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THE NAKED PRIVATE SQUARE

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ABSTRACT

In the latter half of the twentieth century, America witnessed the construction of a "wall of separation" between religion and the public square. What had once been commonplace (such as prayer in public schools and religious symbols on public property) had suddenly become verboten. This phenomenon is well known and has been well studied.

Less well known (and less well studied) has been the parallel phenomenon of religion's expulsion from the private square. Employment law, corporate law, and constitutional law have worked to impede the ability of business enterprises to adopt, pursue, and maintain distinctively religious personae. This is undesirable because religious freedom does not truly and fully exist if religious expression and practice is restricted to the private quarters of one's home or temple.

Fortunately, a correction to this situation exists: recognition of the right to free exercise of religion on the part of business corporations. Such a right has been long in the making, and the jurisprudential trajectory of the courts, combined with the increased assertion of this right against certain elements of the current regulatory environment, suggests that its recognition is imminent.

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TABLE OF CONTENTS

I. INTRODUCTION 2

II. THE WALL OF SEPARATION BETWEEN CHURCH AND BUSINESS 6

III. THE COMING CLASH 16
- A. *The Religiously Expressive Corporation* 16
- B. *The Regulatory State* 24

IV. THE FREE EXERCISE CLAUSE 27
- A. *Background* 28
- B. *Free Exercise Clause Jurisprudence and RFRA* 38
  - 1. *Religious Liberty Under the Free Exercise Clause* 38
  - 2. *The Religious Freedom Restoration Act* 41
  - 3. *Hybrid Claims* 44

V. THE BUSINESS CORPORATION 47
- A. *Historical Background of the Corporation* 48
- B. *Corporate Personhood* 51
- C. *The Corporation as an Association* 53

VI. APPLICABILITY OF THE FREE EXERCISE CLAUSE TO FOR-PROFIT BUSINESS CORPORATIONS 63
- A. *The Claim Articulated* 63
- B. *The Essentiality of the Claim* 65
- C. *Relevant Judicial Precedent* 69
- D. *Anticipated Concerns* 81

VII. CONCLUSION 86

I. INTRODUCTION

Although the Supreme Court announced that the corporation was a "person" for certain purposes under the Fourteenth Amendment to the U.S. Constitution back in 1886,[1] the precise contours of corporate personhood remain murky to this day.[2] That said, the list of Constitutional rights afforded to

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1. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

2. *See* David Graver, Comment, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 236 (1999); *see also* Citizens United v. F.E.C., 558 U.S. 310, 365, 371–72 (2010) (giving corporations the right of free speech).

corporations has generally grown over time,[3] as has been underscored by the Supreme Court's 2010 decision in *Citizens United v. F.E.C*.[4] This Article suggests that the time is ripe to recognize another corporate constitutional right as concomitant with corporate personhood: the right to the free exercise of religion.

In fact, to a large degree, such a right has already been recognized. Incorporated entities that are religiously affiliated, such as churches and church-run non-profit organizations, unquestionably enjoy the protections of the First Amendment's Free Exercise Clause.[5] The Supreme Court affirmed this principle with respect to churches, resoundingly, in its unanimous 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*[6] Much less clear is whether these protections extend to religiously oriented for-profit business corporations as well.

The reasons for recognizing a for-profit corporation's right to the free exercise of religion are manifold. From a policy perspective, the free exercise of religion, a quintessential American value enshrined within the First Amendment to the U.S. Constitution, cannot be fully realized if relegated to the privacy of one's home and temple. For many Americans, both in 1789 and in the present time, religion is a holistic undertaking characterized by a strong communal dimension.[7] The desire—if not the obligation—to live one's life in a manner wholly consistent with one's faith generates a yearning on the part of many to form, join, and patronize associations that reflect such faith, including business associations.[8]

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3. *See* Graver, *supra* note 2, at 236.

4. *Citizens United*, 558 U.S. at 319, 365 (holding that the First Amendment protects corporate political speech).

5. *See* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1305–06 (11th Cir. 2006).

6. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

7. *See* Paul C. Fricke, *The Associational Thesis: A New Logic for Free Exercise Jurisprudence*, 53 HOW. L.J. 133, 161, 170–71 (2009) ("A close reading of Locke's *Letter* shows that his notion of religion starts and ends with a community of believers; it is thoroughly associational. . . . Importantly, Locke does not stand alone when it comes to employing an associational notion of religion. Many theorists of religion have highlighted the necessarily associational dimension of religion.").

8. *See* Karen C. Cash & George R. Gray, *A Framework for Accommodating Religion and Spirituality in the Workplace*, ACAD. MGMT. EXECUTIVE, Aug. 2000, at 124, 124–25 ("Business periodicals are filled with articles heralding both the renewed interest in religion and the growing emphasis on spirituality in society in general and in the workplace."); *see also* Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 474, 481 (2009) (observing the ascendancy of "the integralist style of religious commitment" that "contradicts the norms of

To the extent that law hinders the fulfillment of such desires, law inhibits the realization of the free exercise of religion.

From a jurisprudential perspective, the growing list of constitutional rights possessed by business corporations now firmly includes the First Amendment right to freedom of speech.[9] The trajectory of opinions, especially at the Supreme Court level, suggests that more such rights are to follow.[10] Corporate possession of the First Amendment right to the free exercise of religion, in particular, has already been recognized (whether explicitly[11] or implicitly[12]) by a handful of lower courts, and, until very recently, no court had rejected a corporation's standing to assert such rights.[13] This suggests that, when asserted by a corporation in a case that reaches the Supreme Court, the corporate right to the free exercise of religion will be recognized.[14]

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secularization"—i.e., faith of a type "that rejects the compartmentalization of religion, seeing religion not as one isolated aspect of human existence but rather as a comprehensive system [that is] more or less present in all domains of the individual's life").

9. *See supra* text accompanying notes 3–4.

10. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 578 (1990) (discussing recent Supreme Court decisions expanding the constitutional rights of corporations). That said, the Supreme Court did reject the claim that corporations possessed a right of "personal privacy." F.C.C. v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011).

11. *See, e.g.*, Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1305 (11th Cir. 2006) ("[C]orporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion." (footnote omitted)).

12. *See, e.g.*, Atl. Dep't Store, Inc. v. State's Att'y, 323 A.2d 617, 622 (Md. Ct. Spec. App. 1974) (holding that a restriction on certain business activities on Sunday did not violate business owners' Free Exercise rights without explicitly establishing that the owners possessed such rights in the first place).

13. *See* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate* 28–29, 32–33 (Elon Univ. Sch. of Law Legal Studies Research Paper No. 2013-02, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237630 (cataloging the reasons corporate Free Exercise claims have been defeated, none of which include standing). *But see* Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 3845365, at *1 (3d Cir. July 26, 2013) (holding against the corporation).

Some courts have side-stepped the issue. *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009) ("Intervenors argue that Stormans, a for-profit corporation, lacks standing to assert a claim under the Free Exercise Clause. We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine the rights at issue as those of the corporate owners."); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) ("Because this Court finds that the preventive services coverage regulations do not impose a 'substantial burden' on either Frank O'Brien or OIH, and do not violate either plaintiffs' rights under the Free Exercise Clause, this Court declines to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment.").

14. For a review of judicial precedent on the issue, see *infra* Part VI.C.

Such development is imminent, given the ongoing conflict between religiously inspired corporations and government regulation.[15] Although this conflict is not entirely new, in the past it has been largely sporadic. Cases were few and far between.[16] They were settled or resolved without reaching our nation's highest authority on the Constitution. Today, however, two trends herald the Court's inevitable attention to the matter.

The first is the advent of a religious awakening of sorts, which has spawned a new breed of religiously serious executives, investors, employees, and customers, all of whom are pulling many business corporations toward a more faith-infused model.[17] The second is the dramatic expansion of government regulation, especially into areas that touch upon sensitive moral questions.[18] These trends are on a collision course that will ultimately be set before the Supreme Court. Indeed, as of this writing, the clash of these trends is currently being played out in lower courts throughout the United States.[19]

This Article is organized into five parts. Part II will describe why and how Americans have come to accept a wall of separation between religion and business. Part II will also demonstrate that such separation is an unnatural historical oddity. Part III will survey trends—in the business community, the government, and society at large—that are indicative of the coming conflict between religiously inspired corporations and government regulation. The coming conflict of these trends explains why the issue of corporate Free Exercise rights is one that will inevitably find its way to the U.S. Supreme Court.[20] Part IV will review the Free Exercise Clause of the First Amendment to the U.S. Constitution, from both its philosophical underpinnings to its present-day interpretation. It will also discuss the Religious Freedom Restoration Act, which was passed by Congress in response to the Supreme Court's interpretation of the Free

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15. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1517, 1519, 1536 (2001) (observing "the increasing conflict between the freedom of expressive association and the expanding reach of anti-discrimination law").

16. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523–24 (1993); Lemon v. Kurtzman, 403 U.S. 602, 606–07, 612, 616 (1971); Sherbert v. Verner, 374 U.S. 398, 399–403 (1963); Braunfeld v. Brown, 366 U.S. 599, 600–01, 603, 606 (1961).

17. *See infra* Part III.A.

18. *See infra* Part III.B.

19. *See infra* text accompanying notes 467–81.

20. *See* Carpenter, *supra* note 15, at 1517–18 (detailing the conflict between these trends); *see also infra* Parts II, III.

Exercise Clause and bears heavily upon any assertion of religious freedom against federal law or action. Part V will discuss the business corporation generally—its background, its current proliferation, and its treatment under the law. Part VI will apply the Free Exercise Clause to the corporation, and consider what a corporate Free Exercise claim would look like. Part VI will also review case law that has addressed or touched upon this issue. This Article concludes that recognition of corporate Free Exercise rights is not simply an imminent likelihood, but also an essential means of effectuating First Amendment values and individual liberty.

II. THE WALL OF SEPARATION BETWEEN CHURCH AND BUSINESS

The modern business corporation is commonly portrayed as a thoroughly secular institution in which religion plays no role and has no place.[21] Indeed, our laws appear to presume as much. American employment law has been interpreted to require a religiously neutral workplace,[22] and American corporate law has been interpreted to require that business executives check their morals at the door and work solely to maximize shareholder wealth.[23] Not surprisingly, then, many balk at the notion that a business corporation should be afforded any First Amendment rights at all under the U.S. Constitution.[24] If the corporation is truly

21. *See* Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 92 (2010) ("Of course, deep-seated patterns of thought, ingrained business practices, and social norms make it difficult to link the spheres of faith and business, leading to what Alford and Naughton call 'a divided life,' where matters of Spirit and finance occupy wholly separate spheres.") (citing HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION 12 (2001)).

22. *See* Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289, 297 (1991); Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 588 (1989) (observing that American courts have assumed that "the implementation of religious policies, practices, or values by the employer is inherently discriminatory"). Such a position is similar to the one adopted by France in these matters, an outlier among Western nations in its approach to religious liberty. *See* Michael Baker, *Security and the Sacred: Examining Canada's Legal Response to the Clash of Public Safety and Religious Freedom*, 13 TOURO INT'L L. REV. 1, 36–41 (2010), *available at* http://www.tourolaw.edu/ILR/uploads/articles/v13/Michael_Baker.pdf; François Gaudu, *Labor Law and Religion*, 30 COMP. LAB. L. & POL'Y J. 507, 512–13 (2009).

23. *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1392 (2008). *But see* Lyman Johnson, *Corporate Law Professors as Gatekeepers*, 6 U. ST. THOMAS L.J. 447, 450 (2009) (challenging the "myth" of the shareholder maximization norm). Moreover, the modern business corporation is routinely portrayed as downright evil. *See* Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1373 (2001).

24. *See, e.g.*, Brief of Amicus Curiae American Independent Business Alliance in Support of Appellee on Supplemental Question at 4–5, 7–8, Citizens United v. F.E.C., 558

"monomaniac[al]"[25] and "soulless,"[26] existing for the singular purpose of profit-maximization, it doesn't exactly make for a particularly good participant in the marketplace of ideas, nor for a subject worthy of the protections that go by the name "religious freedom."[27]

Before evaluating this common perception in light of recent developments,[28] let us first consider how this common perception came to be. In other words, what has brought about this separation of "church and business"?[29]

As an initial matter, the separation does not appear to be a particularly natural one, in the sense that it fails to comport with the traditions of human society. Prior to the Industrial Revolution (and thus for most of recorded human history), work was largely agricultural.[30] Even with all its severity,[31] such work was less alienating than the urban, factory life, which was to come.[32] For people then (and perhaps today as well) felt a shared

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U.S. 310 (2010) (No. 08-205); Kent Greenfield, Daniel Greenwood & Erik Jaffe, *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 877–78 (2007) ("My fundamental claim is that corporations should not have speech rights because they are illegitimate participants in political debate.").

25. Greenfield, Greenwood & Jaffe, *supra* note 24, at 883.

26. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1703–04 (2000).

27. Greenfield, Greenwood & Jaffe, *supra* note 24, at 883; *see also* Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 136–37 (2006).

28. *See infra* Part III.A.

29. The discussion that follows will focus on European history since the modern business corporation is largely a product of Western Civilization. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 772 (2005) ("The corporation as a legal person separate from its owners is a uniquely Western institution. Other legal systems, such as Muslim law, did not (before they were influenced by the West) have a concept of legal personality separate from individual human beings. The corporate form originated in Roman law in its classical period (the first two centuries AD), was further developed in the Middle Ages in both canon (Church) and civil law, and was adopted from civil law by the Anglo-American common law tradition." (footnote omitted)). That said, many of the points made herein (especially with regard to the concept of work) could be made with respect to other civilizations as well. *See, e.g.*, Alain Supiot, *Orare / Laborare*, 30 COMP. LAB. L. & POL'Y J. 641, 642–43 (2009) (expressing the relationship between religion and work amongst the African, Greek, and Indian communities).

30. *See* J.M. ROBERTS, A HISTORY OF EUROPE 130 (1996) ("For the majority, life rested on agriculture . . . .").

31. *See* JAMES WESTFALL THOMPSON, ECONOMIC AND SOCIAL HISTORY OF THE MIDDLE AGES (300–1300), at 742 (1928) (describing the peasant's life as "hard" and "monotonous").

32. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS V 156–57 (1796) (commenting on the retarding effects of the mundane, urban, factory life).

a bond with nature and the earth.[33] This supported a perspective in which one's life was fully integrated, rather than segmented into several different spheres of existence.[34]

Moreover, regardless of whether an individual peasant or serf worked for himself or for the profit of someone else, the work in question was ordinarily performed at, or close to, home.[35] Indeed, life, family, faith, and work largely overlapped, with no clear boundaries demarcating one from the other.[36]

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33. *See* MARC BLOCH, FEUDAL SOCIETY 72 (1961); Supiot, *supra* note 29, at 642–43. In a brutal passage from the *Wealth of Nations*, Adam Smith comments upon the effects of the division of labor that marked his era (Industrial Revolution England). 1 SMITH, *supra* note 32, at 156–57. Although Smith was referring to the effects of manual labor in a factory, parallels can certainly be drawn to the very menial tasks doled out to low-level "white-collar" workers in corporate offices across America. *See* E.G. West, *The Political Economy of Alienation: Karl Marx and Adam Smith*, 21 OXFORD ECON. PAPERS 1, 3, 13–15, 19 (1969) (advancing that Smith's division of labor was referring to manual labor in a factory). Although I would not go as far as Smith does in describing the effects of these positions, I certainly concur that they can be degrading and, to an extent, dehumanizing. Indeed, corporate life has become the stuff of dark humor—see, for example, *Dilbert* (comic strip), and *The Office* (NBC television show).

> In the progress of the division of labour, the employment of the far greater part of those who live by labour, that is, of the great body of the people, comes to be confined to a few very simple operations; frequently to one or two. But the understandings of the greater part of men are necessarily formed by their ordinary employments. The man whose whole life is spent in performing a few simple operations, of which the effects too are, perhaps, always the same, or very nearly the same, has no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur. He naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble, or tender sentiment, and consequently of forming any just judgment concerning many even of the ordinary duties of private life. Of the great and extensive interests of his country he is altogether incapable of judging . . . . It corrupts even the activity of his body, and renders him incapable of exerting his strength with vigour and perseverance, in any other employment than that to which he has been bred. His dexterity at his own particular trade seems, in this manner, to be acquired at the expence of his intellectual, social, and martial virtues. But in every improved and civilized society this is the state into which the labouring poor, that is, the great body of the people, must necessarily fall, unless government takes some pains to prevent it.

1 SMITH, *supra* note 32, at 156–57. For a similar but more contemporary assessment, see E.F. SCHUMACHER, SMALL IS BEAUTIFUL 32, 37, 39 (1973): "[M]ethods and equipment [of work] should be such as to leave ample room for human creativity," otherwise "[t]he worker himself is turned into a perversion of a free being. . . . [S]oul-destroying, meaningless, mechanical, monotonous, moronic work is an insult to human nature which must necessarily and inevitably produce either escapism or aggression, and that no amount of 'bread and circuses' can compensate for the damage done . . . ."

34. *See* DAVID W. MILLER, GOD AT WORK 6–7, 74 (2007); *see also* Wald, *supra* note 8, at 481.

35. *See* THOMPSON, *supra* note 31, at 749.

36. *See* EILEEN POWER, MEDIEVAL PEOPLE 1–24 (1924).

The same generally held true for nonagricultural workers as well, such as artisans and guildsmen. Work for them was a very personal affair:

> In an era of the most primitive mechanization, the only motive force was provided by [the guildsman's] own body, the only machinery his own hands and a few simple tools which permitted him to manipulate directly the raw materials. He purchased his own supplies—leather, yarn, charring wood, or whatever. Aided customarily by no more than a single journeyman, he worked directly for his clients, transforming in a series of steps the raw material into finished goods . . . .[37]

Thus, the concept of segmenting one's "work" from one's "personal" and "religious" life would have been largely alien to the pre-Industrial laborer. "[P]hysical work, socializing, and play" were "blended together" over the course of the day.[38] Indeed, for most people of this time, St. Benedict's sixth century motto "*laborare est orare*" ("to work is to pray") made particularly good sense, for "humankind equated work with prayer."[39] As one commentator has explained, the understanding was that "[t]hrough his labors, man was integrated into an order that transcended him and linked him to his fellow men and to the gods."[40] Indeed, "the traditional worker justified his enterprise to himself in terms more moral and religious than economic."[41] Thus, the intermingling of work and faith was not merely a practical fact of life but rather an intermingling grounded upon widely-shared philosophical and theological beliefs. Talk of achieving an appropriate "work/life" balance, so familiar today, would have been unintelligible.

Society was also much more homogenous in the centuries preceding the Industrial Revolution.[42] In Europe, for example, the Church was ubiquitous,[43] and set standards and traditions that

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37. Edward Shorter, *The History of Work in the West: An Overview*, *in* WORK AND COMMUNITY IN THE WEST 1, 8 (Edward Shorter ed., 1973).

38. *See id.* at 9.

39. *See* Supiot, *supra* note 29, at 641–42; *see also* THE CLOISTERED HEART, www.thecloisteredheart.org/2012/09/laborare-est-orare.html (last visited Sept. 19, 2013) (attributing "*laborare est orare*" to St. Benedict); CHRISTIAN CLASSICS ETHEREAL LIBRARY, http://www.ccel.org/ccel/benedict (last visited Sept. 19, 2013) (establishing the time period in which St. Benedict was alive).

40. *See* Supiot, *supra* note 29, at 642.

41. *See* Shorter, *supra* note 37, at 10.

42. *See* THOMPSON, *supra* note 31, at 647–48, 671 (contrasting heterogeneous religious divisions against the homogenous political divisions).

43. *See id.* at 647–48.

workers shared across most of the continent.[44] Moreover, many medieval peasants essentially worked for the Church, as the Church was "by far the largest proprietor in Europe, holding perhaps one-fourth or more of all the land," and by virtue of the fact that Church properties "attracted peasants from other estates by offering more favorable conditions of life and work."[45] This furthered and reinforced the common, shared understanding of work and how it fits into one's life as an integrated whole.[46]

Although the preceding focus was largely on the medieval European world, much of the same could be said for the classical, ancient world and non-European civilizations as well.[47] There too we see that "work is not a separate sphere of life."[48] Indeed, in many such cultures, to this day, there "is often no separate word for work."[49] This is because in such cultures "[t]here is a unity between raising a family and hunting or gathering; between making pots and training children; and between building houses and practicing one's religion."[50]

This contrasts dramatically with the situation today. For the laborer of today, a more appropriate motto would be "*laborare* aut *orare*"—"to work *or* to pray."[51] In the West, the link between work and faith began to crumble with the Protestant Reformation, which tore asunder the uniformity of religious belief.[52] This began the process of religious individualism, and with it the inability to reach consensus on questions of faith.[53] This undermined the heretofore common understanding of work and its nature.[54] The link between work and faith was weakened further by the "Enlightenment" era that followed,[55] which began

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44. *See* HAROLD J. BERMAN, LAW AND REVOLUTION 320, 322 (1983) ("By the twelfth century, all peasants in Western Christendom, including serfs, had legally protected rights."); POWER, *supra* note 36, at 14; THOMPSON, *supra* note 31, at 647 (describing the pervasiveness of the church during the pre-Industrial era).

45. *See* BERMAN, *supra* note 44, at 320.

46. *See* MILLER, *supra* note 34, at 74.

47. *See supra* note 29.

48. HERBERT APPLEBAUM, THE CONCEPT OF WORK 9 (1992).

49. *Id.* at 9–10.

50. *Id.*

51. Supiot, *supra* note 29, at 643–44.

52. *See* HAROLD J. BERMAN, LAW AND REVOLUTION, II 55–56, 60 (2003).

53. *See id.* at 42–43 (noting the abolition of the Roman Catholic distinction between a "higher clergy and a lower laity" and the emergence of an individual responsibility to minister to others).

54. For example, is work a means by which we glorify God, or is it punishment for original sin?

55. *See* APPLEBAUM *supra* note 48, at 583–84.

the relegation of religion as a matter wholly private and subjective[56] (or, according to some, as ultimately irrelevant[57]). The link between work and faith was finally broken with the advent of industrialization and urbanization. With the factory, and the subdivision of labor that accompanied it, everything changed: "All the threads in the fabric of popular life were unraveled and then rewoven together: how people lived in families, how they interacted with their neighbors in communities, how they thought of the politically powerful."[58]

Industrialization and urbanization served to remove a large number of workers from their homes, both in terms of their ancestral lands and their place of abode.[59] Severed from the sources of faith and family (which had, in prior generations, surrounded them) the post-Industrial Revolution worker experienced a newfound separation between his or her "work life" and his or her "personal" and "religious" life, both physically and temporally.[60] Work had become "seculariz[ed]" to the "complete inversion of the everyday sense of religion" that had formerly prevailed.[61] As one commentator explained: "In industrialized cultures, the world of work is separated and divorced from the home, family life, religious life, and other diverse activities of citizens."[62] Emile Durkheim explained how this phenomenon contributes to a state of "anomy"—normlessness and estrangement.[63]

The consequences of this development are difficult to underestimate. It is not simply the case that work traditionally possessed a religious dimension but rather that it was also traditionally understood that "every economic decision has a moral consequence."[64] Indeed, as originally understood,

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56. *See* Supiot, *supra* note 29, at 646.

57. *See* BERMAN, *supra* note 52, at 382 ("[T]he historian C. John Sommerville . . . contends that Protestantism led to dissent, which led to relativism, which led to Deism, which led to atheism.").

58. *See* Shorter, *supra* note 37, at 1, 16

59. Gerben J.N. Bruinsma, *Urbanization and Urban Crime: Dutch Geographical and Environmental Research*, *in* 35 CRIME AND JUSTICE: A REVIEW OF RESEARCH 453, 467 (Michael Tonry & Catrien Bijleveld eds., 2007).

60. *See* Supiot, *supra* note 29, at 641–42, 644.

61. *See id.* at 644, 646.

62. *See* APPLEBAUM, *supra* note 48, at 9.

63. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 368 (1933); Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 67–69 (2001); *see also supra* note 33.

64. *See* GEORGE P. SCHWARTZ & WILLIAM J. KOSHELNYK, GOOD RETURNS: MAKING MONEY BY MORALLY RESPONSIBLE INVESTING xvi (2010) (quoting BENEDICT XVI, CARITAS IN VERITATE § 37, at 39 (2009)).

"economics" as a discipline was a branch of moral philosophy.[65] This would seem to make sense, for "[a]t its core, economics is about human action," and "[h]uman existence is on all sides a moral existence."[66] Thus, modernity has not only severed the link between work and faith, but it has also largely severed the broader connection between economics generally and authentic—that is, morally significant—human flourishing as well.[67]

Old habits die hard, however. For some time, despite the overall trend toward separation, some business owners continued to mix work and religion. It was not unusual in nineteenth-century America for businesspeople to actively integrate religion (or at least religiously grounded morals) into the workplace.[68] Indeed, the Ford Motor Company's "Americanization" programs did the same sort of thing on a secular level well into the early years of the twentieth century.[69]

Such programs became increasingly difficult to maintain, as the religious diversity of the West has increased dramatically over time.[70] This increase in diversity has been experienced to no greater degree than perhaps in the United States, due to both the multiplication of American religious sects and immigration from all corners of the globe over the past century.[71] In such a heterogeneous, multicultural society, a consensus emerged eschewing religion in the workplace.[72] It was simply seen as unwise to introduce a subject as "divisive" as religion into the

65. *See* John M. Breen, *Love, Truth, and the Economy: A Reflection on Benedict XVI's* Caritas in Veritate, 33 HARV. J.L. & PUB. POL'Y 987, 997 (2010); *see also* Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL'Y 737, 751–55 (2009).

66. *See* Gerson Moreno-Riaño, *Democracy, Humane Economics, and a Culture of Enterprise*, 13 J. MARKETS & MORALITY 7, 10 (2010).

67. *See id.* at 11–12.

68. *See* George S. White, *The Moral Influence of Manufacturing Establishments (1836)*, *in* THE NEW ENGLAND MILL VILLAGE, 1790–1860, at 345, 345–46, 351 (Gary Kulik, Roger Parks & Theodore Z. Penn eds., 1982); S.V.S. Wilder, *Ware Factory Village (1826–1827)*, *in* THE NEW ENGLAND MILL VILLAGE, 1790–1860, *supra*, at 243, 243–51; Smith Wilkinson, *Contract and Memorandum Books (1824)*, *in* THE NEW ENGLAND MILL VILLAGE, 1790–1860, *supra*, at 451, 465.

69. *See* Stephen Meyer, *Adapting the Immigrant to the Line: Americanization in the Ford Factory, 1914–1921*, 14 J. SOC. HIST. 67, 67–80 (1980) (discussing Ford Motor Company's attempt to integrate immigrants into its new system of mass production through use of an "Americanization program").

70. *See generally* NOAH FELDMAN, DIVIDED BY GOD 11–12 (2005) (demonstrating that the religious diversity of the West has increased exponentially over time); Meyer, *supra* note 69, at 67–80.

71. *See* FELDMAN, *supra* note 70, at 10–14.

72. *See Toppling a Taboo: Businesses Go 'Faith-Friendly'*, KNOWLEDGE@WHARTON (Jan. 24, 2007), http://knowledge.wharton.upenn.edu/article.cfm?articleid=1644.

business setting, which thrives on unity, stability, and peace.[73] It could generate conflict among employees and alienate customers.[74] The conventional wisdom became "religion and business simply don't mix."[75] Epitomizing this attitude is the decision of Harvard Business School, in 1997, to initially turn down "a gift from industrial cleaning company ServiceMaster Co. for a religion-and-business lecture."[76] The reason: "Harvard officials were nervous about sponsoring anything with religious content."[77]

The desirability of a religiously neutral workplace received legal manifestation with the passage of Title VII in 1964,[78] and with the passage of more aggressive legislation in New Jersey and Oregon in 2006 and 2009, respectively.[79] Title VII famously prohibits employment discrimination on the basis of religion, sex, race, or national origin.[80] To this end, the original language forbade employers from making employment decisions on the basis of religion—unless the employer was a "religious corporation, association, or society" and the decision was with respect to "work connected with the carrying on by such corporation, association, or society of its religious activities . . . ."[81] The term "religious corporation" does not refer to

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73. *See id.*

74. *See* Maya Dollarhide, *When God Goes to the Office*, CNN (Mar. 10, 2008, 10:35 AM), http://http://www.cnn.com/2008/LIVING/worklife/03/10/religion.at.the.office/. "As Richard Posner argues, everyday commerce depends on the ability of parties to displace debates about 'deep issues' that have little practical payoff and that can 'disrupt and even poison commercial relations among strangers.'" Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 216 (2005) (quoting RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 12 (2003)).

75. MILLER, *supra* note 34, at 3; *see also* Danielle Lee, *Diversifying the Religious Experience*, CORP. RESP. MAG., http://thecro.com/node/588 (last visited Sept. 19, 2013). Indeed, even churches themselves had generally become "uninterested in, if not hostile towards, the business world . . . ." *Toppling a Taboo: Businesses Go 'Faith-Friendly'*, *supra* note 72.

76. Michelle Conlin, *Religion in the Workplace*, BUSINESSWEEK (Nov. 1, 1999), http://www.businessweek.com/1999/99_44/b3653001.htm.

77. *Id.*

78. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255.

79. Act of July 26, 2006, ch. 53, § C.34:19-9–14, 2006 N.J. Acts 681, 681–83 (codified as amended at N.J. STAT. ANN. § 34:19-9–14 (West 2011)); Act of Aug. 4, 2009, ch. 890, §§ 1–2, 2009 Or. Laws 3167, 3167–68 (codified as amended at OR. REV. STAT. § 659.780, 659.785 (2011)); *see* Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 115 (2010).

80. 42 U.S.C. § 2000e-2(a) (2012); *see also* Ashlie C. Warnick, *Accommodating Discrimination*, 77 U. CIN. L. REV. 119, 133 (2008).

81. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255; *see also* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 91 (2002). This language was broadened in 1972, exempting

a religiously inspired business corporation but rather an incorporated church or a faith-based nonprofit.[82] Moreover, the definition of what constitutes a "religious organization" for purposes of Title VII is fairly narrow, and ascertained by the courts on a case-by-case basis inquiring into the source of the organization's funding and the character of the organization's activities.[83] Unless an organization fits within this narrow definition, it will have no ability to shape the character of its workforce via religiously selective hiring practices.[84]

On the flip side, although Title VII expressly requires that employers reasonably accommodate the religious observances of their employees,[85] courts construing this mandate have permitted employers to discharge employees whenever "the employee's exercise of her religion poses more than a *de minimis* cost to the employer."[86] In combination, these two aspects of Title VII serve to promote a workplace (in the for-profit, private sector) scrubbed of religious influence, for neither the employer nor the employee can necessarily take religion all that seriously in the work environment. The employer is restricted from using religion as a hiring criterion, and the employee has no right to practice his or her religion should such practice require anything more than a minor accommodation on the part of the employer.[87]

The States of New Jersey and Oregon have gone one step further via the Worker Freedom from Employer Intimidation Act and Worker Freedom Act, respectively. [88] These acts can make

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qualifying religious organizations from Title VII's prohibition of religious discrimination with respect to all their work, regardless of whether such work is part of the organization's "religious" activities or not. *See id.* at 91; *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 332 n.9 (1987).

82. *See* Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, ENGAGE, Sept. 2010, at 4, 5–6.

83. *See* Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 218 (2002). It has not been interpreted to include for-profit entities independent of any particular church or religious institution. *See* Aden & Carlson-Thies, *supra* note 82, at 7 n.4.

84. *See* Lin et al., *supra* note 83, at 218.

85. *See* 1 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 9:80 (2012).

86. Sidney A. Rosenzweig, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2515–16 (1996) (emphasis added); *see, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134–36 (1st Cir. 2004).

87. Unless, as indicated, the employer is a "religious organization" such as a church or church-affiliated enterprise. *See* Lin et al., *supra* note 83, at 196, 215–19.

88. *See* N.J. STAT. ANN. § 34:19-9 (West 2011); OR. REV. STAT. § 659.785 (2011); *see also* Hartley, *supra* note 79, at 115.

proselytization in the workplace, if conducted by an employer other than a religious organization, an intentional tort.[89] Thus, not only is a for-profit employer precluded from taking religion into account when hiring, but the employer may also, under these acts, be precluded from talking about religion to its existing employee team. Indeed, under this legislation, it is arguably unlawful for an employer even to post religious images on its letterhead.[90]

As substantial as their requirements are, Title VII and the Worker Freedom acts have had an impact even beyond the letter of their proscriptions. As a result of legislation such as this, "people had incorrectly assumed that it was illegal to practice any form of religious expression in the workplace."[91] This assumption is an exaggeration, but nevertheless has served to guide conduct in the workplace.[92] Additionally, many people confuse or misunderstand the Constitution,[93] and mistakenly believe that the First Amendment's Establishment Clause, which has been interpreted as requiring "separation of church and state," somehow applies to business corporations.[94] Indeed, "[a]lmost reflexively, people cite[] the constitutional 'separation of church and state' as the rationale for [their] view" that the workplace must be devoid of religious expression.[95] Further, some people may also take to heart the antidiscrimination rationale that is at the root of Title VII and the Worker Freedom acts and support a workplace in which religion is off limits out of concern for religious minorities, who may feel threatened or uncomfortable in a religiously infused environment, but at the expense of those who would welcome such an environment.

Hence we have the naked private square.[96]

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89. *See* N.J. STAT. ANN. §§ 34:19-10, 34:19-13; OR. REV. STAT. § 659.785; *see also* Hartley, *supra* note 79, at 115. These acts contain exemption rules for religious organizations but fail to define a "religious organization." *See* N.J. STAT. ANN. § 34:19-11; OR. REV. STAT. § 659.785(4)(d).

90. *See* Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1720–21 (2008).

91. MILLER, *supra* note 34, at 67.

92. *See id.*

93. *See generally* ERIC LANE & MICHAEL ORESKES, THE GENIUS OF AMERICA 203 (2007) (giving historical background on the Framers' intentions when they wrote the Constitution and how people today have generally lost sight of those intentions).

94. MILLER, *supra* note 34, at 67.

95. *Id.*

96. *Cf.* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE vii (1984). Neuhaus described the "naked public square" as "the result of political doctrine and practice that would exclude religion and religiously grounded values from the conduct of *public*

III. THE COMING CLASH

Contrary to recent generations, Americans today are witnessing the rise of the "religiously expressive corporation"—a business organization driven by religious values and concerns alongside a desire to turn a profit.[97] Simultaneously, America's federal government has entered a phase of significant and sustained regulatory activity.[98] Taken together, these developments portend a coming clash between businesses and government—a clash in which the First Amendment's Free Exercise Clause will be increasingly invoked. In fact, such a clash is currently underway.[99]

A. *The Religiously Expressive Corporation*

Many factors have come together to give rise to the religiously expressive corporation. Behind them all is an upswing of religion and spirituality in American society generally.[100] There

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business." *Id.* (emphasis added). I would describe the "naked public square" as the result of law and practice that have served to exclude religion and religiously grounded values from the conduct of the private business corporation.

97. *See, e.g.*, *About Us*, JWEEKLY.COM, http://www.jweekly.com/page/about/ (last visited Sept. 7, 2013) ("The mission of j. [sic] the Jewish news weekly, and the Corporation is: 1. To connect, enlighten and strengthen the multi-faceted Jewish community of Northern California. 2. To be a forum for news, information, ideas and opinions affecting Jews locally, nationally and internationally. 3. To enrich the cultural, religious and social life of the community through articles, interviews, reviews and features."); *About Us*, SIENNA GROUP, http://www.prolifecatholic.com/about.html (last visited Sept. 19, 2013) (professing dedication to supporting pro-life and pro-family organizations); *Explanation of Mission and Values*, O'BRIEN INDUSTRIAL HOLDINGS, LLC, http://www.christyco.com/mission_and_values_details.html (last visited Sept. 19, 2013) (including in the first part of their mission statement a quote from scripture: "'Work hard and willingly but do it for the Lord and not for the sake of men. You can be sure that everyone, whether slave or free man, will be properly rewarded by the Lord for whatever work he has done well . . .' Ephesians 6:1–9."); *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/our_company.cfm (last visited Sept. 19, 2013) ("At Hobby Lobby, we value our customers and employees and are committed to . . . [h]onoring the Lord in all we do by operating the company in a manner consistent with biblical principles.").

98. *See* Sarah Fox, *A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 VA. ENVTL. L.J. 299, 331 (2010).

99. *See* Melissa Steffan, *Hobby Lobby Solidifies 'Major Victory' Against HHS Contraceptive Mandate*, CHRISTIANITY TODAY (July 30, 2013, 11:52 AM), http://www.christianitytoday.com/gleanings/2013/june/hobby-lobby-tenth-circuit-hhs-contraceptive-mandate.html (demonstrating this clash with a discussion concerning Hobby Lobby and a Pennsylvania cabinet-making company, both of which requested "reprieve from the Affordable Care Act['s contraceptive mandate]"); *infra* text accompanying notes 467–81.

100. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD 12–15 (2009); Cash & Gray, *supra* note 8, at 124.

are some fairly astonishing statistics that bear this out. Consider, for example, the rise in demand for religious literature and media as the twentieth century came to a close: "Religious and spiritual materials that include new age, Christian, Jewish, and Muslim publications were the fastest growing segment in adult publishing for 1996 and 1997. Religious radio stations have quadrupled over the past 25 years, while religious television shows increased fourfold in the 1980s."[101]

Anecdotally, "[a]lmost everywhere you look . . . you can see religion returning to public life."[102] Religion is "thriving in today's America—as an economic force, an intellectual catalyst and a political influence."[103]

Curiously, however, this perception is seemingly at odds with some other statistical data. For example, the number of Americans who self-identify as belonging to no religion at all (the "nones" as they are popularly called) has jumped from 8% to 15% between 1990 and 2008.[104] That said, when measuring things such as belief in God, attendance at religious services, or frequency of prayer, Americans' views are characterized by a great degree of stability over the past few decades.[105] Similarly stable is the number of Americans who claim that religion is "very important" in their lives.[106] Even among those identifying no religious affiliation, only a small minority profess to be atheists or agnostics—the vast majority profess, instead, a "spirituality" divorced from organized religion.[107]

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101. Cash & Gray, *supra* note 8, at 124 (footnote omitted).

102. MICKLETHWAIT & WOOLDRIDGE, *supra* note 100, at 12.

103. *Id.* at 26.

104. Cathy Lynn Grossman, *Most Religious Groups in USA Have Lost Ground, Survey Finds*, USA TODAY (Mar. 17, 2009, 6:35 PM), http://www.usatoday.com/news/religion/2009-03-09-american-religion-ARIS_N.htm.

105. *See* David Paul Kuhn, *The Fall of Mass Attendance but Not US Religiosity*, REALCLEARPOLITICS (Apr. 9, 2009), http://www.realclearpolitics.com/articles/2009/04/gallup_poll_religious_attendance.html; David Masci & Gregory A. Smith, *God is Alive and Well in America*, PEW RESEARCH CTR. (Apr. 4, 2006), http://pewresearch.org/pubs/15/god-is-alive-and-well-in-america; *Religion Among the Millennials*, PEW RESEARCH CTR. (Feb. 17, 2010), http://pewforum.org/Age/Religion-Among-the-Millennials.aspx; *see also* RODNEY STARK, WHAT AMERICANS REALLY BELIEVE 9 tbl.4 (2008) (demonstrating that weekly church attendance has remained relatively stable over the last fifty years).

106. Frank Newport, *This Christmas, 78% of Americans Identify as Christian*, GALLUP (Dec. 24, 2009), http://www.gallup.com/poll/124793/this-christmas-78-americans-dentify-christian.aspx. Which, after dropping from the 1950s to the 1970s, has hovered around 55% from 1980–2008. *See id.*

107. *See* PEW RESEARCH CTR., "NONES" ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 42 (2012), *available at* http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Unaffiliated/NonesOnTheRise-full.pdf.

This statistical stability, coupled with the rise of the "nones," makes it difficult to discern what is fueling the apparent uptick in religiosity. The matter would seem, therefore, to be qualitative, not quantitative, in nature. Some of the data appear to bear that out. In a 2008 survey, 74% of Americans responded that "faith is becoming more important in their lives."[108] Thus, the uptick in religiosity is apparently not a matter of more Americans becoming religious but rather of greater intensity on the part of those Americans who already claim to be religious.[109] Such intensity of faith is often a hallmark of "religious integralism"—that form of religion which sees "religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life."[110] Although religious integralism is not ordinarily a feature of mainstream Protestantism in America, it is a feature of the fastest growing religious groups in America: Islam, Orthodox Judaism, Mormonism, fundamentalist and evangelical Protestantism, and the more traditional expressions of Catholicism.[111]

Although the reasons for this increase in religious fervor and integralism are well beyond the scope of this Article, it is important to observe that this phenomenon is apparently underway, as it helps explain, in large part, the proliferation of religiously expressive corporations.

Further, if, as I have posited, the separation of work and faith over the past couple of centuries is an unnatural anomaly,[112]

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108. *See* Sue Shellenbarger, *Praying with the Office Chaplain*, WALL ST. J., June 23, 2010, at D1.

109. *See id.*; Eve Tahmincioglu, *Reconciling Religious Beliefs with Work*, NBCNEWS (Sept. 30, 2007, 6:13 PM), http://www.nbcnews.com/id/20973408/ns/business-careers/t/; *see also* ROSS DOUTHAT, BAD RELIGION 4–5 (2012).

110. Fouad A. Riad, *Foreword: Religious Expression in the Workplace*, 30 COMP. LAB. L. & POL'Y J. 467, 481 (2009).

111. *Id.*; *see, e.g.*, Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 610 (2006) ("Muslims incorporate the laws of Shari'a into their daily affairs and attempt to structure their private and professional lives in accordance with the values of their faith."); Ann Carey, *The CARA Study and Vocations*, CATHOLIC WORLD REPORT (May 7, 2011), http://www.catholicworldreport.com/Item/572/the_cara_study_and_vocations.aspx#.UdQ8UT54b6k (last visited Sept. 19, 2013) (observing that among Catholic religious orders, the fastest growing over the past 20 years are "orders that observe a traditional religious life," such as those that "wear a religious habit, work together in common apostolates, and are explicit about their fidelity to the Church and the teachings of the Magisterium"); *see also* MICKLETHWAIT & WOOLDRIDGE, *supra* note 100, at 17–18 ("There are all sorts of long-term reasons why hotter, more combative religions will gain."); Traci Osuna, *Promoting Workship with the Traditional Mass*, ZENIT (June 9, 2010), http://www.zenit.org/article-29545?l=english (observing that although vocations are falling in most U.S. dioceses, vocations to traditional orders of Catholic priesthood are rising).

112. *See supra* notes 29–30 and accompanying text.

it is not surprising to see the rekindling of a "deep desire by men and women no longer to compartmentalize their lives and parts of their days" as did previous generations of recent vintage—especially among the religiously fervent.[113] This desire has led, in turn, to the reintroduction of religion in the workplace, a major factor in the rise of the religiously expressive corporation.[114]

Although the twentieth century witnessed the continued trend toward separating work from faith and business from religion,[115] the twenty-first century is clearly featuring a reversal of that trend.[116] Anecdotally, this phenomenon is driven home by contrasting the decision of Harvard Business School, in 1997, to turn down a generous offer to fund a religion-and-business lecture because it feared the controversy that such a lecture would generate,[117] with Yale University's decision in 2003 to establish a Center for Faith & Culture, which explicitly featured a focus on "Ethics and Spirituality in the Workplace."[118]

But there is more than anecdotal evidence to demonstrate the growing influence of religion in the workplace. As David Miller writes in his 2007 book, *God at Work*:

> Today, contrary to . . . the late 1970s, growing numbers of businesspeople of all levels are attending conferences and

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113. *See* Nancy Lovell, *The Last Taboo: An Interview with David Miller*, HIGH CALLING (Apr. 10, 2006), http://www.thehighcalling.org/work/last-taboo-interview-david-miller#.UdW-L_nVCSp. It should be noted that in some circles the concept of work as a sacred vocation with a religious dimension has never fully vanished but has persisted over the years. For example, this view has been an explicit mainstay of Catholic Social Teaching for over a century. *Cf.* BENEDICT XVI, CHARITY IN TRUTH: CARITAS IN VERITATE § 53, at 61 (2009) ("As a spiritual being, the human creature is defined through interpersonal relations. The more authentically he or she lives these relations, the more his or her own personal identity matures."). *See generally* LEO XIII, RERUM NOVARUM (1891); JOHN PAUL II, ON HUMAN WORK: LABOREM EXERCENS 5 (1981). Calvinism, too, has a long tradition of viewing work within a religious framework. *See, e.g.*, David H. Kim, *The Need to Recapture the Heart of Calvinism*, CTR. FOR FAITH & WORK (Sept. 21, 2010), http://test.faithandwork.org/?p=276.

114. *See* MILLER, *supra* note 34, at 3–6; *supra* note 97 and accompanying text.

115. *See supra* Part II.

116. *See* MILLER, *supra* note 34, at 3–6. Generalizing a bit, according to Miller, the modern movement to integrate (or re-integrate) faith and work actually began in the 1980s, and "was already well under way before the terrorist attacks of September 11, 2001, and has only gained momentum since." *Id.* at 3, 6–7; *see also* Mark Freedland & Lucy Vickers, *Religious Expression in the Workplace in the United Kingdom*, 30 COMP. LAB. L. & POL'Y J. 597, 602 (2009) (discussing advent of religiously inspired for-profit business organizations). Moreover, the current "faith and work" movement certainly had its modern predecessors as well. *See* DOUGLAS A. HICKS, RELIGION AND THE WORKPLACE: PLURALISM, SPIRITUALITY, LEADERSHIP 18 (2003).

117. *See supra* notes 76–77 and accompanying text.

118. *See* MILLER, *supra* note 34, at 96; *see also Ethics and Spirituality in the Workplace*, YALE CENTER FOR FAITH & CULTURE, www.yale.edu/faith/esw/esw.htm (last visited Sept. 19, 2013).

> management seminars on spirituality and work, participating in small prayer and study groups on faith and leadership, and reading books, magazines, and newsletters for self-help as regards integrating biblical teachings with marketplace demands.[119]

Indeed, Miller proceeds to argue that the "faith at work" phenomenon qualifies as a bona fide "social movement" as sociologists would use that term.[120]

Not only does a religiously infused workplace bring the modern workplace more into line with its historical predecessors, but it also speaks to the fact that today "the workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family."[121] An individual's development as a human being, on a variety of levels, can very well occur largely within the context of their employment and careers.[122] As such, employees are increasingly seeking out workplaces congruent with their values—including their religious values.[123] As John McGinnis has pointed out, "[a]s society becomes wealthier, the distinction between what many people do for a living and what they do to express themselves blurs."[124]

Another factor giving rise to the religiously expressive corporation is the rise of the religious entrepreneur. A famous example is S. Truett Cathy, founder of Chick-Fil-A, who pursued an approach to business based on "biblical principles."[125] But there are, of course, many others.[126] As previously mentioned, as of 2011, 55% of Americans claimed that religion was "very important" in their lives.[127] Unless religious individuals are somehow less likely to be entrepreneurs, odds are that any particular, newly formed company is being formed by an individual who happens to

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119. MILLER, *supra* note 34, at 3, 20–21.

120. *Id.* at 20–21, 105–23.

121. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 3 (2000).

122. *See* Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 57–58 (2012).

123. *See* Cash & Gray, *supra* note 8, at 132.

124. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 538 n.268 (2002).

125. *See* ABOUT S. TRUETT CATHY, http://www.truettcathy.com/about.asp (last visited Sept. 19, 2013).

126. *Cf.* CHRISTIANENTREPRENEURS, http://www.christianentrepreneurs.com/ (last visited Sept. 19, 2013) (advertising that the company is "looking for Christian entrepreneurs in all phases of their business, large and small investors, and vendors who can service small business needs").

127. *See Religion*, GALLUP, http://www.gallup.com/poll/1690/religion.aspx (last visited Sept. 19, 2013).

consider religion "very important" (or by a consortium of individuals, the majority of whom would consider religion "very important"). All things being equal, one could expect this "very important" influence of religion to make itself felt on American companies. Thus, religiously expressive corporations might simply be the reflection of their founders, embracing the same priorities as these particular individuals, in the same way that many nonreligious corporations today (even quite large ones) reflect the vision, beliefs, and priorities of their particular founders.[128] Indeed, given the 55% statistic, it would seem more appropriate to question why a given company was *not* characterized by a religious influence or component.

Another factor is the increased religiosity of business executives.[129] In a recent poll of 110 high-level business leaders, 70% agreed "a great deal" or "somewhat" with the statement that "religious beliefs and values of a corporate executive should influence their business decisions,"[130] and a "growing number of executives 'take their faith seriously' as a source of meaning and direction."[131] Indeed, to the extent that the workplace may be integral to an employee's personal development, it is even more likely to be integral to a corporate officer's development, given the greater weightiness of the responsibilities and decisions that mark his or her tenure.[132] Indeed, as I have discussed elsewhere, these are the individuals whose lives are most closely intertwined with the corporate entity, and for whom a religious dimension would be the most important:

> [A] corporate officer's development as a human being may very well turn on how she discharges the corporate duties that dominate her daily life . . . . Not surprisingly, therefore, the call for ethics in business "does not come primarily from an outraged public, the polemics-hungry press, or publicity-minded congressional committees." Instead, "[i]t comes from executives themselves who want the opportunity to think

128. *See* Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 358–59 (2011).

129. *See* Shellenbarger, *supra* note 108; *see also* MICKLETHWAIT & WOOLDRIDGE, *supra* note 100, at 156–60 ("America's executive class is probably its second most religious elite in the country after the senior military.").

130. *See Business Ethics in a Time of Economic Crisis*, MARIST COLL. INST. FOR PUB. OP. & KNIGHTS OF COLUMBUS, http://maristpoll.marist.edu/wp-content/misc/us090309/Business%20Ethics%20Survey/Business%20Ethics%202009.pdf (last visited Sept. 19, 2013).

131. *See* Shellenbarger, *supra* note 108.

132. *See* Colombo, *supra* note 122, at 57–59.

through and clarify the conflicts in which they find themselves on a daily basis."[133]

To the officer or executive for whom religion is important, few things might be more significant than the ability to fulfill one's career at a company that embodies his or her religious values.

The values embraced by a corporation, religious or otherwise, are of increasing concern to investors as well, and this, too, contributes to the rise of the religiously expressive association.[134] One cannot fail to observe the phenomenon of socially responsible investing, whereby investors (individual and institutional) screen their investment decisions with recourse to factors that are moral and ethical in nature.[135] Over the past couple of decades, this movement has witnessed tremendous growth, exemplified by the increase from 55 socially responsible mutual funds with $12 billion in assets in 1995 to 250 such funds with over $316 billion in assets in 2010.[136] This amounts to approximately $1 out of every $7 invested in the United States.[137]

A subset of this class would be those investors who steer their investments to companies whose products and services comport (or at least do not conflict with) their religious beliefs.[138] This being twenty-first-century America, there are, unsurprisingly, dozens of such funds, catering to (among others) investors who are devout Catholics, Muslims, and Protestants.[139]

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133. *See* Colombo, *supra* note 122, at 42 (alteration in original) (footnote omitted) (quoting ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS 5 (1992)).

134. *See* BENJAMIN J. RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW 1–2, 43 (2008).

135. *See* RICHARDSON, *supra* note 134, at 1–2, 43; SCHWARTZ & KOSHELNYK, *supra* note 64, at 8–10 (2010); George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257, 258–62 (1997).

136. *See* Adam Bold, *What You Need to Know About Socially Responsible Investing*, U.S. NEWS (Apr. 19, 2011), http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2011/04/19/what-you-need-to-know-about-socially-responsible-investing.

137. *See* Barbara Wall, *Financial Goals, Spiritual Needs*, INT'L HERALD TRIB., June 5, 2005, at 18.

138. *See* RICHARDSON, *supra* note 134, at 111–20; SCHWARTZ & KOSHELNYK, *supra* note 64, at 10–11 (distinguishing between "socially responsible investing" and "morally responsible [faith-based] investing").

139. *See* Wall, *supra* note 137; Erin Joyce, *Impact Investing: The Ethical Choice*, FORBES (May 26, 2010, 6:38 PM), http://www.forbes.com/2010/05/26/impact-investing-ethical-personal-finance-responsible.html (explaining how impact investing now includes faith-based investing); Lisa Smith, *A Guide to Faith-Based Investing*, INVESTOPEDIA (Feb. 29, 2012), http://www.investopedia.com/articles/stocks/12/investing-and-faith.asp#axzz2J6tiKGR8 (explaining Catholic, Islamic, Jewish, and Protestant investing and mutual funds); Mark Thomsen, *Catholic Values-Based Investment Products Rise in Number*, SOC. FUNDS (June 7, 2001), http://www.socialfunds.com/news/print.cgi?sfArticleId=595

Here too there has been remarkable growth: the number of such funds has more than tripled since 2000, and the assets of such funds have climbed from $10 billion in the late 1990s to over $27 billion as of 2009.[140] Thus, business corporations may be motivated to embrace a religious dimension due to pressure from shareholders and other investors.[141]

Incentives for businesses to embrace religious personae may come from customers as well. American consumers increasingly endeavor to patronize businesses and establishments that honor their values, and religious customers are no exception.[142] Indeed,

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(commenting on increase of investment products targeting Catholic investors). Examples of such funds are plentiful. *See, e.g.*, *About Amana Mutual Funds Trust*, AMANA MUT. FUNDS TR., http://www.amanafunds.com/retail/about/index.shtml (last visited Sept. 19, 2013) (partnering with an investment advisor that selects companies that do not violate the requirements of the Islamic faith at the time of investment); *About Us*, U. ISLAMIC FIN., http://www.myuif.com/about-us/ (last visited Sept. 19, 2013) (announcing a community bank targeting Muslims through *Shariah* conscious practices); *Ave Maria Catholic Values Fund*, AVE MARIA MUT. FUNDS, http://www.avemariafunds.com/funds/avemxSummary.php (last visited Sept. 19, 2013) ("Ave Maria Catholic Values Fund seeks long-term capital appreciation from equity investments in companies that do not violate core values and teachings of the Roman Catholic Church."); *Hall of Shame*, TIMOTHY PLAN (2013), http://www.timothyplan.com/Download/HallofShame.pdf (last visited Sept. 19, 2013) ("The Timothy Plan® is a family of mutual funds designed to help investors own morally clean portfolios. By screening out (avoiding to own) companies involved in activities contributing to the moral decline of America, the Timothy Plan® is committed to keeping its portfolios morally responsible . . . . The Timothy Plan® family of mutual funds, avoids investing in companies that are involved in practices contrary to Judeo-Christian principles.").

140. *See* Daren Fonda, *Faith & Finance: A Boom in Religious Funds*, SMARTMONEY MAG., Dec. 22, 2009.

141. *See* RICHARDSON, *supra* note 134, at 74, 95–96; SCHWARTZ & KOSHELNYK, *supra* note 64, at 6–7, 10–11; Jonathan Burton, *Investing with Principles*, WALL ST. J., Apr. 4, 2011, at R8 (noting increase in exchange-traded funds committed to social responsibility).

142. *See* CONE, RESEARCH REPORT: CONE CAUSE EVOLUTION & ENVIRONMENTAL SURVEY 8 (2007), *available at* http://www.conecomm.com/stuff/contentmgr/files/0/a8880735bb2e2e894a949830055ad559/files/2007_cause_evolution_survey.pdf (explaining the contradiction whereby consumers consider a company's commitment to social issues during purchasing decisions yet make fewer purchases); Sheila M. J. Bonini, Kerrin McKillop & Lenny T. Mendonca, *The Trust Gap Between Consumers and Corporations*, MCKINSEY Q., No. 2, 2007, at 7, 10, *available at* http://cecp.co/summitmaterial/2007summit/pdfs/Mendonca%20_handout1.pdf; *BBMG Study: Three-Fourths of U.S. Consumers Reward, Punish Brands Based on Social and Environmental Practices*, BBMG (June 2, 2009), http://www.csrwire.com/press_releases/27052-BBMG-Study-Three-Fourths-of-U-S-Consumers-Reward-Punish-Brands-Based-on-Social-and-Environmental-Practices ("America's consumers are rewarding brands that align with their values, punishing those that don't and spreading the word about corporate practices . . . ."); *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY, http://www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Sept. 19, 2013) (explaining that consumers are more likely to patronize sustainable businesses); Lawrence Glickman, *Whole Foods Boycott: The Long View*, WASH. POST (Sept. 2, 2009, 5:30 AM), http://voices.washingtonpost.com/shortstack/2009/09/whole_foods_boycott_the_long_v.html?hpid=news-col-blog (examining the American boycott tradition).

religious individuals have increasingly been clamoring for greater sensitivity to their religious values and concerns on the part of corporate America.[143] Niche marketing is nothing new, and religiously oriented commercial establishments may fare well by sincerely catering to co-religionists.[144] Indeed, even businesses that are not religiously oriented have long reached out to religiously minded customers and potential customers—just as they have reached out to nearly every other demographic when foreseeably profitable to do so.[145] Adverting once again to the statistic that 55% of Americans consider religion "very important" in their lives,[146] this niche would appear to be quite a considerable one.

Finally, consider the possibility of *all* the above-referenced constituencies coalescing around a particular company that espouses a well-defined religious or faith orientation—a company that was founded by an individual of strong religious convictions, and who made his or her convictions felt in the company's policies and practices. A company that, in turn, attracted investors, officers, and employees who shared in those convictions, and who supported the religious "mission" of the company. Customers, too, might patronize the business in preference to others, out of support for the company's religiously inspired policies and practices. It is not at all surprising to see why such a business might come into existence. Nor should it be surprising to witness such businesses turn to the Free Exercise Clause to protect their particular, religiously inspired values and practices from government action that threatens to undermine them.

B. The Regulatory State

Concurrent with the reintroduction of religion into the workplace[147] has been the growth of the "regulatory state" in the United States.[148] By itself, this portends increased opportunities for conflict, for the simple reason that greater regulation inevitably yields more points of contention between the regulated

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143. *See Business Ethics in a Time of Economic Crisis*, *supra* note 130, at 29; *see also* RICHARDSON, *supra* note 134, at 111–20.

144. *See, e.g.*, Christine Girardin, *Religion, Profit Mix Downtown*, DAYTONA NEWS-JOURNAL, Mar. 14, 2004.

145. *See, e.g.*, Frank Green, *Some Christian-Owned Businesses Reach Out to a Like-Minded, Faithful Market*, SAN DIEGO UNION-TRIBUNE, Nov. 24, 2002, at H1.

146. *See supra* text accompanying note 127.

147. *See supra* Part III.A.

148. Fox, *supra* note 98, at 331.

and the regulator.[149] Compounding the situation, however, is the fact that business regulation over the past few decades has taken on a more value-laden, and a less specifically economic character.[150] Whereas early twentieth-century business regulation focused on issues such as minimum wage and child labor,[151] late twentieth-century business regulation has addressed issues of civil rights and discrimination.[152] As it opens, the twenty-first century has continued along this trajectory, witnessing demands that employers provide equal benefits to same-sex couples[153] and that employers offer health insurance plans that cover such things as contraceptives, abortifacients, and sterilization.[154] This serves to increase conflict, as the values animating some of this modern regulation and the values driving religiously inspired businesses can diverge in ways that are less likely when dealing with purely economic regulation.[155]

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149. *See id.* at 308.

150. *See id.* at 331; *see also, e.g.*, Mayer, *supra* note 10, at 583 ("Over time, regulation became more federal and intrusive in character . . . and regulation became explicitly designed to serve environmental, consumer, and social—rather than economic—goals."); Ayelet S. Lebovicz, Note, *"Cover My Pills": Contraceptive Equity and Religious Liberty in* Catholic Charities v. Dinallo, 16 CARDOZO J.L. & GENDER 267, 269 (2010) (discussing the New York Women's Health and Wellness Act which "requires employers that provide drug coverage to include prescription contraceptive drugs and devices").

151. *See* Pamela N. Williams, *Historical Overview of the Fair Labor Standards Act*, 10 FLA. COASTAL L. REV. 657, 660–61, 670–71 (2009) (noting the invalidation of the District of Columbia's attempt to set a minimum wage for children and that Congress wanted FLSA to address minimum wages).

152. *See* Kristin H. Berger Parker, Comment, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945, 952–54 (2008).

153. *See* Vanessa A. Lavely, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 248–49 (2007) (highlighting Massachusetts's legal recognition of same-sex marriage including employee benefits).

154. Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 767 (2005) (outlining the justifications given by those who support mandatory prescription contraceptive coverage); Madison Park, *Birth Control Should Be Fully Covered Under Health Plans, Report Says*, CNN HEALTH (July 19, 2011, 6:52 PM), http://www.cnn.com/2011/HEALTH/07/19/birth.control.iom/index.html (noting the Institute of Medicine's recommendation that the government require health insurance providers to cover contraceptives and sterilization). For a prominent example of the implementation of these demands, see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the regulations thereunder—particularly the "contraceptive mandate" promulgated by the Department of Health and Human Services pursuant to the Act. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–30 (Feb. 15, 2012).

155. *Cf.* Carpenter, *supra* note 15, at 1517, 1533 (observing "the increasing conflict between the freedom of expressive association and the expanding reach of anti-discrimination law").

Examples of such conflict abound. In contravention of local law, Muslim taxi drivers in Minneapolis have refused to accept passengers with dogs—including blind passengers with seeing-eye dogs—on the grounds that dogs are "unclean."[156] Muslim male employees have refused to shake hands with women on account of a religious mandate against their touching of women, raising concerns of sexism in the workplace.[157] In violation of antidiscrimination legislation, a kosher-meat corporation sought to dismiss a butcher because he did not live a visibly pious Orthodox Jewish life.[158] Perhaps most notably of all, a handful of religiously oriented business corporations filed suit in 2012 to block implementation of a government requirement that employee health insurance plans include coverage of sterilization, birth-control, and, arguably, abortifacients—the "contraceptive" mandate adopted by the Department of Health and Human Services in response to the Affordable Care Act of 2010.[159]

In each of these examples, we have a collision between the religiously grounded values of some and the civil rights of others. Were only individuals or actual churches involved, resolution of these conflicts would be relatively straightforward.[160] First, we would look to see if the statute or regulation in question contained an exemption for the religiously motivated conduct in

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156. *See* Michael Conlon, *Minnesota Muslim Taxi Drivers Could Face Crackdown*, REUTERS (Jan. 17, 2007, 2:09 PM), http://www.reuters.com/article/2007/01/17/us-muslims-taxis-idUSN1732288320070117.

157. Title VII: Religious Discrimination—Religious Accommodation—Sex Discrimination, EEOC, http://www.eeoc.gov/eeoc/foia/letters/2009/religionhandshake letter.redacted%20for%20posting.final.html (last updated Jan. 25, 2010).

158. *See* Maruani v. AER Servs., Inc., No. 06-176, 2006 WL 2666302, at *1–3, *7 (D. Minn. Sept. 18, 2006) (finding that the court lacked subject matter jurisdiction over the illegal discrimination count).

159. *See* Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292–93 (D. Colo. 2012); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1156 (E.D. Mo. 2012); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013); Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs., No. 12-cv-06756 (N.D. Ill. filed Aug. 22, 2012). These cases are, in many respects, companion cases to the more widely publicized litigation brought by a group of forty-three diverse Catholic Church-affiliated entities against "the Department of Health and Human Services' (HHS) sterilization, abortifacient and birth-control insurance mandate." *See* Mary Ann Glendon, *Why the Bishops Are Suing the U.S. Government*, WALL ST. J., May 22, 2012, at A17.

160. *See* Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1304 (2013) (discussing the exemption for religious employers under the contraceptive mandate); *see also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1982 (2007).

question. If so, the exemption would be applied and the conflict resolved.[161] If such an exemption were lacking, we would then turn to the First Amendment's Free Exercise Clause and apply the appropriate test needed to determine whether the religiously motivated conduct in question was protected under the U.S. Constitution.[162] If so, the individual (or institution) would be relieved from compliance with the law.[163] Finally, we would consult the Religious Freedom Restoration Act—or a state analogue thereof—and see if its provisions apply to the conflict at hand, and if so resolve the situation accordingly.[164] All this would be possible because existing jurisprudence and legislation is clear that individuals, and religious institutions themselves (that is, actual churches and church-affiliated entities), have standing to claim such exemptions and to assert such defenses.[165] What is far less clear is whether a religiously motivated for-profit corporation has standing to assert the very same claims and defenses.[166]

IV. THE FREE EXERCISE CLAUSE

In order to properly assess the applicability of the Free Exercise Clause to the conduct of a putative corporate claimant, we must, of course, familiarize ourselves with the Clause itself.

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161. Such as the exemption for "religious institutions" contained in Title VII. 42 U.S.C. § 2000e-1(a) (2006); *see* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 284–86 (1994); Corbin, *supra* note 160, at 1973–77; *see also* Tan, *supra* note 160, at 1304 (discussing the ACA's exemptions for religious employers).

162. *See* Brant, *supra* note 161, at 278–79.

163. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Or, if applicable, one's state analogue protecting the free exercise of religion. *See* David H.E. Becker, Note, *Free Exercise of Religion Under the New York Constitution*, 84 CORNELL L. REV. 1088, 1100–02 (1999). As will be discussed, because of the applicable standard, claimants rarely prevail in such cases. *See infra* Part IV.B (examining the Free Exercise Clause jurisprudence and the Religious Freedom Restoration Act ("RFRA")). They are, nevertheless, entitled to their day in court.

164. 42 U.S.C. § 2000bb-1(a); *see also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 111–13 (1996) (exclaiming the broad reach of the RFRA standard of review); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466–67, 471–72 (2010) (noting that as of 2010, sixteen states had enacted a version of the RFRA); *infra* Part IV.B (examining the Free Exercise Clause jurisprudence and the RFRA).

165. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1505–07 (1999); *see also, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 699, 701, 710 (2012) (allowing a church to assert its Free Exercise rights); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 528, 547 (1993) (same); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 647, 674–75 (10th Cir. 2006) (same).

166. *See* Tan, *supra* note 160, at 1351.

This Part sets forth the history of the Free Exercise Clause, along with the jurisprudence that has developed from its interpretation.

A. Background

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[167] So begins the first sentence of the First Amendment to the U.S. Constitution, setting forth what has come to be known as the "Establishment" and "Free Exercise" Clauses. Especially for its time, the First Amendment was "an absolutely unique constitutional provision for a nation."[168]

The backdrop of the First Amendment was the religious "strife and intolerance" that marked the Old World and particularly England.[169] For most of the seventeenth century, the era of America's colonization, England was marked by an established state church (the Church of England), and other faiths were, to a greater or lesser degree, generally suppressed.[170] Interestingly, England's American colonies did not all follow suit.[171] Some, such as Virginia, retained the Church of England as the established faith.[172] Although others, particularly the colonies of New England, continued to observe an established faith, many substituted other faiths for the Church of England.[173] Four colonies—Rhode Island, New Jersey, Pennsylvania, and Delaware—lacked an established religion altogether.[174]

Although many conflate the question of religious liberty with the (dis)establishment of religion, the two concepts are separate.[175] Here, too, the colonies varied. Some (most notably

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167. U.S. CONST. amend. I.

168. *See* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 567 (1992).

169. *See* McConnell, *supra* note 163, at 1421.

170. *See id.*

171. *See id.* at 1422.

172. *See id.* at 1423.

173. *See id.* at 1422–23.

174. *See* Deborah Jones Merritt & Daniel C. Merritt, *The Future Of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895, 901 n.25 (2007).

175. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107–09 (2003). A state with an established religion can indeed permit broad tolerance of other faiths, and a state without an established religion can indeed be quite intolerant of certain particular faiths. With regard to the former point, consider the fact that Denmark, Finland, Greece, Sweden, Norway, Malta, and Bulgaria each have a specific state-established religion, yet none of these nations is known for its intolerance of religious

Maryland, for a time) extended religious liberty to all faiths,[176] while others aggressively persecuted minority sects.[177]

The critical point is that by the time of the Constitution's ratification, Americans enjoyed an experiment with disestablishment, and a taste of religious freedom, that few of their contemporaries in the Old World had ever experienced.[178]

Another factor heavily influenced the adoption of the First Amendment: the intense religiosity of the Founding generation.[179] According to Michael McConnell's impressive review of the historical record, the commitment to non-establishment and religious liberty enshrined in the First Amendment was not simply a product of Deistic, or Enlightment-era thinking (as is commonly supposed).[180] In fact, many leading intellectual rationalists of the time supported an established state-supported religion as necessary to "promote public morality."[181] Regardless of whether he himself was a "rationalist," the rationalist perspective was encapsulated well by President George Washington in his 1796 Farewell Address: "[O]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . . And let us with caution indulge the supposition that morality can be maintained without religion."[182]

Instead, non-establishment and religious liberty was championed vociferously by the "most intense religious sects" of the time—sects that also suffered from minority status.[183] They saw non-establishment as essential to health of religion

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minorities. T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305, 329 n.107 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (cited in Shelley A. Low, *Europe Threatens the Sovereignty of the Republic of Ireland: Freedom of Information and the Right to Life*, 15 EMORY INT'L L. REV. 175, 186 n.50 (2001)); *International Religious Freedom Report for 2012*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper (last visited Sept. 19, 2013). Indeed, John Locke, "one of the most influential[] advocates of religious freedom," was nevertheless "willing to countenance governmental encouragement of the state religion." McConnell, *supra* note 163, at 1431, 1433.

176. *See* McConnell, *supra* note 175, at 2128.

177. *See* McConnell, *supra* note 163, at 1423–25.

178. *Cf. id.* at 1421.

179. *See id.* at 1437.

180. *See id.*

181. *See id.* at 1441.

182. *Id.* (quoting George Washington, Farewell Address (Sept. 17, 1796), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 169, 173 (Henry Steele Commager ed., 9th ed. 1973)).

183. *See* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 933; McConnell, *supra* note 163, at 1438.

generally, their religions in particular, and necessary to prevent its subordination to the state.[184] This view was well captured by James Madison, who declared:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour [sic] of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[185]

Although some Rationalists and Deists took the opposite perspective, many joined with the religiously fervent in support of Madison's robust approach to religious liberty.[186] Thomas Jefferson, for example, favored a vigorous Free Exercise Clause coupled with a vigorous Establishment Clause.[187]

Thus, in the debate over religious freedom, both sides joined issue on the question of religion's profound importance to society.[188] The bold separation of church and state contained in the American Constitution was not spurred by a belief in religion's unimportance but rather driven by an acknowledgment of its unique importance.[189] As McConnell explains, in the debate over religious liberty, each side granted the importance of religion, but followed this premise to different conclusions:

> The paradox of the religious freedom debates of the late eighteenth century is that one side employed essentially secular arguments based on the needs of civil society for the support of religion, while the other side employed essentially religious arguments based on the primacy of duties to God over duties to the state in support of disestablishment and free exercise.[190]

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184. *See* McConnell, *supra* note 163, at 1438.

185. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *available at* http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html.

186. *See* Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIGION 338, 351–53 (2012).

187. *See* John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499, 501 (2004).

188. *See* McConnell, *supra* note 163, at 1442–43; Movsesian, *supra* note 186, at 351.

189. See Movsesian, *supra* note 186, at 351.

190. *See* McConnell, *supra* note 163, at 1442.

We know, of course, which side prevailed, as the United States lacks an established faith, and its Constitution protects religious liberty. Further examination of this victory, however, reveals an interesting nuance.

The Lockean ideal of religious freedom, which weighed heavily in the minds of the Framers, was predicated upon "tolerance."[191] For the peace of society, "sweeping toleration toward religious dissenters" was the best policy according to Locke.[192] Not surprisingly, therefore, early drafts of state constitutions, such as Virginia's, contained clauses proclaiming religious "tolerance."[193] These approaches were, however, soundly rejected.[194] As McConnell put it, "The United States, several millions of dissenters and a century of pluralism ahead of Locke's England, had advanced beyond mere toleration of religion."[195]

"Tolerance," as James Madison and others pointed out, implies "an act of legislative grace."[196] As per the American Declaration of Independence, rights as fundamental as religious liberty are not granted by the State but rather are something with which each individual is "endowed by their Creator;" constitutions and bills of rights merely give recognition to this fact.[197] As Thomas Paine remarked: "Toleration is not the *opposite* of intoleration, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it."[198]

Thus, in place of language establishing religious "tolerance," Virginia's influential constitution was ultimately drafted to guarantee "the full and free exercise of [religion]."[199] This language, in large part, carried over into the U.S. Constitution.[200] As Douglas Laycock eloquently explains:

> The religion clauses represent both a legal guarantee of religious liberty and a political commitment to religious liberty. The religion clauses made America a beacon of hope for religious minorities throughout the world. The extent of

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191. *See id*. at 1430–31.

192. *Id.* at 1432 (elaborating that Locke did not propose extending this toleration to Catholics or atheists, neither of which he believed could be trusted for different reasons).

193. *See id.* at 1443.

194. *See id.*

195. *Id.* at 1444.

196. *Id.* at 1443–44.

197. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

198. THOMAS PAINE, *The Rights of Man* (pt. 1), *in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243, 291 (Philip S. Foner ed., 1945).

199. McConnell, *supra* note 163, at 1443 (internal quotation marks omitted).

200. *See supra* text accompanying note 167 (quoting U.S. CONST. amend. I).

religious pluralism in this country, and of legal and political protections for religious minorities, is probably unsurpassed in human experience. Religious liberty is one of America's great contributions to civilization.[201]

This foray into the historical backdrop of the Free Exercise Clause is helpful because it sheds light on many issues that are today contested.[202] Some, it would seem, read the Free Exercise Clause as little more than the protection of individual conscience, or, at most, something essentially equivalent to freedom of belief.[203] Others, however, assert that this is not what the Founders intended.[204] As Noah Feldman has concluded, "the Free Exercise Clause gave special protection to religious activity, greater than the protection available to nonreligious conduct."[205]

Feldman's assessment contains two critically important elements germane to this Article's inquiry. The first is that, in the American constitutional ordering, religion is *sui generis*.[206] Although other constitutional rights (such as freedom of speech) might appear similar or analogous, it would be a mistake to conflate them.

Even more telling is the recognition that the Free Exercise Clause protects not merely religious thought or belief but rather "religious activity."[207] Anemic indeed would be a version of religious liberty restricted merely to religious thought and belief. Even Elizabethan England, with its legendarily cruel and severe persecution of Catholics and non-Anglican dissenters, arguably permitted as much.[208] The same can be said of ancient Rome: "The faithful were seldom persecuted in Rome for *believing* in Christianity,—they suffered oftenest for *acting* it."[209]

Thus, any genuine theory of religious liberty—and thus any understanding consistent with the intent of the Constitution's

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201. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 222.

202. A discussion of the modern judicial interpretation of the Free Exercise Clause is set forth in Part IV.B *infra*.

203. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314, 316 (1996); Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1, 2, 7 (2008).

204. *See* Laycock, *supra* note 203, at 337 (explaining that "exercise" in the Founders' time meant activity or practice, not merely belief or speech).

205. FELDMAN, *supra* note 70, at 206. This position is not without its detractors, who challenge it on both normative and descriptive grounds. *See* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 60–61 & n.16 (2006).

206. *See* U.S. CONST. amend. I; FELDMAN, *supra* note 70, at 10–11 (characterizing the Establishment and Free Exercise Clauses as an "experiment").

207. *See* Laycock, *supra* note 203, at 337.

208. *See* McConnell, *supra* note 175, at 2160.

209. JOHN P. DAVIS, CORPORATIONS 36 (1905).

framers—must extend not merely to religious thought, but to religiously inspired conduct as well. In a moment, we shall examine the difficulty that the courts have had in identifying the contours of religious freedom under the Free Exercise Clause.[210] Before doing so, however, let us first consider the range of conduct that one might sensibly expect to be protected.

Distinguishing conduct that is religiously inspired from that which is not religiously inspired can be a daunting task, especially because "religion permeates the life of devout individuals and influences so many of their decisions."[211] One approach to this problem would be to equate religious conduct to little more than worship.[212] Thus, aside from worship at one's temple, church, mosque, or home, religious individuals and institutions have scarcely cognizable religious liberty rights before the federal government.[213]

Just as it can be difficult to distinguish conduct that is religiously inspired from that which might not be, it likewise can be difficult to distinguish religiously inspired conduct that amounts to "worship" from religiously inspired conduct that does not amount to "worship." Indeed, as Laycock points out, "[I]t is illusory to distinguish the right to worship from the right to engage in other religious practices."[214] Many if not most religions circumscribe a code of behavior that is completely integrated into

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210. *See infra* Part IV.B.1.

211. *See* Brownstein, *supra* note 205, at 69.

212. Based upon its litigation strategy and policy proposals, this would appear to be the perspective of the Executive Branch under President Obama. *See* O. Carter Snead, *Obama's Freedom Deficit*, FIRST THINGS, Mar. 2012, at 24.

213. *See id.* at 25. A colleague has suggested that this is the view of the Supreme Court as well in light of *Smith*. Emp't Div. v. Smith, 494 U.S. 872 (1990). *Smith* will be discussed at length below. *See infra* text accompanying notes 250–60. In short, the *Smith* Court held that religious practices must yield to laws of general applicability. *See Smith*, 494 U.S. at 890. This might seem the equivalent of arguing that religious liberty protects little more than freedom of belief and worship, and does not extend to religiously inspired conduct in general. There is an important difference, however, in the Court's holding and the federal government's position. The Court explicitly acknowledged the appropriateness of promulgating exemptions from generally applicable laws in order to protect religious adherents. *See id.* The Court identified such exemptions, crafted via the political process, as a part of our nation's religious liberty protections. *Id.* The Court did not take a position on whether such exemptions should or should not be promulgated but remained neutral on that political question. *See id.* The government, however, has taken a position on this question, one which generally rules out the accommodation of religious practices that conflict with its laws and policies. *See* Snead, *supra* note 212, at 24 (discussing President Obama's narrower interpretation of religious liberty in light of certain policies). I posit that there is a difference between the Court's opinion of religious exemptions (which is one of neutrality) and the government's (which is one of general denial).

214. *See* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 427 (2011).

their system of beliefs—a code of behavior that could be considered an extension of their "worship."[215] Temple services most obviously constitute worship, but what about grace before meals? What about sacrificial dietary restrictions, or manners of dress? Could not these, too, be considered acts of worship, defined by the dictionary as "reverent honor and homage paid to God"?[216]

This gives rise to another approach to "free exercise," one that covers not simply conduct that constitutes "worship" per se but rather one that covers a much broader range of activity. The broader approach comports better with both the American understanding at the time of the Constitution's adoption, and with the understanding of the modern, developed world insofar as is was accurately captured by the 1948 United Nation's Universal Declaration of Human Rights.[217]

Regarding the American experience, the phrase "free exercise of religion" was generally understood at the time of its incorporation into the Bill of Rights to encompass more than simply religious "worship."[218] It was understood to extend to essentially any religiously grounded conduct that was dictated by conscious and conviction.[219] As John Witte explained:

> Though eighteenth century writers, or dictionaries, offered no universal definition of "free exercise," the phrase generally connoted various forms of free public religious action—religious speech, religious worship, religious

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215. *See* ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 78 (1979) (explaining that the commandments of Judaism "penetrate every nook and cranny of a person's existence, hallowing even the lowliest acts and elevating them to a service to God . . . the multitude of laws governing even such mundane acts as eating, drinking, dressing and business, sanctify every facet of life, and constantly remind one of his responsibilities toward God") (quoted in Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339, 1352 n.85 (2003)).

216. WEBSTER'S ENCYLCOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1646 (1989). *But see* Brownstein, *supra* note 205, at 138 ("Location can also be taken into account in developing doctrine to protect the free exercise of religion.").

217. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

218. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1996).

219. McConnell, *supra* note 163, at 1452. Of course, this general opinion was not shared by everybody; most notably embracing a more restrictive view was Thomas Jefferson. *Id.* at 1450–52. Indeed, Jefferson "espoused a strict distinction between belief . . . and conduct," and apparently would have preferred no protection for religious conduct that conflicted with generally applicable secular law. *Id.* at 1451. According to McConnell, however, Jefferson's position was "extraordinarily restrictive for his day," and his compatriot James Madison, whose views more closely aligned with those of most Americans of the time, prevailed in the drafting of the First Amendment. *Id.* at 1452, 1455.

> assembly, religious publication, religious education, among others. Free exercise of religion also embraced the right of the individual to join with like-minded believers in religious societies, which religious societies were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual.[220]

The Universal Declaration of Human Rights, adopted in 1948, hews to this eighteenth century understanding of religious liberty, defining freedom of religion as a person's freedom "either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[221]

It is important to observe, also, the associational dimension of religious liberty. To a number of commentators and courts religion is a wholly private matter.[222] Indeed, this would be in general keeping with American's general Protestant religious tradition, which had an approach to religion that could be more or less summarized by Thomas Jefferson's remark that "religion is a matter which lies solely between a man and his God."[223] To others, however, religion "connotes a community of believers,"[224] and as such includes an important communal dimension.[225] Indeed, "[m]ost religions cannot be exercised in a proper manner if the believers are deprived of the possibility to act collectively."[226] It can be fairly said, therefore, that for most religions, "individual freedom of religion cannot be guaranteed unless there is a collateral guarantee for the freedom to found

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220. Witte, *supra* note 218, at 395 (footnote omitted).

221. Universal Declaration of Human Rights, *supra* note 217, at 74.

222. *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 485 (1991) ("For many Justices, the only constitutionally cognizable religious experiences were those that implicated the solitary individual."); Michael Newsom, *Pan-Protestantism and Proselytizing: Minority Religions in a Protestant Empire*, 15 WIDENER L. REV. 1, 21–22 (2009).

223. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 34 (2010); *see also* Newsom, *supra* note 222, at 21 ("The fundamental affirmative principle of Protestantism is private judgment.").

224. McConnell, *supra* note 163, at 1490. Indeed, an original (and rejected) draft of the First Amendment explicitly referred to freedom of "conscience," in place of "exercise." *See* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 381 (2012).

225. *See* Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CALIF. L. REV. 367, 392 (2005); McConnell, *supra* note 163, at 1490.

226. Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575, 2578 (2009) (internal quotation marks omitted).

and to operate a church or other religious community."[227] Although addressing conscience, the following insights from Robert Vischer's *Conscience and the Common Good* are fully applicable to religion: "[A] strictly individualized conception of conscience will obfuscate the need for society to defend the myriad relationships that are integral to conscience's full flourishing."[228]

In short, a vision of religious liberty that fails to protect religiously inspired collaborative and associational conduct would be quite a parsimonious one. Under such a vision, few religious individuals would be able to live out their lives in a manner satisfactorily consistent with their beliefs and obligations.[229] For most religious individuals, this associational activity will take place within a particular parish or congregation.[230] For some, it will extend to charitable organizations and perhaps to faith-based clubs and interest groups.[231] For still others, it might even extend to one's choice of associates in the world of commerce and chosen place of employment.[232] Thus, failure to recognize the religious liberty rights of religious entities, including religious corporations, amounts to a restriction on the religious liberty of individuals as well. Depriving corporations of religious liberty simultaneously deprives individuals of the right to freely exercise their religion by means of a for-profit, corporate undertaking. It relegates their career choices to the non-profit world and restricts the opportunities they might otherwise have to invest in and patronize establishments that are wholly consistent with their most deeply-held principles and beliefs.

Finally, and critically, it should be noted that one need not be religious, or have a particularly favorable view of religion, in order to grasp the wisdom of a robust conceptualization of religious liberty. "Religious liberty does not view religion as a

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227. *Id.* (internal quotation marks omitted); *see also* Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, *in* CHRISTIANITY AND HUMAN RIGHTS 267, 269–70 (John Witte, Jr. & Frank S. Alexander eds., 2010).

228. VISCHER, *supra* note 223, at 15.

229. *But see* James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of* Smith, 17 N. ILL. U. L. REV. 1, 15 (1996) (suggesting propriety of individuals over organizations with respect to Free Exercise rights).

230. *See* Donald R. Ploch & Donald W. Hastings, *Some Church; Some Don't*, 34 J. SCI. STUDY RELIGION 507, 509 (1995); *see also* Frank Newport, *In U.S., 77% Identify as Christian*, GALLUP (Dec. 24, 2012), http://www.gallup.com/poll/159548/identify-christian.aspx (demonstrating that significant percentages of religious Americans attend religious services monthly or more often).

231. *See Faith and Community*, RELIGION & COMMUNITY (POLIS CTR.), Spring 1996, at 1, 3.

232. *See id.*

good thing to be promoted, nor as a dangerous force to be contained."[233] Regardless of one's thoughts about religion, it is sensible for society to afford generous protections to religiously motivated behavior "because attempts to suppress religious behavior will lead to all the problems of conflict and suffering that religious liberty is designed to avoid . . . because religious behavior is as likely as religious belief to be of extraordinary importance to individuals."[234] As Laycock points out, "beliefs about religion are often . . . important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for."[235] Freedom to "adopt religious beliefs and engage in religious practices . . . is one vital aspect of personal autonomy."[236] Common sense dictates that such suffering and conflict be avoided if at all reasonably possible. Thus, for purely secular reasons having to do with the maintenance of public order and peace, it would seem sensible to protect religious conduct from encroachment or prohibition to the broadest extent reasonably possible.[237]

James Madison offered another argument in support of religious liberty, one that is noteworthy for both its practicality and brutal honesty. In *The Federalist No. 51*, Madison explained that the security of rights, both religious and civil, depends on the "multiplicity" of interests and sects.[238] A robust approach to religious liberty is self-perpetuating, as it promotes a "multiplicity of sects" that inhibits the rise of a potentially rights-destructive hegemony.[239] Paradoxically, therefore, the more a society is marked by a vibrant religious pluralism, the less likely it is that government and public policy will be dictated by any one particular religious perspective. In more ways than one, therefore, freedom *of* religion contributes to freedom *from* religion.[240]

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233. Laycock, *supra* note 203, at 314.

234. *Id.* at 319.

235. *Id.* at 317.

236. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 3 (2006).

237. *But see* Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1778 (2011) (questioning whether the "secular case for religious liberty" provides an adequate justification for it).

238. Andrew A. Beerworth, Comment, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 386–87 (2004).

239. *Id.*

240. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–98 (1992).

B. Free Exercise Clause Jurisprudence and RFRA

Although common sense, and understandings both modern and traditional, suggests that religious liberty ought to extend beyond belief to religiously motivated conduct as well, how far it ought to extend and how to implement such a regime of religious liberty are different (and difficult) questions. Even if we may all agree on what constitutes religiously motivated conduct, and even if we may all agree that such conduct ought generally to be protected from governmental encroachment, certain limits must inevitably apply. For there are limits to every freedom enumerated in the Bill of Rights, as such is necessary for an orderly society.[241] Even the fiercest defender of religious freedom is unlikely to support its application to protect, for example, the practice of human sacrifice so central to the Aztec religion.[242]

1. Religious Liberty Under the Free Exercise Clause. There is universal agreement among scholars and commentators that the Free Exercise Clause absolutely prohibits the government from interfering with an individual's religious beliefs.[243] Indeed, this proposition is buttressed by the Establishment Clause, which prohibits the federal government from demanding citizen support of some official state religion, be that via tax dollars or otherwise.[244] Belief, per se, is inviolable.

With regard to conduct, one approach to religious liberty would be to protect against the regulation or circumscription of conduct targeted specifically because of its religious motivation.

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241. *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1747, 1764 (2009).

242. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 66 (2007) ("The Aztec priests, often wearing flayed human skins, skillfully cut out the hearts of living victims. Their favorite victims were children, whose tears were supposed to be a special source of pleasure to the Aztec gods. The dead bodies were then eaten by the Aztec upper class, which used cannibalism as their major source of protein."); Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the "Creative Destruction" of Public Space*, 87 N.C. L. REV. 673, 693–94 (2009); *see also* Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

243. *See* FELDMAN, *supra* note 70, at 20; *see also* Glendon & Yanes, *supra* note 222, at 495 (discussing the Supreme Court's focus on "protecting the religious liberty *of the individual*"); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 792 (1993).

244. *See* Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) ("[Characterization of prayer as a favored practice] is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . ."); *see also* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 400 (2012).

This would address prohibitions not on headwear in general, for example, but on headwear worn for religious reasons, such as a yarmulke, headscarf, or mantilla. All generally agree that this is prohibited by the Free Exercise Clause.[245] Perhaps this is the standard that those who substitute the phrase "freedom of worship" for "freedom of religion" have in mind.[246] What this means in practice is that for such a law to pass constitutional muster, the government would need to demonstrate that it is "justified by a compelling [government] interest and is narrowly tailored to advance that interest."[247] Thus, legislation could simultaneously allow an individual's heart to be removed for the purpose of transplantation, but not for the purpose of some religious ritual. Although such a law was aimed at prohibiting a specifically religious practice, it would readily find justification under even the heightened compelling government interest standard.[248]

The next potential approach adds a discretionary twist to the preceding: the Free Exercise Clause protects the beliefs and conduct already identified, but also permits Congress and the states, in their discretion, to promulgate exemptions to generally applicable law for religious individuals and groups—otherwise known as "religious accommodations."[249] Such is essentially the standard embraced by the U.S. Supreme Court in its 1990 decision *Employment Division v. Smith*.[250] Absent such a legislative act, an individual is not relieved of his or her obligation to follow a generally applicable law.[251] Quoting approvingly from precedent, the Court in *Smith* held:

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[252]

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245. This is essentially the holding of *Smith*, and all nine Justices agreed that the Free Exercise Clause protects at least this. *See* Emp't Div. v. Smith, 494 U.S. 872, 877–88, 890, 903, 909 (1990).

246. *See supra* text accompanying notes 211–13.

247. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

248. *See* Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 235 (1998) (explaining the standard under the Free Exercise Clause as set forth in *Smith*).

249. *See id.* at 236.

250. *See Smith*, 494 U.S. at 888, 890.

251. *See id.* at 878–79.

252. *Id.* at 879 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940); Reynolds v. United States, 98 U.S. 145, 167 (1879)).

When such generally applicable laws are challenged by a Free Exercise claimant, and if no legislative accommodation has been granted, the standard by which they are assessed is the lenient "rational basis" standard: the law "need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."[253]

According to many commentators, the *Smith* decision reversed the historical standard under which the Free Exercise Clause had been interpreted.[254] Pursuant to that earlier standard, even a law of general applicability could be challenged by those whose religiously motivated conduct was abridged by it.[255] This would represent the most generous and robust reading of the Free Exercise Clause (and the final standard for our consideration). [256] As the dissenters in *Smith* explained:

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.[257]

Under this approach, the First Amendment protects all religiously motivated conduct—whether such conduct was targeted for circumscription because of its religious motivations or not.[258] Any law that infringes on such conduct would need to satisfy the compelling government interest/least restrictive means test.[259] Much ink has been spilled over whether this test is

253. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006). It should be noted that under existing precedent, a law that would otherwise appear to be "generally applicable" loses that designation if it contains a "system of individual exemptions" attached to it. *Id.* at 650. In such a case, the law "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

254. *See, e.g.*, Brownstein, *supra* note 205, at 68–69; Glendon & Yanes, *supra* note 222, at 521–22.

255. *Smith*, 494 U.S. at 907 (Blackmun, J. dissenting).

256. McConnell, *supra* note 163, at 1410, 1512.

257. *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting).

258. *Id.* at 907–08, 911, 921 (Blackmun, J., dissenting) (arguing that the peyote prohibition would not withstand scrutiny under the historical standard even though the State did not specifically target religious users of the substance); *see also* McConnell, *supra* note 163, at 1515–16. *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–48 (1992) (disputing the claim that the framers intended the Free Exercise Clause to cover exemptions).

259. *See* Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 43–44 (1998) (discussing Justice Blackmun's use of the test in *Smith*). The only exception would be for religious conduct and practices

the appropriate one, but such is beyond the scope of this Article.[260] What must be discussed, however, is the congressional reaction to the *Smith* decision.

2. The Religious Freedom Restoration Act. Within three years of the *Smith* decision, Congress attempted its overturn via the Religious Freedom Restoration Act (RFRA).[261] The Act's stated findings recount much of what has been previously discussed:

> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[262]

The Act declared that its purpose was to restore the "pre-*Smith*" case law standard for adjudicating Free Exercise claims and set forth its understanding of that standard in the Act's operative section, which reads in its entirety as follows:

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that disturbed the public peace or safety, see McConnell, *supra* note 163, at 1462, 1466, although these would most likely pass muster under the compelling government interest test in any event.

260. *See* 1 GREENAWALT, *supra* note 236, at 15–25 (surveying the arguments regarding mandatory exemptions and concluding that the "evidence about any original understanding about compelled exemptions is . . . indecisive"); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 351 (2010). My own reading of the literature suggests that the question of original intent is a difficult one to resolve, and I agree with the assessment that precedent before *Smith* was "unprincipled, incoherent, and unworkable." *See* Glendon & Yanes, *supra* note 222, at 477–78. As such, I believe *Smith* to be a very important, but not necessarily revolutionary, decision.

261. *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1161 (2009).

262. 42 U.S.C. § 2000bb(a) (2006) (emphasis added).

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.[263]

RFRA was endorsed by a broad array of public advocacy groups, from the American Civil Liberties Union (ACLU) on the left to religious groups on the right.[264] In prescient remarks, Nadine Strossen, president of the ACLU, remarked that "[i]n the aftermath of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws."[265] She declared that "[a]t risk were such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services . . . ."[266] Not surprisingly, RFRA passed Congress with overwhelming bipartisan support and was signed into law by President Clinton.[267]

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263. *Id.* § 2000bb-1(a)–(c).

264. *See* Thomas D. Dillard, *The RFRA: Two Years Later and Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435, 435 (1996).

265. *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 80–81 (1992) (statement of Nadine Strossen, President, American Civil Liberties Union, and Robert S. Peck, Legislative Counsel, American Civil Liberties Union); *see also* Kevin C. Walsh, *ACLU's President on Forced Provision of "Contraception Services" Over Religious Objections–Circa 1992*, WALSHSLAW (July 13, 2012), http://walshslaw.wordpress.com/2012/07/13/aclus-president-on-forced-provision-of-contraception-services-over-religious-objections-circa-1992/.

266. Walsh, *supra* note 265.

267. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; Dillard, *supra* note 264, at 435.

RFRA was challenged in the courts and upheld as applied to federal legislation and regulation but struck down as applied to state action on the theory that it exceeded Congress's powers under the Fourteenth Amendment.[268] This, in turn, spawned the promulgation of "state RFRAs": state-level legislation enacted to secure the Free Exercise protections contained in RFRA for those individuals whose religiously motivated conduct is impaired by state law or regulation.[269]

As a result of *Smith* and its aftermath, the Free Exercise landscape is as follows:

A law challenging religious belief is "never permissible" under the First Amendment.[270]

If a law specifically targets for circumscription a person's religiously motivated conduct, the First Amendment requires that it must be struck down unless it is "justified by a compelling [government] interest and is narrowly tailored to advance that interest."[271]

If a *federal* law of general applicability "substantially burden[s]" a person's religiously motivated conduct, there is no relief afforded under the First Amendment; the law need only be "rationally related to a legitimate governmental interest."[272] However, under RFRA, the government will bear the burden of proving that the law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" in order for it to be upheld.[273]

If a *state* law of general applicability "substantially burden[s]" a person's religiously motivated conduct, there is no relief afforded under the First Amendment; the law need only be "rationally related to a legitimate governmental interest."[274] Nor is there any relief afforded under RFRA. That said, in a state with an analogue of the federal RFRA, such a law would

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268. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (upholding application of RFRA's dictates to the Controlled Substances Act); City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1412 (2012).

269. *See* Lund, *supra* note 164, at 474–77.

270. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

271. *See id.*

272. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006).

273. 42 U.S.C. § 2000bb-1(b) (2006).

274. *Grace United Methodist Church*, 451 F.3d at 649.

be struck down if it fails to comply with the compelling government interest/least restrictive means standard.[275]

Finally, if a state law of general applicability "substantially burden[s]" a person's religiously motivated conduct in a state that has not adopted a its own version of RFRA, then the person's ability to challenge such law will be dependent upon the religious liberty protections contained in his or her state's constitution, if any.[276]

3. Hybrid Claims. Before proceeding, a potentially significant wrinkle in the above regime ought to be mentioned. In order to account for precedent in which claimants were granted an exemption to a law of general applicability under the Free Exercise Clause, the Supreme Court in *Smith* recognized and distinguished certain "hybrid situation[s]."[277] As the Court explained, these situations implicated both the Free Exercise Clause and other constitutional rights:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").[278]

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275. *See* Lund, *supra* note 164, at 474–77.

276. *See id.* at 479. An additional wrinkle that I have not addressed is the effect of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* 42 U.S.C. § 2000cc(a)(2)(C). This Act once again attempts to apply the compelling governmental interest/least restrictive means standard to state action as did RFRA, but within certain limited contexts. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 721–23 (2008).

277. Emp't Div. v. Smith, 494 U.S. 872, 882 (1990).

278. *Id.* at 881–82 (citations omitted). The Court explicitly upheld (as a hybrid rights situation) the special right of parents to resist laws of general applicability when it comes to questions of child-rearing, preserving as good law the precedent of *Wisconsin v. Yoder*. *Id.*; Wisconsin v. Yoder, 406 U.S. 205, 219–20, 234 (1972); *see* B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After* Employment Division v. Smith, 32 CARDOZO L. REV. 1857, 1866–67

This "aside" of hybrid situations is an interesting one, but not something in which courts since *Smith* have shown much interest.[279] Indeed, some have fairly characterized it as mere dicta.[280] Scholars, too, have not lavished much attention on the exception (indeed, most of the commentary hails from student notes).[281] Because the exception may be of relevance to

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(2011). The Court also acknowledged an additional exception to its holding (that a law of general applicability does not yield to a Free Exercise claim) with regard to legislation or regulation that contains within it a set of recognized exceptions. *Smith*, 494 U.S. at 884. In such situations, a Free Exercise claim can be pursued on the grounds that the law's recognized exceptions fails to take into account a potential exception for religious believers who are disproportionately burdened by the law. *Id.* This enabled the Court to uphold its earlier decision in *Sherbert v. Verner*. *Id;* Sherbert v. Verner, 374 U.S. 398, 400–02, 410 (1963); *see also* Hill, *supra*, at 1866 (discussing the Court's decision to maintain *Sherbert* as "good law").

279. William J. Haun, Comment, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. U. L. REV. 265, 266–67 (2011).

280. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006) (citing Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001)).

281. A Westlaw search of articles on the Free Exercise Clause referencing "hybrid" in their title yields only twenty-three articles, many of which are student notes, and only twenty-two of which concern the Free Exercise Clause and Hybrid Rights Exception. *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573 (2003); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77 (2004); Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2008); Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23 (2006); Murad Hussain, *Reweighting the Balance: Religious Groups, Mortal Threats, and "Hybrid Situations"*, 117 YALE L.J. POCKET PART 177 (2008); Ming Hsu Chen, Note, *Two Wrongs Make a Right: Hybrid Claims of Discrimination*, 79 N.Y.U. L. REV. 685 (2004); Bradley L. Davis, Comment, *Compelled Expression of the Religiously Forbidden: Pharmacists, "Duty to Fill" Statutes, and the Hybrid Rights Exception*, 29 U. HAW. L. REV. 97 (2006); William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993); Shawn Gunnarson, Note, *No Constitutional Shelter: The Ninth Circuit's Reading of the Hybrid Claims Doctrine in* American Friends Service Committee Corp. v. Thornburgh, 7 BYU J. PUB. L. 413 (1993); William J. Haun, Comment, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. U. L. REV. 265, 265–66 (2011); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119 (2000); Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209 (2005); Hope Lu, Comment, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE W. RES. L. REV. 257 (2012); James R. Mason, III, Comment, Smith*'s Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995); Eric J. Neal, Note, *The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in* Thomas v. Anchorage Equal Rights Commission, 24 SEATTLE U. L. REV. 169 (2000); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649 (2001); Benjamin I. Siminou, Note,

corporate Free Exercise rights, however, it merits our attention.[282]

The circuits have split over their approach to Free Exercise hybrid rights claims. The Sixth and Second Circuits refuse to recognize hybrid rights claims altogether.[283] The Ninth and Tenth Circuits, along with most other lower courts in general, do recognize hybrid rights claims.[284] Within these circuits, "where a party asserts a 'colorable,' or arguable, hybrid rights claim, then strict scrutiny review applies in evaluating the party's Free Exercise claim."[285] A "colorable" claim is a showing that presents a "fair probability" that (1) religiously motivated conduct and (2) some other fundamental right has been infringed.[286]

Initially, the hybrid rights claim appears entirely redundant: why couple a Free Exercise claim with another alleged rights violation instead of simply litigating the other alleged rights violation? Indeed, the standard as articulated has given rise to a considerable amount of confusion.[287] Adding my voice to the cacophony of perspectives, it appears as though the benefit to the claimant in a hybrid rights situation is as follows: the claimant is relieved of the obligation of having to demonstrate that this other fundamental right has actually been violated. Instead, the claimant can require the government to meet its burden of "strict

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Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in Douglas County v. Anaya, 85 NEB. L. REV. 311 (2006); Peter M. Stein, Note, Smith v. Fair Employment and Housing Commission*: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith*?*, 4 GEO. MASON L. REV. 141 (1995); Kyle Still, Comment, Smith*'s Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385 (2006); Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494 (2010); John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741 (2005).

282. *See* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 213–14 (2005) (providing an example of a circumstance in which an employer could qualify for a hybrid right claim).

283. Leebaert v. Harrington, 332 F.3d 134, 143–44 (2d Cir. 2003); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993); *see also* Graff, *supra* note 281, at 31–32.

284. *See* Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998); Ventura Cnty. Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241, 1251 (C.D. Cal. 2002); Hinrichs v. Whitburn, 772 F. Supp. 423, 432 (W.D. Wis. 1991); *see also* Graff, *supra* note 281, at 32.

285. *See* Graff, *supra* note 281, at 32.

286. *See id.* at 32–34; *see also* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) ("[A] free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated—that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits." (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703, 707 (9th Cir. 1999))).

287. Siminou, *supra* note 281, at 331 n.121.

scrutiny" with regard to the challenged law or regulation by simply *alleging* a "colorable" violation of some other fundamental right (coupled with a demonstration that his or her religiously motivated conduct is being substantially burdened).[288] Of particular relevance to for-profit corporations would be the well-established freedom of expressive association.[289] As will be discussed, some business corporations may qualify as an "expressive association," thereby triggering the strict scrutiny standard under the hybrid-rights exception recognized in *Smith*.[290]

V. THE BUSINESS CORPORATION

Before exploring the question of whether the for-profit business corporation ought to possess Free Exercise rights under the First Amendment to the U.S. Constitution,[291] let us first consider the business corporation itself, and the rights it has been afforded over time.

The concept of the "corporation" is, fundamentally, quite a simple one. It revolves around the understanding that individuals commonly join together into collectives, in pursuit of some shared undertaking.[292] Whether it be a marriage or a club

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288. *See* Aden & Strang, *supra* note 281, at 591–92, 594 n.193, 602 (citing the Supreme Court's holding that a Free Exercise claim, on its own, would not trigger strict scrutiny but combined with the "interests of parenthood" warranted strict scrutiny).

289. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

290. *See infra* text accompanying notes 403–04. That said, few cases have grappled with such a hybrid. *See* Magid & Prenkert, *supra* note 282, at 197–98; *see also* Salvation Army v. Dep't. of Cmty. Affairs, 919 F.2d 183, 200–01 (3d Cir. 1990) (recognizing potential viability of associational-Free Exercise claim); Stevens v. Optimum Health Inst.—San Diego, 810 F. Supp. 2d 1074, 1096 n.2 (S.D. Cal. 2011) (asserting associational-Free Exercise hybrid, but not discussing it at length due to finding that claimants failed to demonstrate religious burden); McCullen v. Coakley, 573 F. Supp. 2d 382, 419 (D. Mass. 2008) (rejecting hybrid rights theory as having "no basis in the Constitution"); United States v. Hsia, 24 F. Supp. 2d 33, 46 (D.D.C. 1998), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999); Kissinger v. Bd. of Trs. of Ohio State Univ.—Coll. of Veterinary Med., 786 F. Supp. 1308, 1314 (S.D. Ohio 1992) (hybrid claim rejected because the court found no connection between claimant's associational freedom and Free Exercise claims); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 453 (Ind. 2001) (recognizing potential of associational-Free Exercise hybrid); S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 721–24 (N.J. 1997) (rejecting hybrid rights claim because court found (1) no associational freedom implicated and (2) no religious relief burdened; court ruled further that the challenged law would survive strict scrutiny in any event); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) (rejecting claimant's particular hybrid rights claim, without opining on its viability generally, on the basis that claimant failed to allege a "colorable" associational freedom claim); Commonwealth. v. Miller, 57 Pa. D. & C.4th 11, 16–17 (2002) (recognizing and applying associational-Free Exercise hybrid).

291. *See infra* Part VI.

292. *See* Gary Alan Fine & Brooke Harrington, *Tiny Publics: Small Groups and Civil Society*, 22 SOC. THEORY 341, 342–43 (2004) (recognizing that American society has been build

or a business or a nation, society has long recognized the separate and distinct nature of collective entities that individuals combine to form.[293] A parent, for example, is seen as both a part of, but distinct from, his or her family. "Corporate law" is, therefore, in many respects, little more than society's way of giving legal recognition and order to this understanding (within certain contexts). Thus, as the corporation's history is recounted in the pages that follow, it would do one well to bear in mind that, at the heart of all complexities of corporate forms and corporate law lie the simple, ordinary phenomenon of the human tendency to form groups and the law's efforts to make sense of these groups.

A. Historical Background of the Corporation

Human beings have come together to form business enterprises from time immemorial.[294] What largely separates the corporate form of business (at least in its modern manifestation) from other business entities are five distinguishing characteristics: (i) limited liability, (ii) free transferability of ownership, (iii) indefinite existence, (iv) separation of ownership from control, and (v) separate entity status.[295] Although a business enterprise need not possess all or even most of these characteristics to be considered a corporation, most corporations in existence today do indeed exhibit all five of them.[296]

As David Skeel has explained, these key characteristics "emerged fitfully over the centuries" with antecedents dating back to ancient Rome.[297] Indeed, Blackstone "attributed the invention of private corporations to . . . Numa Pompilius," the second king of Rome.[298] Other scholars have posited that the corporation first came into existence in ancient Greece.[299] In any

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on the foundation of small groups for centuries); *see also* Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 250 (2008).

293. *See* Fine & Harrington, *supra* note 292, at 342–43.

294. Much of what follows in this Part V.A is built upon, and expands upon, my previous discussion of the corporation's history. *See* Colombo, *supra* note 292, at 250.

295. *See* David A. Skeel, Jr., *Christianity and the Large-Scale Corporation*, *in* CHRISTIANITY AND LAW 311, 313 (John Witte, Jr. & Frank S. Alexander eds., 2008). For an explanation of these characteristics, see *id.* at 313–14.

296. *See id.* at 313.

297. *Id.* at 314.

298. *See* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 25 (2002). Numa Pompilius was the second king of Rome (following Romulus, Rome's first king and founder), reigning from 715 to 673 B.C. 8 THE NEW ENCYCLOPEDIA BRITANNICA 825 (15th ed. 2005).

299. *See* Arner, *supra* note 298, at 25.

event, the "corporations that had developed under the Roman Empire perished in the general ruin of Roman institutions" following the fall of Rome in 476 A.D.[300] What is undeniable is that by the Middle Ages, clear forerunners of the modern business corporation existed in the form of universities and the medieval Church.[301] The Dutch East India Company and the East India Company of the seventeenth and eighteenth centuries furnish two additional well-known forerunners of the modern business corporation.[302] Another well-known corporate forerunner was the "Virginia Company of London" which, in 1607, established the first English settlement on American soil (Jamestown, Virginia), thus introducing the corporation to America over four centuries ago.[303]

Unlike modern corporations, pre-modern corporations "were essentially state chartered monopolies for the pursuit of some interest beneficial to the state."[304] Hence, medieval corporations, and practically all corporations up until the mid-nineteenth century, concerned themselves with undertakings such as education, religion, colonization, foreign trade, bridge-building, hospital maintenance, and other public-oriented activities.[305] Corporations were chartered by the Crown (or, in America, by the state legislature) individually and specifically.[306] To achieve their ends, corporations were granted certain powers and rights.[307] Thus, at the turn of the nineteenth century, corporations were largely conceived of as "an agency of the government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state."[308]

But things changed throughout the nineteenth century. "Incorporation" transitioned from a particularized, case-by-case granting of authority, to a matter of general availability.[309] In other words, any individual, or group of individuals, who complied with certain specified guidelines, was entitled to a corporate charter.[310]

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300. DAVIS, *supra* note 209, at 35.

301. *See* Colombo, *supra* note 292, at 250–51; Skeel, *supra* note 295, at 315.

302. Skeel, *supra* note 295, at 315–16.

303. *See* Colombo, *supra* note 292, at 251.

304. *See* Arner, *supra* note 298, at 26.

305. *See* DAVIS, *supra* note 209, at 145; Arner, *supra* note 298, at 26, 28–29; Colombo, *supra* note 292, at 251–52.

306. *See* Arner, *supra* note 298, at 36–37; Colombo, *supra* note 292, at 252.

307. Colombo, *supra* note 292, at 252.

308. Arner, *supra* note 298, at 46.

309. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 425–26 (2003).

310. *Id.*

This development was fueled, in part, by a desire to escape from the corruption that had seeped into the incorporation process, whereby special favors could be expected in exchange for the special privilege of incorporation.[311] It was also fueled, in part, by a desire to raise revenue through the attraction of business and the collection of filing fees associated with incorporation.[312] The more liberal a state's laws of incorporation were, the more business it could attract and the more filing fee revenue it could generate.[313]

When coupled with the benefit of limited liability, which appeared in England in 1855 and in the United States in the 1930s,[314] the importance of the corporate enterprise was difficult to understate. The advent of the corporation enabled an individual, almost any individual with a good enough idea to raise the capital he or she needed (via the investment of stock purchasers) to put that idea it into action.[315] The shield of limited liability allowed putative stock purchasers to take on just the amount of risk with which they were comfortable.[316] This is what led Nicholas Murray Butler, president of Columbia University, to famously remark in 1911: "In my judgment the limited liability corporation is the greatest single discovery of modern times . . . . Even the steam engine and electricity are far less important than the limited liability corporation and they would be reduced to comparative impotence without it."[317]

At the same time, states were beginning to allow businesses to incorporate for "any lawful business or purpose whatever," and not

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311. *Id.* at 426.

312. Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 537 (2005).

313. *See id.* at 537. *But see* Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 335 (2007) ("The disproportionate number of incorporations in New Jersey in the 1880s does not appear to reflect a deliberate strategy to derive revenue from out-of-state business incorporations, but simply a recognition and accommodation of the fact that many New Jersey businesses also conducted substantial activities in neighboring states.").

314. *See* Avi-Yonah, *supra* note 29, at 789.

315. 1 WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATION § 21, at 42 (1917) ("[T]he modern corporation makes great undertakings feasible since it enables many individuals to co-operate in order to furnish the large amounts of capital necessary to finance the gigantic enterprises of modern times."). It should be noted that even without limited liability, corporations enable "large groups" of people to "conduct enterprises impossible to any member of the group as an individual." *See* George F. Deiser, *The Juristic Person*, 57 U. PA. L. REV. 131, 133 (1908).

316. *See* Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 537–38 (2007).

317. 1 FLETCHER, *supra* note 315, § 21, at 43; *see also* Morrissey, *supra* note 316, at 534–35.

merely a purpose that had an explicitly publicly-oriented thrust.[318] Thus, by the close of the nineteenth century, the modern business corporation "truly came into its own."[319] Not surprisingly, the liberalization of the rules of incorporation was accompanied by a dramatic rise in the number of business corporations.[320] In the United States, there were 335 corporations in 1800; by 1890 there were nearly 500,000.[321]

B. Corporate Personhood

As the corporation evolved over time, so did the law's treatment of it. Of particular relevance here is the concept of "corporate personhood."

At its simplest, to be a "legal person" (or a juristic person) is "to be the subject of rights and duties."[322] Certainly "natural persons" (human beings) are "legal persons."[323] But fictitious persons (*personae fictae*) enjoy, and have historically enjoyed, this treatment as well.[324]

From its earliest days, the corporation has been viewed as one such fictitious person—an entity distinct from its individual, human members and in possession of its own set of rights and duties.[325] Indeed, this is one of the defining characteristics of the corporation—"entity status."[326] This distinguishes the corporation from several other aggregate entities, which do not enjoy legal personhood.[327]

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318. Yablon, *supra* note 313, at 334 (internal quotation marks omitted).

319. Skeel, *supra* note 295, at 316.

320. *See id.* at 317.

321. *See id.* I also surmise that this transition was furthered by Adam Smith's publication of *The Wealth of Nations* in 1776. Despite the fact that Smith "was not fond of the idea of large companies," Arner, *supra* note 298, at 38, his basic premise, that the pursuit of their own private interest by individuals and entities redounds to the common good, would seem to provide a theoretical justification for permitting business to incorporate generally, and for "any lawful business or purpose whatever." *See also* DAVIS, *supra* note 209, at 29 ("The unprecedented growth of private corporations since 1830" appears related to the "justification for their existence in the general opinion that public welfare is materially promoted by the more facile exercise in corporate form of social functions whose exercise is prompted by the pursuit of private interest."); Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL'Y 203, 215 (2000).

322. Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283, 291 (1928).

323. *See* P. W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW 1 (1938) (holding this proposition true at least in all "civilised [sic] countries").

324. *See* Deiser, *supra* note 315, at 135–36.

325. *See* DUFF, *supra* note 323, at 1–2; Avi-Yonah, *supra* note 29, at 791.

326. *See* Skeel, *supra* note 295, at 313.

327. Without more, a "law school faculty," for example, does not enjoy entity status—it cannot sue or be sued in its own name. *See* W.W. BUCKLAND & PETER STEIN, A TEXT-BOOK OF ROMAN LAW 174 (1963).

But in many respects, whether an entity enjoys "legal personhood" is merely the beginning, and not the end, of the analysis,[328] for the list of potential rights, and potential duties, is a long one and not all legal persons share in them equally.[329]

The first important statement on the strength of corporate personhood in the United States was provided in 1819 by the Supreme Court in *Trustees of Dartmouth College v. Woodward*.[330] Although operating within the framework of nineteenth-century concession theory,[331] the Court nevertheless recognized that corporations have certain rights vis-à-vis the state, such as the right to have the state honor its contracts with the corporation (of which the corporate charter is a form).[332]

The concept of corporate personhood took a dramatic leap forward with the 1886 Supreme Court case *Santa Clara County v. South Pacific Railroad Co.*[333] In *Santa Clara* the Court opined that parts of the Fourteenth Amendment to the U.S. Constitution (adopted in 1868) were applicable to business corporations.[334] More specifically, the Court declared that the Amendment's language prohibiting a state from denying to "any person within its jurisdiction the equal protection of the laws"[335] applied to corporations because corporations were "persons" within the meaning of this text.[336]

As would be expected, *Santa Clara* opened the floodgates to increased recognition of corporate rights. Ever since the *Santa Clara* decision, corporations have enjoyed a growing list of constitutionally protected rights.[337] To date, this development has

328. *Cf.* Smith, *supra* note 322, at 284.

329. *See* Note, *What We Talk About When We Talk About Persons*, 114 HARV. L. REV. 1745, 1746–47, 1749–55 (2001).

330. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); *see also* Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1147–48 (2012) (discussing the historical significance of *Dartmouth College*).

331. Chief Justice Marshall captured the concessionary view of the corporation well and famously in his opinion: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Dartmouth Coll.*, 17 U.S. (4 Wheat.), at 636.

332. *See* Note, *Extent of Reserved Power to Amend the Charter of a Charitable Corporation*, 40 HARV. L. REV. 891, 891–94 (1927). For a novel interpretation of *Dartmouth College*, see Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 206–16 (2006).

333. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

334. *Id.*

335. U.S. CONST. amend. XIV, § 1; *Santa Clara*, 118 U.S. at 395.

336. *Santa Clara*, 118 U.S. at 396.

337. Graver, *supra* note 2, at 236, 238.

culminated in the recognition of corporate free speech rights equivalent to that of a natural person, as established by the Supreme Court in its 2010 decision, *Citizens United v. F.E.C.*[338] In *Citizens United*, the Court ruled that the First Amendment's prohibition on congressional abridgment of free speech applied with full force to corporate political speech.[339]

C. The Corporation as an Association

An anticipated objection to the possibility of corporate Free Exercise standing will focus on the concept of corporate "religious beliefs." This is because at the heart of any Free Exercise claim is the assertion of a substantially burdened religious belief, which finds its expression in action or conduct that has somehow been stymied by the state.[340] Indeed, over 200 years ago it was famously said that a corporation lacks, among other things, a "soul[] to damn."[341] But both our jurisprudence and political philosophy each suggest that a business corporation can possess cognizable religious "beliefs."[342] This can be justified if we are able to view the religious corporation as an "association."

By "association" I mean a genuine community of individuals—investors, owners, officers, employees, and customers—coming together around a common vision or shared set of goals, values, or beliefs.[343] For some, that vision and those values might center on the environment,[344] or an aversion to

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338. Citizens United v. F.E.C., 558 U.S. 310, 343, 362 (2010).

339. *See id.* at 343, 361–62.

340. *See* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 107 (2008).

341. "This observation was made by Edward Thurlow, Lord Chancellor of England, 1778–1792 and quoted by Terence Powderly in an article that appeared in the Southland Times on September 3, 1888." Johnson, *supra* note 330, at 1141 n.21. More recently, the U.S. Supreme Court held that corporations do not enjoy the "personal privacy" rights protected by the Freedom of Information Act, but a close reading of the Court's opinion reveals that this was based more upon statutory interpretation than upon a theory of the corporation. F.C.C. v. AT&T Inc., 131 S. Ct. 1177, 1181–85 (2011).

342. *See* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116–17 (D.D.C. 2012) (observing that five corporate entities all "share the same religious beliefs"); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (questioning whether corporations can possess religious beliefs); *see also supra* note 97 and accompanying text (detailing the rise of the "religiously expressive corporation").

343. *See supra* text accompanying notes 127–33 (noting that because corporations are composed of individuals, some of whom are religious, religiously expressive corporations might be the reflection of their founders).

344. *See, e.g.*, *Our Commitment to the Environment*, BURT'S BEES, http://www.burtsbees.com/c/root-commitment-to-environment.html (last visited Sept. 19, 2013).

animal testing and cruelty.[345] For others, however, the common core might be religious in nature.

The importance of associations to our nation is difficult to underestimate. Recent scholarship, notably Francis Fukuyama's *Trust: The Social Virtues and the Creation of Prosperity*[346] and Robert D. Putnam's *Bowling Alone: The Collapse and Revival of American Community*[347] vividly highlight the indispensability of communities and associations to any healthy society. This largely confirms the nineteenth-century observations of Alexis de Tocqueville, who chronicled the ubiquity of associations in the United States, extolling the virtues they inculcate and the irreplaceable role they play in our democratic republic.[348] In short, the very health of our civilization appears closely linked to the health of our associations.[349] Thus, to the extent that an entity can be considered an association, even if that entity happens to be a business corporation, it ought to be fully entitled to the protections of the Free Exercise Clause of the First Amendment.[350]

As a general matter, associations have ordinarily found protection under the Free Exercise Clause. Churches, schools, and countless non-profit organizations have regularly asserted religious liberty rights before the U.S. Supreme Court, and their standing to do so has not been seriously challenged.[351]

So the question before us must be narrowed: is there something special about the business corporation that precludes it from possessing values and beliefs, thereby disqualifying them from associational status? Corporations certainly behave as though they can possess values and beliefs, as they have increasingly and explicitly embraced statements of values, missions, principles, and beliefs.[352] Indeed, these statements are

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345. *See, e.g.*, *Against Animal Testing*, THEBODYSHOP, http://www.thebodyshop-usa.com/values-campaigns/against-animal-testing.aspx (last visited Sept. 19, 2013).

346. *See generally* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 4–5 (1995).

347. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000).

348. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

349. *See* Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 41–42 (2012).

350. I have made this argument previously, with respect to freedom of speech rights. *See id.* at 29, 35.

351. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 699–702 (2012); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 533–34 (1993).

352. *See* Jay Gronlund, *How Employer Branding Can Foster Trust and Loyalty*, INT'L HR J., Spring 2003, at 26. For a small sampling of such statements, see *Ben & Jerry's*

commonly called "*credos*"—Latin for "I believe."[353] Many commentators, however, remain unconvinced.[354]

The Supreme Court provides a good starting point for our analysis of this question, particularly given its "freedom of association" jurisprudence.[355] With this jurisprudence, the Court has recognized the importance of associations and the importance of extending constitutional protections to associations.[356] As Justice Brennan, writing for the Court in *Roberts v. United States Jaycees*, remarked, the Constitution protects "collective effort on behalf of shared goals" in order to "preserve 'political and culture diversity'" and to protect "dissident expression from suppression by the majority."[357] In its 2000 decision *Boy Scouts of America v. Dale*, the Court reiterated the importance of associational rights, remarking that they are "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[358]

Significantly, the Court also explained that the First Amendment's protections are "not reserved for advocacy groups."[359] This would seem to open the door for recognizing that business corporations (along with other entities) may engage in

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Mission Statement, BEN & JERRY'S, http://www.benjerry.com/activism/mission-statement (last visited Sept. 19, 2013) ("We have a progressive, nonpartisan social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our day-to-day business activities. Our focus is on children and families, the environment and sustainable agriculture on family farms."). *See also Beliefs*, LIMITEDBRANDS, http://www.limitedbrands.com/our_company/about_us/beliefs.aspx (last visited Sept. 19, 2013) ("At Limited Brands, we are guided in our work and our interactions with others by four core principles—our values. These are the same beliefs that have made us successful since our start in 1963."); *Our Core Values*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/company/corevalues.php (last visited Sept. 19, 2013); *Our Principles*, SC JOHNSON, http://www.scjohnson.com/en/company/principles.aspx (last visited Sept. 19, 2013) ("This We Believe explains SC Johnson's values in relation to the five groups of stakeholders to whom we are responsible and whose trust we have to earn . . . .").

353. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 170 (2005); Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 103 n.77 (2009); *see also "Credo"*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=credo (last visited Sept. 19, 2013).

354. *See infra* notes 383–87 and accompanying text.

355. *See* 1 GREENAWALT, *supra* note 236, at 387–95.

356. *See* Erica Goldberg, *Amending* Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129, 133–34 (2011).

357. 1 GREENAWALT, *supra* note 236, at 387–88 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

358. Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000).

359. *Id.* at 648.

protected First Amendment activity despite the fact that they may have been organized for other purposes as well.

That said, a critical factor for recognition as a constitutionally protected association is that the group in question be found to be "expressive."[360] "[T]o come within [the First Amendment's] ambit, a group must engage in some form of expression, whether it be public or private."[361] From this, the Supreme Court has identified and recognized two kinds of associations: "intimate" and "expressive."[362]

The "intimate association" concerns close interpersonal relations, such as those within a family.[363] This is not the kind of association that a business corporation could potentially qualify as, and no further discussion of it is necessary here.[364]

The "expressive association" is characterized by individuals banding together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[365] "The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[366] This is a category for which some business corporations could qualify.[367]

Complicating matters, however, is the ambiguous dividing line between an association that qualifies as "expressive" and one that does not.[368] Indeed, Richard Epstein has persuasively argued that any such divide "cannot be defended on either political theory or constitutional law grounds."[369] Among other

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360. *Id.*

361. *Id.*

362. *Id.* at 646.

363. Roberts v. United States Jaycees, 468 U.S. 609, 618–20 (1984).

364. *Id.* at 620.

365. *Id.* at 618; *see also* Goldberg, *supra* note 356, at 133–34.

366. *Roberts*, 468 U.S. at 618.

367. *See* Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1487 & n.22 (2001).

368. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 176 (2010).

369. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139 (2000) (quoted in Farber, *supra* note 367, at 1498). Epstein also remarked that "[o]nly the bold and foolhardy would claim that current law allows business associations . . . out from under the thumb of the antidiscrimination laws." *Id.* Those remarks strike uncomfortably close to home, and as such prompt a response here. I am certainly not arguing that *all* business associations would be entitled to bring Free Exercise claims, and I am not at all addressing the ultimate merits of such claims if brought against anti-discrimination laws. I am, instead, making the more modest argument that *some* business corporations ought to have standing to bring Free Exercise claims, without passing judgment on how those claims would be resolved.

deficiencies, this dichotomy fails to recognize that every association has expressive potential.[370]

Nevertheless, if we proceed as best we can under the *Roberts* dichotomy, we would put to one side of the line those associations formed for the exclusive purpose of expressive activity and actively engaged in such activity (a political advocacy group could be so characterized).[371] These would be the easiest cases, as such groups would certainly qualify as expressive associations.[372]

On the other end of the spectrum would be an association that was neither formed to engage in expressive activity and that engages in no expressive activity whatsoever. Trouble is immediately encountered because it is not altogether easy to identify a group that truly engages in no expressive activity whatsoever. Further, one can imagine that any such group, despite its formation and past practice, might readily choose to engage in expressive activity if prompted by a particular event, situation, or change in leadership. Should such an entity be entitled to evolve into an expressive association, or must it remain permanently locked out of this designation? Putting aside those difficulties, such groups would occupy the opposite end of the expressive/non-expressive spectrum, and as such populate the minimal set of groups deemed "nonexpressive."

Most difficult of all to contend with are those associations that lie somewhere between these two poles. Justice Brennan provided no guidance on how to characterize such groups. In her *Roberts* concurrence, however, Justice O'Connor attempted to articulate a standard by which to distinguish groups such as these.[373] She declared that an association's constitutional protections should only be limited "when, and only when, the association's activities are not predominantly of the type protected by the First Amendment."[374] To this she added an important rule of thumb: if the association is a commercial entity, it cannot be deemed an expressive association.[375]

370. Inazu, *supra* note 368, at 176.

371. *See* Farber, *supra* note 367, at 1498–99 (discussing Justice O'Connor's treatment of exclusively expressive associations in her *Roberts* concurrence).

372. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 612–13, 626 (1984) (finding that a substantial part of the activities of an organization dedicated to promoting and fostering the growth of young men's civic organizations constituted "protected expression").

373. *See* Farber, *supra* note 367, at 1500.

374. *See id.* at 1499 (quoting *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring)).

375. *See id.*

Although it has its supporters, Justice O'Connor's formulation has been met with no small amount of criticism.[376] Indeed, not a single other justice signed onto it.[377] Her distinction between groups that are "predominantly" expressive and those that are not "predominantly" expressive falters for the same reasons that the fundamental distinction between expressive and non-expressive organizations falters.[378]

Moreover, her assumption that commercial associations can never be "expressive" betrays quite narrow and unimaginative thinking.[379] As I have explained elsewhere, at length, the line between "commercial" and "noncommercial" is often times illusory and misleading.[380] Also, as I have explained previously here, it is to some extent ahistorical.[381] It is not difficult to envision a commercial entity that is strongly committed to a particular cause or set of values such that its expressive activity can fairly be said to predominate—indeed, companies such as this already exist.[382]

Those who agree with Justice O'Connor's formulation argue that the corporation's profit motive belies any claim that

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376. *See, e.g.*, Wayne Batchis, Citizens United *and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of* The *Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5, 19–21 (2012); Farber, *supra* note 367, at 1500.

377. *Roberts*, 468 U.S. at 611.

378. *See supra* text accompanying notes 369–70.

379. *See* Farber, *supra* note 367, at 1500.

380. *See* Colombo, *supra* note 349, at 36–42.

381. *See supra* Part V.A.

382. *See* Colombo, *supra* note 349, at 40–41; *see, e.g.*, MANPOWER, CONNECTING PEOPLE TO POSSIBILITIES: CORPORATE SOCIAL RESPONSIBILITY UPDATE 4 (2008), *available at* http://www.right.com/about-us/company-values/manpowergroups-social-responsibility-report.pdf; *About CBC*, CAUSE BASED COMMERCE, http://causebasedcommerce.com/about.html (last visited Sept. 19, 2013) (providing telephone services to values-based consumers, allowing them to support causes and positions that align with their beliefs); *About Us*, MICROPLACE, https://www.microplace.com/about_us (last visited Sept. 19, 2013) (identifying itself as an investment company which directs funds to help "develop communities, support women, promote fair trade, provide affordable housing, conserve land and water, promote health, support green causes, and more"); *Company Values*, RIGHT MGMT., http://www.right.com/about-us/company-values/ (last visited Sept. 19, 2013) (providing career development services with a dedication to social responsibility, including environmental respect); *Solae Core Values*, SOLAE, http://www.solae.com/About-Solae/Values.aspx (last visited Sept. 19, 2013) (listing company values that include safety and health, highest ethical behavior, respect for people, and environmental stewardship); *TOMS Company Overview*, TOMS, http://www.toms.com/eyewear/corporate-info/ (last visited Sept. 19, 2013) (expressing dedication to providing shoes and glasses/eye care to children in third world countries and discussing the One for One program, which gives a pair of shoes to a poor child for every pair of shoes purchased).

the organization can be "predominantly" expressive.[383] Given the obligation of corporate directors and officers to maximize shareholder wealth, they maintain that business corporations ought not be afforded the protections of the First Amendment.[384] As they explain it, the business corporation is simply not an association capable of possessing genuine beliefs (let alone capable of genuine expression) but rather more akin to a robotic machine, fixated on profits.[385] Even though investors, officers, employees, and customers might influence a corporation to adopt a religious (or some other) persona, this persona is only legitimate to the extent that it is insincere—a ruse concocted to maximize profits.[386] This must be so because directors are duty bound to maximize shareholder wealth and must not let religion (or anything else for that matter) get in the way.[387] As such, the rights and protections of the First Amendment, which exist to protect "the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience," are simply inapplicable to such an entity.[388]

Lyman Johnson persuasively argues against the accuracy of the profit-maximizing-automaton characterization.[389] As he explains (thanks to the operation of the business judgment rule) corporate directors and officers have tremendous latitude in managing corporations as they see fit, and as such are not shackled (certainly not in practice but not even in theory) to shareholder wealth maximization.[390] Elsewhere, I, too, have argued that shareholder "primacy" is not coterminous with shareholder wealth maximization but rather naturally calls into play normative values and concerns.[391]

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383. *See* Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 651–52 (1989).

384. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1032 n.104 (1998).

385. *See id.* at 1033; Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1320 (2011).

386. *See* Greenwood, *supra* note 384, at 1033–34.

387. *Cf.* Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine) at 33.

388. Wallace v. Jaffree, 472 U.S. 38, 49 (1985); *see also* F.C.C. v. AT&T Inc., 131 S. Ct. 1177, 1181–85 (2011) (concluding that although corporations are legal "persons," they do not possess a "personal privacy interest[]" as that term is used in the Freedom of Information Act).

389. *See* Johnson, *supra* note 23, at 450 ("[N]o law requires that businesses pursue only the goal of corporate profit or the goal of investor wealth maximization.").

390. *See id.* at 450–51; *see also* Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) (explaining the business judgment rule).

391. Colombo, *supra* note 292, at 290.

Once relieved of the shackles of profit maximization, a robust debate over what should drive corporate policy and conduct can ensue. Within this debate, the notion that corporations ought to take into account more than simply profits is nothing new. Consider, for example, this description of the role of profits and business, as articulated by John Paul II in his 1991 encyclical *Centesimus Annus*:

> The Church acknowledges the legitimate role of profit *as an indication that a business is functioning well*. When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm's condition. It is possible for the financial accounts to be in order, and yet for the people—who make up the firm's most valuable asset—to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency. *In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society*. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business.[392]

On a secular level, society appears to have already recognized this, giving form to the yearning of investors, customers, employees, and officers to combine and form businesses consistent with their particular values and convictions.[393] This is evidenced by developments both in the marketplace and in state legislatures, such as the promulgation of Benefit Corporation statutes and the B Corporation movement.[394] Together, these phenomena belie the notion that every corporation views (or must view) profit-maximization as its priority *über alles*. To the extent that a corporation takes advantage of a Benefit Corporation statute or signs a B Corporation pledge, it should fit squarely within the definition of "expressive association," Justice O'Connor's commercial/noncommercial penumbra notwithstanding.

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392. JOHN PAUL II, ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM: CENTESIMUS ANNUS 68–69 (1991) (emphasis added).

393. *See supra* note 382 and accompanying text (providing examples of such businesses).

394. *See infra* text accompanying notes 397–402.

B Corporations are corporations that have voluntarily committed themselves to business practices that are "socially responsible," including subjection to third-party oversight and certification.[395] By identifying itself as a B Corporation, a for-profit business can attract investors, customers, employees, and officers who share a common commitment to socially responsible corporate conduct at the expense of eschewing a policy of strict profit-maximization. Since the movement began in 2006, over 600 businesses in the United States and Canada have opted for this certification.[396]

Perhaps even more interesting has been the promulgation of Benefit Corporation statutes over the past few years.[397] These statutes explicitly take aim at the shareholder wealth maximization norm.[398] Whereas the B Corporation movement could be said to represent merely a commitment to maximize profits in a matter consistent with socially and environmentally responsible business practices,[399] the Benefit Corporation movement actually serves to jettison the profit-maximization norm altogether.[400]

Currently adopted in nineteen states, including Delaware, Benefit Corporation statutes permit for-profit businesses to incorporate as "benefit corporations," and, as such, balance their focus on shareholder primacy with a focus on certain competing, publicly-oriented interests, such as environmental preservation.[401] The New York Benefit Corporation statute, which

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395. *See The B Corp Declaration*, BCORPORATION, http://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration (last visited Sept. 19, 2013); *Ben & Jerry's Joins the B Corp Movement!*, BEN & JERRY'S, http://www.benjerry.com/company/b-corp (last visited Sept. 19, 2013).

396. Amanda Stephenson, *Firms Make a 'B' Line for Environmental Symbol*, CALGARY HERALD, June 20, 2012, at D1. This is, admittedly, a small fraction of the total number of business corporations in operation—which number in the millions in the United States alone. *See The 2006 Statistical Abstract: The National Data Book*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, https://www.census.gov/compendia/statab/ 2006/business_enterprise/ sole_proprietorships_partnerships_corporations/ (last visited Sept. 19, 2013). But the development nevertheless underscores the fact that for at least some businesses, the corporate form is not understood as requiring the maximization of profits to the exclusion of all other values.

397. *See* Angus Loten, *With New Law, Profits Take Back Seat*, WALL ST. J., Jan. 19, 2012, at B1.

398. *See id.* (noting that B Corporation statutes allow companies' governing boards "to consider social or environment objectives ahead of profits"); *see also* Greenwood, *supra* note 384, at 1033.

399. *See supra* text accompanying notes 395–96.

400. *The Non-Profit Behind B Corps*, BCORPORATION, http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Sept. 19, 2013).

401. *See* BENEFIT CORP INFORMATION CENTER, http://www.benefitcorp.net/state-by-state-legislative-status (last visited Sept. 19, 2013); *see also, e.g.*, S.B. 1238, 51st Leg.,

is typical, proclaims that the corporation's directors and officers "shall not be required to give priority to the interests of any particular person or group [including shareholders] . . . over the interests of any other person or group,"[402] effectively displacing the shareholder primacy norm.

Given the examples of B Corporations and Benefit Corporations, the practice of stereotyping all businesses as little more than profit maximizers simply does not comport with reality.[403] As such, it is not justifiable to deny to each and every business corporation the "expressive association" classification. Like any other organization, whether or not a business corporation qualifies as an expressive association should turn on its particular nature and practices; there should be no bar automatically precluding them from such designation. As Daniel Farber put it, the commercial or noncommercial character of an enterprise is "[a]t best . . . only a rough proxy for its expressive nature."[404]

Further, whether a corporation is capable of possessing religious beliefs is not, primarily, a technical or legal one but rather a broader, philosophical one. Although a corporation's designation as a B Corporation, Benefit Corporation, or "expressive association" would certainly simplify matters, such a designation is not essential to finding that a particular corporation is capable of possessing and acting upon religious beliefs.[405] A corporation should be able to assert a Free Exercise claim even though it might fall short of "expressive association" status. Being an "association" for the purpose here (the purpose of justifying the assertion of a Free Exercise claim)[406] need not be coterminous with being an "expressive association." All that matters is whether a given corporation is actively and intentionally serving as a vehicle through which individuals are

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Reg. Sess. (Ariz. 2013); H.B. 1510, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); H.B. 13-1138, 69th Gen. Assemb., Reg. Sess. (Colo. 2013).

402. N.Y. BUS. CORP. LAW § 1707(a)(3) (McKinney Supp. 2013).

403. *See* Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Responsibility?*, 110 J. BUS. ETHICS 133, 135 (2012) ("The benefit corporation has many of the characteristics of the traditional corporation, except that its legal charter legitimizes pursuing certain social and environmental values and may, in as yet isolated cases, request government monies to support those values.").

404. *See* Farber, *supra* note 367, at 1500.

405. Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (demonstrating the complexity of proving a corporation's ability to hold religious beliefs without the benefit of such a designation).

406. *See* Olree, *supra* note 340, at 107.

consciously actualizing their shared religious beliefs.[407] Neither the operation of corporate law, nor the realities of the marketplace, nor the fundamental aspects of human nature compel us to conclude that the business corporation lacks such a capacity.

Although it may be sensible to adopt certain initial presumptions regarding a corporation's expressive nature, any final conclusion should entail individual inquiry. This is because tremendous diversity characterizes those entities known as "business corporations."[408] In light of this, it is wrong to adhere to an absolutist, one-size-fits-all position with regard to the expressive nature of the corporation and, consequently, the recognition of corporate free exercise rights. Indeed, when fundamental constitutional rights are in question, it is unwise to base determinations upon stereotypes and probabilities.

VI. APPLICABILITY OF THE FREE EXERCISE CLAUSE TO FOR-PROFIT BUSINESS CORPORATIONS

A. *The Claim Articulated*

Recognition of corporate Free Exercise rights entails, first and foremost, corporate standing to assert claims arising under the Free Exercise Clause.[409] Standing requires a claimant to demonstrate that conduct engendered by its "sincerely held religious beliefs" was substantially burdened by law or regulation.[410]

The belief in question need not necessarily be "central" to the claimant's religion, nor the conduct in question something "commanded" by the claimant's religion.[411] Indeed, "judges should not question the centrality of particular beliefs or practices to a

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407. Another way of justifying the corporation's ability to serve as such a vehicle, and one which I have considered at length elsewhere, is to conceptualize certain corporations as "associations" under Alexis de Tocqueville's definition of the term. As such, the corporation is an extremely vital and important component of our democratic republic. *See* Colombo, *supra* note 349, at 29–35. Such a conceptualization would, I posit, lead us to recognize the full panoply of rights protected under the First Amendment—including the right to the free exercise of religion. *See id.* at 5.

408. *See id.*

409. *See* Olree, *supra* note 340, at 107.

410. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833–34 (1989); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (noting that the government must show a compelling state interest to justify a "substantial" infringement on First Amendment rights); *see also* Olree, *supra* note 340, at 107.

411. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 334–35 (1999).

faith, or the validity of particular litigants' interpretations of [a particular denomination's] creeds."[412] Courts may inquire into the sincerity of the purported beliefs in question, but not their merits.[413]

What constitutes a "substantial burden" remains a matter of some debate.[414] The best that the Supreme Court has had to offer is as follows:

> A "substantial burden" is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs" . . . or one that forces a person to "choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand . . . ."[415]

Thus, a corporate Free Exercise claimant would have to demonstrate (1) adherence to a set of religious beliefs; (2) conduct that is undertaken (or refrained from) on account of those beliefs; and (3) government action that substantially burdens such conduct (or, conversely, compels such conduct in the event that it is refrained from on account of the corporation's religious beliefs). The corporation's ability to make these required showings might raise some interesting factual questions in particular cases,[416] but as a theoretical matter, it is not difficult to see how they could be made. For example, in order to examine the sincerity of a corporation's professed adherence to certain religious beliefs, its history, policies, practices, statements and charter could all be examined.[417] Whether the corporation is closely held, versus publicly held, could also play a role in this determination, as it may better enable (or undermine) the corporation's ability to claim adherence to an articulable set of religious beliefs and values.[418]

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412. *See* Olree, *supra* note 340, at 108 (internal quotation marks omitted).

413. *See id.*; *see also* Wald, *supra* note 8, at 479 ("Drawing on the Lockean tradition, American law assumes that religious rights [are] inherent in individuals and the state has no competence to define what is or isn't authentically religious.").

414. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937 (1989).

415. Lovelace v. Lee, 472 F.3d 174, 187 (2006) (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 404).

416. *See infra* text accompanying notes 427–35 (laying out the factual bases for a potential discrimination claim by Chick-Fil-A).

417. *See* Farber, *supra* note 367, at 1492 (discussing the Court's deference to the Scouts' professed values in Boy Scouts of Am. v. Dale, 530 U.S. 640, 651–52 (2000)).

418. *See id.* (noting that Chief Justice Rehnquist stressed the Boy Scouts' status as a private organization in *Dale*).

B. The Essentiality of the Claim

For those corporations that sincerely embrace and profess a commitment to religious beliefs and principles, recognition of standing to bring Free Exercise claims is not only sensible, but essential. The key to apprehending this is to appreciate the importance of associations in a free society, and realization that certain for-profit corporations can qualify as "associations" as previously discussed.[419] Permitting authentically religious business corporations to exist allows religious individuals greater opportunities to live out their lives more fully in keeping with the dictates of their consciences. It no longer forces them artificially to compartmentalize their lives into "work" and "worship" but rather enables them to live a more fully integrated existence.[420]

Recognition of corporate Free Exercise rights also empowers religious individuals to accomplish that which they would not or perhaps could not in isolation. Most individuals are effectively powerless to influence society and safeguard their own interests.[421] This is especially true if they hold views that are uncommon or unpopular.[422] They may lack the time, ability, or resources needed (perhaps even all three) to accomplish anything of note. However, when combined with others, individuals can be a potent force in society. Collectively, individuals can give rise to organizations large in number, rich in resources, and able to call upon the skills and talents of hundreds, if not thousands, of people.[423] Such undertakings add more vigorously to the diversity and pluralism of society that America so proudly celebrates than separated, atomized individuals practicing their faiths in private.

Despite the present proliferation of religiously committed business organizations, their future is in jeopardy. Their ability to persist in their present form is largely dependent upon the willingness of the government to allow them to do so.[424] Shorn of the protections of the Free Exercise Clause, they remain exposed

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419. *See supra* Part V.C (arguing that a corporation is an association).

420. *See supra* text accompanying notes 110–14 (analyzing the growing influence of religion in the workplace).

421. *See generally* Caroline Mala Corbin, *Expanding the* Bob Jones *Compromise*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 123, 136–37 (Austin Sarat ed., 2012) (addressing the value of associations in protecting minority groups from government oppression).

422. *Id.*

423. *See* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES, *supra* note 421, at 194, 194 (describing examples of minority religious groups gathering into associations).

424. *See, e.g.*, HICKS, *supra* note 116, at 147 (analyzing loss of religious freedoms in Singapore due to government intolerance).

to elimination by government action that is well intended (such as the employment law of New Jersey and Oregon,[425] which effectively prevents a corporation from embracing a religious persona altogether), and even, perhaps, to outright, pernicious discrimination that is not so well intended.[426] Two vivid illustrations of their vulnerability were provided in 2012.

Consider, first, the controversy over the "Chick-Fil-A" restaurant chain that simmered over the summer of 2012.[427] The company was founded in 1967 by S. Truett Cathy, a deeply religious Evangelical Christian,[428] and is organized as a privately held corporation.[429] Although it disclaims being a "Christian" company per se, Chick-Fil-A does admit to basing its operations upon "biblical values."[430] This is something that both customers and employees are well aware of, and the company's stores do not open on Sundays in observance of the Christian Sabbath.[431] Indeed, it is something that customers and employees appear to actively support.[432]

Pursuant to its religiously inspired values, the company has donated money to certain advocacy groups that have advanced its biblically based view regarding marriage.[433] Because of their personal disagreement with the position taken by the company on this issue, the Mayor of Boston and a city alderman in Chicago each publicly threatened to block Chick-Fil-A's efforts to open restaurants in those towns.[434] This would provide a clear example of government action being taken against a corporation on account of that company's religiously motivated conduct (if not its views).

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425. *See supra* note 79 and accompanying text (commenting on state employment laws in New Jersey and Oregon).

426. To the extent that a constitutional defense existed, it would not be predicated upon the First Amendment.

427. *See* Kim Severson, *Chick-Fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, July 26, 2012, at A13 (describing the Chick-Fil-A controversy).

428. *See id.*

429. *See Company Fact Sheet*, CHICK-FIL-A, http://www.chick-fil-a.com/Company/Highlights-Fact-Sheets (last visited Sept. 19, 2013) (describing the company as privately held and detailing corporate policies).

430. *See* Allan Blume, *'Guilty as Charged,' Dan Cathy Says of Chick-Fil-A's Stand on Faith*, BRNOW.ORG (July 2, 2012), http://www.bpnews.net/bpnews.asp?id=38271.

431. *See id.*

432. *See* Amy Bingham, *Chick-Fil-A Has 'Record-Setting' Sales on Appreciation Day*, ABC NEWS (Aug. 2, 2012), http://abcnews.go.com/Politics/OTUS/chick-fil-record-setting-sales-appreciation-day/story?id=16912978; *Chick-Fil-A Employer Reviews*, INDEED, http://www.indeed.com/cmp/Chick--fil--a/reviews (last visited Sept. 19, 2013).

433. *See* Severson, *supra* note 427.

434. *See id.*

Note here that it is the corporation which has engaged in religiously motivated conduct (in the form of the donations it has made), and it is the corporation that is facing discrimination.[435] It would seem, therefore, that if a Free Exercise claim were to be raised against such government action, this claim could only be brought by the corporation itself.[436] Lack of corporate standing in this context would enable blatant religious discrimination, on the part of government actors, against business corporations without the safeguards of the Free Exercise Clause.[437]

Some may argue that the attacks against Chick-Fil-A by the mayor and the alderman were not predicated upon any animus against the company's traditional, Evangelical version of Christianity but rather were predicated upon a commitment to extending the benefits of marriage to same-sex couples.[438] Assuming that such a distinction can be maintained in light of the facts, it is largely irrelevant to the fundamental point of this Article. All that distinction would do is vary the standard of scrutiny applicable to the government action. If Chick-Fil-A were specifically targeted because of its religious beliefs, then government action taken against it would be reviewed under the strict scrutiny of the "compelling government interest" test.[439] If instead we were to characterize the government action as one of "general applicability," unrelated to religious belief, then it would only need to be defended as having a "rational basis."[440] Either way, the basic question remains: should a company such as Chick-Fil-A, dedicated toward observance of certain religious

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435. *See id.*

436. *See supra* text accompanying notes 409–10 (concluding that corporate standing is necessary for freedom of religion claims).

437. An argument could be made that such government action would also be violative of the First Amendment right to freedom of speech. *See* Greenfield, Greenwood & Jaffe, *supra* note 24, at 884 (examining the free speech rights of corporations). Thus, even if Free Exercise standing were not extended to corporations, Chick-Fil-A could raise a Free Speech claim against the mayor and the alderman. There are, of course, those who would deny corporations free speech rights as well. *See supra* note 27 (listing articles that discuss Supreme Court opinions on corporate free speech).

438. Fran Spielman, *Emanuel Goes After Chick-Fil-A for Boss' Anti-Gay Views*, CHI. SUN-TIMES, July 25, 2012, http://www.suntimes.com/13988905-761/emanuel-goes-after-chick-fil-a-for-boss-anti-gay-views.html.

439. *See supra* text accompanying note 271 (describing the "compelling government interest" standard for government action burdening free exercise of religion); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (noting that a law burdening religious practice must be viewed with strict scrutiny).

440. *See supra* text accompanying note 253 (detailing the standards to determine a compelling government interest). The test might be different depending on the Free Exercise rights recognized in the applicable state constitutions, and/or the existence and interpretation of applicable "state RFRA" statutes. *See supra* text accompanying notes 268–69, 275–76.

values, have standing to challenge government action that impedes the observance of those values? To answer the question in the affirmative is *not* to conclude that Chick-Fil-A's observance of religious values ought to invariably trump government action that prevents adherence to those values.[441] To answer the question in the affirmative is merely to recognize the ability of Chick-Fil-A to have its day in court, to litigate through the competing interests of the company and those of the government, and to have the matter resolved by a neutral judge in accordance to whatever standard is applicable under the circumstances.

Consider also the case of Hercules Industries. This 265-person heating, ventilation, and air conditioning (HVAC) manufacturer is owned and operated by a family deeply devoted to its Catholic faith.[442] Unlike so many other companies today, which are criticized for putting "profits over people," Hercules is managed with an eye toward the holistic well-being of its employees as per Catholic social teaching on the responsibility of business.[443] In fact, Catholic principles permeate the operations of the company.[444]

As such, Hercules would never offer anything to its employees that was knowingly harmful, injurious, or toxic.[445] Under well-known, well-established Catholic teaching, that is exactly what the federal government, under the Affordable Care Act ("ACA"), attempted to require the company to do in 2012: to offer insurance products and services (namely, contraceptives, sterilization, and, arguably, abortifacients) to its employees that violate core moral and ethical principles upon which the company is based.[446]

Once again, the religious beliefs in question here are the corporation's, as it is corporate policy that the government seeks to regulate via the ACA.[447] Once again, the only potential

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441. *See, e.g.*, United States v. Lee, 455 U.S. 252, 258, 260–61 (1982) (concluding that a sole proprietor's exercise of religion was trumped by the compelling government interest of payroll taxes).

442. *See* First Amended Verified Complaint at 2, 9, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK), *available at* http://www.adfmedia.org/files/NewlandComplaint.pdf.

443. *See Newland*, 881 F. Supp. 2d at 1292.

444. *See id.*

445. *See* PAUL VI, HUMANAE VITAE § 17 (1968) (describing the harms of artificial methods of birth control in the context of the Catholic viewpoint); Stabile, *supra* note 154, at 753 ("The 1984 papal *Charter on the Rights of the Family* provides that 'human life must be respected and protected absolutely from the moment of conception." (quoting HOLY SEE, CHARTER OF THE RIGHTS OF THE FAMILY, art. 4 (Oct. 22, 1983))).

446. *See Newland*, 881 F. Supp. 2d at 1292.

447. *See id.*

claimant here would be the corporation, as only the corporation would have standing to bring a Free Exercise claim under such circumstances.[448] The owners and managers of Hercules would not be in a position to bring suit as individuals because the regulation in question does not circumscribe their conduct per se, but that of the corporation.[449]

The case of Hercules Industries is illustrative for another reason as well. Unlike (arguably) the Chick-Fil-A example, and the experience of our Constitution's Framers, most attacks upon religious liberty today (in the United States, at least) are not intentionally aimed at conduct that is religiously inspired.[450] As Douglas Laycock explains, "deliberate persecution is not the usual problem in this country," but rather religious liberty is more often threatened by "indifference" fueled by lack of awareness or perhaps even hostility:[451]

> Religious organizations and believers can lose the right to practice their faith for a whole range of reasons: because their practice offends some interest group that successfully insists on a regulatory law with no exceptions, because the secular bureaucracy is indifferent to their needs, or because the legislature was unaware of their existence and failed to provide an exemption. Some interest groups and individual citizens are aggressively hostile to particular religious teachings, or to religion in general. Others are not hostile, but simply cannot understand the need to exempt religion. But whether regulation results from hostility, indifference, or ignorance, the consequence to believers is the same.[452]

As the preceding examples demonstrate, Laycock's point is being borne out.

C. *Relevant Judicial Precedent*

As previously mentioned, the Supreme Court in *Citizens United* has already announced that the First Amendment's free

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448. *See supra* Part III.A (positing the use of corporate standing on free exercise of religion claims); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21, 1129 (10th Cir. 2013) (en banc) (holding that for-profit corporations "can be 'persons' exercising religion for purposes of [RFRA]" and that "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations").

449. *See Newland*, 881 F. Supp. 2d at 1292 (arguing that the law impacts their corporate benefits program not the individual owners).

450. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288, 1292 (W.D. Okla. 2012) (discussing the religious neutrality of the Affordable Care Act), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

451. Laycock, *supra* note 201, at 225.

452. *Id.*

speech protections apply to corporations. The logic of the opinion could readily be extended to freedom of religion. The Court noted that the Amendment's proclamation that "Congress shall make no law . . . abridging the freedom of speech" applies *regardless of the speaker*, thereby covering corporations as well as individuals.[453] Similarly, the Amendment's proclamation that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" could (and should, I suggest) be read as enjoining Congress from prohibiting any religiously motivated conduct, regardless of the actor. In both contexts, the primary focus is on the power of Congress; the nature of the actor is secondary, if not irrelevant. Congress cannot interfere with the exercise of religion, just as it cannot interfere with the freedom of speech.[454] It matters not who or what is doing the acting or the speaking.[455] The matter is not so much one of individual or associational rights, so much as the government's powerlessness to act in such a way.[456]

Further, the Supreme Court has already held that (1) profit-seeking sole proprietors, and (2) non-profit corporations do indeed have standing to bring Free Exercise claims. With regard to profit-seeking businesses, the Supreme Court has, on two occasions, recognized the standing of sole proprietors to bring Free Exercise claims challenging regulation that impacts their businesses.[457] In *United States v. Lee*, an individual who was both a farmer and a carpenter had standing to raise a Free Exercise defense to his failure to pay social security taxes for the farmhands and carpentry shop assistants he employed.[458] The individual was Amish and "object[ed] on religious grounds to receipt of public insurance benefits and to payment of taxes to

453. *See* Citizens United v. F.E.C., 558 U.S. 310, 340 (2010); *see also* U.S. CONST. amend. I.

454. U.S. CONST. amend. I.

455. *Citizens United*, 558 U.S. at 361–62 (holding that the First Amendment's prohibition on abridgment of free speech applies to corporations); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1305 (11th Cir. 2006) ("[C]orporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion." (footnote omitted)).

456. 42 U.S.C. § 2000bb-1(a) (2006) (describing the limitations of the government's power to restrict First Amendment rights).

457. *See* United States v. Lee, 455 U.S. 252, 252, 254, 256 (1982) (deciding the case on its merits, holding that sole proprietor had Free Exercise standing under to challenge social security taxes levied upon his business though ultimately the challenge was unsuccessful); Braunfeld v. Brown, 366 U.S. 599, 601, 606 (1961) (finding "merchants" had standing to challenge Sunday closing laws on Free Exercise Clause, Establishment Clause, and equal protection grounds).

458. *Lee*, 455 U.S. at 254–55.

support public insurance funds."[459] In *Braunfeld v. Brown*, Philadelphia merchants had standing to challenge that town's Sunday-closing laws, claiming that it burdened their free exercise of religion.[460] The merchants were Orthodox, Sabbath-observing Jews, and as such were unable to work on Saturday.[461] Inability to open their shops and do business on Sunday so as to compensate for this "impair[ed] the ability of all appellants to earn a livelihood" if they wished to remain faithful to their religious beliefs.[462] These cases stand for the unmistakable proposition that a sole proprietor has standing to raise a Free Exercise claim against a law or regulation that adversely affects his or her profit-seeking commercial enterprise if that law or regulation conflicts with the proprietor's religious beliefs and obligations.[463]

With regard to incorporated entities, the Supreme Court has consistently recognized their standing to bring Free Exercise claims, but so far only in situations in which these corporations were non-profit.[464] This has been made abundantly clear in the body of law that comprises the "ministerial exemption," pursuant to which it has been repeatedly held that the Free Exercise Clause grants religious *organizations* the right to make employment decisions free from the typical regulatory oversight that governs the employment decisions of most other groups, profit and nonprofit alike.[465] This was driven home most vividly by the Court's unanimous 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, which recognized the standing of a religious school to bring Free Exercise and Establishment Clause claims.[466]

459. *Id*. at 254.

460. *Braunfeld*, 366 U.S. at 601–02.

461. *Id.*

462. *Id.* at 601.

463. *See also* Jasniowski v. Rushing, 678 N.E.2d 743, 749 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997) (granting standing to a "secular, for-profit, subchapter S corporation engaged in the business of repairing and selling electric motors" because it is "[t]he nexus between the sole proprietor and his business is sufficiently compelling such that [the company] can raise a free exercise challenge asserting the free exercise rights of its sole corporate officer and shareholder").

464. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 577 (1983); *see also* Chosen 300 Ministries, Inc. v. City of Phila., No. 12–3159, 2012 WL 3235317, at *16 (E.D. Pa. Aug. 9, 2012) (standing presumed without discussion); Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n, 941 A.2d 868, 881 (Conn. 2008) (applying federal precedent to interpret state constitution's Free Exercise Clause).

465. Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576–77 (1st Cir. 1989) (describing the history of the body of law associated with the ministerial exception).

466. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012). When I speak of an organization's standing to bring suit in the preceding

What the Supreme Court has yet to do is to connect these two strands of case law and hold that corporations that also happen to be for-profit have standing to bring Free Exercise claims.[467] However, some lower courts have indeed made this connection, and many more have come close to doing so.

The U.S. Courts of Appeals for the Seventh and Tenth Circuit each have had an opportunity to address the question of corporate Free Exercise rights, occasioned by the aforementioned challenges to the "contraceptive mandate."[468] In each case, both the facts and the procedural posture were essentially the same. Each concerned a business corporation that operated pursuant to certain religious principles, principles that the corporation would be forced to violate were it to offer the insurance coverage mandated by the Affordable Care Act.[469] Procedurally, each plaintiff sought a preliminary injunction to block the enforcement of the Act's contraceptive mandate, which was scheduled to take effect on August 1, 2012.[470] In order to grant the injunction, the courts needed to find, among other things, that plaintiffs had a likelihood of success on the merits were the cases to be fully litigated.[471]

The Seventh and Tenth Circuits agreed that plaintiffs were likely to succeed on the merits.[472] In reaching their conclusions, each of the circuits passed judgment on the question of corporate Free Exercise rights. The Tenth held that "as a matter of

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cases, I refer to standing to bring suit in its own name, for an injury allegedly injuring it—as distinct from the recognition of "associational standing" to bring suit on behalf of the organization's members. *See* Cornerstone Christian Schs. v. Univ. Interscholastic League, 563 F.3d 127, 134 (5th Cir. 2009). "An association can have standing on the basis of direct injury against itself as an association," and "[u]nder certain circumstances, an association can also have standing on the basis of injury to its members." Contractors Ass'n of E. Pa., Inc. v. City of Phila., 945 F.2d 1260, 1264 (3d Cir. 1991). Thus, when it comes to an assertion of the Free Exercise Clause as either a claim or defense, "[t]here are two possible theories under which an institution might assert the free-exercise clause . . . : (1) it has institutional rights of free exercise, or (2) it may assert the free-exercise rights of its principals." Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 789 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986).

467. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285, 1288 (W.D. Okla. 2012) (commenting on the lack of court holdings on the issue of for-profit corporate standing with respect to Free Exercise claims), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

468. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21 (10th Cir. 2013) (en banc); Grote v. Sebelius, 708 F.3d 850, 852–53 (7th Cir. 2013); *see also* Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 3845365, at *1, *24 (3d Cir. July 26, 2013).

469. *Hobby Lobby*, 723 F.3d at 1120–21; *Grote*, 708 F.3d at 852.

470. *Hobby Lobby*, 723 F.3d at 1120–21; *Grote*, 708 F.3d at 852–53.

471. *Hobby Lobby*, 723 F.3d at 1120–21; *Grote*, 708 F.3d at 853–55.

472. *Hobby Lobby*, 723 F.3d at 1120–21; *Grote*, 708 F.3d at 853–55.

constitutional law, Free Exercise rights may extend to some for-profit organizations."[473] The Seventh rejected the government's assertion that "a secular, for-profit corporation cannot assert" a religious liberty claim, holding that "the corporate form is not dispositive of the claim."[474] Although the Seventh Circuit did not address the issue of corporate Free Exercise rights at length, the Tenth Circuit did.[475]

The Tenth Circuit, in *Hobby Lobby Stores, Inc. v. Sebelius*, made the now-familiar point that "[i]t is beyond question that associations—not just individuals—have Free Exercise rights."[476] The rationale set forth by the Tenth Circuit is that recognition of associational freedoms are an "indispensable means of preserving other individual liberties."[477] The court proceeded to note that among those associations that enjoy the protections of the First Amendment are included those that have incorporated.[478] The court noted further that, although such protections have not been explicitly extended to for-profit corporations by the Supreme Court, the Supreme Court has recognized that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*."[479] As the Tenth Circuit summarized things:

> In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate *and* [pursue a for-profit undertaking]. At that point, Free Exercise rights somehow disappear.[480]

The court proceeded to note that nothing in the text of the First Amendment precludes its applicability to business corporations, and then recounted the historical understanding of

473. *Hobby Lobby*, 723 F.3d at 1129.

474. *Grote*, 708 F.3d at 854.

475. *See Hobby Lobby*, 723 F.3d at 1133–37 (discussing corporate and for-profit Free Exercise rights); *Grote*, 708 F.3d at 853–55 (relying upon the analysis in Korte v. Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012)).

476. *Hobby Lobby*, 723 F.3d at 1133; *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

477. *See Hobby Lobby*, 723 F.3d at 1133 (quoting *Roberts*, 468 U.S. at 618).

478. *Id.* at 1133–35.

479. *Id.* at 1134.

480. *Id*.

Free Exercise along lines similar to those recounted here.[481] In his concurrence, Judge Hartz cited Justice Brennan's poignant admonition that the "State may [not] put an individual to a choice between his business and his religion."[482]

At least two federal district courts (the Eastern District of New York and the District of Nebraska) and one state court (the Court of Special Appeals of Maryland) have recognized, without discussion, a for-profit corporation's standing to bring a Free Exercise claim.[483] In *Commack Self-Service Kosher Meats v. Hooker*, the claimant, an incorporated "deli and butcher shop . . . that specializes in kosher foods" was permitted to raise a Free Exercise claim against New York State's kosher labeling and marketing regulations.[484] In *Womens Services v. Thone*, the claimant, "a Florida corporation" that "provides facilities and support staff to physicians who perform abortions and other gynecological services on its premises" challenged Nebraska's law regulating abortions.[485] Curiously, the abortion provider itself raised a Free Exercise claim against the law, despite lacking any evidence that impediments to the procurement of an abortion would violate a "tenet of any religion."[486] This lack of evidence defeated plaintiff's Free Exercise claim but, critically, the court did not question the ability of the plaintiff corporation to bring the Free Exercise claim per se.[487] In *Atlantic Department Store v. State's Attorney*, the claimant, "a corporation conducting retail business in Prince George's County," was permitted to bring a Free Exercise claim against that county's Sunday closing laws.[488] Unfortunately, in all three cases, the corporation's standing to raise the Free Exercise issue per se was apparently not challenged, and as such the issue of standing was not addressed by the court.

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481. *Id.* at 1133–37.

482. *Id.* at 1148 (Hartz, J., concurring) (alteration in original) (citing Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (Brennan, J., dissenting)).

483. *See* Commack Self-Service Kosher Meats v. Hooker, 800 F. Supp. 2d 405, 405, 415 (E.D.N.Y. 2011) (deciding a for-profit kosher butchering company's Free Exercise claim on its merits), *aff'd*, 680 F.3d 194 (2d Cir. 2012); Womens Servs, P.C. v. Thone, 483 F. Supp. 1022, 1029–30, 1032 (D. Neb. 1979) (holding that because the Ladies Center "personal involvement [was] direct, specific, and concrete," it had standing to bring constitutional claims); Atl. Dep't Store v. State's Att'y, 323 A.2d 617, 617–19 (Md. Ct. Spec. App. 1974) (granting an injunction to a for-profit corporation because of a Free Exercise claim on its merits).

484. *Commack Self-Service Kosher Meats*, 800 F. Supp. 2d at 407.

485. *Womens Servs.*, 483 F. Supp. at 1029–30.

486. *Id.* at 1032, 1040.

487. *See id.* at 1040. The court, in a footnote, did advert to "[a]nother ground for standing," predicated upon associational standing theory. *Id.* at 1030 n.6.

488. *See Atl. Dep't Store*, 323 A.2d at 618–19.

The Ninth Circuit Court of Appeals has come very close to recognizing the right of for-profit business associations to raise Free Exercise claims or defenses. In a pair of cases hailing from the Ninth Circuit, for-profit business corporations were granted standing to bring Free Exercise claims, but on the theory that the interests of the owners of the corporation and the corporation itself were indistinguishable, as the corporations were closely held.[489] Indeed, the courts were explicit in "declin[ing] to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine[d] the rights at issue as those of the corporate owners."[490]

Similar reasoning was employed in a Minnesota case, concerning a for-profit health club that was pervasively Christian in its policies and practices.[491] In response to an action by the State's Department of Human Rights, the club defended its religiously driven employment practices with recourse to the Free Exercise Clause.[492] Significantly, the Court found that the State's "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority."[493] That said, because the corporate veil had been pierced, and the club's individual owners were being held responsible for the actions of the club, the Court held that "it is unnecessary to decide whether . . . a corporation[] has a first amendment right to free exercise of religion," as the club is essentially a stand-in for the individual owners.[494]

The Ninth Circuit and Minnesota cases were resolved via recourse to "associational standing" theory, in which the business entities were granted standing simply as a proxy for their owners.[495] In these particular cases, this was not difficult for the courts to do, as each concerned a closely held corporation in which the interests of the owners could clearly be ascertained.[496] In such situations, the corporation's interests are largely indistinguishable from that of its owner(s).

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489. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120–21 (9th Cir. 2009); E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620 & n.15 (9th Cir. 1988).

490. *Stormans*, 586 F.3d at 1120; *Townley*, 859 F.2d at 620 & n.15.

491. *See* State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985) (granting standing to the owners of the health club as indistinguishable from the club itself).

492. *Id.* at 850–51.

493. *Id.* at 850.

494. *Id.* at 850–51.

495. *See supra* note 466 (explaining the "associational standing" theory).

496. *See supra* text accompanying note 489.

In many other situations, however, a corporation will be marked by the separation of ownership and control.[497] Here, a corporation's interests and policies would not be identical to that of its ownership but rather a function of the needs and wants of its various constituencies.[498] For corporations such as these, owners are not a proper proxy in Free Exercise litigation. Instead, recourse to statements in shareholder resolutions, the corporate charter, and similar documents, in addition to a review of corporate policies and practices, would be necessary to furnish the evidence needed to assess the corporation's Free Exercise claim. Unanimity among shareholders in such a situation is unlikely, but unanimity is not required even for associational standing to be recognized.[499]

Moving beyond these cases, the Eleventh Circuit acknowledged, albeit in dicta, the standing of for-profit corporations to bring suit in their own right, without recourse to associational standing theory.[500] In *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, the Eleventh Circuit declared that "corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion."[501] Since the plaintiff in that case was a religious corporation (a church), this broad language is dicta as applied to for-profit corporations.[502] Nevertheless, the court's sweeping statement is not so qualified and represents clear language in recognition of corporate Free Exercise rights.[503]

Individual judges have expressed support for the idea of corporate Free Exercise standing in even bolder terms. In a dissent that turned on an issue other than standing, Ninth Circuit Judge Tashima proclaimed, "I assume, for purposes of the stay motion, that Stormans, as a [for-profit business] corporation, has a protectible [sic] free exercise right under the First Amendment."[504]

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497. *See* DUFF, *supra* note 323, at 1–2; Avi-Yonah, *supra* note 29, at 791.

498. *See supra* Part III.A.

499. *See* Nat'l Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press, 990 F. Supp. 245, 251 (S.D.N.Y. 1997) (recognizing that shareholder dissent does mean the organization lacks associational standing).

500. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1305 (11th Cir. 2006).

501. *Id*. (footnote omitted).

502. *See id.* at 1300, 1305.

503. *See id.* at 1305.

504. Stormans, Inc. v. Selecky, 526 F.3d 406, 417 n.8 (9th Cir. 2008) (Tashima, J., dissenting).

In another dissent, Judge Noonan of the Ninth Circuit offered the most extensive analysis of the issue yet to appear in a judicial decision.[505] The dissent was penned in the case of *E.E.O.C. v. Townley Engineering and Manufacturing Co.*, one of the two Ninth Circuit cases (discussed previously) in which the court side-stepped the issue of whether a for-profit corporation had standing to bring a Free Exercise claim in its own right and decided, instead, to allow the corporation to bring suit on behalf of its owners.[506] Judge Noonan found this side-stepping unnecessary and was prepared to hold that the First Amendment's Free Exercise Clause makes no distinction between individuals and organization, and between profits and non-profits.[507] Judge Noonan's remarks are cogent and insightful, and merit reproduction at considerable length:

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that Townley Manufacturing Company rightly invokes. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.
>
> The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free. A statute cannot subtract from their freedom. . . .
>
> Respect for the religious beliefs of others is particularly difficult when one does not share these beliefs. Judges are no more immune than congressmen from prejudices that are not only officious and overt but subtle and latent and incline one to take less than seriously notions of religious belief that depart markedly from one's own or some assumed norm. The First Amendment is an effort, not entirely forlorn, to interpose a bulwark between the

505. *See* E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).

506. *Id.* at 619–20 & n.15 (majority opinion).

507. *Id.* at 623 (Noonan, J., dissenting).

> prejudices of any official, legislator or judge and the stirrings of the spirit.
>
> The [E.E.O.C.] and the court appear to assume that there must be a sharp division between secular activity and religious activity. Such a sharp division finds nourishment in one of our cases. But of course such a dichotomy is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time. Such a split is attractive to some religious persons. It is repudiated by many, especially those who seek to integrate their lives and to integrate their activities. Among those who repudiate this theology is the Townley Manufacturing Company.[508]

The Chief Justice of the Minnesota Court of Appeals also must be added to the list of dissenting jurists who have expressed the belief that the Free Exercise Clause applies to corporations, at least closely held corporations.[509] He observed that the distinction "between institutional rights of free exercise and a corporation's assertion of the free exercise rights of its principals is a distinction without a difference when a corporation is closely held."[510] When the alleged harm or regulation befalls the corporate entity, and failure to recognize availability of the Free Exercise Clause to the corporate claimant would "effectively preclude[] [religious businesspeople] from entering the marketplace."[511] Chief Justice Popovich continued:

> Can it be said that a professional person who incorporates a sole professional corporation loses all constitutional rights because of the incorporation? Such a result would be absurd. Individuals of strong religious convictions do not live in a vacuum or practice their faith only on their days of worship. Religious values should and do permeate a person's daily activities.[512]

Importantly, against this backdrop of precedent and dissents stands, as of this writing, only one published, nonreversed decision in which a court has definitively held that a for-profit corporation lacks standing to bring a Free

508. *Id.* at 623–25 (citations omitted).

509. *See* Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 798 (Minn. Ct. App. 1985) (Popovich, C.J., dissenting), *aff'd*, 389 N.W.2d 205 (Minn. 1986).

510. *Id.*

511. *Id.*

512. *Id.*

Exercise claim as a matter of course.[513] In another one of the contraceptive mandate cases, the Third Circuit Court of Appeals, contrary to the Seventh and Tenth Circuits, held that "secular corporations cannot engage in religious exercise" and as such do not possess religious liberty rights.[514] The case in question was *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*.

In *Conestoga Wood,* the Third Circuit began by acknowledging, as it had to, that certain associations have Free Exercise rights. It limited this, however, to "churches and other religious entities," and stated that it need not add the for-profit business corporation to this list.[515] This acknowledgment is difficult to square with the court's proclamation, elsewhere in its opinion, that it "cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion."[516] As the court explained:

> 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.[517]

The earlier acknowledgment is difficult to square with this later proclamation and reasoning because the very same argument can be made against "churches and religious entities" for whom Free Exercise rights are readily invoked.[518] That is, unless one wishes to delve into the most rarified heights of theology, an individual church, or a religious entity such as a school or hospital, does not "pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of [its] individual actors."[519] The court was either unaware of or untroubled by this fairly profound inconsistency.

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513. Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 3845365, at *1 (3d Cir. July 26, 2013).

514. *Compare id.* (holding against corporation), *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21 (10th Cir. 2013) (en banc) (ruling that corporate plaintiffs were allowed to bring claims under RFRA), *and* Grote v. Sebelius, 708 F.3d 850, 852–53, 855 (7th Cir. 2013) (granting corporation's motion for injunction against enforcement of provisions of the Patient Protection and Affordable Care Act).

515. *Conestoga Wood*, 2013 WL 3845365 at *5, *7.

516. *Id.* at *5.

517. *Id.* (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd en banc*, 723 F.3d 1114 (10th Cir. 2013)).

518. *See id.*

519. *See id.*

Further in its opinion, the court stressed the separate legal entity that a corporation obtains, and how this prevents its owners from asserting Free Exercise claims through the corporation.[520] As the court concluded: "A holding . . . that a for-profit corporation can engage in religious exercise . . . would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners."[521]

Although the court is correct in identifying as a "fundamental principle" of corporate law that a "corporation is a legally distinct entity from its owners," it does not at all follow that this principle would be "eviscerate[d]" by a holding that "a for-profit corporation can engage in religious exercise."[522] The court fails to comprehend the possibility of a corporation that is both separate of its owners and religiously expressive in its own right at the same time. As has been explained previously, a corporation's religious identity flows not simply from the wishes of its owners but rather from the confluence of a multitude of constituencies.[523]

As things currently stand, *Conestoga Wood* is an outlier. In many if not most of the cases in which a for-profit corporation has asserted Free Exercise rights, that standing has been granted, usually justified via recourse to associational standing theory, sometimes implicitly recognized without comment, and, most recently in the Tenth and Seventh Circuits, explicitly endorsed.[524] In those cases in which a corporate Free Exercise claimant did not prevail, aside from *Conestoga Wood*, it was not on the ground that the corporation did not possess standing to raise a Free Exercise claim as a matter of law.[525] In short, judicial precedent on this issue points overwhelmingly in one direction—

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520. *Id.* at *7–8.

521. *Id.* at *9.

522. *See id.*

523. *See supra* Part III.A.

524. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21 (10th Cir. 2013) (ruling that corporate plaintiffs were allowed to bring claims under RFRA); Grote v. Sebelius, 708 F.3d 850, 852–53, 855 (7th Cir. 2013) (granting corporation's motion for injunction against enforcement of provisions of the Patient Protection and Affordable Care Act); *see also supra* note 483 and accompanying text (describing situations where courts have decided a Free Exercise claim on its merits without commenting on the corporation's standing).

525. *See, e.g.*, O'Brien v. U.S. Dep't of Health and Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) ("Because this Court finds that the preventive services coverage regulations do not impose a 'substantial burden' on either Frank O'Brien or OIH, and do not violate either plaintiffs' rights under the Free Exercise Clause, this Court declines to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment.").

the direction favoring recognition of corporate Free Exercise rights.

D. Anticipated Concerns

The prospect of corporate Free Exercise rights certainly raises some interesting and challenging concerns, and here I shall address them briefly.[526]

As a prefatory matter, it is important to underscore what such recognition does *not* entail. It does not entail a reassessment of First Amendment Free Exercise jurisprudence. The law and standards set forth in *Smith*, RFRA, and applicable state constitutions and enactments would remain the same.

Consequently, recognition of corporate Free Exercise rights does not mean that corporations will be necessarily absolved of compliance with laws of general applicability, even if they happen to be fervently religious in character. Like most Free Exercise claimants, corporations invoking the Free Exercise Clause will most likely fail in their assertion that they are entitled to a constitutional exemption from a given law.[527] Recognition of such rights only permits the corporate claimant its day in court: it grants to the corporate claimant the right to have its Free Exercise argument adjudicated by an impartial judge. To the extent that a valid corporate claimant does come forth, its claim could very well be rejected on the merits, as most claims are, after application of the governing standard.[528]

Some may be concerned that recognition of corporate Free Exercise rights would do little more than afford opportunistic, pretextual, self-serving attempts on the part of businesses to evade an undesirable regulation.[529] Of course, such attempts are possible, and probably even foreseeable to a degree.[530] However,

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526. Indeed, entire articles could probably be authored on the inadvisability of such recognition, and I would most heartily welcome their contribution to the issue's resolution.

527. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (holding that the government's interest in preventing discrimination outweighed the Free Exercise claims asserted by Bob Jones University). To the extent that corporations could successfully characterize their claims as "hybrids," corporate claimants may indeed fare better than the typical Free Exercise claimant. *See supra* Part IV.B.3 (describing the concept of hybrid claims). As discussed, however, the concept of hybrids has not, to date, gained much traction. *See supra* Part IV.B.3.

528. *Bob Jones*, 461 U.S. at 604 (rejecting the plaintiff's claim on its merits in spite of the presence of a valid Free Exercise claim).

529. *See* Greenfield, Greenwood & Jaffe, *supra* note 24, at 883 (commenting on the morally irresponsible decisions made by corporations in order to maximize profit).

530. *See id*.

to date, the facts do not substantiate this concern. Free Exercise cases brought by for-profit corporations are statistically rare.[531] This suggests that Free Exercise claims are not raised indiscriminately. In those cases where a business corporation has asserted a Free Exercise argument, the record has either firmly established the strength and sincerity of claimant's attachment to certain religious beliefs and convictions or has been silent on this question because the case was decided on other grounds.[532] In other words, to the extent that these cases are being brought, they appear to be brought by corporations that are authentically religious in nature. This should not be surprising, for rarely will a corporation be able to assert Free Exercise rights. Especially among large, publicly traded corporations, very few can credibly maintain adherence to a code of religious beliefs, the predicate for asserting a Free Exercise claim.[533]

The primary objection that can be anticipated is the fear of rampant discrimination in hiring, accommodation, and other areas in the wake of corporate Free Exercise rights.[534] These concerns are certainly not without merit. The rekindling of religion in the workplace has, admittedly, sparked "a battle between what has long been a secular work world in the U.S. and

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531. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) (reviewing the history of corporate standing with respect to Free Exercise claims and concluding that the courts had not yet commented on the issue), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

532. *See* E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 & n.5 (9th Cir. 1988) (crediting sincerity of claimant's religious beliefs); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (W.D. Wash. 2012) (same); Commack Self-Service Kosher Meats, Inc. v. Hooker, 800 F. Supp. 2d 405, 416 (E.D.N.Y. 2011), *aff'd*, 680 F.3d 194 (2d Cir. 2012) (finding that the challenged regulation "does not restrict any religious practice"); Maruani v. AER Servs., Inc., No. 06-176, 2006 WL 2666302, at *10 (D. Minn. Sept. 18, 2006) (failing to discuss sincerity of claimant's religious beliefs because compelling government interest was found); State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 855–57 (Minn. 1985) (crediting sincerity of claimant's religious beliefs); Jasniowski v. Rushing, 678 N.E. 2d 743, 745, 749–50 (Ill. App. Ct. 1997) (same), *vacated*, 685 N.E.2d 622 (Ill. 1997). *But see* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1040 (D. Neb. 1979) ("[P]laintiffs have presented no evidence to indicate that a woman's obtaining of an abortion without the regulation imposed by this legislation would constitution [sic] a fundamental tenet of any religion. Therefore, the challenged regulation could not interfere with the practice of a fundamental religious tenet.").

533. *See Religious Corporations?*, DAILY KOS (Aug. 2, 2013 12:58 PM), http://www.dailykos.com/story/2013/08/02/1228497/-Religious-Corporations# (noting that only sixty large corporations have sued the federal government over the ACA).

534. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) (addressing a Free Exercise claim asserted by the University in order to justify its policy of racial discrimination); *Townley*, 859 F.2d at 612 (addressing a religious discrimination claim asserted by an employee discharged allegedly because he failed to attend mandatory devotional services).

the ever-increasing religiosity permeating our society."[535] As with any battle, there have been casualties. "The number of lawsuits claiming workplace religious discrimination . . . jumped by nearly 50 percent between 1997 and 2007 . . . according to the Equal Employment Opportunity Commission."[536] That is indeed problematic. Whether these lawsuits are equally meritorious, or rather reflect a reaction by some against an unwelcome infusion of religion in the working environment, would require further investigation.

Balanced against this are a large number of employees for whom the workplace has become a more welcoming environment.[537] From the proliferation of "workplace chaplains,"[538] to a greater willingness on the part of businesses to accommodate the religious practices of their employees,[539] workers are more empowered to be open about their faith than in yesteryear.[540] As one study on the issue thoughtfully concluded:

> There is little doubt that American society and its political and legal institutions are moving toward a more open, value-expressive environment that will put even greater pressure on companies to honor employees' requests for religious and spiritual accommodation. . . . Over the last 35 years, society has come full circle from advocating a workplace free of religion to encouraging a spiritually and religiously expressive one. There is little debate that many people desire this more individually relevant workplace. The challenge for managers is to make this environment work—legally, socially, and productively.[541]

Further, fears of discrimination should be tempered by the realities of the twenty-first-century marketplace.[542] As the Chick-

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535. Tahmincioglu, *supra* note 109.

536. Maya Dollarhide, *When God Goes to the Office*, CNN (Mar. 10, 2008), http://www.cnn.com/2008/LIVING/worklife/03/10/religion.at.the.office/.

537. *See Toppling a Taboo: Businesses Go 'Faith-Friendly'*, *supra* note 72 (providing examples about the growing practice of religion in the work place).

538. A growth industry which has "grown fastest since 2001" and is expanding from its roots in the Bible Belt to regions across America. *See* Shellenbarger, *supra* note 108; *see also* Cash & Gray, *supra* note 8, at 124 (commenting on the "booming" office place chaplain industry).

539. *See* Cash & Gray, *supra* note 8, at 125.

540. As David Miller put it: "The '60s was about race in the workplace; the '70s addressed women's needs; the '80s was about family-friendly policies and the Americans With Disabilities Act; the '90s was about sexual orientation, 'and now, the big question is religion.'" Tahmincioglu, *supra* note 109 (paraphrasing David W. Miller, executive director of the Yale Center for Faith & Culture).

541. Cash & Gray, *supra* note 8, at 132.

542. *See id.* at 128 (discussing how to mitigate religious discrimination in the modern workplace).

Fil-A example discussed earlier demonstrates, mere adherence to unpopular religious beliefs can spark trouble for a business so inclined, even if those beliefs are not put into practice via company conduct towards consumers or employees.[543] Very few corporations could be expected to engage in conduct that would be rampantly unpopular, regardless of whether such conduct would be protected by the Free Exercise Clause. There would be tremendous market pressure against such actions, especially if the corporation was publicly traded, and, as such, needed to concern itself with the capital markets as well as the consumer market.[544]

There are other limiting principles as well. For companies that lack a commitment to a particular set of religious beliefs and principles, the prohibitions on religious discrimination contained in state and federal legislation ought to certainly apply with full force. Even for companies that do constitute religiously expressive corporations, discrimination need not arise as an issue. The company's principles and values could be such that individuals of various religious backgrounds—and even no religious background at all—could readily tow the company line without problem.

However, for those religiously expressive corporations that insist on the indispensable need to base hiring and promotional decisions on an applicant's religious beliefs, an exemption from laws prohibiting such discrimination ought to be seriously considered and thoughtfully evaluated.

As a general proposition, and drawing upon the insights of John Garvey and Robert Vischer, twenty-first-century America should be considered capable of handling such companies.[545] In a society as incredibly diverse as our own, authentic pluralism can and should include an institutional component; we should welcome into our midst those institutions (including business corporations) that add to our diversity via their adherence to a particularized set of values and beliefs—even if idiosyncratic or unpopular. In other words, pluralism need not entail a "least common denominator" view of the world, in which every

543. *See supra* text accompanying notes 427–40.

544. *See* Greenwood, *supra* note 384, at 1046 (providing an example of an investor making a decision despite the moral consequences).

545. *See* VISCHER, *supra* note 223, at 5–6 (describing how the market place can provide consumers that do not agree with a corporation's religion a reasonable alternative); John Garvey, *Introduction to AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125, 127–28 (2009) (extolling the virtues of "institutional pluralism").

association's practices are deemed acceptable by all (or by the majority). Rather, in a diverse society pluralism could and ought to encompass entities that add to our diversity via their very own lack of diversity. By analogy, instead of a rule requiring all restaurants to serve the same cuisine, we should tolerate (perhaps even welcome) restaurants that are strictly Italian, French, Cuban, Portuguese, and the like.

As Andrew Beerworth explains, "the structure of the Constitution—and the quintessence of American rights theory—embraces pluralisms and militates against artificially constructed uniformities."[546] It is precisely by allowing normatively divergent corporations to flourish that such groups can truly add to the mix of America's pluristic society, and "counter government-induced homogeneity and cultural assimilation."[547]

Further, as Rick Garnett has explained, "discrimination" is not, per se, problematic.[548] What is problematic is "wrongful" discrimination.[549] Such discrimination is usually predicated upon animus, or a desire to demean.[550] Very roughly put, wrongful discrimination could be summarized as discrimination "against" a particular group. Conversely, and again put very roughly, nonproblematic discrimination could be summarized as discrimination "in favor" of a particular group.[551] As Garnett puts it:

> It is [entirely] understandable, sensible, and unremarkable for a group that is devoted to a value, idea, or truth to limit its membership to those who are themselves so devoted. It does not usually demean a person, or call into question a person's equal ultimate worth, to exclude her from an association because she does not embrace the association's aims or reason for being.[552]

That said, even tolerance of otherwise legitimate discrimination has its limits and may be indefensible depending on the circumstances. This, too, Vischer has addressed eloquently.[553] Consider, for example, a state law that insists that

546. Beerworth, *supra* note 238, at 387.

547. *Id.* at 388.

548. *See* Garnett, *supra* note 423, at 197.

549. *Id.*

550. *See id.* at 202, 208.

551. This "for" or "against" dichotomy reflects my own thinking and is not purported to reflect the views of Garnett.

552. Garnett, *supra* note 423, at 219.

553. *See* VISCHER, *supra* note 223, at 174–75.

pharmacies stock their shelves with the potentially abortifacient "morning after pill." (Vischer's example here does not concern employment discrimination but offers an analysis that can readily be applied to the employment context.) Some pharmacies object to dispensing the morning-after pill on religious grounds.[554] Were these pharmacies permitted to raise a Free Exercise claim against the law's implementation as applied to them, part of the court's evaluation of the claim (more specifically, the court's assessment of the government's interest in the law) ought to take into account whether other pharmacies in the area are able and willing to supply the pill.[555] In other words, if litigated, the question need not be decided on a theoretical level but rather on a case-by-case basis.[556] The weight of the government's interest in the law or regulation should be permitted to vary depending upon the context and circumstances of each particular case.[557] As with antitrust law, what is permissible for a given corporation to do may turn upon its relative power and importance within a particular market.[558] Although this certainly entails a bit more work for our courts,[559] given the rights and principles at stake, and the need to thoughtfully balance them, this appears to be a thoroughly fair and appropriate approach.

VII. CONCLUSION

The free exercise of religion has been rightly called America's "first freedom."[560] It captures the spirit of our pilgrim nation—a nation founded, in large part, by people seeking a land where they could live and practice their faiths free from government persecution.[561] It reflects a particular commitment to

554. *Id.* at 174.

555. *See id.* at 174–75.

556. *See id.* That said, certain forms of discrimination might simply be off limits in virtually every situation. More specifically, and put differently, the government might always have a "compelling government interest" in support of antidiscrimination laws that prohibit discrimination on the basis of race. This is because it could fairly be maintained (and I would indeed maintain), that given our nation's particular history, coupled with the explicit text of the Fourteenth Amendment, "race is different." Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 54 (2009).

557. *See* VISCHER, *supra* note 223, at 174–75 (discussing the factors the government would have to consider if there were non-discriminatory options available).

558. *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937–38 (1981).

559. *See id.* at 938 (illustrating the arduous task presented by this kind of economic analysis).

560. Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000).

561. *See supra* Part IV.A. (discussing the era of American colonization).

protect the liberties of those whose religious beliefs and practices might be unpopular and, as such, subject to governmental encroachment arising from either animus or ignorance.[562]

Any authentic version of religious freedom must take into account its associational dimension. An individual's religious freedom is of little value if he or she is unable to band together with others in practice thereof. It is for that reason that the First Amendment has always been interpreted to protect the rights of not only religious individuals but also religious institutions.[563]

Religious institutions include churches, temples, and mosques.[564] They include schools, hospitals, and charities that embrace a religious mission.[565] Today, however, some for-profit corporations are embracing a religious mission as well.[566] This is not surprising. Few associations are as ubiquitous and as significant to society as the business corporation.[567] Countless millions of Americans work for, invest in, and patronize business corporations on a daily basis. Indeed, few institutions play a greater role in an individual's life than corporations do today.[568] Whereas the pilgrims of yesteryear established communities in which to live and farm together, religious individuals of our own time increasingly wish to order their lives around a corporation (or corporations) that comport with their most deeply held values.[569] They have no desire to segregate their lives into spheres that are reflective of their faith and those that are not.[570]

This underscores a critical point: failure to recognize the religious liberty rights of the business corporation means failure to recognize fully the religious liberty rights of flesh-and-blood

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562. *See supra* text accompanying notes 183–84 (asserting that the Non-Establishment Clause is very important to minority religious sects).

563. *See* Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n, 941 A.2d 868, 881–82 (Conn. 2008) (discussing the history of the First Amendment rights of religious organizations and the link).

564. THE NEW SHORTER OXFORD DICTIONARY ON HISTORIC PRINCIPLES 399–400, 1835, 3244 (Lesley Brown ed., 1993).

565. *See* Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299, 310 (4th Cir. 2004).

566. *See supra* note 97 (listing several such corporations).

567. *See supra* note 321 and accompanying text (explaining the growth of corporations in America).

568. *See Statistics About Business Size (Including Small Business) from the U.S. Census Bureau*, U.S. CENSUS BUREAU, http://www.census.gov/econ/smallbus.html (last updated Aug. 22, 2012) (notating the large number of corporations by payroll size).

569. *See supra* Part V.A (explaining the history and growth of corporations).

570. *See* Riad, *supra* note 110, at 480–81 (commenting on the growth of "religious integralism"); *see also supra* text accompanying note 420 (commenting on the importance of faith in the work place).

human beings.[571] Without the recognition of such corporate rights, authentically religious for-profit institutions could not exist. This would, in turn, deprive religious entrepreneurs of the right to create business corporations consistent with their religious principles and beliefs. It would similarly deprive potential officers, employees, investors, and customers of such an enterprise around which to coalesce and partake. Such failure would undermine both the spirit and the efficacy of the First Amendment and call into question our nation's alleged commitment to pluralism, diversity, and tolerance.

Fortunately, extending the protections of the Free Exercise Clause to business corporations entails no jurisprudential stretch. Rather, existing precedent clearly lights the way forward. Yesteryear's unsustainable distinctions between commercial and noncommercial entities, and between expressive and non-expressive associations, are falling away in light of modern realities. Left, in stark relief, is a body of case law that recognizes the Free Exercise rights of corporate bodies in general and of business owners in particular. 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. Given current trends in business, government, and society, U.S. courts will soon have manifold occasions to do so.

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571. *Cf.* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 777 (2001) ("[T]he first amendment . . . should not permit the state to tell the church when it is being 'religious' and when it is not." (quoting *Legislative Activity by Certain Types of Exempt Organizations*, *Hearings Before the H. Ways & Means Comm.*, 92d Cong., 2d Sess. 99, 305 (1972))).