the Jewish Sabbath, sought exemption from a law requiring retail stores to close on Sunday.[53] Even assuming their businesses were incorporated (the briefs and opinions are silent on the issue), Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman, and Joseph R. Friedman asserted the religious liberty claims on their own behalf, not on behalf of any business entity.

Furthermore, in both cases the business owners lost. In rejecting Lee's claim, the Supreme Court emphasized that employers may not impose on their employees in the name of religion:

> 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. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[54]

This passage, whether read expansively or narrowly, suggests that for-profit employers are not entitled to religious exemptions that impose on their employees. Under an expansive reading, religious exemptions are simply not available for commercial actors, even if they are individuals: When religious observers ("followers of a particular sect") voluntarily ("as a matter of choice") engage in commerce ("enter into commercial activity"), they must follow the same rules as other commercial actors even if contrary to their religious practices ("the [religious] limits they accept on their own conduct . . . are not to be superimposed on the statutory schemes which are binding on others in that activity").

A more narrow reading of this passage is that commercial actors are not entitled to religious exemptions that interfere with laws designed to protect employees.[55] For example, the

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[50] 455 U.S. at 257 ("The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.").
[51] *Lee*, 455 U.S. at 255.
[52] The majority and dissent were in agreement on this point. *Braunfeld*, 366 U.S. at 601 (describing plaintiffs as "merchants in Philadelphia who engage in the retail sale of clothing and home furnishings"); *id.* at 611 (Brennan, J., concurring and dissenting) ("[A]ppellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith.").
[53] *Id.* at 611.
[54] *Lee*, 455 U.S. at 261.
[55] *Cf.* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 294 (1985) ("[B]y entering the economic arena and trafficking in the marketplace, the [religious] foundation has subjected itself to the standards Congress has prescribed for . . . employees.") (citation omitted).

Lee Court noted with approval that while social security law exempted religious employers who were self-employed, the exemption did not reach religious employers who employed others.[56] To do so, as the end of the quotation explains, would be to impose the employer's religious beliefs and practices onto employees who may not share them.[57]

Neither *United States v. Lee* nor *Braunfeld v. Brown*, with their human rather than corporate plaintiffs, supports corporate religious liberty. In fact, even more explicitly than it did in *Amos*, the Supreme Court in *Lee* intimated that free exercise exemptions stop where commercial activity starts. At the very least, for-profit employers are not entitled to a religious exemption if that exemption "operates to impose the employer's religious faith on the employees."[58]

III. The Harm of Corporate Religious Liberty

Religious exemptions for for-profit corporations are problematic not just because they are without theoretical or precedential foundation, but because they will harm actual living employees. To start, for-profit corporations will seek exemptions from laws—such as the contraception mandate—that are meant to protect their employees. In addition, corporate religious liberty will come at the expense of employees' individual religious liberty.

Religious accommodations have always raised the concern that religious observers would become above the law.[59] This worry is less pressing when the exemption does not impose on others.[60] But often religious exemptions do burden others. When a Sabbath observer refuses weekend shifts, odds are a co-worker will be stuck with them.[61] The greater the burden-shifting, the more problematic the exemption.[62] When considering the issue in the health care context, recall that the contraception mandate applies only to corporations with more than fifty employees. To grant large corporate businesses an exemption is to affect hundreds (Conestoga) if not thousands (Hobby Lobby). Furthermore, these corporations are seeking exemptions from laws that are designed to protect employees. What basic healthcare or wage security or

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[56] *Lee*, 455 U.S. at 261 ("Congress drew a line in [I.R.C.] § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer.").

[57] The Court has also denied religious exemptions even when the employees share their employers' beliefs. In *Tony & Susan Alamo Foundation*, both employers and employees protested application of the Fair Labor Standards Act minimum wage requirements at a religious nonprofit engaged in commercial activities. The Court rejected their Free Exercise Clause claim, holding "[l]ike other employees covered by the Act, the [employees] are entitled to its full protection. Furthermore, application of the Act to the Foundation's commercial activities is fully consistent with the requirements of the First Amendment." 471 U.S. at 305.

[58] *Lee*, 455 U.S. at 261.

[59] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

[60] For example, allowing sacramental use of hoasca, an otherwise illegal drug, does not burden any third party. *Cf. Gonzales v.O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

[61] *Cf.* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[62] Frederick Mark Gedicks and Rebecca Van Tassell argue that when the burden-shifting is great enough, as it is with the contraception mandate cases, the religious exemption violates the Establishment Clause. *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming 2014).

workplace safety laws for employees might be challenged next?[63] Corporate religious liberty would leave employee protections vulnerable to religious exemptions.

To make matters worse, granting religious exemptions to for-profit corporations will exacerbate the power imbalance between employers and employees. There is no denying the immense power of corporations. As Justice Stevens observed in his *Citizens United* dissent, corporations "inescapably structure the life of every citizen."[64] This enormous power is no less true vis-à-vis their own employees. Indeed, the inequality between for-profit corporations and those who labor for them is unfortunately a defining characteristic of American society. While corporations' power over employees is not the same as the government's, it is potentially just as coercive. This is especially true when the corporation is the gatekeeper to basic human needs like preventive health care.[65] Thus, exempting for-profit employers from laws meant to protect employees will increase their power to the detriment of their employees.

Even more troubling for those who place a premium on religious conscience, corporate religious liberty will potentially trample on employees' religious rights. Religious obligations can point towards contraception use as well as away from it. For example, according to one expert, "in the thinking of mainstream Protestant Christian Ethics . . . nearly no aspect of life is more sacred, closer to being human in relation to God, than bringing new life into the world to share in the gift of God's grace and God's covenant."[66] Parents should not bring new life into the world unless "the conditions into which the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled."[67]

Consequently, a corporation's withholding of contraception coverage will impose on, for example, a mother who has strong beliefs, beliefs rooted in her deeply-held faith, that she could not fulfill her parental responsibilities if she had any (more) children. In other words, enabling a large corporation to act according to its beliefs will make it harder for employees to follow theirs. Maybe this burden shifting from employer to individual employee would be acceptable if association were entirely voluntary. But in the case of employees of for-profit corporations, it is not. The end result is that recognizing corporate religious liberty will make religious liberty more available for the elite, and more scarce for everyone else.

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[63] *See, e.g., Hobby Lobby Stores, Inc.*, 723 F.3d at 1174 n.8 (Briscoe, C. J., concurring in part and dissenting in part) (arguing that corporate religious liberty might let corporations owned by Jehovah Witnesses exclude blood transfusions from their health care policies, Scientologist corporations exclude antidepressants or emergency psychiatric care, and Muslim, Jewish or Hindu owned business exclude any medical treatment that contain pig or cow, including anesthesia, intravenous fluids, and gelatin-coated pills); Korte v. Sebelius, 735 F.3d 654, 691-92 (7th Cir. 2013) (Rovner, J., dissenting) (arguing that corporate religious liberty might let corporations deny FMLA leave to same-sex parents).

[64] *Citizens United*, 558 U.S. at 465 (Stevens, J., dissenting).

[65] The contraception mandate litigation would have been avoided if the United States had government-provided single payer health care as most other industrialized countries do.

[66] McRae v. Califano, 491 F.Supp. 630, 700 (E.D.N.Y. 1980), *rev'd sub nom.*, Harris v. McRae, 448 U.S. 297 (1980).

[67] *McRae*, 491 F.Supp. at 700.

Conclusion

Corporate religious liberty is theoretically unjustified, without precedent, and potentially very harmful. The Free Exercise Clause and the Religious Freedom Restoration Act are meant to protect human beings—their relationship with God, their inherent dignity, and their voluntary religious associations. None of these rationales apply to for-profit corporations. Not surprisingly, while the Supreme Court has recognized the religious liberty of individuals and of churches, it has never extended religious liberty to for-profit corporations. On the contrary, the Court has suggested that free exercise exemptions are not available to employers in the commercial context if they "impose the employer's religious faith on the employees."[68] Finally, corporate religious exemptions privilege the (illogical) "religious rights" of powerful corporations over the employment rights and religious rights of employees.

[68] *Lee*, 455 U.S. at 261.