Taking Free Exercise the Second Mile: Why *Hobby Lobby* Fails to Go Far Enough

Eric Checketts*

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I. INTRODUCTION

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA).[1] The new law is controversial for a variety of reasons.[2] Some feel the law goes too far,[3] while others feel it does not go far enough.[4]

In 2011, the controversy entered the religious realm when the U.S. Department of Health and Human Services (HHS), pursuant to the new law, required certain employers to provide insurance coverage for contraceptives that some believe cause abortion.[5] This new requirement created conflict for certain closely held corporations, the owners of which felt they would violate their religious beliefs if they were to support abortion in any way.[6] The most notable of these companies was Hobby Lobby, Inc. (Hobby Lobby).[7]

In an effort to avoid both the violation of sincerely held religious beliefs and the imposition of millions of dollars in fines, Hobby Lobby and other closely held corporations filed suit against the government.[8] Hobby Lobby and other plaintiffs argued that the Religious Freedom Restoration Act (RFRA) protected them from enforcement of the contraceptives mandate because the mandate was a substantial burden on the owners' free exercise of religion.[9] Ultimately, the Supreme Court agreed, and rejected the government's assertion that RFRA cannot apply to for-profit corporations.[10] The Court restricted the reach of its holding to closely held corporations, however, prompting some to ask, *what exactly is a closely held corporation?*[11]

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. Within the controversy were, among other things, accusations that the law is unconstitutional, that it is too expensive, and even that it is oppressive. *See, e.g.*, Rick Santelli, *Obamacare is Unconstitutional*, CNBC (Dec. 20, 2013, 3:53 PM ET), http://www.cnbc.com/id/101289811# (arguing in no uncertain terms that the ACA is unconstitutional); Sarah Hurtubise, *Poll: Uninsured Americans Still Think Obamacare Is Too Expensive*, DAILY CALLER (Apr. 29, 2014, 6:13 PM), http://dailycaller.com/2014/04/29/poll-uninsured-americans-still-think-obamacare-is-too-expensive/ (discussing the results of a poll indicating that the majority of Americans now think the ACA has resulted in higher healthcare costs overall); Rebecca Wilde, *Obamacare, Communism, and Oppression*, PATRIOT UPDATE (Feb. 14, 2014), http://patriotupdate.com/articles/obamacare-communism-oppression/ (arguing that the ACA is inherently flawed and oppressive).

3. *See* Jim Angle, *Some ObamaCare Patients With High Deductibles Turning To Community Care Centers*, FOX NEWS (Nov. 4, 2014), http://www.foxnews.com/politics/2014/11/04/some-obamacare-patients-with-high-deductibles-turning-to-community-care-centers/ ("The latest Fox News Poll from October 25[–]27 found that by a 46[–]26[%] margin, more voters think ObamaCare 'went too far' than 'didn't go far enough.'").

4. *See* Seth Koenig, *Maine Nurses Say Obamacare Doesn't Go Far Enough, Argue For Universal Coverage*, BANGOR DAILY NEWS (Oct. 14, 2013, 5:38 PM), http://bangordailynews.com/2013/10/14/health/maine-nurses-say-obamacare-doesnt-go-far-enough-argue-for-universal-coverage/ (discussing a group of nurses who feel that the ACA "doesn't go far enough toward universal health coverage").

5. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (discussing the owners of several corporations and their religiously motivated fight against the contraceptives mandate).

6. *Id.*

7. *Id.*

8. *See id.* (discussing the owners of Hobby Lobby, Inc., Mardel, Inc., and Conestoga, Inc. and their religiously motivated fight against the contraceptives mandate).

9. *See id.* at 2765 (discussing the plaintiffs' religious reasons for suing the government).

10. *See Hobby Lobby*, 134 S. Ct. at 2775 (holding that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA").

11. *See* Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does 'Closely Held' Mean?*, WALL STREET J. (June 30, 2014, 2:56 ET), http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577 (discussing what it means to be closely held).

This Note examines a slightly different question; specifically, whether there is any compelling reason not to extend the *Hobby Lobby* ruling to corporations of every size and type. Part II introduces the ACA, RFRA, and the *Hobby Lobby* case itself. Part III explores the arguments for and against affording RFRA protection to corporations. And finally, Part IV recommends that either the Court, Congress, or both, extend *Hobby Lobby*[12] to all corporations.

II. BACKGROUND

This Part first discusses the ACA, its purpose, and some of its effects; this is followed by a summary of the ACA provision that calls for the coverage of preventive health services. This Part next discusses the so-called "contraceptives mandate" established by HHS. This Part then explores RFRA and Hobby Lobby's efforts to avoid compliance with the contraceptives mandate by using that Act as a shield. This is followed by a discussion of whether corporations have Free Exercise rights, and a summary regarding the ambiguity as to the Court's *Hobby Lobby* ruling vis-à-vis the definition of a "closely held" corporation.

A. The Patient Protection and Affordable Care Act

Enacted on March 23, 2010, the ACA is a law that Congress promulgated in response to the U.S. healthcare crisis.[13] The healthcare crisis that catalyzed the law's enactment consisted not of skyrocketing costs alone, but also a reported 50 million Americans who were unable to obtain health insurance as a result of those costs.[14] A truly expansive—and, many still insist, unconstitutional[15]—approach to an admittedly complicated problem, "the ACA is the most extensive reform to the U.S. health care system since the creation of Medicare and Medicaid in 1965."[16]

Congress passed the ACA, claiming it had the authority to do so pursuant to the Commerce Clause.[17] In its original 906 pages,[18] the ACA made substantial changes to the

12. Referring specifically to the Court's imputation of RFRA protections to for-profit corporations.

13. *See* Nicole Huberfeld, *Heed Not the Umpire (Justice Ginsburg Called NFIB)*, 15 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 43, 44 (2013) (praising Justice Ginsburg's fact-oriented analysis of the healthcare crisis in *NFIB v. Sebelius*).

14. *Id.* at 43.

15. *See* Connor Boyack, *Why Conservatives Should Want the Supreme Court to Uphold Obamacare*, DAILY CALLER (Mar. 27, 2012, 5:05 PM), http://dailycaller.com/2012/03/27/why-conservatives-should-want-the-supreme-court-to-uphold-obamacare/ (arguing that conservatives should hope the United States Supreme Court finds the ACA unconstitutional so states may instead oppose it).

16. *See generally* David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669 (2012) (explaining how the tax-related provisions of the ACA interact and arguing for further cost-reducing reform).

17. Douglas A. Bass, *Validity of the Minimum Essential Medical Insurance Coverage, or "Individual Mandate," Provision of [Section] 1501 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119*, 60 A.L.R. Fed. 2d 1 (2011); *see also* U.S. CONST. art. I, § 8, cl. 3 (referring to the "Commerce Clause" of the U.S. Constitution, outlining the authority of Congress to "regulate commerce . . . among the several States").

18. Tom Giffey, *Is 'Obamacare' Really That Long?*, LEADER-TELEGRAM (Dec. 2, 2014, 2:47 PM), http://www.leadertelegram.com/Uncategorized/2012/07/17/Is-Obamacare-really-that-long.html.

way insurance companies—and employers generally—do business.[19] Among these sweeping changes are prohibitions against excluding applicants with preexisting conditions;[20] restrictions on insurance plan pricing;[21] and, most relevant to this Note, mandatory coverage of "preventive health services."[22]

B. 42 U.S. Code Section 300gg-13, Coverage of Preventive Health Services

The part of the ACA that calls for the coverage of preventive health services is found in U.S. Code, Title 42. The relevant section states: "In general . . . [a] . . . group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for," among other things, "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration."[23] For clarity's sake, it is important to note that the Health Resources and Services Administration (HRSA) is "an agency of the [HHS]."[24]

C. The U.S. Department of Health and Human Services' Addition of Contraceptives to the List of Mandated Benefits

About a year and a half after Congress enacted the ACA, HHS implemented significant additions to the law's scope.[25] Pursuant to its authority under 42 U.S.C. section 300gg-13, "[o]n August 1, 2011, HHS adopted new Guidelines for Women's Preventive Services (Guidelines)—including well-woman visits, contraception, and domestic violence screening and counseling."[26] Additionally, "[t]hese preventive services are required to be covered without cost sharing in most non-grandfathered health plans starting with the first plan or policy year beginning on or after August 1, 2012."[27]

The new rules did contain an exemption, which excluded "religious employers" from the requirement of providing contraceptives.[28] Under the rules, to qualify for the religious exemption, an employer had to meet certain criteria.[29] These criteria included:

> (a) [t]he inculcation of religious values is the purpose of the organization; (b) [t]he organization primarily employs persons who share the religious tenets of the organization; (c) [t]he organization serves primarily persons who share the religious tenets of the organization; and (d) [t]he organization is a nonprofit

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19. *See* Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 150 (2010) (reporting the significant obstacles facing businesses in the insurance market after the ACA).

20. *Id.* at 151.

21. *Id.*

22. 42 U.S.C. § 300gg-13 (2010).

23. *Id.* § 300gg-13(a)(4).

24. Edward A. Morse, *Lifting the Fog: Navigating Penalties in the Affordable Care Act*, 46 CREIGHTON L. REV. 207, 234 (2013).

25. U.S. Dep't of Health & Human Servs., *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, HHS.GOV (Aug. 1, 2011), http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html (discussing the contraceptives mandate released by HHS on August 1, 2011).

26. *Id.*

27. *Id.*

28. *Id.*

29. Zubik v. Sebelius, 983 F. Supp. 2d 576, 596 (W.D. Pa. 2013).

> organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended [i.e., an organization exempted from filing IRS Form 990].[30]

The exemption was, however, a narrow one—at least sufficiently narrow as to make the mandate ripe for conflict between the government and certain employers who felt their religious liberty was in jeopardy.[31]

D. The Religious Freedom Restoration Act

RFRA is best understood in light of the history behind both the colonization of the New World and the subsequent adoption of a constitutionally enshrined right to the free exercise of religion. Indeed, "[r]eligious liberty is embedded in our nation's DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact. RFRA embodies America's tradition of protecting religious conscience[, a tradition] that predates the United States itself."[32]

American deference to religious liberty has endured for centuries.[33] As far back as the 1600s, that deference included religious legal exceptions.[34] Such exceptions included "Quakers [being] exempted in some colonies from oath-taking and removing their hats in court[;] Jews [being] . . . granted exemptions from marriage laws [that were] inconsistent with Jewish law[; and] exemptions from paying taxes to maintain established churches."[35]

While America's Constitution makes no mention of a "separation of church and state"[36]—a mythical freedom *from* religion[37]—it does guarantee a freedom *of* religion.[38] This guarantee is forged in the first line of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[39] Of course, the courts have never interpreted the First Amendment's protection for the "free exercise of religion" as granting absolute license for any action motivated by religious

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30. *Id.*

31. *See, e.g.*, *infra* Section II.E (discussing the owners of Hobby Lobby and the moral and religious dilemma in which they feel the mandate placed them).

32. Kim Colby, *A Perpetual Haven: Why the Religious Freedom Restoration Act Matters*, WITHERSPOON INSTITUTE (June 30, 2014), http://www.thepublicdiscourse.com/2014/06/13391/.

33. *See id.* (discussing America's religious roots).

34. *See id.* (discussing the history of religious legal exceptions in America).

35. *Id.*

36. The term "separation of church and state" originated in a letter written by President Thomas Jefferson to the Danbury Baptist Association of Connecticut in 1802. Jennifer A. Marshall, *Why Does Religious Freedom Matter?*, HERITAGE FOUND. (Dec. 20, 2010), http://www.heritage.org/research/reports/2010/12/why-does-religious-freedom-matter. Quite different from intending the result some have sought by imputing the phrase to an imaginary provision of the Constitution, Jefferson was writing of his desire to "protect states' freedom of religion from federal government control and religious groups' freedom to tend to their internal matters of faith and practice without government interference generally." *Id.*

37. This is in reference to the common misconception that the Constitution ensures a "separation of church and state," which, it is further argued, inheres a freedom *from* religion. *See* Dallin H. Oaks, Apostle, The Church of Jesus Christ of Latter-day Saints, *Religious Freedom*, Address at Brigham Young University-Idaho (Oct. 13, 2009), http://www.mormonnewsroom.org/article/oaks-religious-freedom ("Atheism has always been hostile to religion, such as in its arguments that freedom *of* or *for* religion should include freedom *from* religion.") (emphasis in the original). Incidentally, Oaks is a former justice of the Utah Supreme Court.

38. U.S. CONST. amend. I.

39. *Id.*

intent;[40] but the latter half of the twentieth century saw a tightening of the judicial belt, vis-à-vis deference to religious liberty against conflicting government interests.[41]

A series of cases over several decades established conflicting positions on government interference with religious liberty, and ultimately prompted, congressional action to reaffirm the First Amendment's "Free Exercise" protections.[42] The first notable case was *Sherbert v. Verner*, in which plaintiff Sherbert contested South Carolina's denial of her application for unemployment benefits.[43] Sherbert's employer had fired her because she refused to work on Saturdays, notwithstanding her religious reasons for that refusal.[44]

The defendant, Employment Security Commission (Commission), denied her subsequent application for unemployment benefits, stating that Sherbert's religious opposition to Saturday work was not "good cause" to decline alternative work opportunities offered by the employer or the Commission.[45] Ultimately, the Supreme Court agreed with Sherbert's contention that the Commission's decision unduly burdened the free exercise of her religion.[46] The Court's *Sherbert* holding advanced the compelling interest test, which places upon the government the burden of showing a "grave[] abuse[]," or that the plaintiff's behavior endangers "paramount interests [that] give occasion for permissible limitation."[47]

In the later case of *Wisconsin v. Yoder*, the Court reaffirmed the compelling interest test from its *Sherbert* decision.[48] In *Yoder*, the Court affirmed the Wisconsin Supreme Court's reversal of the defendants' conviction.[49] The defendants were parents who had been charged with and convicted of violating their state's compulsory education laws.[50] The defendants declined to send their children to school after the children had completed the eighth grade.[51] This decision was informed by their Amish and Mennonite religious beliefs, which they argued, would be violated by sending their children to school after the eighth grade.[52] In upholding the reversal of the defendants' conviction, the Court held that the defendants' interest in adhering to their religious beliefs outweighed the state's otherwise legitimate interest in producing competent citizens.[53] Or, phrased in terms of the relevant legal presumption: the state failed to demonstrate a compelling interest that

40. *See* Davis v. Beason, 133 U.S. 333, 342 (1890) (stating that the First Amendment's Free Exercise clause "was never intended . . . as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society").

41. *See generally, e.g.*, Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991) (discussing the existence of, and offering an explanation for, the declining state of religious freedom in the United States).

42. *See* Section II.D (discussing various cases over several decades establishing conflicting positions on government interference with religious liberty, and prompting reaffirmation of the First Amendment's "Free Exercise" protections).

43. Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).

44. *Id.* at 399.

45. *Id.* at 401.

46. *Id.* at 403.

47. *Id.* at 406.

48. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

49. *Id.* at 236.

50. *Id.* at 207–08.

51. *Id.* at 207–09.

52. *Id.*

53. *Yoder*, 406 U.S. at 225–26.

justified its interference with the defendants' religious beliefs.[54]

Nearly twenty years later, the compelling interest test from *Sherbert* and *Yoder*—and, arguably, deference to the free exercise of religion—was turned on its head. This change of position was marked by *Employment Division v. Smith*, which involved a dispute between two members of the Native American Church and the Oregon State Employment Division that had denied them unemployment benefits.[55] Employment Division denied the benefits because the applicants' employment had been terminated as a consequence of their "ingest[ing] peyote for sacramental purposes at a ceremony" for their church.[56]

The Court "considered whether the Free Exercise Clause . . . permitted . . . Oregon to include religiously inspired peyote use within the reach of its criminal prohibition on use of [peyote], and thus deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[57] It held that Oregon *could* criminalize even "religiously inspired" use of peyote.[58] Going even further, the Court soundly rejected any notion of a need for the government to demonstrate a compelling interest; it stated, "[i]n recent years we have abstained from applying the [compelling interest test] . . . at all."[59]

The consequences of the Court's holding in *Smith* would prove to be far reaching.[60] Prior to *Smith*, the Court had applied a strict scrutiny standard to government actions in conflict with this religious freedom.[61] The *Smith* decision did away with this standard by holding, "the sounder approach . . . is to hold the [compelling interest] test inapplicable to [free exercise] challenges."[62]

Congress disapproved of the *Smith* decision and sought to restore the strict scrutiny standard *Smith* had abandoned.[63] It accomplished this restoration through RFRA.[64] The Act itself states, "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[65] In a clear message that religious liberty is entitled to the protection offered by the strict scrutiny standard, Congress re-entrenched the compelling interest test which the Court had sought to destroy.[66]

The text of RFRA directly addresses Congress's disapproval of the *Smith* holding:

> [I]n *Employment Division v. Smith*, . . . the Supreme Court virtually eliminated

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54. *See id.* (holding that the state failed to demonstrate a compelling interest that justified its interference with the defendants' religious beliefs).

55. Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

56. *Id.*

57. Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act, (42 U.S.C.A. §§ 2000bb et seq.)*, 135 A.L.R. Fed. 121, 2a (1996).

58. *Smith*, 494 U.S. at 890.

59. *Id.* at 883.

60. This is in light of the passage of RFRA that resulted from the *Smith* decision, as well as the monumental decisions that would arise subsequent to RFRA—specifically *City of Boerne v. Flores* and *Burwell v. Hobby Lobby, Inc.*

61. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring the government to demonstrate a substantial state interest that justifies the "substantial infringement" of one's religious liberty).

62. *Smith*, 494 U.S. at 885.

63. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (explicitly rejecting the *Smith* holding and reaffirming the strict scrutiny standard embodied in the compelling interest test used up until *Smith*).

64. *Id.*

65. *Id.*

66. *Id.*

> the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; . . . 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.[67]

Through RFRA, Congress not only turned its back on *Smith*, but obliged all levels of government to respect the Free Exercise Clause, by stating "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; governments should not substantially burden religious exercise without compelling justification."[68]

However, the shining armor in which Congress sought to clothe the Constitution's Free Exercise protection has not remained without chinks. Indeed, it bears mention that the Supreme Court declared RFRA unconstitutional insofar as it relates to state- and locally-imposed burdens on religious exercise.[69] The Court made this declaration in the form of its holding in *City of Boerne v. Flores*.[70]

E. Hobby Lobby's Efforts to Avoid Compliance with the Contraceptives Mandate

David and Barbara Green and their children comprise a Christian family that owns and operates two businesses, Hobby Lobby and Mardel, Inc. (collectively "Hobby Lobby").[71] The companies are for-profit, controlled entirely by the Green family,[72] and are run in accordance with the family's Christian faith.[73] "'As part of their religious obligations' the Green family [has long provided] health insurance coverage" to the companies' employees; however, also consistent with the family's religious beliefs, this insurance coverage "ha[s] long explicitly excluded . . . contraceptive devices that might cause abortions[,] and pregnancy-termination drugs like RU-486."[74]

The Green family's beliefs, and certainly their corporate practices, set the stage for conflict with the HHS. After the HRSA published its list of mandated preventive services—finalized on February 15, 2012, by the HHS, the Department of Labor, and the Department of the Treasury[75]—Hobby Lobby had to make a decision.[76] As Hobby Lobby put it, "they face[d] an unconscionable choice: either violate the law, or violate their faith" by providing

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67. *Id.*

68. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

69. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

70. *Id.* at 534. *City of Boerne v. Flores* was a suit brought by a church official against the City of Boerne—which had denied the church's building permit application pursuant to a local zoning ordinance. The church official claimed that the denial of a building permit unreasonably burdened the church's religious exercise, and was therefore unlawful under the RFRA. The Court did not agree; applying RFRA to state and local governments, the Court declared, amounts to "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534, 536.

71. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

72. Both Hobby Lobby and Mardel are "operated through a management trust which owns all the voting stock in the corporations." *Id.*

73. *Id.* at 1284–85.

74. *Id.* at 1285.

75. *Id.* at 1284.

76. *See Hobby Lobby*, 870 F. Supp. 2d at 1285 (discussing Hobby Lobby's view of the "unconscionable choice" they faced as a result of the new contraceptives mandate).

contraceptives pursuant to the HHS list of preventive services.[77] The consequence for refusing to provide contraceptive coverage would be a penalty of about $490 million per year; and the penalty if they discontinued coverage entirely would be about $26.8 million.[78]

Faced with the prospect of violating their faith or being hit with crushing penalties, Hobby Lobby took legal action.[79] Hobby Lobby filed suit against "HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for . . . [abortion-inducing] contraceptives."[80] Around the same time, another Christian family-owned corporation, Conestoga Wood Specialties Corp. (Conestoga), brought a similar suit in which they raised the same faith-based objection to the contraceptives mandate.[81]

F. Corporations Have Free Exercise Rights

At trial level, both Hobby Lobby and Conestoga lost their cases.[82] In each case, the loss was due, in part, to the court finding that corporations do not have rights to the free exercise of religion pursuant to the First Amendment.[83] In *Hobby Lobby*, Judge Heaton of the Western District of Oklahoma stated, "The purpose of the free exercise clause is 'to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority.'"[84] Judge Heaton continued, "[p]laintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations such as [Hobby Lobby] . . . have a constitutional right to the free exercise of religion."[85]

In *Conestoga*, the district court stated that the basic purpose for creating a corporation "is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[86] Judge Goldberg further remarked, "[The] separation between a corporation and its owners 'at a minimum . . . means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.'"[87] *Hobby Lobby* and *Conestoga* both

77. *Id.*

78. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014). The figure of $490 million per year for refusing to provide contraceptive coverage is the combined figure for both of the Greens' companies: $475 million per year for Hobby Lobby, Inc., and $15 million per year for Mardel, Inc. The figure of $26.8 million per year for discontinuing coverage entirely is the combined figure for both of the Greens' companies: $26 million for Hobby Lobby and $800,000 for Mardel, Inc. *Id.*

79. *Id.* at 2757.

80. *Id.* at 2755.

81. *See generally* Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (containing an example of a suit brought by a privately-held corporation owned and run by a family of the Mennonite faith, which opposes the use of contraceptives on religious grounds).

82. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("The court concludes plaintiffs Hobby Lobby and Mardel do not have constitutional free exercise rights as corporations."); *see also Conestoga*, 917 F. Supp. 2d at 409 ("[W]e conclude that Conestoga cannot assert free exercise rights under the First Amendment.").

83. *Conestoga*, 917 F. Supp. 2d at 409.

84. *Hobby Lobby*, 870 F. Supp. 2d at 1288.

85. *Id.*

86. *Conestoga*, 917 F. Supp. 2d at 408.

87. *See id.* (agreeing with and quoting from the court's decision in *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, Slip Op. at 12, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012)).

appealed their respective district court rulings.[88]

Interestingly, the two different appeals resulted in a circuit split.[89] Hobby Lobby's appeal in the Tenth Circuit ended with a decision that "corporations can be 'persons' exercising religion for purposes of [RFRA], and, as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations."[90] Conestoga's appeal in the Third Circuit, on the other hand, ended with the court's decision that a corporation has no rights under either the Free Exercise Clause or RFRA.[91]

G. The Supreme Court's Hobby Lobby *Ruling and Closely Held Corporations*

The U.S. Supreme Court granted certiorari for both Hobby Lobby and Conestoga, in the combined case of *Burwell v. Hobby Lobby Stores, Inc.*[92] Ultimately, the Court resolved the circuit split and held that, as applied to closely held corporations such as Hobby Lobby and Conestoga, the HHS contraceptives mandate *does* violate RFRA.[93] In so holding, the Court rejected HHS's argument that the shareholders forfeited their Free Exercise rights, vis-à-vis their business operations, when they decided to organize as a corporation.[94]

The Court asserted, "RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice."[95] Saliently, the Court added, "the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them."[96] In short, the Court found in favor of Hobby Lobby and Conestoga, but restricted its holding to corporations similarly situated; specifically, it held that "a federal regulation's restriction on the activities of a for-profit *closely held* corporation must comply with RFRA."[97]

Though the Court did not see fit to define "closely held corporation," various sources describe such a corporation as one that has few shareholders and that is managed similar to a partnership.[98] For example, in the Mississippi case of *Hall v. Dillard*, the court submitted "[a] closely held corporation is defined as a corporation having fifty or fewer

88. *See generally* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (containing Hobby Lobby's appeal of the district court ruling); *see also* Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS, 724 F.3d 377 (3d Cir. 2013) (containing Conestoga's appeal of the district court ruling).

89. *See* Robert Hogan, *PPACA and the Moral Integrity of Corporations*, 23 ANN. HEALTH L. ADVANCE DIRECTIVE 164, 165 (2014) (stating that Hobby Lobby's and Conestoga's efforts have "given rise to a circuit split, which is typified by the Tenth Circuit's en banc opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, and the Third Circuit's opinion in *Conestoga Wood Specialties v. Secretary of U.S. Department of Health & Human Services*").

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

91. *See Conestoga*, 724 F.3d at 388 ("[T]he free exercise claims of a company's owners cannot 'pass through' to the corporation . . . . Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion [and, therefore,] it cannot assert a RFRA claim.").

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

93. *Id.* at 2755.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Hobby Lobby*, 134 S. Ct. at 2775 (2014) (emphasis added).

98. *See infra* note 99 and accompanying text (offering a definition for "closely held" corporation); *see also infra* note 100 and accompanying text (offering another definition for "closely held" corporation).

shareholders where the management operates in an informal manner akin to a partnership."[99] Another definition suggests closely held corporations are "those with shares that are not publicly traded and have only a few shareholders, all or a majority of whom participate in the management of the corporation."[100]

III. ANALYSIS

This Part examines the *Hobby Lobby* holding, as well as the arguments for and against extending RFRA protections to corporations. Section III.A analyzes the *Hobby Lobby* ruling itself. Section III.B explores the issue of "closely held corporations," and analyzes various criticisms of *Hobby Lobby* and its extension of RFRA's religious exercise protections to corporations.

A. Burwell v. Hobby Lobby Stores, Inc.

In assessing the contraceptives mandate's compatibility with RFRA, the Court's task was to consider "several questions, each potentially dispositive of Hobby Lobby's . . . claims. . . ."[101] These questions included:

> Do for-profit corporations rank among "person[s] [sic]" who "exercise . . . [sic] religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?[102]

The question relevant to this Note is the first, whether for-profit corporations "rank among 'person[s] [sic]' who 'exercise . . . religion'"?[103]

The crucial phrase in RFRA is that which orders that the "Government shall not substantially burden *a person's* exercise of religion . . . ."[104] There is, however, an exception to this proscription against unreasonable burdens on religious exercise, the wording of which is relevant: "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 . . . interest."[105] Equally fundamental to the Court's analysis is the RFRA provision that confers standing, specifically that: "[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."[106]

The definition of "person" played a prominent role in *Hobby Lobby*.[107] In considering

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99. Hall v. Dillard, 739 So.2d 383, 386 (Miss. Ct. App. 1999).

100. Jason M. Tanguay, *Minority Shareholders and Direct Suits in Closely Held Corporations Where Derivative Suits Are Impractical:* Durham v. Durham, 5 PIERCE L. REV. 469, 472 (2007).

101. *Hobby Lobby*, 134 S. Ct. at 2793 (Ginsburg, J., dissenting).

102. *Id.*

103. *Id.*

104. Religious Freedom Restoration Act of 1993, 1993 Enacted H.R. 1308 Pub. L. No. 103-141, 107 Stat. 1488 (2000) (emphasis added).

105. *Id.* (emphasis added).

106. *Id.* (emphasis added).

107. *See Hobby Lobby*, 134 S. Ct. at 2769 (discussing the definition of "person" and the issue's importance to the Court's decision).

RFRA's textual inclination towards "person[s]," the Court built its analysis on "[t]he first question . . . [of] whether [RFRA] applies to regulations that govern the activities of for-profit *corporations* like Hobby Lobby."[108] HHS argued that, as to standing to sue under RFRA, the law precludes not just the plaintiff corporations, but also the company owners as individuals.[109] This is because HHS contends (1) the companies are for-profit, and (2) the contested regulations, "at least as a formal matter, apply only to the companies and not to the owners as individuals."[110]

RFRA provides a definition to four of its words or phrases; but Congress left a glaring absence in the place many would have hoped to find a definition of "person."[111] Nevertheless, adopting HHS's view on corporate personhood in the face of the statute's apparent ambiguity "would have dramatic consequences," the Court noted.[112] In contrast to HHS's narrow view, the majority observed,

> RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice [of either giving up 'the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations']?[113]

"An examination of RFRA's text," the Court concluded, "reveals that Congress did no such thing."[114]

Electing not to adopt HHS's presumption, vis-à-vis RFRA's lack of a definition for "person," the Court "look[ed] to the Dictionary Act, which [it] must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.'"[115] The Court found that, "[u]nder the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'"[116] Seeing "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition," and in consideration of HHS's "little effort to argue otherwise," the Court held that the RFRA's use of the word 'person' "reach[es] the closely held corporations involved in [this case]."[117]

HHS advanced two other arguments regarding RFRA protection for Hobby Lobby, both of which the Court dismissed almost summarily.[118] One of these arguments centers

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108. *Id.* at 2767 (emphasis added).

109. *Id.*

110. *Id.*

111. Religious Freedom Restoration Act of 1993, 1993 Enacted H.R. 1308 Pub. L. No. 103-141, 107 Stat. 1488 (2000).

112. *Hobby Lobby*, 134 S. Ct. at 2757.

113. *Id.* at 2767–68

114. *Id.*

115. *Id.* at 2768 (citing the Dictionary Act, 1 U.S.C. § 1 (2012)).

116. *Id.* The Court also cited *FCC v. AT&T Inc.*, in which it opined, "[w]e have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear." FCC v. AT&T, 562 U.S. 397, 404–05 (2011).

117. *Hobby Lobby*, 2751 S. Ct. at 2768–69.

118. *See id.* at 2769 (regarding HHS and the principal dissent's argument that corporations cannot exercise

on the statutory term "exercise of religion," an exercise of which, HHS urges, Hobby Lobby and such corporations are incapable.[119] The Court contemplated a variety of explanations for this argument, including the corporate form and the profit-making objective, but it found none to be persuasive.[120]

The second of the arguments is that "RFRA did no more than codify [the] Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection."[121] The Court quipped, "[t]his argument has many flaws."[122] Among the flaws it lists, first and most notable is the Court's remark that "nothing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment."[123]

Ultimately, the Court found in favor of Hobby Lobby.[124] In so holding, as to the applicability of RFRA, it stated "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."[125] The Court explicitly restricted its holding to closely held corporations, however, because the case only involved such companies.[126] As to "large, publicly traded corporations such as IBM or General Electric," the Court reasoned, "it seems unlikely that [such] . . . corporat[ions] . . . will often assert RFRA claims[;] . . . [i]n any event, we have no occasion in [this case] to consider RFRA's applicability to such companies."[127]

B. Closely Held Corporations

The scope of the Court's holding was immediately a talking point.[128] Liberals were patently upset with the ruling,[129] while conservatives were naturally content with it.[130]

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religion, the majority states "[n]either HHS nor the dissent, however, provides any persuasive explanation for this conclusion"); *see also id.* at 2772 (regarding HHS's codification of pre-*Smith* jurisprudence theory, the majority states "[t]his argument has many flaws").

119. *Id.* at 2769.

120. *Id.* at 2769–71.

121. *Hobby Lobby*, 2751 S. Ct. at 2772.

122. *Id.*

123. *Id.*

124. *Id.* at 2785.

125. *Id.* at 2775.

126. *Hobby Lobby*, 2751 S. Ct. at 2774.

127. *Id.*

128. *See, e.g.*, Danny Vinik, *The Hobby Lobby Ruling May Not Be as Bad as It Seems—for Now*, NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118471/hobby-lobby-ruling-will-likely-not-prevent-free-contraceptive-coverage (stating that "the narrow ruling only applied to closely held for-profit corporations, but did not rule out a similar application to all for-profits").

129. *See id.* (stating that "the 5-4 ruling immediately infuriated liberals").

130. *See Hobby Lobby Ruling Puts Green Family in Crosshairs*, FOXNEWS (July 1, 2014), http://nation.foxnews.com/2014/07/01/hobby-lobby-ruling-puts-green-family-crosshairs (stating that "the ruling revitalized religious conservatives").

Section III.B discusses prominent criticisms of the Court's recognition of corporate free exercise of religion. Specifically, these criticisms include: (i) corporations are entities separate from their owners, and cannot by themselves exercise religion;[131] (ii) corporations shield their owners from liability, and it would be excessive, if not abusive, to allow them to operate as an extension of their owners for religious purposes as well;[132] and (iii) corporate free exercise empowers corporations to intrude into individuals' private lives.[133]

1. Corporations Are Entities Separate from Their Owners and Cannot by Themselves Exercise Religion

The arguments against affording corporations—particularly for-profit corporations—the right to the free exercise of religion center on the legal distinction of the corporation as an entity separate from its owners.[134] As one argued, "[c]orporations, as conglomerate entities, exist indefinitely and independently of their shareholders. They carry out acts and affect individual lives, and have an identity that is larger than their constituent parts. Walmart is Walmart, even when Sam Walton resigns."[135] Essentially, this argument is that "[t]he very goal of the corporate form is to separate the person from the entity, shielding the person from obligation and liability and ensuring that the entity focuses on profit maximization."[136] Therefore, the argument goes, a corporation should not be allowed to claim an exemption through beliefs of which it, as an entity, is incapable—beliefs held by entities legally separate and distinct from itself.[137]

In her *Hobby Lobby* dissent, Justice Ginsburg ardently presented this argument, notably quoting Justice Stevens' observation that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."[138] Notwithstanding such existential and sensory shortcomings, as eminent scholar Richard A. Epstein noted: "it hardly follows that [corporations] have no rights, given that they succeed to the rights of their shareholders."[139] Indeed, as Epstein further noted, "[c]onfiscation of corporate assets," such as the fines Hobby Lobby faced by disobeying the contraceptives mandate, "not only harms the corporation, but it also hurts the individual shareholders it wipes out."[140]

Hobby Lobby proponents further argue that the profit-making objective itself should have no bearing on a corporation's right to the free exercise of religion.[141] As one author stated:

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131. *Infra* Section III.B.1.

132. *Infra* Section III.B.2.

133. *Infra* Section III.B.3.

134. *See generally, e.g.*, Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303 (2014) (generally speaking critically of opposition to the contraceptives mandate).

135. *Id.* at 317–18.

136. *Id.* at 318.

137. *See* Jay Michaelson, *Why Corporations Don't Deserve Religious Freedom*, REUTERS (Mar. 24, 2014), http://blogs.reuters.com/great-debate/2014/03/24/why-corporations-dont-deserve-religious-freedom/ (arguing that corporations do not deserve to be protected from regulation through their owner's religious beliefs).

138. Burwell v. Hobby Lobby Inc., 134 S. Ct. 2751, 2794 (2014).

139. Richard A. Epstein, *The Defeat of the Contraceptive Mandate in* Hobby Lobby*: Right Results, Wrong Reasons*, CATO SUP. CT. REV. 35, 45 (2014).

140. *Id.*

141. *See generally*, Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013) (defending the right of for-profit corporations to the free exercise of religion).

> 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 . . . . 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. To the extent that law hinders the fulfillment of such desires, law inhibits the realization of the free exercise of religion.[142]

As a dissenting justice once argued, forcing a person "to choose between his religious faith and his economic survival . . . is a cruel choice."[143]

Professor Epstein responded to this type of anti-corporate free exercise argument by praising Justice Alito's rejection of HHS's claim that "the owners of the companies forfeited all RFRA protection when they decided to [incorporate]."[144] Epstein elaborates:

> The analysis here follows the form appropriate in antitrust law generally. The inquiry is always whether the condition or restriction is intended to increase the global efficiency of activities in the corporate form or to secure a wealth transfer from one group to another. The former creates a positive-sum game (whereby all parties subject to the regulation are better off) that should be supported, while the latter creates a negative-sum game (whereby the losses to some parties are larger than the gains to others) that should be stoutly opposed. To be sure, this antitrust-type analysis is normally confined to tie-in and exclusive-dealing contracts. And of course, the weak protection of economic liberties under modern law allows the state a free hand in imposing massive transfer payments on various groups, such that corporations are not insulated from that power. But when religious liberty is at issue, RFRA's higher standard of judicial review applies, even as the antitrust-like critique of monopoly behavior by the state carries over.[145]

When a regulation imposed on a corporation creates obligations that conflict with the owners' religious beliefs, it would seem to make no practical difference whether that corporation is closely held or otherwise; in either case, religious liberty is at issue.

2. Corporations Shield Their Owners from Liability, and Society Should Not Allow Them to Operate as an Extension of Their Owners for Religious Purposes as Well

Another argument against *Hobby Lobby* and corporate free exercise protection is that, because corporations have already been granted "special advantages—such as limited liability," they cannot also exercise religious rights; they have forfeited those rights.[146] One Green Party politician said as much when he opined, "[f]orming a corporation is not a right, it is a privilege . . . . A corporation limits the liability of those who form it, in

142. *Id.* at 3–4.

143. Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J. dissenting).

144. Epstein, *supra* note 139, at 44.

145. *Id.* at 44–45.

146. Brittany Limes, *Peering into the Corporate Soul:* Hobby Lobby Stores, Inc. v. Sebelius *and How for-Profit Corporations Exercise Religion*, 91 DENV. U. L. REV. 661, 666 (2014).

exchange for which the corporation is supposed to benefit society, just as every law passed by Congress is supposed to benefit 'we, the people.'"[147]

To the contrary, there is an argument that, rather than being a coat of many colors for an already overindulged privileged class, as some might argue, incorporation's limited liability protection is motivated by a legitimate public policy.[148] As Epstein explains:

> [L]imited liability, rightly understood, is the only way to get people of substantial wealth to commit large sums of capital to common ventures over which they exercise no direct control. That large aggregation often *increases* the pool of assets available to various claimants against the corporation. Contracting parties can then secure guarantees from individual shareholders or third parties if they fear that corporate assets might prove insufficient to cover their potential liabilities. The state can, and often does, require corporations to take out insurance to protect tort creditors, who now gain access to potential funds in the hands of independent third parties that contract creditors are not able to reach. The ubiquity of limited liability offers ample testimony to its efficiency.[149]

Put another way, it is not as if the legal fiction of incorporation represents a score of one to zero in favor of conservatives in the epic battle over social policy. Nor, therefore, is the recognition of corporate free exercise of religion an expansion of that imaginary point deficit.

3. Corporate Free Exercise Empowers Corporations to Intrude into Individuals' Private Lives

A concern expressed by a number of *Hobby Lobby* opponents is the decision does more than merely exempt corporations from laws that burden their owners' religious beliefs.[150] The argument is, essentially, *Hobby Lobby*'s recognition of corporate free exercise deprives individuals of the ability to make personal, private decisions.[151] For example, Senator Mark Udall, while trying to pass a bill that would effectively nullify *Hobby Lobby*, remarked:

> The U.S. Supreme Court's *Hobby Lobby* decision opened the door to unprecedented corporate intrusion into our private lives. Coloradans understand that women should never have to ask their bosses for a permission slip to access common forms of birth control or other critical health services. My common-sense proposal will keep women's private health decisions out of corporate boardrooms, because your boss shouldn't be able to dictate what is best for you and your family.[152]

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147. *See* Eric Black, *David Cobb On How Corporations Are Stealing Our Self-governing Rights*, MINNPOST (July 30, 2014), http://www.minnpost.com/eric-black-ink/2014/07/david-cobb-how-corporations-are-stealing-our-self-governing-rights (quoting 2004 Green Party presidential nominee David Cobb).

148. *See* Epstein, *supra* note 139, at 43 (discussing the policy reasons for the practice of limited liability protection through incorporation).

149. *Id.*

150. *See, e.g.*, Epstein, *supra* note 139, at 37 (quoting Senator Mark Udall's statement about Hobby Lobby's threat to individuals' private lives).

151. *See id.* (quoting a New York Times editorial stating the opinion violated women's rights).

152. *Id.*

Udall's co-sponsor, Senator Patty Murray, stated in similar fashion: "Your health care decisions are not your boss's business. Since the Supreme Court decided it will not protect women's access to health care, I will."[153]

Hobby Lobby proponents argue, contrary to the opposition's claims, the decision in no way "opened the door to . . . corporate intrusion into [individuals'] private lives;"[154] Richard Epstein went so far as to accuse *Hobby Lobby* opponents of "intellectual confusion" in making such allegations.[155] As he observed:

> It is not as though *Hobby Lobby*, by not complying with the HHS mandate, is forcing women to either abstain from sex or risk pregnancy. [Women] still retain the option of purchasing contraception independently or switching jobs. Unlike Christians in Mosul, they will not be beheaded or tortured or confined for the exercise of their beliefs.[156]

As to this gross confusion of the issues, one blogger more pointedly quipped:

> These claims are unabashedly dishonest because they fail to take into account two important points: A) Hobby Lobby covers birth control. I say again: Hobby Lobby covers birth control[; and] B) Whether any employer covers birth control or not, none are trying to stop women from accessing it. The issue here is whether a private company should be forced to pay for birth control, not whether it should be allowed to sneak into your house at night and check to make sure you don't have a bottle of Yaz in your medicine cabinet.[157]

In short, the extension of free exercise rights to corporations has no effect on the right or ability of individuals to make private and personal decisions. As the previously cited blogger stated further: "If your boss is in your bedroom, call the police. Or stop inviting him in. When you ask him to pay for what you do in the bedroom, you are inviting him in."[158]

IV. RECOMMENDATION

This Note recommends that the *Hobby Lobby* decision be made to apply to corporations of every size and type. Whether a corporation is small and closely held, or publicly held by millions of shareholders, it should be afforded the right to the free exercise of religion. Such an extension of *Hobby Lobby* should be accomplished by Congress, by the Supreme Court, or both. This Part will explain the following reasons for this assertion: (a) the considerations that motivate the protection for closely held corporations also apply to publicly held corporations; and (b) publicly held corporations are afforded freedom of speech under the First Amendment, and there is no compelling reason to deny them the other rights extended by that Amendment.

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153. *Id.*

154. *Id.*

155. Epstein, *supra* note 139, at 38.

156. *Id.*

157. Matt Walsh, *Want Birth Control? Go Buy It. Nobody is Stopping You*, MATT WALSH BLOG (June 30, 2014), http://themattwalshblog.com/2014/06/30/want-birth-control-go-buy/2/#vXkT1WY6TFBB2GFF.99. Note that Yaz is the brand name of a popular birth control pill. *Yaz Birth Control*, DRUGWATCH, http://www.drugwatch.com/yaz/ (last visited Mar. 8, 2016).

158. Walsh, *supra* note 157.

A. The Considerations That Motivate the Protection of Closely Held Corporations Also Apply to Publicly Held Corporations

The Court's reasoning in *Hobby Lobby* lends itself to all corporations, not just those closely held. Justice Ginsburg suggested as much in her *Hobby Lobby* dissent:

> Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood . . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.[159]

In *Hobby Lobby*, the Court dismissed the government's argument that the religious rights of shareholders cannot be imputed to the corporations they own. The Court observed:

> An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.[160]

Incorporation is not, therefore, a hook upon which a shareholder is legally obliged to hang her religion at the door of commerce.

The size and diversity of publicly held corporations do not militate against *Hobby Lobby*'s application to such corporations. The religious beliefs of the shareholders of a publicly held corporation will, of course, be more difficult to ascertain than that of a closely held corporation. And, there is a greater likelihood that a minority of shareholders of a publicly held corporation will have their beliefs silenced by those of the majority. But the reality is that minorities among publicly held corporate shareholders have their beliefs and preferences overridden by that of the majority on a regular basis.[161]

As to the establishment of a corporation's religion, that could be accomplished in the same manner that a corporation establishes any other policy or procedure. For example, during corporate formation, the founders could include in the corporate charter[162] a statement describing religious beliefs or principles that are to guide corporate decision-making. In that situation, any future shareholders would have, at a minimum, constructive notice of the corporation's religiously guided actions.

An existing corporation, on the other hand, could amend its bylaws to include a

159. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J. dissenting).

160. *Id.* at 2768.

161. *See* Stewart E. Sterk, *Minority Protection In Residential Private Governments*, 77 B.U. L. REV. 273, 275 (1997) ("In publicly held corporations, the majority of shareholders, through the management it selects, typically has broad discretion to act even in ways that displease minority shareholders.").

162. For a discussion of corporate formation and charters, see generally David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, DUKE L.J. 201 (1990) (discussing "theories of the corporation").

statement describing religious beliefs or principles that are to guide *future* corporate decision-making. Religiously motivated amendments to corporate bylaws would be subject to the same challenges and limitations that arise anytime a corporation seeks to make such a change.[163] Thus, while it would likely be unnecessary to ascertain the religious beliefs of the various shareholders, any attempt to impute religious beliefs to the corporation would be subject to the voting power of those shareholders.

A dissatisfied shareholder, whether her dissatisfaction is related to her religious beliefs or otherwise, has options. Among those options are: tolerating the objectionable corporate action; engaging in corporate democracy;[164] or selling her shares. These options, notably, are the same as that of the dissatisfied shareholder in a closely held corporation.

B. Publicly Held Corporations Are Afforded Freedom of Speech Under the First Amendment and Should Also Enjoy the Other Rights Extended by That Amendment

The Court recognizes many constitutional rights as applied to publicly held corporations.[165] Among these rights are the Fourth Amendment right against unreasonable search and seizure;[166] the Fifth Amendment right against the taking of their property without compensation;[167] and other Fifth Amendment rights under the Due Process and Double Jeopardy clauses.[168] Perhaps most relevantly, the Court has also "recognized that First Amendment protection extends to corporations."[169] As to freedom of speech, for example, the Court recently held "speech does not lose First Amendment protection 'simply because its source is a corporation.'"[170] The Court has also said "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[171]

Admittedly, "[c]orporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-

163. For a discussion of bylaws, their purposes, and the process involved in changing them, see generally Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205 (2005) (discussing bylaws and the board-selection process).

164. For a discussion of corporate democracy, see Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1358 (2014) ("Corporate democracy is rooted in the premise that shareholders are analogous to voters in a democracy, and that just as democracy is government 'of the people, by the people, and for the people,' corporate governance should be governance that is of the shareholder, by the shareholder, and for the shareholder.").

165. *See generally* Amanda D. Johnson, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187 (2010) (discussing various constitutional rights that are afforded corporations and some that are not).

166. *See id.* at 194 (stating "corporations have enjoyed Fourth Amendment protection for decades").

167. *See id.* at 196 ("Since the nineteenth century, corporations have been granted Fifth Amendment protection under the Due Process, Takings, and the Double Jeopardy Clauses.").

168. *Id.*

169. Citizens United v. FEC, 558 U.S. 310, 342 (2010) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978)). The Court made this statement in the context of a question about the constitutionality of certain statutes governing corporate political speech.

170. *Id.*

171. Pac. Gas & Elec. Co. v. Pub. Utils. Com., 475 U.S. 1, 8 (1986) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)). This statement was later cited by the Court in *Citizens United*, 558 U.S. at 342.

incrimination, or equality with individuals in the enjoyment of a right to privacy."[172] Alluding to a bifurcation of constitutional applicability, the Court has explained "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[173] The question of whether a particular constitutional right is "'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."[174]

There is nothing in the "nature, history, [or] purpose" of the Free Exercise Clause that necessitates limitation of its application to only natural persons and closely held corporations. This Note recommends that the benefit of the Court's *Hobby Lobby* ruling be extended to all corporations. This could be done by Congress—which could amend RFRA to explicitly include corporations of every size and type—or by the Supreme Court, which could rule in a publicly held corporation's favor in any future Free Exercise or RFRA case. At its core, the principle that should guide this change is that statutory rights should not be permitted to interfere with constitutional rights. Indeed, this principle applies even if a corporation is the party claiming those constitutional rights.

V. CONCLUSION

Religion, and the ability to act freely in accordance therewith, is an integral part of not only our national history, but also our national identity.[175] Indeed, that is the theme of RFRA, which invalidates any government action that substantially burdens the free exercise of religion—absent a compelling government interest achievable by no less restrictive means.[176] So central is religious freedom to the American way of life that the Supreme Court has held individuals are entitled to the protection of this freedom even when they act through a corporate proxy.[177]

Hobby Lobby is an important step in putting religious freedom back on a pedestal of social priority, but it fails to go far enough. It will not do to restrict applicability of RFRA to closely held corporations; that limitation is not only unnecessary, but it also ignores the considerations that guided the Court's decision to hold RFRA applicable to corporations at all. In the future, should such an opportunity present itself, the Court should hold RFRA applicable to corporations of every size and type. Alternatively, Congress could statutorily accomplish the same result. Such a change would reduce ambiguity, if not more precisely align de facto with de jure, vis-à-vis that ideal of religious liberty envisioned by our nation's founders.[178]

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172. *First Nat'l Bank*, 435 U.S. at 778 n.14.

173. *Id.* (citing United States v. White, 322 U.S. 694, 698–701 (1944)).

174. *Id.*

175. *See supra* Section II.D (examining the history of religious freedom in the United States, both prior and subsequent to our founding as a nation).

176. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

177. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (stating "protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies").

178. *See* Maria Wiering, *U.S. Needs Founding Fathers' Religious Liberty Vision, Alito Tells MD Lawyers*, CATHOLIC REV. (Oct. 31, 2014), http://www.catholicreview.org/article/news/local-news/u-s-needs-founding-fathers-religious-liberty-vision-alito-tells-md-lawyers (discussing Justice Alito's speech about our nation's need

to understand and apply the Founding Fathers' vision for religious liberty).