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# Corporate Piety and Impropriety: *Hobby Lobby's* Extension of RFRA Rights to the For-Profit Corporation

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## Abstract

In *Burwell v. Hobby Lobby, Inc.*, the Supreme Court held, for the first time, that the Religious Freedom Restoration Act (RFRA) applied to for-profit corporations and, on that basis, it allowed Hobby Lobby to omit otherwise mandated contraceptive coverage from its employee healthcare package. Critics argue that the Court's novel expansion of corporate rights is fundamentally inconsistent with the basic principles of corporate law. In particular, they contend that the decision ignores the fact that the corporation, as an artificial entity, cannot exercise religion in its own right, and they decry the notion that the law might look through the corporate veil to protect the corporate owners' rights even while having the veil shield the owners from liability for the corporation's wrongs.

In addition to these (supposed) deviations from corporate law principles, commentators express deep concern about *Hobby Lobby's* implications. Will the decision apply not just to closely-held corporations but to publicly traded ones as well? If so, how should courts deal with disagreement among shareholders about the religious convictions the corporation should adopt? Will the Court-sanctioned exemption from the contraceptive mandate open the door to other religiously-based exemptions from healthcare coverage that the Affordable Care Act requires—blood transfusions for the corporation owned by Jehovah's Witnesses, or any form of medicine other than faith healing for the corporation owned by Christian Scientists? And does the notion of corporate religious rights threaten to justify corporate invocations of other rights—perhaps even Second Amendment rights to bear arms, or rights of the corporation to vote in political elections?

This Article focuses on the corporate law aspects of the decision, and it seeks to respond to the groundswell of reactions among corporate law scholars. I argue here that much of the consternation results from mistaken notions about the nature of the corporation and the rights that its owners may enjoy. The ambition here, however, is not merely to correct misconceptions. This Article seeks to offer a theory of what the corporation is, what it is for, and why we might ascribe religious rights to it in the first place—considerations that elucidate just what *Hobby Lobby* should, and should not, portend. I argue that constitutional rights should be ascribed to a corporation when it is necessary to protect the constitutional rights of its controlling members. To that end, I provide a way of determining just who the corporation's controlling members are. At the same time, I seek to elucidate, and ultimately cabin, the scope of corporate religious freedom by considering the burdens that an exemption might impose on third parties. In this way, the Article's theoretical contributions aim to forestall the parade of horrors that *Hobby Lobby* otherwise threatens to unleash.

## Disciplines

Business Administration, Management, and Operations | Business Law, Public Responsibility, and Ethics | Business Organizations Law | Civil Rights and Discrimination | Constitutional Law | First Amendment | Health Law and Policy | Insurance | Insurance Law | Law | Organizations Law | Religion Law | Supreme Court of the United States

# CORPORATE PIETY AND IMPROPRIETY: *HOBBY LOBBY'S* EXTENSION OF RFRA RIGHTS TO THE FOR-PROFIT CORPORATION

AMY J. SEPINWALL\*

*In Burwell v. Hobby Lobby, Inc., the Supreme Court held, for the first time, that the Religious Freedom Restoration Act (RFRA) applied to for-profit corporations and, on that basis, it allowed Hobby Lobby to omit otherwise mandated contraceptive coverage from its employee healthcare package. Critics argue that the Court's novel expansion of corporate rights is fundamentally inconsistent with the basic principles of corporate law. In particular, they contend that the decision ignores the fact that the corporation, as an artificial entity, cannot exercise religion in its own right, and they decry the notion that the law might look through the corporate veil to protect the corporate owners' rights even while having the veil shield the owners from liability for the corporation's wrongs.*

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## I. INTRODUCTION

Do for-profit corporations have a right to religious freedom? And are the owners of a corporation permitted to “reverse pierce”<sup>1</sup> the corporate veil to exercise their constitutional rights, even while claiming the protections of the veil to limit their liability for the corporation’s wrongs? The Supreme Court, in *Burwell v. Hobby Lobby, Inc.*,<sup>2</sup> answered both questions in the affirmative,<sup>3</sup> holding that the Religious Freedom and Restoration Act of 1993 (RFRA)<sup>4</sup> applied to for-profit corporations, and grounding the extension of RFRA rights on the free exercise rights of the corporation’s owners. Because the Court went on to find that the Affordable Care Act’s (ACA) “contraceptive mandate”<sup>5</sup> failed RFRA’s test for establishing when a neutral law of general application may burden religious exercise,<sup>6</sup> the Court concluded that the for-profit corporations before it were entitled to an exemp-

<sup>1</sup> See, e.g., Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013).

<sup>2</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>3</sup> The two questions track the two key arguments advanced in the Corporate Law Professors’ amicus brief to the Supreme Court in *Hobby Lobby*. The brief effectively urged the Court to answer “no” to both questions. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 14, *Hobby Lobby*, 134 S. Ct. 2751, (Nos. 13-354, 13-356), 2014 WL 333889, at \*14 [hereinafter Corporate Law Professors’ Brief].

<sup>4</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2013).

<sup>5</sup> I join Marty Lederman and others in thinking that the term “mandate” is misleading here. See Marty Lederman, *Hobby Lobby Part III—There Is No “Employer Mandate,”* BALKINIZATION (Dec. 18, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html>. For the relevant portion of the Affordable Care Act, see Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (2013).

<sup>6</sup> RFRA states, in relevant part, that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b) (2013).

tion.<sup>7</sup> The Court thus ruled that the companies could offer their employees a health insurance package that excluded forms of contraception the corporate owners found objectionable.

In this way, *Hobby Lobby* expanded corporate rights in a manner that corporate law scholars have deemed “unprecedented”<sup>8</sup> and fundamentally inconsistent with the basic principles of corporate law.<sup>9</sup> This Article argues against this tide of critical commentary.<sup>10</sup> Drawing on insights about corporate “personhood”<sup>11</sup> and corporate constitutional rights that I develop elsewhere,<sup>12</sup> I offer a qualified defense of the decision. In particular, I argue that the Court was right to reject the notion that corporations can exercise religion and right to hold that we should nonetheless confer free exercise rights

<sup>7</sup> *Hobby Lobby* consolidated two cases involving claims of conscientious objection on the part of three employers. In the first case, on appeal to the Tenth Circuit, two closely-held corporations owned by the Green family—Hobby Lobby, Inc., a chain of craft stores, and Mardel, Inc., a publisher of Christian texts—challenged the contraceptive mandate and won. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). In the second case, on appeal to the Third Circuit, Conestoga Wood, a closely-held corporation owned by the Hahn family that manufactures kitchen cabinets, also challenged the contraceptive mandate, but lost. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013). For ease of exposition, I refer in the text only to Hobby Lobby, though everything I say about it applies to Mardel and Conestoga, unless otherwise indicated.

<sup>8</sup> Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/after\\_hobby\\_lobby\\_there\\_is\\_only\\_rfra\\_and\\_that\\_s\\_all\\_you\\_need.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.single.html).

<sup>9</sup> See, e.g., Corporate Law Professors’ Brief, *supra* note 3; Caroline Mala Corbin, *Hobby Lobby: Religious Liberty for the Elite*, AM. CONSTITUTION SOC’Y (July 11, 2014), <https://www.acslaw.org/acslblog/hobby-lobby-religious-liberty-for-the-elite>. But see, e.g., Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014).

<sup>10</sup> A key piece of evidence for the consensus view among corporate law professors is the Corporate Law Professors’ Brief, *supra* note 3, at 3–6, which was signed by forty-four corporate law professors at thirty-six law schools accredited by the Association of American Law Schools. The arguments addressed here have also been given voice in, for example, Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U.L. REV. COLLOQUY 151 (2012); Alan E. Garfield, *The Contraceptive Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1 (2014), <http://columbialawreview.org/wp-content/uploads/2014/01/Garfield-114-Columbia-Law-Review-Sidebar-1.pdf>; Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y & L. 305. Stephen Bainbridge offers a sustained critique of the Corporate Law Professors’ Brief. See Stephen M. Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE (Mar. 2014), [http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge\\_Final.pdf](http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge_Final.pdf). However, his article focuses on the brief’s arguments against reverse veil piercing, and his response to those arguments is different from the response I offer in Part III.A.

<sup>11</sup> See, e.g., Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 101 (2012); Amy J. Sepinwall, *Responsibility for Group Transgressions* (Dec. 16, 2010) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

<sup>12</sup> Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012). Some of the arguments here were previewed, in a highly condensed form, in a *Washington Post* op-ed published before *Hobby Lobby* was decided. See Amy J. Sepinwall, *Can a Corporation Have a Conscience?*, WASH. POST (Mar. 21, 2014), [http://www.washingtonpost.com/opinions/can-a-corporation-have-a-conscience/2014/03/21/951fd6b4-af76-11e3-a49e-76adc9210f19\\_story.html](http://www.washingtonpost.com/opinions/can-a-corporation-have-a-conscience/2014/03/21/951fd6b4-af76-11e3-a49e-76adc9210f19_story.html).

upon the corporation as a way of protecting the free exercise rights of the corporation's members. At the same time, however, I aim to show that the theory upon which these arguments rely provides resources for cabining *Hobby Lobby's* application to other bids for religiously-based exemptions.

Some commentators criticize *Hobby Lobby* for construing for-profit corporations as entities that can practice religion;<sup>13</sup> for expanding the notion of corporate personhood;<sup>14</sup> for carrying forward *Citizens' United's* assertions of corporate constitutional rights;<sup>15</sup> and for allowing corporate owners to assert their constitutional rights through the corporate form even while the corporate veil protects the owners from incurring the corporation's liabilities.<sup>16</sup> On the other side, critics contend that the decision did not go far enough. According to these critics, *Hobby Lobby* ought to have recognized that there is no principled distinction between non-profit and for-profit corporations when it comes to religious exercise.<sup>17</sup> If churches can practice religion, then so too can Chick-fil-A, or *Hobby Lobby*, or perhaps even Wal-Mart and other publicly traded companies.<sup>18</sup>

As I shall argue, some of this commentary rests on mistaken readings of the case, and much of it rests on confusion about what the corporation is, what capacities it enjoys, and what rights its owners can claim. More specifically, I shall contend that the decision did not proclaim that corporations are persons, capable of exercising religion. Nor should it have done so. Thus, in Part I, I argue that no corporation can "be" religious or exercise religion. No corporation, then, is entitled to a religious accommodation *in its own right*.

<sup>13</sup> See, e.g., AZ BlueMeanie, *Hobby Lobby Is a Radical Departure from Religious Exercise Jurisprudence*, BLOG FOR ARIZ. (June 30, 2014), <http://blogforarizona.net/hobby-lobby-is-a-radical-departure-from-religious-exercise-jurisprudence>; Jamie Raskin, *The Gospel of Citizens United: In Hobby Lobby, Corporations Pray for the Right to Deny Workers Contraception*, PEOPLE FOR THE AMERICAN WAY (2014), [http://www.pfaw.org/sites/default/files/HobbyLobby\\_Mech.pdf](http://www.pfaw.org/sites/default/files/HobbyLobby_Mech.pdf).

<sup>14</sup> Dahlia Lithwick, *Un-People*, SLATE (Dec. 3, 2013, 4:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/12/hobby\\_lobby\\_and\\_corporate\\_personhood\\_the\\_alarming\\_conservative\\_crusade\\_to.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/hobby_lobby_and_corporate_personhood_the_alarming_conservative_crusade_to.html) ("Corporate Personhood is back! And this time, it's got God on its side."); see also Dana Milbank, *In Hobby Lobby Ruling, the Supreme Court Uses a 'Fiction'*, WASH. POST, (June 30, 2014), [http://www.washingtonpost.com/opinions/dana-milbank-in-hobby-lobby-ruling-the-supreme-court-uses-a-fiction/2014/06/30/37663c72-009b-11e4-8572-4b1b969b6322\\_story.html](http://www.washingtonpost.com/opinions/dana-milbank-in-hobby-lobby-ruling-the-supreme-court-uses-a-fiction/2014/06/30/37663c72-009b-11e4-8572-4b1b969b6322_story.html) ("Mitt Romney said it, and [in *Hobby Lobby*] the Supreme Court upheld it: Corporations are people, my friend."); Philip Lorish, *And Who Is a Person? The Problem with Hobby Lobby (Part I)*, THE HEDGEHOG REV. (July 14, 2014), <http://iasc-culture.org/THR/channels/THR/2014/07/and-who-is-a-person-the-problem-with-hobby-lobby-part-i/> (claiming that the legal academy's early commentary concludes that "the most enduring legacy of *Hobby Lobby* may not be in the area of religious liberty but, rather, in an expanded (and expanding) notion of corporate personhood").

<sup>15</sup> See, e.g., Lithwick, *supra* note 14; Raskin, *supra* note 13 (contending that *Hobby Lobby's* "outlandish" claims "would not have [had] a prayer except for *Citizens United*, the miracle gift of 2010 that just keeps giving"); Schwartzman, Schragger & Tebbe, *supra* note 8.

<sup>16</sup> See, e.g., Sepper, *supra* note 10, at 317.

<sup>17</sup> See, e.g., Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59, 114 (2013).

<sup>18</sup> See *id.* at 74; Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 234 (1994).

This brings us to the rights of the corporation's members. We grant rights of religious freedom to churches and other non-profit corporations organized to serve religious ends as a way of protecting the free exercise rights of these corporations' individual constituents. But this rationale, critics contend, does not apply to the for-profit corporation, which is not organized to serve religious ends. In Part II, I take up the claim that limited liability disqualifies the owners of for-profit corporations from seeking to assert their rights of religious freedom through the corporate form.

One might think that gaining clarity on the nature of the corporation and the source of its religious rights is unnecessary in light of the *Hobby Lobby* decision. The Court ruled that owners of a closely-held for-profit corporation can claim a religious exemption from the ACA's contraceptive mandate if they can establish that the mandate imposes a "substantial burden" on their religious exercise and the government fails to show that the burden is motivated by a "compelling interest" served in the "least restrictive" way.<sup>19</sup> Whatever one might think of the cogency of the decision, it is now the law of the land. One might conclude, then, that there is no point in interrogating the decision's foundations and implications.

But we should not be so quick to abdicate the scholarly responsibility to comment, especially where, as here, there is deeply felt concern about what *Hobby Lobby* portends.<sup>20</sup> Will the decision apply not just to closely-held corporations but to publicly traded ones as well? If so, how should courts deal with disagreement among shareholders about the religious convictions the corporation should adopt? Does the notion of corporate religious rights threaten to justify corporate refusals to cover other health interventions—for example, life-saving abortions,<sup>21</sup> or therapies derived from embryonic stem cells?<sup>22</sup> More sweepingly, if corporations have rights of religious freedom, must we also accord them other foundational rights—rights to vote in political elections,<sup>23</sup> or perhaps even Second Amendment rights to bear arms,<sup>24</sup> or

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<sup>19</sup> The quoted language here tracks the key elements in the test that RFRA prescribes. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2013).

<sup>20</sup> Cf. Ann Lipton, *Yet Another Person Weighs in on Hobby Lobby*, BUS. LAW PROF BLOG (July 12, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/yet-another-person-weighs-in-on-hobby-lobby.html](http://lawprofessors.typepad.com/business_law/2014/07/yet-another-person-weighs-in-on-hobby-lobby.html) (explaining that "there is something of an obligation for all corporate law bloggers to weigh in on *Hobby Lobby*").

<sup>21</sup> See generally Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 16 (2014) (listing plausible religious objections to corporate funding of psychiatric care, treatment of illnesses related to the use of alcohol or tobacco, blood transfusions, delivery of babies born out of wedlock, and vaccination against the HPV virus).

<sup>22</sup> Judge Rovner raises this and other hypothetical extensions that would follow from allowing religious exemptions to the contraceptive mandate. See *Korte v. Sebelius*, 735 F.3d 654, 689–93 (7th Cir. 2013) (Rovner, J., dissenting), cert. denied, 134 S. Ct. 2903 (2014); see also *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1240 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) (listing further and equally far-reaching hypothetical pleas for exemptions from the ACA on religious grounds).

<sup>23</sup> John Hasnas has recently argued that if one holds that corporations are moral agents, then, as a matter of logic, one must also hold that corporations are persons. As such, corpora-

rights to marry humans or other corporations?<sup>25</sup> Enhanced clarity on just what the corporation is, what it is for, and why we might ascribe religious rights to it in the first place—which this Article seeks to provide—can yield answers to these questions that elucidate just what *Hobby Lobby* should, and should not, entail.

## II. CORPORATE RELIGIOUS FREEDOM?

When contemplating the issues raised in challenges to the contraceptive mandate, courts and commentators have divided over the question of whether for-profit corporations have rights of religious freedom in the first place. This question has been identified as “the central”<sup>26</sup> and “fundamental”<sup>27</sup> question in *Hobby Lobby*—one of “profound cultural” interest<sup>28</sup> and “a topic of energetic debate in current American political and social discourse.”<sup>29</sup>

This Part takes up the core question of whether corporations are the kind of entities that can be said to exercise religion. Or, more generally, do corporations have a conscience?<sup>30</sup>

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tions would have rights, including the right to vote in political elections. John Hasnas, *Why Don't Corporations Have the Right to Vote?* (2014) (unpublished manuscript) (on file with author).

<sup>24</sup> See, e.g., Daniel J.H. Greenwood, *Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049, 1075 (“It remains to be seen whether the Court will extend its new Second Amendment jurisprudence to grant corporations a protected right to take up arms against the citizenry, but little in the existing precedents suggests any reason to expect the Court to hesitate.”).

<sup>25</sup> Cf. Stephen Bainbridge, *Citizens United and the Constitutional Rights of Corporations*, PROFESSORBAINBRIDGE.COM (Jan. 18, 2011), <http://www.professorbainbridge.com/professorbainbridge.com/2011/01/citizens-united-and-the-constitutional-rights-of-corporations.html> (describing a protest stunt responding to *Citizens United*'s (alleged) recognition of corporate personhood in which a woman held a news conference to announce the start to her search for a corporate spouse).

<sup>26</sup> Raskin, *supra* note 15, at 9.

<sup>27</sup> Joshua Holland, *Supreme Court to Decide Whether Corporations Can Pray*, MOYERS & CO, (Oct. 22, 2013), <http://billmoyers.com/2013/10/22/supreme-court-to-decide-whether-corporations-can-pray/>.

<sup>28</sup> Lyle Denniston, *Argument Preview: Religion, Rights, and the Workplace*, SCOTUS-BLOG (Mar. 20, 2014, 3:30 PM), <http://www.scotusblog.com/2014/03/argument-preview-religion-rights-and-the-workplace/>.

<sup>29</sup> *Id.*

<sup>30</sup> For scholarly work engaging the relationship between conscience and religious conviction, see, for example, Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 214, 215, 215 n.1 (2009) (noting that “[m]any distinguished legal theorists and philosophers have been drawn to the idea that it is conscience rather than religion that is entitled to special protection, and the U.S. Supreme Court has sometimes embraced the same position” and collecting sources and cases). Nonetheless, the law has been much more hospitable to religiously-based claims of conscience than moral ones. See, e.g., Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1459 nn.7–9 (2013) (collecting cases and statutes supporting and denying exemptions on the basis of non-religious claims of conscience). Since *Hobby Lobby* was decided under a statute protecting religious freedom, I focus here only on religious claims of conscience. It is nonetheless worth noting that many of the paradigmatic instances of conscientious objection contemplate



*Hobby Lobby* was decided on the basis of the Religious Freedom and Restoration Act of 1993.<sup>31</sup> RFRA provides that:

[The government may] not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, . . . [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>32</sup>

RFRA itself does not define the term "person," so controversy emerged over whether RFRA applies to for-profit corporations. After all, for-profit corporations can suffer a substantial burden on their exercise of religion only if they can exercise religion in the first place, and there is much disagreement about whether they can.

Arguments about corporate religious exercise take one of two forms. Some of these turn on conceptions of what the corporation is *for*. Call these *teleological* arguments. Other arguments turn on conceptions of what the corporation *is*. Call these *ontological* arguments. I take up each of these in turn.<sup>33</sup>

#### A. Teleological Arguments About Corporate Religious Exercise

As noted above, teleological arguments focus on corporate purpose and attempt to infer whether for-profit corporations can exercise religion therefrom.<sup>34</sup> Those who argue against the exemption on teleological grounds con-

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both moral and religious grounds for the objection. *See, e.g.*, Church Amendments, 42 U.S.C. § 300a-7(b) (2013) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45) (mandating that the government not discriminate in its disbursement of public funds against individuals or entities who refuse to perform abortion or sterilization procedures because these procedures "would be contrary to [the individual or entity's] religious beliefs or moral convictions"); Oregon Death with Dignity Act § 4.01, Or. Rev. Stat. § 127.885 (2012) (recognizing moral and religious objections to physician assisted suicide); 18 U.S.C. § 3597(b) (2013) (permitting federal employee to absent themselves from executions when the employee opposes capital punishment on moral or religious grounds).

<sup>31</sup> 42 U.S.C. §§ 2000bb-1 to -4 (2013).

<sup>32</sup> 42 U.S.C. § 2000bb-1(b).

<sup>33</sup> Eliding the ontological and teleological questions, Douglas Laycock looks simply to RFRA's legislative history and infers therefrom that "Congress left a clear and explicit record that the public meaning of RFRA covers for-profit corporations and their owners." Douglas Laycock, *Symposium: Congress Answered This Question: Corporations Are Covered*, SCOTUSBLOG (Feb. 19, 2014), <http://www.scotusblog.com/2014/02/symposium-congress-answered-this-question-corporations-are-covered/>. Laycock presents convincing evidence supporting Congress's intention, but the fact that Congress *meant* for corporations to have religious freedom does not entail that corporations *can* exercise religion. The considerations adduced in this Part are aimed at establishing that they cannot.

<sup>34</sup> Lyman Johnson and David Millon argue that *Hobby Lobby* was remarkable in no small part because "[n]ever before had the highest court in the land spoken to an issue that goes to the very foundation of corporate law, namely, corporate purpose." Lyman Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 22 (2014). This Part will explain and critique the arguments of jurists and commentators on both sides of this issue.

tend that for-profit corporations are secular by definition,<sup>35</sup> as if a commitment to turning a profit automatically forecloses an exercise of religion.<sup>36</sup> But there is nothing in the nature of profit-making that restricts the profit maker from imposing religiously-based constraints on his efforts to make money. Jews who observe the Sabbath do not work on Saturdays, presumably losing revenue as a result. And convictions of a secular moral kind can also limit the ways in which a company will seek to earn money<sup>37</sup>—for example, by pursuing philanthropic goals,<sup>38</sup> or adopting green policies that are more expensive than conventional alternatives.<sup>39</sup> In short, teleological arguments do not rule out the notion of a religiously-informed for-profit corporation because there is not one determinate purpose of the for-profit corporation. Instead, there are many different objectives that may legally co-exist alongside, or constrain, the pursuit of profits, including adherence to a set of religious convictions.

Moreover, in eschewing a conception of corporate purpose that allows non-pecuniary values to constrain the pursuit of profit, the dissent unwittingly affirms a vision of the corporation that has been, and deserves to be, discredited. More specifically, the dissent, and like-minded commentators,<sup>40</sup> see the for-profit corporation as steadfastly and exclusively committed to profit maximization. In this regard, the dissent seems to be channeling

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<sup>35</sup> See, e.g., Defendant's Memorandum in Support of Their Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction at 17, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-01 123-JLK) ("Hercules Industries's overriding purpose is to make money . . . . By definition, a secular employer does not engage in any 'exercise of religion.'") (citations omitted).

<sup>36</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014). ("Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money."); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419, at \*4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring) (noting that the mission of Conestoga, "like that of any other for-profit, secular business, is to make money in the commercial sphere") (citations omitted); Rienzi, *supra* note 17, at 61 ("Despite the obvious religious focus of these businesses, the government has argued that their profit-making nature automatically renders them 'secular' and therefore incapable of religious exercise."); Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1547 (2012) (arguing that "[w]ithin for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking").

<sup>37</sup> *Hobby Lobby*, 134 S. Ct. at 2771.

<sup>38</sup> *Id.* at 2771 n.24.

<sup>39</sup> For example, Patagonia, the clothing company, donates one percent of its revenues in the form of grants for environmental activism. As the company describes, "We fund activists who take radical and strategic steps to protect habitat, oceans and waterways, wilderness and biodiversity. This is our niche: supporting people working on the frontlines of the environmental crisis." *Environmental Grants and Support*, PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=2927> (last visited Mar. 24, 2015). It is difficult to see how these grants could enhance Patagonia's profitability, since it is unlikely that activists on the frontlines develop strategies or technologies that make Patagonia more efficient. And Patagonia could likely earn an equivalent public relations benefit were it to donate just a fraction of what it currently does. This is all to say that Patagonia appears to sacrifice profits for the sake of its commitment to the environment.

<sup>40</sup> See, e.g., Sepper, *supra* note 36, at 1547.

Milton Friedman's infamous precept that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase profits . . ." <sup>41</sup> Friedman (and his acolytes) are wrong both as a matter of law and as a matter of logic.

The American Law Institute's *Principles of Corporate Governance*, which endeavor to synthesize corporate law doctrines, state that the law allows the corporation to recognize legal and ethical considerations as well as to devote reasonable resources to philanthropic, educational, humanitarian, and public welfare purposes. <sup>42</sup> Further, as other scholars have noted, the business judgment rule effectively insulates corporate officers from challenges to philanthropic or social responsibility initiatives that they institute. <sup>43</sup>

Moreover, even if one subscribes to the view that the corporation should be run exclusively in the interests of its owners or shareholders, <sup>44</sup> it does not follow that the corporation's exclusive purpose should be to maximize share value. Friedman's argument embodies the logical flaw in question: he asserts that (1) the primary responsibility of corporate executives is "to conduct the business in accordance with [owners'] desires," <sup>45</sup> (2) the primary desire of the owners is "to make as much money as possible" within the bounds of the law, <sup>46</sup> and so (3) "[t]here is one, and only one, social responsibility of business"—"to make as much money as possible." <sup>47</sup> Even if Friedman is right as a matter of fact that the owners' primary desire is to make as much money as possible, it does not follow that this is their only desire, and so we need not conclude that maximizing profits is the only legitimate corporate purpose. Indeed, many owners have competing desires when it comes to the corporation's objectives, and even those who would put profit making at the top of the list might nonetheless have moral taboos that they would want to have operate as side constraints on the means of turning

<sup>41</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (2002) (internal quotation marks omitted).

<sup>42</sup> PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2)–(3) (1994) (stating that corporations may be run in light of "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" even when so doing reduces the firm's profitability); see also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763–70 (2005) (invoking state statutes and case law, as well as federal law, in support of the American Law Institute's statement that corporations need not steadfastly seek to maximize profits).

<sup>43</sup> See, e.g., *Shlensky v. Wrigley*, 237 N.E. 2d 776, 778–80 (Ill. App. Ct. 1968); Lynn A. Stout, *The Problem of Corporate Purpose*, 48 ISSUES IN GOVERNANCE STUDIES 1, 5 (2012) (describing how courts have applied the business judgment rule).

<sup>44</sup> See, e.g., Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991) (stating that corporations and their directors "owe fiduciary duties to shareholders and to shareholders alone"). It is worth noting that progressive corporate law scholars strongly, and to my mind, convincingly, contest the view that shareholders are the owners of a publicly traded corporation. See, e.g., Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1190, 1190–92 (2002).

<sup>45</sup> FRIEDMAN, *supra* note 41, at 1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 6.

a profit. For example, owners otherwise committed to maximizing profits might object to profits earned through child labor, or the sale of arms to genocidal rebels, or the exploitation of poor and vulnerable populations. The fact that these owners take profit-making to be the thing they most desire from the corporation does not entail that they desire that the corporation make a profit at any and all (moral) costs.<sup>48</sup> Moreover, it is just not the case that all shareholders would identify profit-making as the objective to which the corporation should be primarily, let alone exclusively, devoted. The rise of benefit corporations demonstrates as much.<sup>49</sup>

In short, given that the law permits corporations to pursue religious objectives even at the expense of profit maximization,<sup>50</sup> the dissent fails to establish that profit-making is incompatible with religious exercise. Commentators however, have offered other possible reasons for thinking that religious observance cannot be among Hobby Lobby's purposes.

For example, some have argued that Hobby Lobby must not genuinely care about contraceptive methods since it invests in companies that manufacture the contraceptive methods to which it allegedly objects.<sup>51</sup> The investments in question reside in generic mutual funds that include stock in major pharmaceutical companies, including one that produces Plan B, one of the four contraceptive methods contested in the case.<sup>52</sup> Commentators voicing this argument concede that "the investment funds have very small stakes in these pharmaceutical firms overall."<sup>53</sup> Nonetheless, given that Hobby Lobby could instead invest in religious mutual funds that exclude companies manu-

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<sup>48</sup> There are additional problems with Friedman's argument that other corporate law and business ethics scholars have powerfully exposed, most notably that Friedman mistakenly treats shareholders as the owners of the corporation. *See, e.g.*, David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in *PROGRESSIVE CORPORATE LAW 1*, 9–10 (Lawrence E. Mitchell ed., 1995); Stout, *supra* note 44, at 1191.

<sup>49</sup> *See, e.g.*, J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 *AM. U. BUS. L. REV.* 1, 26 (2012).

<sup>50</sup> *See generally* Meese & Oman, *supra* note 9.

<sup>51</sup> *See, e.g.*, Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, *MOTHER JONES* (Apr. 1, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers> (accusing Hobby Lobby of hypocrisy and noting the availability of faith-based investing plans that screen for companies manufacturing abortion drugs). This is hardly a "gotcha" of the kind that undermines the Court's decision, however, for the same reasons I go on to adduce in the text that follows. *See infra* text accompanying note 55.

<sup>52</sup> Heather Long, *Hobby Lobby Does Invest in Birth Control*, *CNN MONEY* (July 2, 2014, 11:10 AM), <http://money.cnn.com/2014/07/01/investing/hobby-lobby-401k-contraception/> ("Employees have the option to put their retirement dollars—and the money that Hobby Lobby contributes on their behalf—into over a dozen different mutual funds. At least eight of those funds have been invested in companies that produce contraceptives such as Teva Pharmaceutical (TEVA), Bayer (BAYRY), and Pfizer (PFE), according to a CNNMoney analysis. Teva makes Plan B. At least one fund also held Forest Laboratories, which makes a drug that is used to induce abortions.").

<sup>53</sup> *Id.*

facturing contraceptives, Hobby Lobby's investment decisions seem to be at odds with its asserted religious convictions.

What are we to make of this seeming inconsistency? The answer, is not much. Religious observance can appear wildly inconsistent from the outside. Sometimes the believer can offer a rationale for practices that appear to depart from her religious convictions and, in this way, she can eliminate the appearance of inconsistency. At other times, the only explanation is that the believer is doing the best she can and surely some observance is better than none. It seems doubtful, and undesirable at any rate, that only those who adhere perfectly to their religious convictions should be eligible for religious accommodation.<sup>54</sup>

With that said, inconsistencies can be relevant to assessing the sincerity of Hobby Lobby's asserted beliefs.<sup>55</sup> Suppose that Hobby Lobby cares not a whit about embryonic life, and is merely being opportunistic by seeking an exemption from the contraceptive mandate because of potential cost savings. The case would then have been wrongly decided with respect to Hobby Lobby. But Hobby Lobby's insincerity would not impugn the Court's holding as applied to a for-profit closely-held corporation with sincere objections to some or all of the contraceptive methods mandated under the ACA. That is, the reasoning of the case does not rise or fall on the sincerity of Hobby Lobby's beliefs because there are presumably other religious for-profit employers who do have sincere objections to contraceptive coverage.

In sum, if the corporation is unfit to exercise religion, this cannot be because adhering to religious precepts can form no part of any for-profit corporation's purpose. It must instead be because the corporation is not the kind of entity that can be religious in the first instance. I turn to such arguments now.

### B. *Ontological Arguments About Corporate Religious Exercise*

Ontological arguments about whether corporations can exercise religious freedom turn on competing conceptions of the nature of the corporation itself. Notably, both the majority and dissent agree that the corporation is an artificial being,<sup>56</sup> as do many corporate law scholars, who hold the view that the corporation is nothing but a nexus of contracts.<sup>57</sup> For those who deny that

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<sup>54</sup> See *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (upholding a Jehovah's Witness's religious objection to participating in the manufacture of tanks even though the objector did not oppose participating in the manufacture of steel that he knew would be used to build tanks).

<sup>55</sup> Sincerity is a criterion courts typically assess in determining whether to grant an exemption under RFRA, though the Court in *Hobby Lobby* had no occasion to do so because "no one ha[d] disputed the sincerity of their religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

<sup>56</sup> See *id.* at 2769; *id.* at 2794 (Ginsburg, J., dissenting).

<sup>57</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418, 1426 (1989); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449,

the corporation is real, the idea that *it* can practice religion in its own right is a non-starter.<sup>58</sup> Again, the majority and dissent are in agreement here.<sup>59</sup> The majority and dissent part ways, however, when it comes to the implications of the corporation's fictitious nature: the dissent takes the corporation's artificiality to entail that for-profit corporations cannot practice religion and concludes that for-profit corporations therefore do not have rights under RFRA.<sup>60</sup> This conclusion is too hasty for even if the corporation does not enjoy RFRA protection in its own right, it might make sense to confer this protection on the corporation as a way of respecting the corporate owners' rights of religious freedom. This is precisely the response the majority offers, and it is also the response that explains why questions of *corporate* religious exercise are a red herring.

Nonetheless, some commentators have sought to argue that corporations, including for-profit corporations, are the kinds of entities that *can* practice religion in their own right.<sup>61</sup> It is worth pausing to consider their arguments because, if accepted, they have potentially radical implications, as we can glean from analogous arguments holding that a corporation is a moral agent in its own right.

To be a moral agent is to be capable of knowing right and wrong and acting in light of this knowledge, and so to be capable of being blamed or praised for the acts the moral agent commits. Once the corporation is conceived as being a moral agent, it may be held responsible for its acts *even if none of its members are responsible for them*.<sup>62</sup> According to those who

1449 (1989); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Non-shareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1269 (1999).

<sup>58</sup> The claim that an artificial entity cannot exercise religion is analogous to the standard line in the law and economics movement about corporate ownership—that as a nexus of contracts, the corporation cannot own itself, nor can anyone else own it. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. REV. 547, 564–65 (2003); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980).

<sup>59</sup> *See Hobby Lobby*, 134 S. Ct. at 2769–70 (arguing that the corporation is a fictitious legal construct, incapable of exercising religion in its own right); *id.* at 2794 (Ginsburg, J., dissenting) (“[T]he exercise of religion is characteristic of natural persons, not artificial legal entities.”).

<sup>60</sup> *Id.*; *see also* *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health and 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.”) (emphasis added); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F.Supp.2d 394, 408 (E.D. Pa. 2013) (“Religious 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.”).

<sup>61</sup> *See, e.g.*, Ronald Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 88 (2014) (“It is time to connect the dots, and explicitly recognize the ability of for-profit corporations to invoke the protections of the Free Exercise Clause.”); *Johnson & Millon*, *supra* note 34, at 23; *Rienzi*, *supra* note 17, at 63.

<sup>62</sup> *See, e.g.*, MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 129 (2000); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 177 (2007). It might seem implausible to think that a corporation could bear responsibility for some act—a wrong, say—even though

subscribe to the notion of corporate moral agency, the corporation is deemed to have its own capacities for knowledge and volition.<sup>63</sup> These capacities sustain the corporation's moral agency, and so it bears its own moral responsibility. In brief, if a corporation is a moral agent, then it must be autonomous.

An analogous form of autonomy underpins claims that the corporation itself can be a religious adherent. As such, the corporation could have religious convictions that none of its members shared.<sup>64</sup> Consider, for example, a closely-held corporation established by a Catholic owner who embedded Catholic precepts in the corporation's charter. Even if the owner subsequently converted to some other religion, and even if no one else in the corporation cared whether the corporation continued to act on Catholic precepts, the corporation would still continue to adhere to Catholicism so long as its charter remained the same. More to the point, the corporation would, according to those who subscribe to this version of corporate personhood, *be* Catholic, in the sense that it was guided by Catholic precepts and its commitments functioned to cause its members, when acting on behalf of the corporation, to abide by these precepts. In this way, the corporation would have a religious identity that none of its members shared. And, most relevant for our purposes, such a corporation could seek exemptions on religious grounds from legal requirements to which *none* of its owners, employees, customers, and so on objected. It is in this sense, then, that the notion of a religious corporation has radical implications, and so deserves our attention.

Broadly speaking, there are three kinds of arguments for the claim that corporations can exercise religion, or *be* religious. First, supporters argue that we frequently ascribe moral properties to businesses—for example, referring to them as “greedy” or “generous”—which implies that we think of them as being moral in their own right. If corporations are moral beings, they continue, surely they can be religious beings too. Second, we ascribe mental states to corporations, as where we hold a corporation criminally liable because of what *it* knew or intended. This suggests that corporations

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none of its individual members were culpable in her own right. But this possibility is not merely the stuff of philosophical fancy. In *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987), for example, the First Circuit held that a bank could be said to know that withdrawals had exceeded the level above which reporting was necessary when some tellers knew the amount of the withdrawals in question but did not know the reporting limits, and other bank employees knew the reporting limits but did not know the amount of the withdrawals. The court found that the knowledge of a corporation “is the sum of the knowledge of all of the employees,” *id.* at 855, and in that way the court was able to impute to the corporation a crime of which none of its individual members was culpable.

<sup>63</sup> See, e.g., CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 165–67 (2011); Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207 (1979); Pettit, *supra* note 62, at 171–72.

<sup>64</sup> Johnson and Millon allow for this possibility, stating that “if the corporation itself enjoys religious liberty, its rights exist separately . . . and would exist . . . even if some—or even all—of its shareholders or directors were atheists and derived no benefit from the corporation's exercise of its own right.” See Johnson & Millon, *supra* note 34, at 18.

have a capacity for belief, and a capacity to act in accordance with the beliefs they form. Finally, corporations sometimes take actions in conformity with religious precepts (for example, closing on the Sabbath), which is a form of exercising religion.<sup>65</sup>

None of these arguments are convincing, however. When we ascribe moral properties to a corporation, we might mean for them to attach to the corporation itself. But we might instead just be using a shorthand. Thus, when we call a corporation “greedy,” what we really might mean to say is that “the corporation is being run in a way that would qualify as greedy if the corporation were a person” or “the managers of the corporation are running it in a greedy way.” In short, we cannot discern from our discourse whether we in fact think of the corporation as moral or immoral in its own right.<sup>66</sup>

The second argument draws an analogy between our practice of holding corporations criminally liable for their wrongs and the notion of corporate religious exercise. As Mark Rienzi writes, “It is unclear what principled reason would justify viewing a corporation as capable of forming and acting upon criminal intentions but incapable of forming and acting upon religious ones.”<sup>67</sup> In response, it is worth noting that at least some arguments for corporate criminal liability do not turn on the notion that corporations can form and act upon criminal intentions; instead, these arguments justify punishing corporations on deterrence-based grounds alone.<sup>68</sup> But even if corporations do have the capacity to form and act upon criminal intentions, that capacity may demand less than the capacity to form and act upon a religious intention. To act on a criminal intention, it is not necessary that one know that one’s conduct is criminal at the time one acts, less still that one commit the act precisely because it is criminal. Not so for religious conduct. To qualify as a religious exercise, the actor should not only act in accordance with a religious precept, he should be motivated to so act precisely because his religion instructs him to.<sup>69</sup> This is not to say that one must feel motivated by

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<sup>65</sup> All three arguments can be found in Rienzi, *see supra* note 17, at 81, 85–86, 110, but other commentators raise one or more of them as well. *See, e.g.*, Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 771–73 (2015); Meese & Oman, *supra* note 9, at 278–79.

<sup>66</sup> I elaborate on this point in Sepinwall, *Guilty by Proxy*, *supra* note 11, at 423–24.

<sup>67</sup> Rienzi, *supra* note 17, at 89; *cf.* Eric Posner, *Stop Fussing over Personhood*, SLATE (Dec. 11, 2013 10:09 AM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html) (acknowledging that the mental states in question reside with the corporation’s individual members, not the corporation itself, but also stating that “the law already treats corporations as capable of being reckless or negligent; of having intentions, beliefs, and states of mind. If it didn’t, then it would be impossible to hold a corporation guilty of committing a crime.”).

<sup>68</sup> *See* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494–95 (1996).

<sup>69</sup> In some characterizations, the notion of *motivation* is at the core of what RFRA aims to protect. *See, e.g.*, Laycock & Thomas, *supra* note 18, at 210 (arguing that RFRA is intended to protect “religiously motivated conduct”).



one's religious commitments in each and every instance; presumably, regular observance becomes a habit and so occurs reflexively.<sup>70</sup> Nonetheless, it should at least be the case that one could be made to feel the force of the motivation—for example, when circumstances tempt one to do otherwise, or when called upon to explain or justify one's observance.

If I am right that religious exercise requires more than mere compliance with the rules and practices of a religion, then the third argument—that corporations sometimes act in accordance with religious precepts<sup>71</sup>—fails as well. To see this, consider that vegans are necessarily kosher, because the prohibitions vegans follow overlap with those that Kashrut mandates.<sup>72</sup> But it would be a mistake to think that every vegan engages in an exercise of Judaism. The motivation for veganism is different from the motivation to live a life in accordance with Jewish precepts around eating. To qualify as an instance of the latter, one has to know and affirm the Jewish dietary laws, and make choices about what and how one eats precisely because of those laws.

More generally, religious exercise requires more than merely forming and acting on intentions. Rienzi seems to agree. He states, “The exercise of religion is not limited to actions or abstentions *required* by a person's religion, but rather includes actions and abstentions *motivated* by religion.”<sup>73</sup> Motivation matters when it comes to religious exercise. But motivation is different from intention and it relies on a different capacity. In particular, motivation depends on certain conative and affective states—in the case of religious motivation, a desire to do right, and a fear of the consequences of doing wrong, respectively. I have argued elsewhere that the corporation does not possess the capacities necessary to experience these states.<sup>74</sup> I will not rehearse these arguments here, though I think one can readily grasp what is at stake if one merely reflects on what it feels like to be motivated. This

<sup>70</sup> Cf. DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 76–89 (2012) (explaining that the distinctive feature of habits, as well as policies, is that, once adopted, they function like exclusionary reasons or reasons that preclude a case-by-case weighing of competing considerations).

<sup>71</sup> See, e.g., Meese & Oman, *supra* note 9, at 278 (“Some lower courts have asserted that ‘for-profit, secular corporations cannot engage in religious exercise.’ As an empirical matter, this claim is false. Shareholder-induced pursuit of religion is common.”) (quoting *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013)).

<sup>72</sup> For a description of the Jewish dietary laws, see *Kashrut: Jewish Dietary Laws*, JUDAISM 101, <http://www.jewfaq.org/kashrut.htm> (last visited Mar. 4, 2015). For a description of the foods veganism permits and forbids, see *What Do Vegans Eat?*, VEGAN OUTREACH, <http://veganoutreach.org/what-to-eat/> (last visited Mar. 4, 2015).

<sup>73</sup> Rienzi, *supra* note 17, at 65 (basing his argument on *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *Wis. v. Yoder*, 406 U.S. 205 (1972), *Sherbert v. Verner*, 374 U.S. 398 (1963), *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Cleveland v. United States*, 329 U.S. 14 (1946)) (emphasis added).

<sup>74</sup> Amy J. Sepinwall, *Monsters, Incorporated: Why Corporations Aren’t Persons and Why We Shouldn’t Care Anyway*, (Feb. 19, 2015) (unpublished manuscript) (on file with author); see also Sepinwall, *Guilty by Proxy*, *supra* note 11 (arguing that the question of corporate moral capacity is “likely unanswerable”).

feeling is not a mere appendage to motivation, an experience that just happens to go along with being motivated. Instead, it is constitutive of motivation—feeling that feeling is part and parcel of what it is to be motivated.

Further, acting on conscience requires more still. Underpinning a commitment to some set of precepts and the motivation that the commitment affords is a kind of self-awareness—a conception of oneself as a certain kind of person, that is, one who lives her life *by* the commitments in question. It is in this sense that religious conscience is deeply bound up with identity,<sup>75</sup> and it is because of the connection between conscience and identity that the law recognizes and sometimes accedes to conscientious objection. As Michael Sandel puts it, “the free exercise of religion enjoy[s] special constitutional protection . . . [because of] the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity.”<sup>76</sup>

The centrality of motivation to religious experience, and identity to claims of conscience, make clear the reason for which corporations themselves cannot act on conscience. Corporations do not have a capacity for motivation, and they do not have the self-awareness that would allow a person to carve out an identity for herself, and set an agenda for the way she will live out her life in light of her deepest commitments. Without motivation or self-awareness, then, the corporation’s acts might be in line with what a given religion requires, but the corporation does not act religiously—it does not, that is, exercise religion.<sup>77</sup>

At this point, the proponent of corporate religious exercise might complain that the considerations adduced to deny that a corporation can be religious impugn not just a for-profit entity’s claims of free exercise but also those of a church. After all, it is not as if a church possesses cognitive, conative, or affective capacities that a for-profit corporation lacks.<sup>78</sup> But it

<sup>75</sup> See, e.g., KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 99 (2005) (arguing that claims of religious conscience are “likely to represent deeply constitutive aspects of people’s identity”); Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 49 (2010) (noting that conscience, in its “modern usage connotes something stronger, that she would disregard a deep aspect of her identity if she went along”); cf. WILLIAM A. GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 67 (2005) (focusing on the relevance of religious convictions and stating that “believers understand the requirements of religious beliefs and actions as central rather than peripheral to their identity”).

<sup>76</sup> MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* xii (1998).

<sup>77</sup> I note that similar considerations should undermine the claim that the corporation has a conscience. For arguments on the other side, see, for example, Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, HARV. BUS. REV., Jan. 1982, available at <https://hbr.org/1982/01/can-a-corporation-have-a-conscience/ar/1> (arguing that a “corporation can and should have a conscience”); Mary Ann Glendon, *Free Businesses to Act with Conscience*, BOS. GLOBE (Dec. 8, 2013), <http://www.bostonglobe.com/opinion/2013/12/08/should-business-have-conscience/cK6o6G6dwrWeRjK1uPVYM/story.html>.

<sup>78</sup> Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) (“[N]o conceivable [legal] definition of the term [“person”] includes natural persons and nonprofit corporations, but not for-profit corporations.”).

makes no sense to say that a church is not religious, the objector might continue. And so a for-profit corporation must be religious too.<sup>79</sup>

In response, I note that the objector is right to think that we should not distinguish between churches and for-profit entities in an analysis of corporate conscience, or corporate religious exercise.<sup>80</sup> Churches, like for-profit corporations, lack a capacity for motivation or emotion, and in addition, a sense of self. We might sometimes speak as if churches have a conscience.<sup>81</sup> But again our speech is either an elliptical reference to the leaders of the organization,<sup>82</sup> or else it is metaphoric—that is, a shorthand for, “the organization has acted in a way that would cause pride or serenity (or shame or guilt) in an individual with a conscience.” And it is no embarrassment to the church that it cannot be religious in the way that an individual can be, just as it is no embarrassment to a zygote, or a chimpanzee, or a spotted owl that it cannot be a person in the way an adult human can be.<sup>83</sup> Moreover, we might have reason to care deeply about the church (just as we might have reason to care about the spotted owl, chimpanzee, or even a zygote)<sup>84</sup> that do not turn on whether it shares the metaphysical capacities of persons. Concepts like

<sup>79</sup> Nate Oman raises this objection in a comment to a blog post I wrote, to which I responded, echoing the considerations I provide in the text of this Article in the paragraphs immediately following this footnote. See Amy Sepinwall, *Replying to Ronald Colombo on Corporate RFRA Rights*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/replying-to-ronald-columbo-on-corporate-rfra-rights.html>. Professor Oman’s comment argues that “[e]quating the religious in religious freedom with you [sic] more demanding definition of religion seems to have the bizarre result that churches not only are not entitled to religious freedom but also aren’t even religious.” *Id.*

<sup>80</sup> Cf. Haskell Murray, *Lyman Johnson—Hobby Lobby, a Landmark Corporate Law Decision*, BUS. LAW PROF BLOG (July 2, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html](http://lawprofessors.typepad.com/business_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html) (“[T]he U.S. failed to convince the Court that corporations as such cannot exercise religion because, let’s face it, our nation is full of churches and other religious bodies where religion quite obviously is being exercised in and through the corporate form.”).

<sup>81</sup> See Joseph P. Marren, *Catholic Church Should Be Ashamed*, CHI. TRIB. (Apr. 6, 2010), [http://articles.chicagotribune.com/2010-04-06/opinion/chi-100406marren\\_briefs\\_1\\_catholic-bishops-catholic-church-ashamed](http://articles.chicagotribune.com/2010-04-06/opinion/chi-100406marren_briefs_1_catholic-bishops-catholic-church-ashamed).

<sup>82</sup> The article quoted in the previous footnote bears the headline, “Catholic Church Should Be Ashamed,” but its very first sentence makes clear that the author’s ire is directed at the leaders of the Church, not the Church itself: “The pope and the Catholic bishops are an embarrassment to the church.” *Id.*

<sup>83</sup> The examples here are drawn from Eric Posner, *supra* note 67, who argues that personhood is sometimes a purely legal concept, in which case it denominates all those entities that enjoy a certain class of legal rights. This argument says nothing about the metaphysical capacities about the entities so denominated.

<sup>84</sup> It may be worth noting that theorists across the ideological spectrum—in particular, those who both support and deny the claim that personhood begins at conception—can nonetheless agree that we have reason to care deeply about prenatal life, including prenatal life from its earliest inception (that is, zygotes). See e.g., Margaret O. Little, *The Morality of Abortion*, in A COMPANION TO APPLIED ETHICS 313, 321 (R. G. Frey & Christopher Heath Wellman eds., 2003) (arguing that one can embrace the moral permissibility of abortion and yet believe that abortions are nonetheless regrettable—oftentimes even tragic); Robert P. George (joined by Alfonso Gómez-Lobo), Personal Statement, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY 258 (President’s Council on Bioethics 2002) (contending that personhood begins at the time a human is conceived).

“religious” or “person” have more or less robust meanings. The church is religious in the narrow sense that it is run in accordance with religious precepts; it is not religious in the more robust sense that we have in mind when we contemplate, for example, the individual who is pious, reverent, or devoted. Put another way, the church is not a religious devotee, though its members are.

The fact that the corporation cannot exercise religion in its own right has important implications for its standing under RFRA: RFRA seeks to protect only those beings capable of exercising religion in the robust sense just adduced. The rationale for granting exemptions from legal requirements turns on the anticipated suffering or guilt that the religious adherent would experience were she compelled by law to violate some tenet of her religion.<sup>85</sup> This suffering or guilt would result from the religious adherent’s sense that in acting against her conscience she betrays herself.<sup>86</sup> If the corporation cannot experience guilt and if it lacks a sense of self, then it makes no sense to think that the corporation is entitled, *in its own right*, to exemptions from laws that interfere with the religious precepts informing the way it is run. Corporations are thus not religious in the sense contemplated by RFRA.

In sum, corporations lack the capacities that are required for religious exercise: they cannot be moved to act in accordance with religious requirements, they cannot experience guilt when they violate one of these requirements, and they do not possess a conscience. If we are to recognize for-profit corporations’ RFRA rights, then, it must be because the corporation’s owners may assert their own RFRA rights through the corporate form.

### III. RIGHTS OF OWNERS

This is, of course, precisely the basis upon which the *Hobby Lobby* majority grounds its extension of RFRA to the for-profit corporation.<sup>87</sup> Rather than rehearse the majority’s arguments here, with which I agree, I seek to counter those that the dissent and commentators have offered in response. In particular, I focus on two arguments: first, that limited liability is

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<sup>85</sup> See, e.g., Martha C. Nussbaum, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 164–74 (2008); Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013)).

<sup>86</sup> See, e.g., Christine Korsgaard, *Conscience* 1 (1996), <http://www.people.fas.harvard.edu/~korsgaard/CMK.Conscience.E.Ed.pdf> (“Conscience . . . is most commonly thought of as the source of pains we suffer as a result of doing what we believe is wrong—the pains of guilt, or ‘pangs of conscience.’”); cf. Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 L. & PHIL. 327, 336 (1999) (“[S]hame is absolutely central to a full understanding of guilt and the pangs of conscience . . . .”); Allen Wood, *Kant on Conscience* 11, <http://web.stanford.edu/~allenw/webpapers/KantOnConscience.pdf> (“The . . . ‘punishment’ we suffer before the inner court of conscience is the painful feeling—a moral feeling, not an empirical one—that arises necessarily from the influence of reason on sensibility, attendant on the recognition that we have violated the moral law.”).

<sup>87</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

incompatible with respecting the owners' rights of religious freedom, and second, that we cannot expect the corporation's individual members to converge in their moral or religious convictions and so the government should not seek to accommodate the convictions of any of them.

### A. *Limited Liability*

The *Hobby Lobby* dissent, along with some lower-court judges and commentators,<sup>88</sup> argues that a corporation's owners should not "have their corporate cake and eat it, too"<sup>89</sup> or, more accurately, "have their veil and pierce it too."<sup>90</sup> In other words, they cannot claim the protection of the corporate veil where liability is concerned but have the government disregard the veil when it comes to asserting their rights of religious exercise.<sup>91</sup> But it is not clear exactly why limited liability cannot arise in conjunction with respecting the owners' religious rights by allowing them to operate their corporation in accordance with their religious convictions.

It is undoubtedly true that the corporation is a distinct legal entity.<sup>92</sup> Just as the "wall of separation between church and state," to borrow Thomas Jefferson's words,<sup>93</sup> is a foundational principle in constitutional law, so too

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<sup>88</sup> See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F.Supp.2d 394, 408 (E.D. Pa. 2013) ("It would be entirely inconsistent to allow [the individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."). For a particularly perspicuous and elaborate version of this argument, see Corporate Law Professors' Brief, *supra* note 3. See also Adam Winkler, *Yes, Corporations Are People*, SLATE (Mar. 17, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/corporations\\_are\\_people\\_and\\_that\\_s\\_why\\_hobby\\_lobby\\_should\\_lose\\_at\\_the\\_supreme.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/corporations_are_people_and_that_s_why_hobby_lobby_should_lose_at_the_supreme.html) ("What the owners want is for the Supreme Court to 'pierce the corporate veil' . . . . But Hobby Lobby's owners only want to pierce the veil for this one issue. They want the court to vindicate their personal beliefs on birth control, yet they still keep the protections of the corporate form for everything else, including limited liability.").

<sup>89</sup> Winkler, *supra* note 88.

<sup>90</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1179 (Mattheson, J., concurring in part and dissenting in part).

<sup>91</sup> *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) ("By incorporating a business, . . . an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation."); see also Corporate Law Professors' Brief, *supra* note 3, at 14 ("Hobby Lobby and Conestoga want to argue, in effect, that the corporate veil is only a one-way street: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil on this occasion.").

<sup>92</sup> *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) ("Incorporation's basic purpose is to create a distinct legal entity with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."); see also WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 456–67 (1797) ("[I]t has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, . . . or corporations.").

<sup>93</sup> Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists*, LIBRARY OF CONG. (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

the separation between the corporation and its owners constitutes the “first principle of corporate law.”<sup>94</sup> Further, the privilege of limited liability that the owners enjoy as a result of this separation is celebrated as the “corporation’s most precious characteristic.”<sup>95</sup>

But it is not clear exactly what this separation between the corporation and its owners should entail beyond limited liability. The fact that some of the corporation’s obligations, powers, and privileges are different from those of its owners need not entail that all must be. There is nothing in the nature of a corporation, or in the nature of limited liability, that renders it incompatible with treating the corporation as if it enjoyed rights of free exercise as a way of respecting the free exercise rights of its members. Corporations enjoy many rights that are grounded in the rights of their members. Rights of free association, for example, can be ascribed to the corporation in the first instance, but their purpose is not to allow the corporation to associate with whomever (or whatever) it wishes but instead to respect the rights of the corporation’s members to associate with one another.<sup>96</sup>

The idea that owners cannot have it both ways seems to presuppose that the nature of the corporation is fixed, and that once the veil is in place, it erects a complete separation between the corporation and its owners. But just like the corporation, the veil is, to paraphrase John Marshall, “an artificial” construct, “existing only in contemplation of law.”<sup>97</sup> As such, the extent of the veil’s coverage or porosity is a matter for the law to decide. If the owners cannot both limit their liability and assert their constitutional rights through the corporate form, this cannot be because of what the concept of the veil means or what the veil or a corporation is. In other words, there is no conceptual or metaphysical truth about the veil or the corporation upon which opponents of corporate religious exemptions can rely.

Perhaps then the argument from limited liability turns not on some inherent inconsistency between limited liability and respect for the owners’ religious rights, but instead on a particular understanding of why the corporation’s owners do, or may, enjoy protection from personal liability. Two

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<sup>94</sup> Corporate Law Professors’ Brief, *supra* note 3, at 3.

<sup>95</sup> *Id.* at 6 (quoting WILLIAM W. COOK, *THE PRINCIPLES OF CORPORATION LAW* 19 (1925)).

<sup>96</sup> See *NAACP v. Ala.* 357 U.S. 449 (1958) (finding that the NAACP was the appropriate party to assert the individual rights to free association of its members). Some scholars have suggested that membership organizations should be distinguished from for-profit corporations, since the former “are deemed to share the values of their members.” Corporate Law Professors’ Brief, *supra* note 3, at 11. For-profit corporations, on the other hand, “are legally distinct entities whose shareholders may have idiosyncratic investment objectives and distinctive—and changeable—economic needs.” *Id.* This is, however, an empirical, contingent claim. There is nothing in the nature of a for-profit corporation that prevents the kind of shared purpose that one finds in a membership organization.

<sup>97</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819); *cf.* Meese & Oman, *supra* note 9, at 277 (“The structure of corporate governance is contingent and contractual, enabling shareholders of closely held corporations to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships.”).

such arguments suggest themselves—one focusing on the rationale for the veil, and the other focusing on case law that speaks to the extent of its coverage.

In arguing against “reverse veil piercing” or a “values pass-through” for the corporation, some scholars contend that the very reason to confer limited liability undercuts veil piercing for purposes of protecting owners’ constitutional rights. These scholars note that limited liability was a legal invention intended to further economic ends. Thus, they write, the “rationale behind the corporate veil is simple: by creating the corporate veil, legislators wanted to encourage entrepreneurial activity by founders, investment by passive investors, and risk-taking by corporate managers.”<sup>98</sup> But, they continue, allowing owners to assert their rights through the corporate form risks making “the raising of capital more challenging, recruitment of employees more difficult, and entrepreneurial energy less likely to flourish.”<sup>99</sup> As such, they conclude, allowing the owners’ values to pass through to the corporation works against the very purpose of having the veil in the first place.

In response, it is worth noting that the argument turns on highly speculative claims about the purported consequences of reverse veil piercing. But even if these consequences emerged, the argument would still be problematic as it presupposes the profits-only maxim that we found contestable and undesirable above.<sup>100</sup> If a closely-held corporation chooses to forsake some profits for the sake of, say, promoting philanthropy, undertaking greener production measures, or giving its employees more vacation days, we would not think that it had abused its veil. Why think it has done so then when it forsakes some profits (if indeed profits will need to be forsaken) for the sake of protecting its owners’ constitutional rights?

A second line of argument appeals to corporate law doctrine in an effort to establish that courts have routinely rejected efforts at reverse veil piercing. The Corporate Law Professors’ Brief cites three cases for the proposition that “corporations and their controlling shareholders cannot invoke the corporate veil on the one hand and ask courts to disregard it on the other.”<sup>101</sup>

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<sup>98</sup> Corporate Law Professors’ Brief, *supra* note 3, at 7; *see also* CHRISTOPHER D. STONE, CORPORATE RESPONSIBILITY: LAW AND ETHICS 23–24 (1975).

<sup>99</sup> Corporate Law Professors’ Brief, *supra* note 3, at 8.

<sup>100</sup> *See supra* text accompanying notes 40–50.

<sup>101</sup> Corporate Law Professors’ Brief, *supra* note 3, at 14–16. The first of these cases, *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946), concerns whether a subsidiary corporation can disregard the separation between it and its parent in order to avoid statutory obligations. Given the parent-subsidiary element there, it is not clear what lessons the case holds for closely-held corporations. Moreover, the fact that reverse veil piercing is inappropriate when it comes to avoiding statutory obligations does not determine the propriety of reverse veil piercing when it comes to constitutional rights. The second case cited, *Moline Props., Inc. v. Comm’r*, 319 U.S. 436 (1943), is inapt for a similar reason because it dealt with tax liabilities, not constitutional rights. There, the sole shareholder of the corporation argued, unsuccessfully, that a corporate sale should be treated as his own, such that the corporation should not have to pay tax on the proceeds from the sale. The Court held that, having gained the advantages of incorporation, the shareholder could not then shirk the associated disadvantages. But

The first two of these cases urge reverse piercing as a means of avoiding statutory obligations that would otherwise befall the corporation. In both cases, the Court refused to disregard the veil, claiming that, economic disadvantages came along with the economic benefits of incorporation, and the corporation would have to take the bad with the good.<sup>102</sup> However well-reasoned these cases are, it is unclear what, if any, implications they hold for cases where owners seek to press their constitutional rights through the corporate form. Statutory obligations are less hallowed than constitutional rights. The fact that the veil prevents individual owners from bypassing the corporate form in order to financially gain does not entail that they may not bypass the corporate form to protect their constitutional rights. The same holds for statutory rights that track constitutional law doctrine like RFRA.<sup>103</sup>

The third case cited in the brief, however, does involve “quasi-constitutional” rights.<sup>104</sup> In *Domino’s Pizza, Inc. v. McDonald*,<sup>105</sup> an African American sole shareholder of a corporation sued under a provision of the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1981. That provision states, in relevant part, that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . .”<sup>106</sup> The sole shareholder claimed that the counterparty to the contract had breached in light of racial animus toward him. But the contract in question had been entered into by the corporation, not its owner, and so the Court held that the corporate owner could not bring suit in his individual capacity. The Court did not, then, deny that owners might press rights to equal treatment through the corporate form. Instead, it rendered a far narrower ruling, holding that § 1981 applied only to the named parties in the contract, and rejecting the owner’s claim only because he was not a named party. As the Court stated, “[t]he fundamental point . . . is [this]: An individual seeking to make *or* enforce a contract under which he has rights will have a claim under 42 U.S.C. §1981, while one seeking to make *or* enforce a contract under which someone else has rights will not.”<sup>107</sup>

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the disadvantages in that case dealt with tax payments, a far cry in importance from constitutional or civil rights.

<sup>102</sup> See *Schenley Distillers*, 326 U.S. 432; *Moline Props.*, 319 U.S. 436.

<sup>103</sup> RFRA is taken to track the pre-*Smith* constitutional jurisprudence interpreting the First Amendment’s Free Exercise Clause. See, e.g., *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1210 (D.C. Cir. 2013) (acknowledging that the task for the court was to ascertain the scope of “the right of free exercise—a right that lies at the core of our constitutional liberties—as protected by the Religious Freedom Restoration Act.”).

<sup>104</sup> Robin L. West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY*, (Samuel Bagenstos & Ellen Katz, eds.) (forthcoming) (manuscript at 1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2363036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363036) (noting that “[c]ontemporary civil rights scholarship overwhelmingly reflects the [notion that] our civil rights are quasi-constitutional rights to be free of discrimination in the private as well as public world” and going on to dispute this notion).

<sup>105</sup> *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

<sup>106</sup> 42 U.S.C. § 1981(a) (2013).

<sup>107</sup> *McDonald*, 546 U.S. at 475 n.2.



In this way, *McDonald* had nothing to do with whether a corporation could assert constitutional rights on behalf of its individual members.

It is worth noting as well that other courts have assigned a “race” to the corporation, drawn from the race of its owners, and thereby permitted corporations to raise discrimination claims on their owners’ behalf.<sup>108</sup> Indeed, the Court in *McDonald* cites some of these other cases, and it declines to weigh in on their cogency because *McDonald* differs on the facts. In those cases, the corporations who were parties to the contract sued; here, by contrast, the corporation had already settled its § 1981 claim, and the question was whether the sole shareholder could bring a claim in his own right.<sup>109</sup>

In short, *McDonald* did not involve a corporation seeking to assert the rights of its owner, as *Hobby Lobby* does. Instead, it involved an owner seeking to have the corporation’s rights accrue to him. *McDonald*, too, then says nothing about whether corporations can claim constitutional rights as a means of protecting those of their owners, less still about whether a grant of limited liability would impede such a claim.

Perhaps the argument from limited liability is better articulated not on the basis of law as it is, but instead on the basis of law as it should be. The thought would then be that limited liability *should* be conferred only in exchange for the owners’ agreement that they will not assert their rights through the corporate form.<sup>110</sup>

In response, one might ask why individuals should have to forsake the prospect of running a business in line with their religious convictions as the price of limited liability. It might be unfair if, say, the law were to confer limited liability on the owners but then decline to hold the corporation accountable for some wrong on the ground that doing so would reduce the value of the corporation. This arrangement would protect the owners’ wealth in two ways—by shielding their personal wealth from liability and by ensuring that the value of their stake in the corporation was not diminished as a result of the corporation’s tortious or criminal conduct. There is a rational relationship between limiting the owners’ liability and treating the corpora-

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<sup>108</sup> See, e.g., *Carnell Const. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703, 716 (4th Cir. 2014) (“We agree . . . that a minority-owned corporation may establish an ‘imputed racial identity’ for purposes of demonstrating standing to bring a claim of race discrimination under federal law.”); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (explaining the “zone of interest” protected by § 1981 claims); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 882 (8th Cir. 2003) (establishing standing to proceed with claims under the Fair Housing Act); *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (determining whether there is standing to claim injury under §§ 1981, 1982).

<sup>109</sup> *McDonald*, 546 U.S. at 473 n.1.

<sup>110</sup> Cf. Kent Greenfield, *Hobby Lobby Symposium: Hobby Lobby, “Unconstitutional Conditions,” and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014, 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes> (“States create the corporate form and bestow its benefits on entities that agree to certain conditions . . . The existential and definitional assumption is that corporations will obey the law and not be claiming legal waivers unavailable to their competitors.”).

tion as liable in their stead—presumably, limited liability is conferred in exchange for the corporation picking up the tab for the harms or wrongs it inflicts. But there is no such connection between limited liability and a limit on the owners' constitutional rights.<sup>111</sup>

A final possibility for thinking that corporations should not be permitted to have it both ways is raised by Mark Tushnet.<sup>112</sup> He argues that the owners of a for-profit firm that enjoys a religious exemption from the contraceptive mandate thereby gain not only the “psychic benefits” of pursuing a business in accordance with their religious commitments; they might also thereby gain a competitive advantage relative to their secular peers, who operate under the mandate's requirements.<sup>113</sup> It is possible, then, that the owners of a religious corporation would enjoy the economic benefits of both limited liability and reduced healthcare coverage costs. But, Tushnet argues, there is something unseemly about the prospect that one should get to enjoy not only the psychic benefits of association but also pecuniary ones in enacting commitments that conflict with the egalitarian underpinnings of liberal democracy.<sup>114</sup> The thought might be something like this:

You are free to live out your racist, sexist, or homophobic views in your social life, but you shouldn't be permitted to earn money while doing so. In particular, you shouldn't be permitted to pocket the cost savings you reap from both limited liability and now an exemption from a regulatory requirement and use them not for furthering your religious commitments but instead [as Tushnet writes] for “purely personal gain—a nicer house than the one owned by investors in the for-profit gymnasium across the street, a longer vacation than the one taken by the investors in the bakery down the block.”<sup>115</sup>

Why shouldn't owners of a for-profit corporation be permitted to gain in this way? For one thing, widespread employment discrimination, even if religiously motivated, threatens to reduce the employment prospects of major segments of the workforce, often falling on groups that already labor under the vestiges of historical oppression. This is a key reason cited by a group of

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<sup>111</sup> Cf. Meese & Oman, *supra* note 9, at 286 (“[W]hether a particular shareholder's personal assets (if any) are available to satisfy the firm's creditors seems normatively irrelevant to shareholders' ability to infuse corporations with their religious values.”).

<sup>112</sup> Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 76–82, (2013).

<sup>113</sup> *Id.*; cf. Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1277 (2008) (“[Religious a]ccommodations . . . are regularly upheld even though they often have the effect of advantaging religious actors over those who would like to act similarly for deeply held secular reasons.”). A similar objection is voiced in the Corporate Law Professors' Brief, *supra* note 3, at 26–28.

<sup>114</sup> For support for the claim that liberalism has the resources to distinguish between discriminatory and non-discriminatory commitments, and to withhold certain benefits (like tax exemption) from the former, see Tushnet, *supra* note 112.

<sup>115</sup> *Id.* at 82.

constitutional law scholars in an open letter to President Obama asking that he not approve a religious exemption from a rule requiring federal contractors to abide by non-discriminatory practices affecting the LGBT community.<sup>116</sup> Framed in this way, the concern is not so much with the religious commitment itself but instead with its effect on third parties. Third-party effects are indeed important,<sup>117</sup> but we have reason to object to the notion of for-profit engagement laced with discriminatory principles even if third parties are not made to bear the cost of this exercise of religion. (Suppose, for example, that the government were to grant an exemption to for-profit entities that refuse to hire gays and lesbians on religious grounds, but it also offered incentives for their employment with the idea that the incentives would offset whatever reduction in employment prospects gays and lesbians encountered in light of the exemptions.) The asserted interest may not be one that should command any governmental respect, independent of its effect on third parties.

Suppose, then, that we were to decide, as we should, that the government should reject religious bids to discriminate.<sup>118</sup> That decision would have nothing to do with the limited liability that a corporation's owners enjoy. If religiously-based discrimination warrants no respect, this is true for sole proprietorships and partnerships as much as it is for corporate owners, even though sole proprietorships and partners do not enjoy limited liability. In other words, it cannot be the case that the reason to deny for-profit corporations a right to discriminate on the basis of sexual orientation is because they enjoy limited liability.<sup>119</sup> The notion that there is a default right to discriminate, but that one cashes that right in once one elects an organizational form providing limited liability, does violence both to the notion of rights and the wrong of discrimination.<sup>120</sup>

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<sup>116</sup> Letter from Katherine Franke et al. to Barack Obama, President of the United States (July 14, 2014), available at [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive\\_order\\_letter\\_final\\_0.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_order_letter_final_0.pdf). See generally Julie Hirschfeld Davis & Erik Eckholm, *Faith Groups Seek Exclusion from Bias Rule*, N.Y. TIMES (July 8, 2014), [http://www.nytimes.com/2014/07/09/us/faith-groups-seek-exclusion-from-bias-rule.html?\\_r=0](http://www.nytimes.com/2014/07/09/us/faith-groups-seek-exclusion-from-bias-rule.html?_r=0).

<sup>117</sup> See Amy J. Sepinwall, *Conscience and Complicity*, 82 U. CHI. L. REV. (forthcoming 2015) (arguing that third-party effects should figure in the RFRA doctrine more prominently than they do now).

<sup>118</sup> This is precisely what the open letter to President Obama urges. Letter from Katherine Franke et al., *supra* note 116.

<sup>119</sup> The Corporate Law Professors' Brief raises a concern about competitive advantage unconnected to limited liability. See *supra* note 3, at 26–28. The argument there is that, if an exemption is good for business, corporations will assert religious objections whether or not these are sincere, in an effort to enhance the corporation's bottom line. The argument, however, rests on speculative empirical premises. Moreover, it is not limited to the corporation. Sole proprietors and partnerships may be no less motivated to affect religion for pecuniary gain. If doubts about sincerity should give us pause, or invite concern about the capacity of courts to distinguish genuine from false beliefs, then we should worry about any and all bids for exemption from regulations grounded in (asserted) religious beliefs. See also Meese & Oman, *supra* note 9, at 293.

<sup>120</sup> Put another way, rights are not commodities. See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 100–103 (1983). See generally MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY

In sum, limited liability does not place a constraint on whether corporations may be treated as if they have RFRA rights. Treating the corporation as such has the potential to protect the rights of religious freedom of the corporation's members, who do not lose these rights as the price of gaining limited liability.

Before moving on, however, I note that the whole concept of reverse veil piercing or a values pass-through<sup>121</sup> is tendentious, if not question-begging. The idea that recognizing the owners' constitutional rights requires that we "pierce" the corporate veil suggests that, as a default matter, the veil does in fact occlude the owners' constitutional rights. Their rights may be protected, then, only if the default is altered—altered in a way that rends the veil and thereby allows the owners' rights to poke through, as it were. At least in the wake of *Hobby Lobby*, though, we might deny that the default coverage the veil provides prevents members from asserting their constitutional rights through the corporate form. Instead, we should conceive of the veil in the first instance as providing nowhere near as much coverage as those who argue from limited liability would contend.

### B. *Diverging Religious Commitments of Members*

It may be that what makes it unfair to allow the owners to assert their constitutional rights through the corporate form is not that they enjoy limited liability but instead that the owners do not speak for all of the corporation's members.<sup>122</sup> The owners might disagree among themselves about what religion, if any, the corporation should adopt, thereby inviting "contentious shareholder meetings, disruptive proxy contests, and expensive litigation" on the issue.<sup>123</sup> Moreover, the corporation's employees may not share the owners' religious convictions. Where this is so, the dissent and others argue, courts threaten to violate the Establishment Clause if they grant exemptions on the basis of convictions of the owners that are not shared by the employees.<sup>124</sup>

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(2012). With that said, the Supreme Court has in recent years begun to commodify certain constitutional rights. Eric Orts and I describe and critique this phenomenon in *Constitutional Commodification* (Nov 4, 2014) (unpublished manuscript) (on file with author).

<sup>121</sup> Corporate Law Professors' Brief, *supra* note 3, at 19.

<sup>122</sup> See, e.g., Margaret Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. (forthcoming 2015); Eric Orts, *The Legal and Social Ontology of the Firm*, THE CONGLOMERATE (Aug. 5, 2014), <http://www.theconglomerate.org/2014/08/the-legal-and-social-ontology-of-the-firm.html>.

<sup>123</sup> Corporate Law Professors' Brief, *supra* note 3, at 10.

<sup>124</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting) ("[Prior to *Hobby Lobby*, RFRA] exemptions had never been extended to any entity operating in the 'commercial, profit-making world' . . . . The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community."); see also *Korte v. Sebelius*, 735 F.3d 654, 722 (7th Cir. 2013) (Rovner, J., dissenting), *cert. denied*, 134 S. Ct. 2903 (2014) ("Like any secular employer in a religiously pluralistic nation, the Kortes and the

The argument presupposes that both the owners and the employees are the kind of members of the corporation who are entitled to have their rights asserted through the corporate form. But the presupposition is flawed, at least when it comes to identifying the corporation's acts with its members.

To see this recall that Hobby Lobby's owners worry that, because its acts redound to them, they bear moral responsibility where Hobby Lobby commits or facilitates a wrong—here, according to the owners' religious beliefs, by subsidizing health insurance that includes “abortifacients.”<sup>125</sup> Setting aside for now the question of whether the subsidization does involve the owners in a wrong, the owners are right in thinking that they bear responsibility for Hobby Lobby's acts.

In general, and as I have argued at length elsewhere,<sup>126</sup> we have more reason to attribute the corporation's acts to some of its members than others. In particular, those who have authority over the way the corporation is run and the corporate identity itself bear responsibility for the corporation's acts, independent of whether they participated directly in those acts.<sup>127</sup> It is for this reason that we do and should blame these members for corporate wrongs, just as we do and should praise them for corporate feats. In the case of Hobby Lobby, the corporate owners are also the corporation's managers<sup>128</sup>—they are most implicated in the corporation's identity and operations. The rank-and-file employees are not in the same boat. They do not set policy, contribute to the corporate vision, or articulate or safeguard its mission. They are not expected to support the corporation in the way that its owners do—for example, by exhibiting strong loyalty to the corporation, privileging the corporation's interests over their own, or experiencing pride in the face of its accomplishments and shame (and perhaps also guilt) in the face of its misdeeds. For all of these reasons, Hobby Lobby's acts are not the acts of the stores' cashiers, custodial staff, or store clerks. By contrast, Hobby Lobby's owners should feel more implicated in its acts and, as such,, courts have

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Grotes must realize that their companies employ individuals who do not share their own religious beliefs and who may choose to use their wages and benefits in ways that are offensive to those beliefs.”); Corbin, *supra* note 9; Sepper, *supra* note 10, at 319 (“In the case of disagreeing shareholders, whose beliefs matter? And what of employees who may not share the owners' beliefs?”); Orts, *supra* note 122 (“[Corporations] are moral creatures because the people who compose them are moral creatures . . . . But we then have to dig deeper and ask ‘who’ is involved in the firm . . . . Perhaps some kinds of firms should have religious rights, but the scope of these potential rights should be constrained. Rights of employees may be equal to those of owners and managers in this context.”).

<sup>125</sup> See *Hobby Lobby*, 134 S. Ct. at 2759.

<sup>126</sup> See Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. (forthcoming 2015) [hereinafter *Crossing the Fault Line*]; Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J. L. & POL. 183 (2006).

<sup>127</sup> See *Crossing the Fault Line*, *supra* note 126.

<sup>128</sup> See *Hobby Lobby*, 134 S. Ct. at 2765 (“David, Barbara, and their children retain exclusive control of both companies . . . . David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO.”) (citation omitted).

reason to privilege the religious convictions of the owners and to allow the corporation to be run in a way that respects those convictions.

To be clear, *Hobby Lobby* should not be read to stand for the proposition that every corporation's owners may impose their religious beliefs on the corporation. Instead, courts should undertake a case-by-case assessment identifying how the corporation is run, who has the most authority over its identity, and who therefore has the most reason to feel implicated in its acts. Where multiple constituent groups enjoy near equal control and yet diverge in their religious convictions, courts should deny a religious exemption that some but not all of these groups seek. Were courts to do otherwise, they would violate the Establishment Clause.

By contrast, where one set of constituents clearly predominates over the others, that set should be permitted to decide on the corporation's moral and religious commitments. Determining which set that set is is not a matter newly prompted by the *Hobby Lobby* decision. Anytime a corporation shifts its values, it invites the prospect that some of its members will contest the shift. So long as those who disagree with the corporation's decision were not unduly disregarded, the mere fact of disagreement is no cause for concern. In this respect, then, Justice Alito appears to have been correct in asserting that concerns about divergence between the religious convictions of different corporate constituents could be addressed through existing state corporate law,<sup>129</sup> as state corporate law has long had occasion to consider such conflicts.<sup>130</sup> At any rate, the fact that members may disagree as to the religious posture within their corporation should not preclude those corporations whose members speak in a unified voice from having their corporation reflect their religious views.

### C. Corporate Religious Freedom vs. Statutory Entitlements

The question to which *Hobby Lobby* gives rise, however, is not merely whose values the corporation will embody but also whose *statutory entitlements* the corporation will satisfy. In respecting the corporate owners' religious convictions, *Hobby Lobby* satisfies the owners' RFRA rights, but it does so at the expense of the rights to contraceptive coverage that the ACA is meant to afford *Hobby Lobby's* employees and their dependents. The issue would then be not whether the owners' values or religious convictions should eclipse those of the employees', but instead whether the owners' val-

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<sup>129</sup> *Hobby Lobby*, 134 S. Ct. at 2774–75.

<sup>130</sup> Justice Alito, *id.*, cites 1 J. COX & T. HAZEN, TREATISE OF THE LAW OF CORPORATIONS §§14:11, 3:2 (3d ed. 2010) in support of his contention that state corporate law governs such conflicts. See also Johnson & Millon, *supra* note 34 at 27–28 (elaborating on the state law voting procedures for resolving such conflicts). See generally RALPH NADER, MARK J. GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION (1977); PROGRESSIVE CORPORATE LAW (Lawrence Mitchell ed., 1995); Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109 (2004).

ues should be given voice when doing so impinges on the rights of the employees—not religious rights, but rights to a good or service that Congress has guaranteed.

Notice, first, that so described, this is *not* a question about how to manage a value conflict between different corporate constituents. Instead, it is to accept that the owners enjoy authority to decide the corporation's values and *then* ask the question whether that authority should be cabined in instances when the owners' values threaten individuals' legitimate interests—here, interests backed by a statutory entitlement scheme. In this way, commentators confuse matters when they conflate the corporate constituent and statutory entitlement issues.<sup>131</sup>

Second, I acknowledge that the prospect that the law would extend an accommodation at the expense of third parties is indeed troubling.<sup>132</sup> But it is worth noting that it is tendentious and unhelpful to contend that Hobby Lobby's owners enjoy an accommodation *at the expense* of the women whose contraception it would otherwise have had to subsidize. What the ACA guarantees employees and their dependents is access to cost-free contraception, not access to employer-subsidized contraception. The right way to characterize an accommodation, then, is to say that the government should respect Hobby Lobby's owners' religious objection to contraception, and, as a result, it should provide the affected women with cost-free contraception in Hobby Lobby's stead. And we, concerned citizens, should hold the government to both sides of this obligation. In short, Hobby Lobby did, and should have, enjoyed an accommodation only because the government can provide one without imposing any significant costs on third parties. Having granted the exemption, the government now incurs an obligation to alleviate any costs that would otherwise befall third parties—an obligation it is poised to meet, given the work-around it has already developed for religious non-profits.<sup>133</sup>

With that said, it is true that not all accommodations that allow an employer to withdraw from providing statutory benefits to its employees can be granted so neatly. Elsewhere, I argue that the doctrine around religious ac-

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<sup>131</sup> See, e.g., Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 170 (2015) (characterizing as "callous" Hobby Lobby's claim that "RFRA should be read to protect a multi-billion dollar corporation against a marginal increase in its operating expenses as the cost of observing its religious beliefs against IUDs and other emergency contraception, but not to prevent the same corporation from shifting the costs of that observance onto lower-income employees and dependents who believe and practice differently") (footnote omitted); *SCOTUS Fails Women: Hobby Lobby Decision Gives Bosses Right to Deny Women Birth Control: Puts the Burden on Women to Pay Increasing Costs*, NAT'L ORG. FOR WOMEN N.Y.C. (Jun. 30, 2014), <http://nownyc.org/reproductive-rights/pregnancy/hobby-lobby/> ("Today our Supreme Court ruled that the religious freedom and healthcare needs of tens of thousands of women matter less than the religious beliefs of corporations.").

<sup>132</sup> I engage this issue at length in Sepinwall, *supra* note 117 (manuscript at 63–67) (on file with author).

<sup>133</sup> See 45 C.F.R. § 147.131 (2014).

commodation needs to be much more sensitive to the effects of accommodations on third parties, and I contend that accommodations should be denied where third-party costs would be unjustifiably large.<sup>134</sup> The concerns I address there arise whenever accommodating someone's claims of conscience threatens to impose costs upon others; the question of for-profit religious exercise raises no distinctive issues.

By contrast, the discussion here has had two more pointed aims. First, concerns about whose views or values the corporation should represent is not new to *Hobby Lobby*; for-profit corporations often seek to adopt moral or religious commitments, and in each of these instances, the corporation must decide whose commitments to adopt, on pain of violating state corporate law if it privileges a corporate constituent that has no right to graft its commitments onto the corporate form. Second, we should resist the view that, in securing an exemption, *Hobby Lobby*'s owners inflict the costs of their religious adherence on their employees and the employees' dependents. Instead, we should read the case as standing for the proposition that an exemption may be granted only where the government can ensure that third parties—the women whose contraception *Hobby Lobby* would otherwise subsidize—are not thereby made to incur significant costs, and we should hold the government to the obligation to protect third parties that the exemption imposes.

#### IV. CONCLUSION

The upshot of this Article's arguments is that corporations are not religious, but corporations may be treated as if they possess rights of religious freedom as a way of protecting the religious freedom rights of the corporation's controlling members. The considerations marshaled in support of these arguments provide some limits on the implications and applications of *Hobby Lobby* going forward. More specifically, the arguments here provide a way of discerning which rights corporations may enjoy: because corporations lack key attributes of moral or metaphysical personhood, any rights they enjoy must be grounded in the rights of their members.

Two implications follow once we recognize that it is the individual members' rights that undergird an assertion of rights on the part of the corporation. First, the corporation can protect its members' rights only if the relevant members—that is, the ones who bear responsibility for the corporation's acts—converge in their understanding of the way in which they want to exercise the rights in question. Where the controlling members lack this unity, courts should refrain from granting their corporation an exemption. Second, even where the controlling members do speak as one, it may still make sense to deny them the opportunity to assert their rights through the corporate form. That is, before granting corporations new rights, govern-

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<sup>134</sup> Sepinwall, *supra* note 117 (manuscript at 63–67) (on file with author).



ments or the courts must ascertain whether the members' rights require transposition to the corporate form in order for those rights to receive their full effect. Thus, for example, individual rights of conscience should extend to the corporation so that individuals do not have to leave their religious convictions at the corporate door (assuming that the corporation's controlling members converge in their religious convictions). But individual voting rights should not entail corporate voting rights because it is not an assault on voting rights to hold that they may be exercised only in an individual capacity. After all, we are a nation committed to the principle of one-person, one-vote.<sup>135</sup> To allow individuals to exercise their voting rights both as individuals and through the corporate form would violate this principle.

In short, as a result of the considerations adduced here, we can identify which corporations may seek to assert the rights of their members, which members' rights are relevant, and which of these rights warrant assertion through the corporate form. But there is still much that remains unresolved. Most significantly, to say that the corporation may seek to assert its members' rights is not to say that the law must yield to that assertion. Nothing here determines when the law should accommodate a valid corporate assertion of rights in the face of a general law of neutral application to which the corporation objects. That determination turns on an inquiry into the proper scope of claims of complicity: when do the corporation's controlling members have *reason* to feel complicit in its acts? And, where these members do have reasonable concerns about complicity, when would it be acceptable to grant the corporation an exemption that imposes costs upon third parties<sup>136</sup> (as an exemption from the contraceptive mandate might were the government not to provide an alternative means of access to contraception to Hobby Lobby's female employees)?<sup>137</sup> Much work then remains before we know when a for-profit corporation can enjoy an exemption given the rights of its individual members. Still, this Article sheds light on the proper place and role of the corporation in society—light that should allay fears of corpo-

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<sup>135</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *see also Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

<sup>136</sup> I take up questions of complicity, third-party costs, and religious exemptions in Sepinwall, *supra* note 117.

<sup>137</sup> While the *Hobby Lobby* opinion made much of the fact that the government had already instituted a work-around to the contraceptive mandate for non-profit institutions that objected to contraception, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014), the Court sowed doubt on the viability of this work-around three days after issuing *Hobby Lobby*, when it ordered the government to find a work-around for this work-around. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

rate domination while satisfying those who believe that individuals should be able to live out their religious convictions at home, at worship, and at work.<sup>138</sup>

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<sup>138</sup> In his concurring opinion, Justice Kennedy defends the extension of RFRA to the for-profit corporation on precisely these grounds. *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., dissenting) (“Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the *political, civic, and economic life* of our larger community.”) (emphasis added) (citation omitted); see also Joey Fishkin, *Hobby Lobby and the Politics of Recognition*, BALKINIZATION (June 30, 2014), <http://balkin.blogspot.com/2014/06/hobby-lobby-and-politics-of-recognition.html> (“[R]eligion is not something people do on their own time, in their own churches, but rather, is a way that apparently even large for-profit businesses may conduct their affairs.”); Sarah Green, *The Hobby Lobby Decision: How Business Got Here*, HBR BLOG NETWORK (July 3, 2014), <http://blogs.hbr.org/2014/07/the-hobby-lobby-decision-how-business-got-here/> (“‘A state that takes seriously its obligations to respect religious free exercise has to understand that individuals are not going to want to leave their religious convictions at the corporate office door.’”) (quoting Amy Sepinwall).