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Corporate Religious Liberty

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CORPORATE RELIGIOUS LIBERTY

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INTRODUCTION

Do for-profit corporations have a right to religious liberty? That is, may a business that sells craft materials or manufactures wood cabinets be excused from obeying a law because it imposes a substantial burden on its religious conscience? This question was front and center in *Burwell v. Hobby Lobby Stores, Inc.*[1] According to the Supreme Court, the answer is yes: Corporations are "persons" entitled to religious exemptions under the Religious Freedom Restoration Act.

The *Hobby Lobby* case was one among dozens challenging the Obama administration's "contraception mandate." The Affordable Care Act requires large employers to provide health care insurance that offers basic preventive care at no extra cost to employees.[2] For women, basic preventive care includes FDA-approved contraception.[3] This contraception requirement triggered intense religious opposition. For example, Catholic doctrine condemns artificial birth control, and the United States

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

2. The Act requires an employer's group health plan to cover "preventive care" without any cost-sharing. Patient Protection and Affordable Care Act, § 2713(a)(4), 124 Stat. 119, 131 (codified at 42 U.S.C. § 300gg-13(a)(4)).

3. As recommended by the independent Institute of Medicine, women's preventive care was defined to include FDA-approved contraception methods. 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54).

Conference of Catholic Bishops (USCCB) complained that the mandate represents "an unprecedented . . . violation of religious liberty."[4] The President of USCCB went so far as to decry the mandate as "simply un-American."[5]

Not all employers, however, were affected by the contraception mandate in the same way. Religious employers such as churches, synagogues, mosques, temples, and their auxiliaries have always been completely exempt.[6] Religiously affiliated non-profit employers such as Catholic Charities are essentially exempt,[7] and were for a long time protected by a safe harbor while the administration finalized its compromise plan.[8] Consequently, challenges brought by for-profit corporations were the first to reach the Supreme Court.[9]

Corporate plaintiffs asserted that forcing them to provide contraception violated their right to religious liberty guaranteed by the Free Exercise Clause[10] and the Religious Freedom Restoration Act.[11] Hobby Lobby Stores, Inc., a national chain of arts and crafts stores, sought an exemption from the contraception mandate on the ground that requiring it to offer employees certain types of birth control violates its religious conscience.[12] The plaintiff in a companion case, Conestoga Wood Specialties

4. Press Release, U.S. Conference of Catholic Bishops, *USCCB Says Administration Mandate Violates First Amendment Freedoms of Religious Orgs. and Others* (March 20, 2013), http://www.usccb.org/news/2013/13-054.cfm.

5. Timothy Dolan, Editorial, *HHS Contraception Mandate Un-American*, USA TODAY, Jan. 25, 2012, *available at* http://usatoday30.usatoday.com/news/opinion/forum/story/2012-01-25/dolan-hhs-health-contraceptive-mandate/52788780/1.

6. Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. 39,873-39,874 (June 28, 2013).

7. Religiously affiliated non-profit employers do not have to include contraception in their health insurance plans or "contract, arrange, pay, or refer for contraception coverage." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,874 (June 28, 2013). Instead, their employees would receive a separate contraception policy paid for by a third-party insurer. *Id.*

8. During the safe harbor time period, lawsuits brought by non-profit plaintiffs were generally held in abeyance or dismissed as unripe. *See, e.g.*, Wheaton Coll. v. Sebelius, 703 F.3d 551, 553 (D.C. Cir. 2012) (holding case in abeyance).

9. Plaintiffs actually include corporations and their owners. This Article focuses on the novel question of whether corporations qua corporations are ever entitled to religious exemptions. For the owners, the question is not whether they can bring free exercise claims—as natural people, they can—but whether the claim has any merit. That question is beyond the scope of this Article.

10. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion])."

11. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2011).

12. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21, 1124–25 (10th Cir. 2013).

Corporation, a manufacturer of wood cabinets, advanced similar claims,[13] as have businesses that sell outdoor power equipment,[14] recycle scrap metal,[15] and manufacture vehicle safety systems[16] and HVAC equipment.[17]

Whether the Free Exercise Clause and the Religious Freedom Restoration Act protect corporate "people" in the same way they protect natural people was a question of first impression. For-profit corporations had never before sought conscientious objector status and the Supreme Court had never before evaluated corporate religious liberty.[18] While the Supreme Court did not reach the Free Exercise Clause question, it did rule that the Religious Freedom Restoration Act (RFRA) covers closely-held[19] for-profit corporations.[20] It also concluded that the objecting businesses should be exempt from the contraception mandate.[21]

From start to finish, much of the Court's reasoning is questionable. Rather than focus on the Court's missteps when applying RFRA's substantial burden and strict scrutiny tests,[22]

13. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381–82 (3d Cir. 2013).

14. Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).

15. Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459, 2012 WL 6951316, at *2 (W.D. Mo. Dec. 20, 2012).

16. Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013).

17. Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

18. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, Circuit Justice, 10th Cir.) (writing that the Supreme Court "has not previously addressed similar RFRA or free exercise claims brought by . . . for-profit corporations").

19. Although there is no single definition of "closely-held corporation," there is consensus that a closely-held corporation is characterized by a small number of stockholders. The IRS, for example, defines a closely-held corporation as one where more than 50% of the stock is owned by five or fewer individuals. Entities, Frequently Asked Tax Questions & Answers, IRS (updated Jan. 1, 2015), *available at* http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5.

20. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

21. *Burwell*, 134 S. Ct. at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA.").

22. Among other things, the Court erred in its willingness to find that facilitation of other people's sins via employee health insurance was a substantial religious burden; its reluctance to recognize that making contraception available to working women was a compelling state interest; and its conclusion that the contraception mandate failed strict scrutiny because third parties (the insurers or government) could provide the health care instead. *Burwell*, 134 S. Ct. at 2775–85.

this Article criticizes the necessary predicate:[23] the idea that for-profit corporations possess religious rights and qualify for religious exemptions.[24]

There is no principled basis for corporate religious liberty.[25] For-profit corporations lack the inherently human characteristics that justify religious exemptions for individuals. They cannot, for example, be said to possess either a relationship with God or inherent dignity. Nor do they possess the unique qualities that arguably justify exemptions for churches. Unlike churches, for-profit corporations are not sacred, primarily religious, or the source of theological truth. They are not even voluntary associations—employees at for-profit corporations simply cannot be equated to the voluntary members of a church. Furthermore, the deleterious consequences of corporate religious liberty, magnified by corporations' extensive power, argue against its recognition. Part I addresses the theoretical question and Part II discusses the harmful results of corporate religious liberty.

PART I: THE ILLOGIC OF CORPORATE RELIGIOUS LIBERTY

The Free Exercise Clause and the Religious Freedom Restoration Act are meant to protect the religious practices of

23. *Burwell*, 134 S. Ct. at 2767 ("The first question that we must address is whether [RFRA] applies to regulations that govern the activities of for-profit corporations like Hobby Lobby [and] Conestoga.").

24. Most scholars writing on this question agree that for-profit corporations have religious liberty rights. *See, e.g.*, Jeremy M. Christiansrreen, *"The Word[] 'Person' . . . Includes Corporations": Why the Religious Freedom Restoration Act Protects Both For- and Nonprofit Corporations*, 2013 UTAH L. REV. 623 (2013); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013) [hereinafter Colombo, *Naked Private Square*]; Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589 (2014); Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401 (2013); Andrew B. Kartchner, *Corporate Free Exercise: A Survey of Supreme Court Cases Applied to a Novel Question*, 6 REGENT J. L. & PUB. POL'Y 85 (2014); Mark L. Rienzi, *God and Profits: Is There Religious Liberty for MoneyMakers?*, 21 GEO. MASON L. REV. 59 (2013); Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporation, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301 (2013); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369 (2014) [hereinafter Vischer, *For-Profit Businesses*]; *but see* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Response to Challenges to the PPACA Contraception Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303 (2014).

25. "Corporate religious liberty" is shorthand for the religious liberty of secular for-profit corporations. While non-profit groups may also incorporate, I will generally refer to non-profit corporations as non-profit organizations for the sake of simplicity.

individuals and churches. At the core of religious liberty is respect for the religious conscience of natural people. This is a uniquely human characteristic that corporations do not possess. Furthermore, attempts to equate for-profit corporations to churches and other voluntary religious associations are bound to fail. Thus, the reasons to protect people and churches do not apply to for-profit corporations.

While *Hobby Lobby* relied on RFRA rather than the Free Exercise Clause, RFRA is inextricably connected to the Free Exercise Clause. Congress passed RFRA in response to *Employment Division, Department of Human Resources v. Smith,*[26] a Supreme Court decision that weakened Free Exercise Clause protection. As the "Restoration" in its name indicates, RFRA was intended to restore as a matter of statutory law the pre-*Smith* constitutional test. RFRA's language also demonstrates that it meant to track the Free Exercise Clause. For example, RFRA's statement of purpose discusses religious liberty in terms of the Free Exercise Clause, noting that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[27] The original statute also defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."[28] Thus, RFRA's text explicitly connected the scope of its protection to the protection offered under the Free Exercise Clause.[29] Because the Religious Freedom Restoration Act is informed by free exercise jurisprudence, the analysis focuses on religious liberty under the Free Exercise Clause.

A. RELIGIOUS LIBERTY AS A PERSONAL RIGHT

Religious liberty may be conceived as enabling the individual to fulfill her religious obligations or as respecting the individual's autonomous religious decisions.[30] Either way, it is meant to

26. 494 U.S. 872 (1990).

27. RFRA, 42 U.S.C. § 2000bb(a)(1) (2013) (emphasis added).

28. Pub. L. No. 103-141 §5, 107 Stat. 1488, 1489 (1993).

29. *See also* S. Rep. No. 103-111, at 8 (1993) [hereinafter *Senate Report*] ("The Committee expects that courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened . . ."); H.R. REP. NO. 103-88, at 6–7 (1993). ("It is the Committee's expectation that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened . . . .").

30. Because these categories are not mutually exclusive, religious liberty can be viewed as advancing both.

protect uniquely human attributes: a person's relationship with God,[31] or a person's conscience, dignity, and autonomy. Consequently, religious liberty is uniquely human, and it makes no sense to extend it to for-profit corporations. Indeed, although the Supreme Court dismissed any difference between a profit-seeking person and a profit-seeking corporate person,[32] the distinction is obvious: only one involves an actual human being.

Whether a particular constitutional clause reaches for-profit corporations depends not on the personhood of the corporation but on the scope of the clause. In deciding whether corporations are "persons" protected by the Constitution, the Supreme Court has sometimes answered "yes,"[33] and sometimes answered "no."[34] It has never announced an overarching framework for analyzing corporate rights.[35] The closest the Court came to doing so was in

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31. Although most religious people in the United States belong to a faith that centers around a God, not all of them do. Some religious people have different names or conceptions of their Supreme Being, while other believers have no gods/goddesses at all. For the sake of simplicity, however, I will refer to the spiritual dimension as an individual's relationship with her "God" or "Creator," aware that it does not quite capture all spiritualties.

32. *Burwell*, 134 S. Ct. at 2770 ("If, as Braunfeld recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby [and] Conestoga . . . do the same?").

33. The Supreme Court has held that corporations have Fourth Amendment rights against unreasonable searches and seizures, Marshall v. Barlow's, Inc., 436 U.S. 307, 311, 325 (1978), and Fifth Amendment rights against double jeopardy, United States v. Martin Linen Supply Co., 430 U.S. 564, 565–67, 575 (1977), and takings, Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 122–23, 138 (1978). It has also been held that corporations are persons protected by the Fourteenth Amendment's guarantee of equal protection and procedural due process. Santa Clara v. S. Pac. R.R., 118 U.S. 394, 396 (1886) (equal protection); Covington & L. Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) (procedural due process).

34. 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 rights 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. 168, 177 (1869). Finally, the Court has repeatedly held that the liberty protections stemming from the Fourteenth Amendment's due process clause do not extend to corporations. Hague v. Comm. for Indus. Org., 307 U.S. 496, 527 (1939) (citing Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906)) ("[T]he liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons."). This last ruling is perhaps the most relevant. If corporations are not persons entitled to liberty protections, then it suggests that corporations are not persons entitled to religious liberty protections.

35. *See, e.g.*, Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909 (2011) ("No unified theory governs when or to what extent the Constitution protects a corporation."); Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 246 (2011) [hereinafter Ripken, *Corporate First Amendment Rights*] ("The Supreme Court has never developed a unified theoretical justification for its conclusion

a footnote in *First National Bank of Boston v. Bellotti*,[36] where it wrote that certain "purely personal" guarantees do not extend to corporations[37] and that "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."[38] In other words, whether a constitutional provision should apply to a corporation depends on what exactly it is meant to protect.[39] If the Free Exercise Clause protects something that is unique to natural people, then its protection should be limited to natural people.

Despite scholarly disagreement about its perimeters, there is near universal agreement that at its core the Free Exercise Clause protects individual religious conscience.[40] In *Wallace v. Jaffree*, for example, the Supreme Court wrote: "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the *individual's* freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience."[41] Nor was this the only time the Supreme Court made this point.[42]

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that corporations are persons under the Constitution. Thus, there is no coherent, consistent way of defining corporate constitutional rights.").

36. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

37. *Bellotti*, 435 U.S. at 778 n.14 ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.").

38. *Bellotti*, 435 U.S. at 778 n.14.

39. While the Supreme Court's decisions have been described as "ad hoc" and "inconsistent," Justice Rehnquist suggested that corporations should be granted constitutional rights if and only if those rights facilitate their economic activity. *Bellotti*, 435 U.S. at 825 (Rehnquist, J., dissenting) (arguing that constitutional rights of corporations should be limited to those "necessary to carry out the functions of a corporation organized for commercial purposes"). Otherwise, rights should be reserved for natural persons.

40. *See, e.g.*, Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1386 (1967) ("The original constitutional consensus concerning religious liberty was an outgrowth of Protestant dissent and humanistic rationalism, the viewpoints that dominated the thinking of the authors of the Constitution. These two perspectives conjoined to place the individual conscience beyond the coercive power of the secular state.").

41. 472 U.S. 38, 49 (1985) (emphasis added).

42. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority"); *cf.* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 451 (1988) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual . . . .").

1. Religious Justification

Why protect religious conscience? James Madison articulated a religious justification in his Memorial and Remonstrance Against Religious Assessments when he argued, "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[43] Accordingly, the state should not hinder anyone from meeting her religious obligations.[44] As Justice Souter explained, "[T]he [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God."[45]

Failure to allow religious people to follow their conscience or meet their obligations may lead to great spiritual harm. Religious commandments are sometimes coupled with the threat of eternal punishment. Those acting out of love or duty[46] rather than (or in addition to) fear may also suffer if unable to fulfill their religious duties.[47] The Free Exercise Clause helps "avoid[] the cruelty" of forcing people to violate their religious beliefs.[48]

2. Secular Justification

A more secular reason to protect religious practice focuses on honoring individual autonomy. One need not agree with someone's deeply held religious beliefs in order to conclude that there is value in respecting her decision to follow them. Ensuring

43. Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 64 (1947) (citing 2 James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* The Writings of James Madison 184 (Gaillard Hunt ed., 1901)).

44. *See, e.g.*, Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013) ("Freedom of religion, understood as a human legal right, is government's recognition of the priority and superiority of God's true commands over anything the state or anyone else requires or forbids.").

45. 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").

46. *See, e.g.*, Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 519–20 (2003) (noting that the relationship between an individual and God can be based on love).

47. Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385, 410 (2005) [hereinafter Perry, *Human Rights*] ("[A] government action/policy that denies freedom of religion to some human beings causes those human beings to suffer.").

48. Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 93 (2004); *see also* Jesse H. Choper, *Defining 'Religion' in the First Amendment* 1982 U. ILL. L. REV. 579, 597–98 (arguing that the purpose of free exercise exemptions is to reduce the psychological distress that believers might feel if forced to choose between conscience and compliance with law).

personal autonomy—that is, individual self-determination[49]—is a touchstone of constitutional rights.[50] "Certain 'zones of conscience' are entitled to legal protection . . . . [to] protect the right of individuals to define and govern their own existence."[51] In particular, religious conscience is protected in order to safeguard "the right of an individual to make choices about his or her spiritual life."[52]

Under this view, compelling people to act contrary to their conscience may cause dignitary harm. "[T]he free exercise of religion is essentially a dignitary right. It is part of that basic autonomy of identity and self-creation which we preserve from state manipulation . . . because of its importance to the human condition."[53] The underlying assumption is that all human beings possess inherent dignity.[54] "This dignity gives man an intrinsic worth, a value sui generis that is 'above all price and admits of no equivalent.'"[55] The explanations for why vary,[56] and the relationship among conscience, autonomy, and dignity is not straightforward, but the three are inextricably linked, and the bottom line is that respecting religious autonomy/conscience is

49. Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 368 (2012) ("The central notion [behind autonomy] is that of self-determination: An autonomous person establishes the rules that will govern his or her life.").

50. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 206 (2011) ("The notion that humans deserve respect as free, autonomous, sovereign, and self-determined agents is so entrenched in American political liberalism that it appears self-evident.").

51. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 15 (2000).

52. Benjamin L. Berger, *Law's Religion: Rendering Culture*, 45 OSGOODE HALL L.J. 277, 309 (2007); *see also* DANIEL A. FARBER, THE FIRST AMENDMENT 246 (1998) (noting that "religion is considered a core example of the kind of personal autonomy which the liberal state is pledged to protect").

53. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990) [hereinafter Brownstein, *Heavenly and Earthly Spheres*].

54. Perry, *Human Rights*, *supra* note 47, at 389 ("The conviction that every human being has inherent dignity [is] . . . fundamental to the morality of human rights."); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 196 (2011) ("Of the various conceptions of dignity, the dignity that arises from one's humanity is the most universal and open understanding of the term. This dignity indicates that worth and regard arise in each individual simply by virtue of being human.").

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

56. "Multiple religious and philosophical theories and conceptions seek to justify this metaphysical view." Barroso, *supra* note 49, at 335–37 (describing religious, philosophical, and historical sources for the concept of inherent worth).

very much about respecting the inviolable dignity of the human person.[57]

3. Neither Justification Applies to For-Profit Corporations

As should be apparent from this brief examination of the core goals of the Free Exercise Clause, this constitutional right only makes sense when applied to actual people. Whether the religious- or autonomy-based justification ultimately carries the day is irrelevant for purposes of determining corporate rights because both justifications are intimately tied to respecting *human* rights.[58]

The religious justification, which centers on obligations to the divine, is about the relationship between "man and his Creator." While people may fear and/or love God, and people may suffer sorrow, pain, shame, or guilt for acting contrary to conscience, for-profit corporations cannot.[59] As should be self-evident, corporations are not sentient and cannot feel anything.[60] They have no sacred relationships,[61] and they certainly do not have a soul.[62]

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57. For example, Kant would argue human beings have inherent dignity because we are capable of rational, autonomous decisions, while others might argue people's autonomous decisionmaking on intensely personal matters must be honored in order to respect their inherent dignity. *Compare* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 207 (2011) ("Kant claimed that human dignity derives from autonomy."), *with* Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in The Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POL'Y 47, 48–49 (1993) ("Human beings are owed respect for their autonomy because they have an inherent dignity.").

58. *Cf.* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("[R]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution.").

59. Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Breyer, J. dissenting) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires.").

60. *Cf.* Dynamic Image Techs., Inc. v. United States, 221 F.3d 34, 37 n.2 (1st Cir. 2000) ("Because corporations, unlike natural persons, have no emotions, they cannot press claims for intentional infliction of emotional distress."); FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994) ("Since a corporation lacks the cognizant ability to experience emotions, a corporation cannot suffer emotional distress.").

61. So, for example, a Jewish person may break a covenant with God, a corporation cannot.

62. 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 C. 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.").

The secular justification equally depends on uniquely human qualities. Respect for religious conscience ultimately traces back to ensuring respect for people's dignity and autonomous decisionmaking. The dignity at issue is human dignity, based upon the idea that humans are ends in themselves, not means to an end. "[H]uman beings have no price and cannot be replaced because they are endowed with an absolute inner worth called dignity."[63] While humans are inherently worthy, for-profit corporations, of course, are not. They are by definition instrumental entities—legal fictions created to facilitate economic growth.[64] "Their merely instrumental rationale leaves them with a morally different status than living flesh and blood people—the people Kant argues must be valued as ends . . . ."[65] Dissolving or selling a corporation does not raise the same moral qualms as killing or selling a human being.[66] In short, insofar as religion is concerned, corporations are not people, and they are not like people.[67] They lack the fundamentally human attributes—whether it be a relationship with the divine or inviolable dignity—that justify religious liberty rights.

In sum, the reasons why we protect the religious liberty of individual persons do not apply to corporate persons. Corporations do not have relationships with God. Corporations do not possess an inviolable dignity. To extend religious liberty exemptions to them distorts the constitutional order by providing accommodations to entities that neither need nor deserve them.

B. RELIGIOUS LIBERTY AS AN INSTITUTIONAL RIGHT

Free Exercise Clause protection also extends to churches, synagogues, mosques, temples, and other houses of worship ("churches" for short).[68] Protecting churches facilitates individual

63. Barroso, *supra* note 49, at 360 (describing Kant's view of human dignity).

64. *Citizens United*, 558 U.S. at 466 (Breyer, J. dissenting) ("Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established.").

65. C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 987–88 (2009).

66. Baker, *supra* note 65, at 988 (noting that killing a corporation elicits none of the "moral qualms that the death penalty famously raises for flesh-and-blood people.").

67. *Cf. Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part) ("Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office.").

68. The *Hobby Lobby* Court seemed to assume without discussion that all non-profits (or perhaps all religious non-profits) were fully protected by the Free Exercise Clause. In fact, while free exercise protection for churches is well-established, free exercise

religious practice. After all, while religious practice may be a solitary endeavor for some, for others it is a group activity.[69] As the Supreme Court has noted, "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community."[70] To fully protect these religious individuals, it is necessary to protect their religious associations.

Just as the Supreme Court saw no meaningful distinction between profit-seeking *human* people and profit-seeking *corporate* people, it saw no meaningful distinction between *non-profit* corporations and *for-profit* corporations. According to the Supreme Court, since non-profit religious corporations like churches merit coverage, so should for-profit religious corporations as 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.[71] In fact, however, the reasons we protect churches do not ultimately apply to for-profit corporations.

Actually, the justifications and appropriate scope of free exercise protection for churches is hotly contested.[72] This

protection for other religious non-profit corporations is not. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), Gonzalez v. O Centro Espirito Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), and Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012), all involved churches. The sole Free Exercise Clause or RFRA case with non-church plaintiffs, the religious schools in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), saw their free exercise challenge summarily rejected, making the case too thin a reed upon which to build expansive claims about religious liberty for all incorporated entities.

69. 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, 1389 (1981) [hereinafter Laycock, *Church Autonomy*] ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.").

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

71. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014) ("The dissent suggests that nonprofit corporations are special because furthering their religious 'autonomy . . . often furthers individual religious freedom as well.' But this principle applies equally to for-profit corporations[.] . . . In these cases, for example, allowing Hobby Lobby [and] Conestoga . . . to assert RFRA claims protects the religious liberty of the Greens and the Hahns.").

72. *Compare* Richard 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) [hereinafter Garnett, *Do Churches Matter?*]; Paul Horwitz, *Church 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.

disagreement takes place across various dimensions.[73] 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. In other words, can churches be rights-holders separate and apart from the individuals that compose them?[74]

1. Church as Proxy

One approach argues that we protect religious institutions only because we protect religious individuals, and any protection for churches derives from protection of its individual members.[75] For example, the European Commission on Human Rights has held that churches may only bring claims on behalf of their members, not in their own right.[76] Some semblance of this approach appears in *Harris v. McRae*,[77] where the Supreme Court rejected a conscience claim by a church group. The Court held that the Women's Division of the Board of Global Ministries of the United Methodist Church lacked standing to bring a free exercise conscience claim.[78] The church group argued that the

73. One issue, which pervades religion clause jurisprudence, is whether religion is special. For example, should religious individuals and their religious associations be accommodated to a greater degree than those whose deeply-held convictions are not religiously based?

74. *See, e.g.*, Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 55 ("A threshold question is the ontological status of groups in constitutional doctrine – that is, does the Constitution protect groups as such, or only as associations of individuals or to the extent that they enhance individual rights or interests?").

75. *See, e.g.*, Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 72; *cf.* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59, 64 (2007) [hereinafter, Garnett, *Freedom of the Church*] (noting that "in our religious-freedom doctrines and conversations, it is more likely that the independence and autonomy of churches . . . are framed as deriving from, or existing in the service of, the free-exercise or conscience rights of individual persons than as providing the basis or foundation for those rights").

76. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 72, at 963 ("[T]he European Commission on Human Rights has held that churches have standing to bring claims under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but has stated quite clearly that the church does so only on behalf of its members."); *see also id.* (noting that "consistent with this approach, the Commission has held that a legal person (as opposed to a natural person) does not enjoy freedom of conscience").

77. 448 U.S. 297 (1980).

78. Harris v. McRae, 448 U.S. 297, 297, 321 (1980). The Court viewed the claim as one brought by an association on behalf of its members; as such, it had to satisfy the requirement that its prosecution did not require the presence of the individual members. *Id.* (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)) (holding that an association cannot have standing unless "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

challenged regulation required its members to act contrary to their religious beliefs.[79] Yet, according to the Court, because conscience claims protect individual conscience, they must be brought by an individual.[80]

The proxy approach offers little support to for-profit corporate religious liberty claims, which, by definition, focus on corporate "conscience" rather than individual conscience.[81] In any event, it assumes that the church is a voluntary association and, as discussed below, for-profit corporations do not fit that bill.

2. Church as Church

Another approach argues that churches are entitled to free exercise protection separate and apart from their members.[82] Under this approach, churches qua churches are religiously significant. It is hard to deny churches' distinct place in religion clause jurisprudence. For example, the Tax Code contains a "parsonage exemption" that provides tax benefits to ministers of churches—a tax break available to no one else.[83] Of all private non-profit organizations entitled to tax exempt status, only churches are not required to prove their exempt status,[84] only churches are not required to file an annual tax return,[85] and only churches are exempt from employment taxes.[86] Along these lines, church property disputes are resolved differently than other property disputes.[87]

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79. *Harris*, 448 U.S. at 321.

80. *Id.* (holding that since "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, the claim asserted here is one that ordinarily requires individual participation").

81. In addition, if groups are merely a means to the end of enhancing individual liberty, then they are presumptively entitled to constitutional protection only to the extent that they do, in fact, enhance individual liberty of the group's members. Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 56 (2010).

82. Garnett, *Freedom of the Church*, *supra* note 75, at 71 (arguing for "recognition by the state of the freedom of the Church – for itself, and not simply as a proxy for the religious liberty rights of individuals"); Paul Horwitz, *Church as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 125 (2009) (arguing that churches qua churches are entitled to free exercise protection).

83. 26 U.S.C.A. § 107 (West 2013).

84. 26 U.S.C.A. § 508 (c)(1)(A) (West 2013).

85. 26 U.S.C.A. § 6033(a)(3) (West 2013).

86. 26 U.S.C.A. § 3121 (West 2013). As with other tax benefits, this one is lost when the church engages in commercial activity that "assumes an independent purpose." Church of Scientology of Cal. v. Comm'r, 83 T.C. 381, 459 (1984), *aff'd* 823 F.2d 1310 (9th Cir. 1987).

87. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian

Why are churches special?[88] To start, many view their church as a sacred entity: "[T]he church is the institutional expression of what is other-worldly, holy, entitled to reverence."[89] According to the Catholic Code of Canon Law, for example, the Catholic Church "ha[s] the character of a moral person by divine ordinance itself."[90] Indeed, for some Catholic theologians, "[C]hrist's identification with the Church is so complete that the Church must be seen as his earthly body, a sacred subject, the bride of Christ 'without spot or wrinkle.'"[91] In short, the argument is that churches deserve special treatment because of their link to the divine.[92]

In addition, it has been argued that churches as independent institutions are pivotal in advancing free exercise. That is, 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."[93] For example, interfering with church autonomy "may disrupt the free development of religious doctrine."[94] Consequently, churches need a degree of autonomy, including the right to religious exemptions from otherwise applicable laws, in order to perform this function.

The recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[95] could be viewed as endorsing the church-qua-church approach rather than the church-as-proxy approach: the *Hosanna-Tabor* Court sided with the church

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Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952).

88. Garnett, *Freedom of the Church*, *supra* note 75, at 80 (arguing that churches do more than play a mediating role in society in the way other voluntary associations do).

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

90. Patrick McKinley Brennan, *Are Catholics Unreliable from A Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard's American Freedom and Catholic Power*, 56 VILL. L. REV. 199, 213 (2011).

91. Michael J. Perry, *Catholics, the Magisterium, and Moral Controversy: An Argument for Independent Judgment (with Particular Reference to Catholic Law Schools)*, 26 U. DAYTON L. REV. 293, 325 (2001); *see also id.* at 316 (noting that the Catholic Church is "understood theologically and analogically as Holy Mother").

92. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 72, at 925 ("Of course, for certain religionists, the church's special institutional authority stems from God."). How much weight religious arguments that those outside the faith do not share ought to have in the constitutional scheme of things is a separate question.

93. Garnett, *Freedom of the Church*, *supra* note 75, at 81; *see also* Garnett, *Do Churches Matter?*, *supra* note 72, at 274 ("The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them.").

94. Laycock, *Church Autonomy*, *supra* note 69, at 1392.

95. 132 S. Ct. 694 (2012).

institution against an individual member and held that the religion clauses required a "ministerial exception"[96] exempting churches from discrimination suits by their ministers.[97] The rationale behind *Hosanna-Tabor* is that the government should not interfere with churches' internal governance, especially their choice of ministers.[98] The ministerial exemption is necessary not only because ministers embody the church's beliefs,[99] but also because they are instrumental in helping to shape them.[100] The bar against "imposing an unwanted minister . . . protects a religious group's right to shape its own faith and mission through its appointments."[101] Since the choice of minister potentially "affects the faith and mission of the church itself,"[102] the state should play no part in that decision.[103]

The logic of the church-qua-church approach falters when applied to for-profit corporations. There are several significant differences between non-profit churches and for-profit corporations. Moreover, to argue that the two are indistinguishable tends to negate the reasons to treat churches as entitled to special autonomy in the first place.[104]

First and most obviously, the practice and promulgation of religion is the overriding purpose of a church. Even assuming that an arts and crafts chain store or wood cabinet manufacturer is

96. *Hosanna-Tabor*, 132 S. Ct. at 706 ("We agree that there is such a ministerial exception.").

97. Although there was evidence suggesting Hosanna-Tabor fired a "minister" in violation of the Americans with Disabilities Act, the ministerial exception precluded an ADA lawsuit. *Hosanna-Tabor*, 132 S. Ct. at 704.

98. Douglas Laycock describes church autonomy as "the right of churches to conduct [religious] activities autonomously: to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." Laycock, *Church Autonomy*, *supra* note 69, at 1389.

99. *Hosanna-Tabor*, 132 S. Ct. at 706 (explaining that government may not "depriv[e] the church of control over the selection of those who will personify its beliefs").

100. *See, e.g.*, Laycock, *Church Autonomy*, *supra* note 69, at 1391 ("When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.").

101. *Hosanna-Tabor*, 132 S. Ct. at 706.

102. *Hosanna-Tabor*, 132 S. Ct. at 707; *see also* Laycock, *Church Autonomy*, *supra* note 69, at 1392 (arguing that interfering in personnel matters "may disrupt the free development of religious doctrine").

103. *Hosanna-Tabor*, 132 S. Ct. at 704 ("It is impermissible for the government to contradict a church's determination of who can act as its ministers.").

104. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794–95 (2014) (Ginsburg, J., dissenting) ("The Court's 'special solicitude to the rights of religious organizations,' Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 706 (2012), however, is just that. No such solicitude is traditional for commercial organizations.").

capable of exercising religion—itself a debatable proposition[105]—it is unlikely to be its principal goal. By definition, for-profit corporations exist to make money; otherwise they would be non-profit. Thus, the Supreme Court misses the mark when it argues that for-profit corporations are just like religious non-profit corporations except that they also make money. The difference is not that for-profit corporations have monetary goals; the difference is that for-profit corporations do not have predominantly religious goals.

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 entities established by God. For-profit corporations are not. Churches are the source of theological truth. For-profit corporations are not. The ministerial exception recognized in *Hosanna-Tabor* is confined to the church's relationship with its minister, because ministers are essential to the creation, embodiment, and dissemination of the faith.[106] There is no logical counterpart to the minister in corporations because corporations simply do not play the same role as churches. While some might try to stretch the definition of a church (and minister) to include non-profit religious corporations,[107] the term would become meaningless if expanded to include for-profit corporations.

3. For-Profit Corporations Are Not Voluntary Associations

A third major difference between non-profit churches and for-profit corporations is that both approaches, the church-as-proxy and the church-qua-church, assume churches are voluntary

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

106. The idea that church autonomy ultimately protects the development of beliefs rather than religious practice finds some support in the Court's attempt to distinguish *Employment Division v. Smith* by claiming that *Smith* was about "outward physical acts" while *Hosanna-Tabor* concerns "the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. As with many arguments in *Hosanna-Tabor*, whether it survives closer scrutiny is debatable. *See* Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School*, 106 NW. U. L. REV. 951, 954–55 (2012). But it does illuminate the Court's conception of the free exercise protection extended.

107. Most obviously, *Hosanna-Tabor*'s church autonomy roots limit it to churches, or at the very most, religious organizations (like seminaries and day schools) that play a pivotal role in the creation and dissemination of doctrine.

religious associations.[108] For-profit corporations, however, are not.

Because any protection for a church depends on its members and must benefit its members under the church-as-proxy approach, it necessarily assumes that the church amounts to an aggregation of its individual members. The view of church and members as alter egos is shared by voluntary associations and underlies standing doctrine for voluntary associations: a voluntary association "is the appropriate party to assert [members'] rights, because it and its members are in every practical sense identical."[109]

While the church may be more than the sum of its parts in the church-qua-church approach, those parts are still voluntary members of the church. The *Hosanna-Tabor* Court certainly assumed it was dealing with a voluntary religious association.[110] The assumption is implicit in statements such as: "[T]he members of a religious group put their faith in the hands of their ministers."[111] Making this assumption more explicit, the concurrence observed that "[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations."[112] It also referred to the rights of "voluntary religious associations"[113] and the Court's freedom of expressive association jurisprudence[114] when explaining why churches must have the power to remove unwanted ministers.

The voluntary nature of association is crucial to justifying church autonomy and ministers' concomitant loss of civil rights

108. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 72, at 959 ("[N]o one advocating church autonomy rejects voluntarism understood as a right of exit."); *Cf.* Patrick Lofton, *Any Club that Would Have Me as a Member: The Historical Basis for a Non-Expressive and Non-Intimate Freedom of Association*, 81 MISS. L.J. 327, 342 (2011) (noting that historically churches were considered "purely voluntary organizations" even if incorporated).

109. Nat'l Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 459 (1958).

110. *Cf.* Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 832 (2002) ("Among the oldest American associations are, of course, churches.").

111. *Hosanna-Tabor*, 132 S. Ct. at 706. The word "member" (as opposed to "employee") and "group" (as opposed to "corporation") are often used to describe those who voluntarily join an association.

112. *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring).

113. *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring).

114. *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (citing Boys Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)).

under the ministerial exemption.[115] It is permissible to exclude ministers from anti-discrimination law's protection because they have consented to the church's rather than the state's adjudication of their employment claims. 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."[116] While this assumption may be contestable even in the case of ministers,[117] it does explain the Court's willingness to grant a free exercise exemption. The association is exempt because all who are affected by the exemption—everyone who will be subject to the rules of the religious association rather than the rules of civil society—have consented to it.[118]

Thus even for churches, free exercise might protect church autonomy vis-à-vis its voluntary members, but not vis-à-vis those who have not voluntarily joined it. "An organization has no claim to autonomy when it deals with outsiders who have not agreed to be governed by its authority."[119] Consequently, to the extent that there is free exercise protection for churches, it is free exercise protection for voluntary religious associations.

While it is true that individuals often exercise their rights through associations, for-profit corporations are not voluntary associations. First, the very things that define a modern corporation preclude viewing it as an association. Second, all those who are associated with the corporation cannot be described as voluntary members.

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115. It is certainly presumed in the work of Douglas Laycock: "Voluntary affiliation with the group is the premise on which group autonomy depends." Laycock, *Church Autonomy*, *supra* note 69, at 1405; *see also* Helfand, *supra* note 24, at 411 ("[T]he Court grounded the autonomy of religious institutions in the implied consent of their members.").

116. *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring).

117. For example, it could be argued that civil rights cannot be waived in advance, which is the general law for employees. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (employees may not by contract prospectively waive their civil rights). Alternatively, perhaps any waiver of civil rights should require actual consent, not implied consent. Or, perhaps it can be argued that implied consent cannot exist without a right of exit, which is not realistically available to those committed to their religion. *See infra* note 150.

118. Brownstein, *Heavenly and Earthly Spheres*, *supra* note 53, at 100 (explaining that religious associations are "predicated on voluntary and consensual participation in a collective undertaking").

119. Laycock, *Church Autonomy*, *supra* note 69, at 1406.

a. For-profit corporations are not associations

Even if corporations are not like natural persons, perhaps they qualify as *associations* of natural persons and should be accorded free exercise protection not on their own behalf, but on behalf of their flesh and blood members. Hence the Court's insistence that protecting corporations is ultimately about protecting the people associated with them: "An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[120]

Although crucial to the Court's holding, its assumption that corporations like Hobby Lobby are essentially associations collapses under closer inspection. This is true whether a corporation is publicly traded or closely held, as were the family-owned Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corporation.[121] The defining characteristics of modern corporations are inconsistent with viewing them as simply an aggregation of their individual members. Voluntary associations and their members may be alter-egos,[122] but corporations and their members are not, precluding any argument that to protect corporate conscience is to protect the consciences of the people who comprise it.[123]

Granted, the notion of the for-profit corporation as a voluntary association has some superficial appeal.[124] It appealed

120. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014); *see also id.* ("[P]rotecting the free-exercise rights of corporations like Hobby Lobby [and] Conestoga . . . protects the religious liberty of the humans who own and control those companies.").

121. While the *Hobby Lobby* ruling was limited to the closely-held companies that had sued, it reasoning its not necessarily confined to closely held corporations. *Burwell*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) ("Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.").

122. Indeed, an association does not have standing unless its individual members would have standing in their own right. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

123. Nat'l Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 459 (1958) ("Petitioner [NAACP, a voluntary association] is the appropriate party to assert that rights, because it and its members are in every practical sense identical.").

124. The three theories of the corporation are (1) the concession theory, which views the corporation as "a creature of the State," *see infra* note 125; (2) the aggregation theory, *see infra* notes 125-130 and accompanying text, which views it as an association of individual people; and (3) the view that currently prevails, the real entity theory. Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1001, 1032

to the *Hobby Lobby* Court. In fact, one of the early theories of the corporation conceived of it as an association of individuals.[125] The first cases extending personhood to corporations were based on an associational theory of corporations. Thus, when the Supreme Court first held that corporations were persons for equal protection purposes,[126] it was with the understanding that the Court was protecting corporations in order to protect their owners. "[P]rivate corporations consist of an association of individuals united for some lawful purpose. . . But the members do not, because of such association, lose their right to protection, and equality of protection."[127] Consequently, the corporation's property was really the property of its investors and should be treated as such:[128] "To deprive the corporation of its property . . . is in fact, to deprive the corporators of their property."[129] Under this view of the corporation, often termed the aggregation or associational theory, the corporate person is the aggregation of the natural persons within, and is essentially their alter ego.[130]

(2010). The real entity theory "views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers." *Id.* at 1001.

125. The aggregation theory followed the concession theory of the corporation, which dominated in the first half of the nineteenth century. The concession or artificial entity theory viewed the corporation as no more than the creation of the state. During this period, legislatures had to approve by special act the charter of each and every corporation. Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 107 (2009) [hereinafter Ripken, *Corporate Personhood Puzzle*]. The most famous articulation of the concession view is from *Trustees of Dartmouth College v. Woodward*: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it." 17 U.S. 518, 636 (1819).

The concession view declined when general incorporation became widely available. Ripken, *Corporate Personhood Puzzle*, at 109. This shift meant that the artificial entity theory, "under which the corporation derives its power from the state, lost most of its appeal, since the state was only vestigially involved in creating corporations." Avi-Yonah, *supra* note 124, at 1011–12. The view that the corporation is artificial, however, is still with us. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1149 (2012). After all, "[n]o one actually believes a corporation is a real person. Everyone recognizes that this fictional person is merely a legal abstraction." Ripken, *Corporate Personhood Puzzle*, at 107.

126. Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 394 (1886) (noting that the Chief Justice prior to argument declared from the bench that corporations are persons for purposes of the Fourteenth Amendment's Equal Protection Clause).

127. Santa Clara v. S. Pac. R.R. Co., 18 F. 385, 402–03 (C.C.D. Cal. 1883). The *Hobby Lobby* Court echoed this claim when it complained that "[a]ccording to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014).

128. Ripken, *Corporate First Amendment Rights*, *supra* note 35, at 221.

129. The Railroad Tax Cases, 13 F. 722, 747 (C.C.D. Cal. 1882).

130. Ripken, *Corporate First Amendment Rights*, *supra* note 35, at 221 (explaining that under aggregate theory, "the corporate person has no existence or identity that is separate

Nonetheless, the main characteristics of the *modern* corporation negate the notion that it is simply an aggregation of individuals. Three major features define the modern corporation: limited liability for shareholders, perpetual life for the corporation, and separation of owners and managers, especially in publicly traded corporations.[131] By the end of the nineteenth century, all three had become standard.[132]

Limited liability is perhaps the most salient characteristic of the modern corporation.[133] Unlike partnerships or sole proprietorships, the shareholders of corporations are liable only for the amount they have invested.[134] The investors' finances and the corporation's finances are separate, so that investors are not responsible for the corporation's debts.[135] Indeed, one of the main purposes of the corporate form is to create an entity that is distinct from its owners. Limiting liability in this way enhances corporations' ability to attract capital,[136] which in turn allows corporations to undertake expensive, large-scale projects. At the beginning of the twentieth century, the Supreme Court observed, "Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."[137]

Limited liability alone precludes equating the modern corporation with its shareholders. The modern corporation's other features, such as perpetual life, further undermine an aggregate view—corporations potentially last forever; the people that compose them do not[138]—but limited liability suffices on its

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and apart from the natural persons in the corporation."); *see also* Avi-Yonah, *supra* note 124, at 1001 (explaining that aggregate theory "views the corporation as an aggregate of its members or shareholders").

131. Advantageous tax treatment might be considered another. Citizens United v. FEC, 558 U.S. 310, 465 (2010) (Stevens, J., dissenting) ("Unlike natural persons, corporations have 'limited liability' for their owners and managers, 'perpetual life,' separation of ownership and control, 'and favorable treatment of the accumulation and distribution of assets.'").

132. Avi-Yonah, *supra* note 124, at 1012.

133. Most states had adopted limited liability by the 1840s. Avi-Yonah, *supra* note 124, at 1008–09.

134. In a partnership, for example, a general partner would be personally liable, *i.e.*, liable to the whole extent of his property, for the debts of the partnership. UNIF. PART. ACT §306(a), 6 (Pt. 1) U.L.A. 117 (2001).

135. The reverse is true as well: the corporation's assets cannot be attached by the investors' creditors. Johnson, *supra* note 125, at 1154; MOD. BUS. CORP. ACT §6.22.

136. *Citizens United*, 558 U.S. at 465 (Stevens, J., dissenting).

137. Hale v. Henkel, 201 U.S. 43, 76 (1906).

138. Ripken, *Corporate Personhood Puzzle*, *supra* note 125, at 112 (noting that corporations can last forever, "a perpetual existence, that its individual members did not share").

own. As one scholar has noted, "Limited liability . . . led to a decline in the emphasis on the aggregate theory because the aggregate view of corporations tended to reduce the distinction between the corporation and its members or shareholders, which is at the heart of limited liability."[139] Aggregate theory assumes the shareholders and the corporation are one and the same, while limited liability insists that they are not.[140] To equate the two, as the *Hobby Lobby* Court did, "eviscerate[s] the fundamental principle that a corporation is a legally distinct entity from its owners."[141] Thus even closely- held corporations where the shareholders are also the managers cannot qualify as associations.

When the shareholders are not the managers, the associational argument, already implausible, becomes absurd. The shareholders cannot be considered the alter egos of their corporation when they play little role in running it, which is the case when ownership and management are separate.[142] The rise of the business judgment rule, where a corporation's directors are not liable to shareholders for their business decisions so long as the decisions were informed, made in good faith, and meant to benefit the corporation,[143] further reduces the owners' influence as it limits their ability to challenge management's decisions. "The business judgment rule rejected the aggregate view in holding that the board of directors possessed powers that were not delegated from the shareholders and that shareholders could not normally call into question the exercise of those powers."[144] In sum, the modern corporation cannot be viewed as an association.

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139. Avi-Yonah, *supra* note 124, at 1009.

140. *See also* Bank of Augusta v. Earle, 38 U.S. 519, 586 (1839) (rejecting the aggregate view because it "would make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation").

141. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 389 (3d Cir. 2013).

142. Avi-Yonah, *supra* note 124, at 1011; *see also* Ripken, *Corporate Personhood Puzzle*, *supra* note 125, at 111–12 (noting that shareholders are often "passive investors" who "[do] not control the corporation in any meaningful sense").

143. Adam J. Richins, *Risky Business: Directors Making Business Judgments in Washington State*, 80 WASH. L. REV. 977, 977 (2005) ("[T]he business judgment rule, as defined by leading corporate-law jurisdictions and the American Bar Association, generally protects directors from liability . . . so long as the director makes decisions in good faith, on an informed basis, without self-interest, and in accordance with the director's belief of what is best for the corporation.").

144. Avi-Yonah, *supra* note 124, at 1018.

b. Employees are not voluntary members

Once employees are factored into the analysis, it becomes more evident than ever that a corporation cannot be described as a voluntary association. Employees of for-profit corporations cannot be equated to the voluntary members of a church. As Justice Ginsburg aptly noted in dissent, "Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations."[145]

So far, I have not specified which natural persons potentially make up the corporate person. The previous section assumed that at a minimum it includes the corporation's owners, and argued that under even this narrow view an aggregate theory makes no sense. In reality, though, a corporation is not so limited and must also include both those who manage it and those who work for it.[146] A corporation could not function without its employees. Nonetheless, the Supreme Court only acknowledged in passing that employees are among those associated with a corporation, and never addressed the theoretical implications of that association.

Although employees are indispensable members of a corporation,[147] they are not equivalent to members of a church, or even members of other voluntary associations. Showing up for work five (or six) days a week is not the same as attending a church service, Boy Scouts meeting, or Rotary Club event. In a voluntary association, people join because "they are persuaded by the principles of the association,"[148] and they have the ability to

145. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting).

146. Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1102 (2000) ("Employees . . . are as much members [of the firm] as shareholders who provide the capital.").

147. Nelson, *supra* note 24, at 1601–02 ("[T]he emergence of stakeholder theory has emphasized that employees are critical to the overall operation of a business enterprise."); Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1053 (2012) ("Although the subsequent theory of the firm literature has not been as explicitly employee-centric [as Ronald Coase], it has generally concurred regarding the importance of employees to the firm.").

148. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 745 (2002) ("[T]he 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."); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 965 (2004) (describing voluntary associations as "communities based on members' common adherence to a distinct set of beliefs").

exit.[149] If your faith changes, you can switch churches.[150] If you do not like the policies of the Boy Scouts, you can turn in your membership and join a different scouting organization.[151]

In contrast, most people work because they must. They need the paycheck.[152] Without a job, employees could not feed their families, meet their rent, or pay for healthcare. Laws that protect employees, including workplace anti-discrimination laws and minimum wage laws, are so strong precisely because of the essential nature of employment.[153] In short, employment is an economic necessity. People cannot choose whether or not to work.

One response might be that while employment itself may be compulsory, employment at these particular religious corporations may be voluntarily chosen precisely because of their principles. Despite the tendency to ignore employees altogether, as the Supreme Court more or less did, some of the more thoughtful corporate religious liberty supporters have acknowledged the importance of voluntariness.[154] Nonetheless,

149. Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools are not Expressive Assocations*, 14 WM. & MARY BILL RTS. J. 415, 458 (2005) (describing as "critical features of associations" that "all members of associations have a cheap-to-exercise right of exit").

150. At least this is true in theory. In reality, walking away from one's religious community is not always so easy. *See, e.g.*, Susan Moller Okin, *"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205 (2002).

151. Again, this presumes that an equivalent to the Boy Scouts is readily available, which is not always the case. *See* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 567 n.238 (2001) (arguing that Boy Scouts is a monopoly).

152. Nelson, *supra* note 24, at 1602 (noting that studies of corporate employees establish that financial compensation is the main reason people work); *cf.* Mazzone, *supra* note 148, at 746 ("[A] workplace is often non-voluntary because most people need income.").

153. For example, Title VII of the Civil Rights Act forbids sexually harassing speech in the workplace if it creates a hostile work environment. 42 U.S.C. § 200(e)-2a (2000); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing hostile work environment claims). These limits on speech would violate the Free Speech Clause if banned outside the employment context. That these speech restrictions are allowed in the workplace underscores (a) the importance of employment and (b) the understanding that exit is not an option in the workplace in the same way it is outside the workplace.

154. Ronald J. Colombo, *The Corporation As a Tocquevillian Association*, 85 TEMP. L. REV. 1, 45 (2012) ("An employee vote . . . would go a long way toward establishing the authenticity and credibility of a corporation's claims of association."); Helfand, *supra* note 24, at 411 (arguing that court should consider employees' perspective when evaluating corporate claims). While he was addressing exemptions for churches rather than exemptions for for-profit corporations, Douglas Laycock also emphasized that voluntariness was a necessary predicate. *See supra* notes 115 and 119 and accompanying text.

they tend to be too quick to assume its presence.[155] For example, in arguing that for-profit corporations can qualify as associations, one proponent explains that he does not mean all for-profit corporations, only those that amount to "a genuine community of individuals—investors, owners, officers, employees, and customers—coming together around a common shared vision or shared set of goals, values, or beliefs."[156] Despite this caveat, he is satisfied that the cooks and cashiers who work for a national fast-food chain "appear to actively support" their CEO's religious values because, well, the CEO's views are no secret.[157] Apparently by virtue of accepting employment with a clearly religious corporation, an employee accepts its corporate values and rules.[158] After all, if the employee's beliefs differ, she can simply work elsewhere.[159]

This claim is neither empirically supported nor is it likely to be.[160] Granted, some employees may well know and share the religious views of their employers. Yet with 13,000 employees nationwide and Title VII's bar on religious discrimination, large corporations like Hobby Lobby Stores, Inc. are bound to be religiously diverse.[161] Moreover, while some dissatisfied

155. *But see* Vischer, *For-Profit Businesses*, *supra* note 24, at 391 (acknowledging that "[w]e are uncomfortable exempting corporations from the law's authority because it can be difficult for individuals to exempt themselves from the corporation's authority").

156. Colombo, *Naked Private Square*, *supra* note 24, at 53.

157. Colombo, *Naked Private Square*, *supra* note 24, at 66; *see also id.* ("[C]ustomers and employees are well aware of [the corporation's biblical values], as the chain's beverage holders are imprinted with biblical verses, and the company's stores do not open on Sundays in observance of the Christian Sabbath."). Indeed, while Colombo is willing to speculate "that customers and employees appear to actively support" the CEO's views, the accompanying footnote cites to (1) a news story about customer support not employee support and (2) employee reviews, almost none of which mention religion at all.

158. *See, e.g.*, Helfand, *supra* note 24, at 424 (arguing that accepting a job with a corporation that "holds itself out as strongly committed to religious principles" essentially means giving consent to abide by its religious decisions regarding the contraception mandate); *cf.* Laycock, *Church Autonomy*, *supra* note 69, at 1409 (in discussing church employees, arguing that "[w]hen an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member").

159. Editorial, *Contraception Mandate Violates Religious Freedom*, USA TODAY (Feb. 5, 2012, 6:28 PM), *available at* http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-02-05/contraception-mandate-religious-freedom/52975796/1 ("[H]aving freely chosen their employer, they'd have a dubious case for grievance against institutions that choose not to offer contraception coverage.").

160. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1060 (2008) ("[A]rguments about the market power of . . . employees in particular seem fanciful to anyone keeping up with the state of working America in the early twenty-first century.").

161. 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 July 5, 2014).

employees may be able to find a comparable full-time position without difficulty, the assumption that employees are always able to choose employers whose values match their own relies on a Lochner-era view of employment opportunities.[162] In short, if a Hobby Lobby Stores, Inc. sales associate disagrees with her benefits package, there is probably not much she can do about it.[163]

The claim that dissenting employees can simply find a more amenable job is not only unrealistic but also somewhat unprincipled. Again, the *Hobby Lobby* Court did not make this argument; it ignored the issue altogether. Corporate religious liberty plaintiffs, however, have, without ever explaining why the "find an alternate" argument does not apply to them. If they do not like the restrictions placed on running a corporation, then perhaps they should find another endeavor where their religious practices do not clash with employment laws. Indeed, the argument arguably has stronger force with regard to for-profit corporations: society grants them certain special advantages, including limited liability and other financial benefits. Those benefits are coupled with certain obligations.[164] Among them is to obey society's employment protection laws.

In sum, the claim that for-profit corporations deserve religious exemptions just like churches is deeply flawed. That corporate employees are not voluntary in the same way as church members are is one of many reasons why arts and crafts stores, wood cabinet makers, and HVAC equipment manufacturers differ from St. Augustine Church, Temple Beth-Am, or Masjid ul Mumilneen.[165] These for-profit corporations simply do not share

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162. *See, e.g.*, Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 323 (1998) (rejecting the assumption that "workers are voluntary participants in the firm and have the power to protect themselves" due to "inefficiencies and illiquidity in the labor market").

163. This lack of choice is not limited to low-income hourly earners. A former professor at Notre Dame University, after emphasizing that over 200 people had applied for her position, wrote, "If you thought people must surely know in advance that working at a Catholic university will restrict their health care choices, or that people who don't want to work within those restrictions can simply find another job, I am here to tell you that you are wrong on both counts." Jennifer Glass, Opinion, *Contraception Issue More Than Just Politics,* CNN (Feb. 10, 2012, 5:28 PM), *available at* http://www.cnn.com/2012/02/10/opinion/glass-contraception.

164. *See, e.g.*, Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment 'Public Figure': Nailing the Jellyfish*, 68 IOWA L. REV. 35, 65 (1982) ("The individual who chooses to incorporate derives the benefits of the corporate form. That individual also submits to the obligations attending incorporation.").

165. *Cf.* Vischer, *For-Profit Businesses, supra* note 24, at 374 (noting "our intuitive reluctance to equate the free exercise claims of Wal-Mart with those of First Presbyterian

the qualities that have been cited to justify churches' preferential treatment. First, their overriding purpose is not religion. Second, they are not sacred. Third, they do not play a pivotal role in protecting and advancing religion. Fourth, it is impossible to describe for-profit corporations as voluntary religious associations.

PART II: THE HARM OF CORPORATE RELIGIOUS LIBERTY

Religious exemptions for for-profit corporations are problematic not just because they are without theoretical foundation, but because they will harm the employees of exempted corporations. 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 the religious observer will become above the law.[166] Besides the risk of legal chaos,[167] exemptions risk imposing substantial burdens on third parties. Not all religious exemptions impose on others,[168] but many do. When a Sabbath observer refuses weekend shifts, odds are a co-worker will be assigned them.[169] The greater the burden-shifting, the more problematic the exemption.[170]

Exemptions from the contraception mandate rank as highly burdensome. The corporate actors litigating these actions are not small mom-and-pop establishments but large companies. After

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Church"). Vischer astutely observes that extending the same level of protection to businesses runs the risk of diminishing protection for all religious claimants. *Id.* at 387.

166. Emp't Div., Dep't Human Res. v. Smith, 494 U.S. 872, 879 (1990) ("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.").

167. *Id.* at 888 (holding that contemplating an exemption any time a law conflicts with someone's faith would be "courting anarchy, [and] that danger increases in direct proportion to the society's diversity of religious beliefs").

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

169. *Cf.* Estate of Thorton v. Caldor, Inc., 472 U.S. 703 (1985).

170. 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).

all, the mandate only applies to corporations with more than fifty full-time employees. Hobby Lobby Stores, Inc., for example, with its 500 plus stores, earns roughly 3 billion dollars every year and employs more than 13,000 full-time employees.[171] To grant Hobby Lobby Stores, Inc., an exemption is to affect thousands.

Furthermore, a religious exemption from the contraception mandate is an exemption from a law enacted in order to help employees—here by increasing employee access to basic health care.[172] From what other healthcare requirement might corporations seek to exempt themselves?[173] Might corporations that oppose homosexuality be able to withhold from same-sex spouses the health care benefits they otherwise provide spouses? Indeed, what employee protection might be challenged next? The Fair Labor Standards Act?[174] The Federal Occupational Safety and Health Act?[175] Title VII of the Civil Rights Act?[176] The Family and Medical Leave Act? [177] Despite the Supreme Court's claim that its decision is narrow,[178] corporate religious liberty leaves all these employee protections vulnerable to religious exemptions.

171. Hobby Lobby Stores, Inc.'s annual sales are listed as three billion dollars. *America's Largest Private Companies, Hobby Lobby Stores*, FORBES, http://www.forbes.com/companies/hobby-lobby-stores/ (updated Oct. 2014). Its owner, David Green, is number 81 in Forbes Magazine's list of the wealthiest people in the United States with an estimated worth of $6.2 billion dollars. Forbes 400, FORBES, http://www.forbes.com/forbes-400/list/#tab:overall (last visited Apr. 9, 2015).

172. *Cf.* Korte v. Sebelius, 735 F.3d 654, 689 (7th Cir. 2013) (Rovner, J., dissenting) ("[B]y permitting the corporate employers to rewrite the terms of the statutorily-mandated health plans they provide to their employees. . . . employees are left without a highly important form of insurance coverage that Congress intended them to have.").

173. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) ("Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?").

174. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2013).

175. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2013).

176. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2013).

177. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (2013); *see also, e.g.*, 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).

178. *Burwell*, 134 S. Ct. at 2760 ("As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can 'opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.'"); *see also id.* at 2783 ("In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs.").

To make matters worse, granting religious exemptions to for-profit corporations will exacerbate the power imbalance between corporate employers and their employees.[179] With their vast concentrations of wealth, there is no gainsaying the power of corporations. "Corporations are more powerful than any institution other than government, and in many cases, more powerful than governments."[180] As Justice Stevens observed in his *Citizens United* dissent, corporations "inescapably structure the life of every citizen."[181] Their power is not the same as the states, but it is potentially just as coercive.[182] Thus, "individuals," including employees, "arguably can be victims of corporate oppression as easily as victims of state oppression."[183] Interpreting the Free Exercise Clause (and RFRA) as granting corporations the right to religious exemptions will substantially "enhance their repressive power."[184] This is especially true when the corporation

179. The growing income inequality in the United States is just one indicator of a significant power imbalance. *See, e.g.*, Max Fisher, *Map: U.S. Ranks Near Bottom on Income Inequality*, THE ATLANTIC, Sept. 19, 2011, *available at* http://www.theatlantic.com/international/archive/2011/09/map-us-ranks-near-bottom-on-income-inequality/245315/ ("Income inequality is more severe in the U.S. than it is in nearly all of West Africa, North Africa, Europe, and Asia."); Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, UC BERKELEY, Sept. 3, 2013, *available at* http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf (finding that between 1993-2012, the real income of the top 1% grew 86.1% compared to the 6.6% growth for the remaining 99%).

180. William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 110 (2004).

181. Citizens United v. FEC, 558 U.S. 310, 465 (2010) (Stevens, J., dissenting); *see also* Fetzer, *supra* note 164, at 63–64 ("The modern corporation may be regarded not simply as one form of social organization but potentially (if not yet actually) as the dominant institution of the modern world." (quoting ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 356 (1932))).

182. Dalia Tsuk, *From Pluralism to Individualism, Berle and Means and 20th-Century American Legal Thought*, 30 LAW. & SOC. INQUIRY 179, 180 n.2 (2005) ("While the corporation's power to enforce its rule is different from the power of the sovereign state to do so, the corporation's economic, social, and cultural impact has become so pervasive in modern society as to make corporate power, in effect, comparable to the coercive power of the state.").

183. Ripken, *Corporate Personhood Puzzle*, *supra* note 125, at 142–43; *cf.* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967) ("The great majority of employees realize that they are expendable, and this realization renders them easy prey to the employer's overreaching demands.").

184. Ripken, *Corporate Personhood Puzzle*, *supra* note 125, at 145 ("If organizations are seen as potentially repressive systems of governance, treating them as individuals and granting them the protections, immunities, and liberties of individuals will just enhance their repressive power." (quoting Meir Dan-Cohen, RIGHTS, PERSONS, AND ORGANIZATIONS 176 (1986))).

is the gatekeeper to basic human needs like preventive health care.[185]

Finally, granting a conscientious exemption for Hobby Lobby Stores, Inc. or Conestoga Woods Specialties Corporation (or another corporation) will impose on the religious conscience of its employees. Religious obligations can point towards contraception use as well as away from it. For example, according to one expert, "[I]n 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."[186] Accordingly, the testimony continues, "In bringing new life into the world human beings must be sure that 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."[187]

Consequently, a corporation's refusal to allow its insurance company to provide contraception will impose on, for example, a mother who has strong conscientious beliefs, beliefs rooted in religious precept, that she could not fulfill her parental responsibilities if she had any (more) children.[188] In other words, enabling a large corporation to act according to its "conscience" will make it harder for its employees to follow theirs.[189]

Perhaps this imposition is acceptable when association is voluntary. But for employees of for-profit corporations, it is not.[190]

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

186. 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); *see also id.* at 696 (describing testimony that under Jewish law a new pregnancy should be avoided "if the new pregnancy threatens the milk available for a baby still being nursed").

187. *McRae*, 491 F. Supp. at 700.

188. Margaret Sullivan, Editorial, *A Grandmother on Sex, Contraception and Religious Freedom*, HUFFINGTON POST, July 17, 2013, *available at* http://www.huffington post.com/margaret-sullivan/a-grandmother-on-sex-cont_b_3600880.html ("For my parents, birth control was integral to a deeply moral and religious worldview of individual responsibility for life.").

189. This risk is not necessarily limited to employees of for-profit corporations. For example, when courts recognize that non-profit institutions such as Catholic hospitals have a conscientious right to deny certain medical procedures such as abortion, it imposes on the conscience of individual doctors working there who believe it is their religious, medical, and ethical obligation to provide all medically necessary treatment for their patients. *See generally* Spencer L. Durland, *The Case Against Institutional Conscience*, 86 NOTRE DAME L. REV. 1655 (2011); Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012). It also imposes on their patients, especially when the Catholic hospital is the only one serving their area.

190. *See supra* Part I.B.3.b.

This awareness may well be what prompted the Supreme Court to suggest that for-profit enterprises are not eligible for free exercise protection: When rejecting the free exercise claim of an Amish employer, Court wrote: "Granting an exemption . . . to an employer operates to impose the employer's religious faith on the employees."[191]

In addition to allowing corporations to dictate their employees' health care options, granting religious exemptions to corporations will have wide-ranging repercussions.[192] It will set a precedent for corporations to escape legal requirements designed to protect employees against their more powerful and potentially exploitive employers. Privileging corporate religious conscience over employee religious conscience also risks making religious liberty yet another luxury reserved for those at the top.

CONCLUSION

There is no basis for corporate religious liberty. The theoretical justifications for free exercise exemptions do not lead to corporate religious liberty. Exemptions to individuals are granted in order to accommodate people's religious conscience. Unlike actual people, however, for-profit corporations have neither a relationship with the divine nor an inherent dignity that must be respected. Exemptions for churches, considered sacred and theologically significant, are granted for reasons not applicable to for-profit corporations. If nothing else, corporations are not like churches because they cannot be classified as voluntary associations. Most troublesome, corporate religious liberty sacrifices employees' employment and religious rights in order to benefit (powerful) corporate employers.

191. United States v. Lee, 455 U.S. 252, 261 (1982).

192. Jean Bucaria, *To The Editor,* N.Y. TIMES, Feb. 8. 2013, *available at* http://www.nytimes.com/2013/02/09/opinion/birth-control-and-religious-freedom.html ("When we let our bosses pick and choose what medical care we have access to, we are protecting the private beliefs of a few to deny the essential needs of many.").