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## The Liberal Case for Hobby Lobby

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# THE LIBERAL CASE FOR *HOBBY LOBBY*

Brett H. McDonnell\*

*The Supreme Court decision in Burwell v. Hobby Lobby Stores, Inc. has stirred strong objections from political liberals. Those objections are misguided, and the Court's opinion reflects core liberal values of social responsibility and tolerance of diversity.*

*In the first half of its decision, the Court held that in some circumstances, for-profit corporations committed to religious goals may invoke the religious liberty protection of the Religious Freedom Restoration Act (RFRA). Liberals have treated this as an appalling and/or humorous extension of rights, which should apply only to humans. However, the Court's decision rightly recognizes that corporations can, and sometimes do, pursue goals other than shareholder profits. This fits well with the stress on corporate social responsibility one finds in progressive corporate law scholarship such as the Author's. Where religious beliefs shape a corporation's purposes, the protections of RFRA may rightly apply. This Article suggests a detailed framework for determining when particular corporations are engaged in the exercise of religion, looking to both organizational and ownership dimensions of commitment to religion. This framework clarifies the somewhat sketchy analysis of the Court and more firmly roots that analysis in corporate law and theory.*

*In the second half of the opinion, the Court held that the contraceptive mandate of the Affordable Care Act substantially burdens the religious exercise of employers, and that the mandate is not the least restrictive means of achieving a compelling governmental objective. Liberals fear that this holding aggressively extends the protection of RFRA while undermining the compelling goal of the contraceptive mandate. In fact, the holding is quite nuanced and limited, and much liberal reaction reflects discomfort with RFRA itself. That is a shame, as creating a diverse society where persons and groups with differing beliefs are able to coexist is a core liberal commitment. Liberals may have lost sight of this commitment as the groups invoking RFRA's protection have shifted from social outcasts to more*

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\* Professor, University of Minnesota Law School. For very helpful comments, I thank Claire Hill, Lyman Johnson, Wulf Kaal, Alan Meese, Paul Rubin, Dan Schwarcz, Eugene Volokh, and participants at a faculty workshop at the University of St. Thomas Law School and an excellent symposium on the *Hobby Lobby* decision at [www.theconglomerate.org](http://www.theconglomerate.org).

*mainstream religious conservatives. That may explain, but does not justify, liberal opposition to Hobby Lobby.*

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### INTRODUCTION

In June of 2014, the U.S. Supreme Court announced its decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>1</sup> The Court held that the contraceptive mandate provision implemented under the Affordable Care Act (“ACA”)<sup>2</sup> violated the free exercise right under the Religious Freedom Restoration Act (“RFRA”)<sup>3</sup> of the plaintiff, for-profit corporations. The case received a huge amount of media attention—more than any case of that term for the Court. Reaction to the decision was intense and highly polarized. Conservatives celebrated,<sup>4</sup> while liberals expressed outrage.<sup>5</sup> That liberal reaction began with Justice Ginsburg’s vehement dissent, which forecasts a perilously slippery slope of potential future cases.<sup>6</sup>

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1. 134 S. Ct. 2751 (2014).
  2. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
  3. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–2000bb-4 (2012).
  4. See Kendall Breitman, *Right Celebrates Hobby Lobby Ruling on Twitter*, POLITICO (June 30, 2014, 12:24 PM), <http://www.politico.com/story/2014/06/hobby-lobby-ruling-reactions-twitter-108440.html>.
  5. See Tina Nguyen, *‘I Feel Sick’: Liberal Pundits React to SCOTUS Hobby Lobby Ruling*, MEDIAITE (June 30, 2014, 11:09 AM), <http://www.mediaite.com/online/i-feel-sick-liberal-pundits-react-to-scotus-hobby-lobby-ruling/>; Richard Thompson Ford, *Hobby Lobby Decision Is Proof That Antidiscrimination Laws Often Discriminate*, N.Y. TIMES (July 1, 2015, 6:02 PM), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/hobby-lobby-decision-is-proof-that-antidiscrimination-laws-often-discriminate>; Marci A. Hamilton, *Hobby Lobby Has Opened a Minefield of Extreme Religious Liberty*, N.Y. TIMES (July 1, 2014, 1:24 PM), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/hobby-lobby-has-opened-a-minefield-of-extreme-religious-liberty>; Mark Tushnet, *True Religious Freedom Leaves State Out of It*, N.Y. TIMES (June 30,

One can break the decision in *Hobby Lobby* down into two main parts, and liberals have objected vigorously to both. In the first part, the Court held that, in appropriate circumstances, for-profit corporations committed to pursuing religious goals may invoke the religious liberty protections of RFRA. Many have seen this as an unjustified extension of rights of a sort that should extend only to live persons, not artificial persons such as corporations.<sup>7</sup> It is seen as part of an ongoing movement by the Court's conservative majority to tilt the playing field towards corporations.<sup>8</sup>

The second part of the decision involves the application of RFRA to the ACA contraceptive mandate. The Court held that the contraceptive mandate substantially burdens the free exercise rights of religious corporations, and that the government could not justify that burden as the least restrictive means of achieving a compelling interest.<sup>9</sup> Critics claim that the Court found a burden on employers where no real burden existed and ignored the costs imposed on female employees.<sup>10</sup> They fear the case will be used to undermine a number of other laws, with attention particularly focused on anti-discrimination laws.<sup>11</sup> Underlying this reaction seems to be distrust of RFRA itself, and a desire to strictly cabin the statute.

This Article argues that the liberal reaction to each part of the *Hobby Lobby* decision is misguided. Rather, the decision is rooted in principles liberals should find deeply attractive. The corporate standing to sue analysis reflects a view of the corporation that closely resembles the picture drawn by progressive corporate law scholars.<sup>12</sup> The majority opinion stresses that corporations can, and

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2014, 8:28 PM), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/true-religious-freedom-leaves-state-out-of-it>.

6. *Infra* note 163 and accompanying text.

7. Kent Greenfield, *Hobby Lobby Symposium: Hobby Lobby, "Unconstitutional Conditions," and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014, 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes/>; Binyamin Applebaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES MAG., July 27, 2014, at MM14; Dana Milbank, *In Hobby Lobby Ruling, the Supreme Court Uses a 'Fiction,'* WASH. POST (June 30, 2014), [http://www.washingtonpost.com/opinions/dana-milbank-in-hobby-lobby-ruling-the-supreme-court-uses-a-fiction/2014/06/30/37663c72-009b-11e4-8572-4b1b969b6322\\_story.html](http://www.washingtonpost.com/opinions/dana-milbank-in-hobby-lobby-ruling-the-supreme-court-uses-a-fiction/2014/06/30/37663c72-009b-11e4-8572-4b1b969b6322_story.html).

8. The other recent Court decision that has been most demonized in a similar way is *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

9. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

10. Emily Bazelon, *Supreme Court Breakfast Table: Corporations Had an Incredible Year at the Supreme Court*, SLATE (June 30, 2014, 6:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/supreme\\_court\\_hobby\\_lobby\\_decision\\_it\\_was\\_all\\_about\\_sex.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_hobby_lobby_decision_it_was_all_about_sex.html); Dahlia Lithwick, *After Hobby Lobby*, SLATE (July 9, 2014, 6:05 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/07/after\\_hobby\\_lobby\\_mucullen\\_and\\_harris\\_v\\_quinn\\_the\\_men\\_of\\_the\\_supreme\\_court.html](http://www.slate.com/articles/double_x/doublex/2014/07/after_hobby_lobby_mucullen_and_harris_v_quinn_the_men_of_the_supreme_court.html).

11. Ford, *supra* note 5.

12. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2007); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995); Lyman Johnson & David Millon, *Corporate Law After Hobby*

do pursue a large variety of ends beyond simply maximizing the profit that flows to shareholders. Corporations may be used to pursue moral goals that aim to make the world a better place—an idea that resonates with the (generally left-of-center) corporate social responsibility movement.<sup>13</sup> Where such goals are rooted in religious principles, a corporation may, and should, be able to invoke RFRA protections.

The liberal reaction to the second half of the *Hobby Lobby* decision shows that many contemporary liberals have drifted away from a core commitment of the liberal tradition. “Liberal” is derived from “liberty,” and liberalism has traditionally strongly supported religious liberty for all.<sup>14</sup> This is rooted in a commitment to creating a diverse society where persons and groups with differing beliefs are able to co-exist with as much room as possible to exercise those beliefs without constraint. RFRA reflects and attempts to advance that commitment, and the *Hobby Lobby* decision for the most part reasonably balances the competing interests of religiously minded employers’ liberty and employee access to health care under the ACA.

This Article argues that *Hobby Lobby* reflects and advances these core liberal values in the following seven sections. Part I describes the history of RFRA and the cases cited in *Hobby Lobby*. Of particular note here is the strong liberal support for the principles underlying RFRA, both by liberal justices in the old Free Exercise clause cases and by congressional Democrats and President Clinton in the passage of RFRA.

Part II introduces the corporate standing issue, i.e., whether and when for-profit corporations should be protected under RFRA. It presents the two best arguments against such standing. One argument is that those who run such corporations allegedly have a fiduciary duty to focus solely on maximizing shareholder financial returns.<sup>15</sup> The other argument is that corporations have a separate legal personality quite distinct from their shareholders, and it is

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Lobby, 70 BUS. LAW. 1 (2014/2015); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J. L. BUS. & FIN. 334 (2008). Note that insofar as there is an identified left-of-center group of scholars within American corporate law, it has tended to use the term “progressive” rather than “liberal.” Many political activists also use that term. In this paper, I occasionally use the term “progressive,” but mostly stick with the term “liberal” to describe those who tend towards left-of-center views in politics. I do so because that term remains the most-used word for such persons within U.S. politics today. Perhaps more significantly, I use the term “liberal” because of its ties to the concept of liberty.

13. For an overview of related issues, see Ian B. Lee, *The Role of the Public Interest in Corporate Law*, RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 106 (Claire A. Hill & Brett H. McDonnell eds., 2012). For a recent survey of the economics literature, see Markus Kutzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LIT. 51 (2012).

14. One can see this in the great liberal thinkers from John Locke, see JOHN LOCKE, LETTERS CONCERNING TOLERATION (1689), to John Rawls, see DANIEL A. DOMBROWSKI, RAWLS AND RELIGION: THE CASE FOR POLITICAL LIBERALISM (2001). For a recent statement of this tradition, see MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008).

15. See *infra* notes 73–77 and accompanying text.

inappropriate to infer corporate religious beliefs from the beliefs of individual shareholders.<sup>16</sup>

Part III then analyzes the flaws in those two arguments, and builds upon that analysis to suggest a framework for assessing when a corporation may claim RFRA protection. As progressive corporate law scholars have stressed *contra* the duty argument, corporations may legitimately pursue a wide variety of ends.<sup>17</sup> The argument against standing based on the separate legal personality of corporations is (somewhat) valid when opposing one particular way of deriving RFRA standing for corporations. That argument looks to the religious beliefs of individual shareholders. A better grounded argument for corporate RFRA standing looks to commitments made within the legal structure of a corporation, with the board of directors as the key decision-maker. The resulting framework for analyzing RFRA standing considers two dimensions: organizational and ownership. Along each dimension, a corporation can vary from no to high religious commitment. Ownership looks to the number and concentration of shareholders, and the degree to which they share strongly held religious beliefs. More importantly, the organizational dimension looks to various ways in which the corporation, as an organization, has formally or informally committed to following a religious purpose. Where a corporation shows a strong, pervasive, and lasting commitment through the dimensions in combination, that corporation helps to advance the religious purpose of various groups who come together in the business.

Part IV analyzes the Court's opinion in *Hobby Lobby* and shows that it is quite consistent with the arguments and framework presented in Part III. The Court sees corporations as collective organizations that help a range of constituents pursue not just financial gains, but also a variety of other goals. Liberals seem to have been blinded either by a strong distrust of corporations or by an inability to identify with socially motivated businesses whose goals flow from religious beliefs rather than more secular values. A clearer picture shows that the Court's vision of corporations is highly consistent with liberal visions of the corporation.

Parts V and VI explore the Court's application of RFRA to the ACA contraceptive mandate. Part V considers whether the mandate imposes a substantial burden on religious employers. The majority and the dissent grasp opposing sides of a real dilemma. The dissent argues that the link between employers and the use of controversial contraceptives is too indirect and, as such, the statute does not substantially burden employers. However, this position requires uniform acceptance of individual complicity in complex causal situations, which itself is a hotly debated topic on which moral traditions differ.<sup>18</sup> The majority prefers to accept believers' assertions that the mandate places a burden on

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16. See *infra* notes 78–80 and accompanying text.

17. There is some debate over how far the Court goes in this direction, with some arguing that the Court thinks that other ends are appropriate only where shareholders have explicitly approved such goals. I argue that the best interpretation of the majority opinion, as a whole, assumes that corporations may pursue other goals more readily than that. See *infra* notes 128–45 and accompanying text.

18. See *infra* notes 182–91 and accompanying text.

their religious principles.<sup>19</sup> Although this position opens the door to potential abuse,<sup>20</sup> the majority's approach is truer to the purpose of RFRA than that of the dissent. However, it should be stressed that the Court should closely examine whether the asserted religious beliefs are truly genuine in future cases.<sup>21</sup>

Part VI analyzes the Court's application of RFRA's strict scrutiny language. The Court held that promoting contraceptive access for women could be a compelling interest, but the ACA's contraceptive mandate as applied to for-profit corporations was not the least restrictive means of achieving that interest. Although there is some language in the majority opinion that can be read broadly, ultimately the opinion—especially Justice Kennedy's concurrence—is a limited, fact-specific accommodation, whose extension beyond the contraceptive mandate is questionable. The burden on religious employers is lessened, while female employees still receive coverage at no greater cost.<sup>22</sup> It is a win-win solution, and a good illustration of how careful use of RFRA can advance legal goals while reducing the burden they place on religious believers.<sup>23</sup>

Part VII concludes. The fact that this limited and compelling accommodation has stirred such outrage illustrates that many contemporary liberals no longer support vigorous application of religious liberty. This may be explained by a change in political alignment and an analysis of who stands to gain from religious liberty laws like RFRA. In RFRA's foundational cases, the plaintiffs were generally members of nonmainstream religious groups operating in a society that was often unwilling to take their beliefs seriously. Liberals saw protecting them as part of their mission of protecting underdogs and promoting a diverse society. However, liberals have recently won some significant battles in the "culture wars," and more mainstream conservative religious groups are looking to use RFRA to put some limits on the resulting statutes. Many liberals do not sympathize with this use of RFRA, and fear the role of still powerful conservative religious groups who continue to try to restrict the liberties of those whom their religion condemns.<sup>24</sup> Combined with populist distrust of corporations, they see the Court in *Hobby Lobby* as going wrong in all sorts of ways. That is a shame. RFRA could provide a useful safety valve in the culture wars, serving as a way to protect some of the interests of traditionalist religious groups while still preserving the

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19. See *infra* notes 183–86 and accompanying text.

20. See *infra* notes 188–93 and accompanying text.

21. See *infra* notes 191–93 and accompanying text.

22. See *infra* notes 221–24 and accompanying text.

23. It is true that the Court holds open the possibility that this accommodation itself may violate RFRA. Should the Court in future cases hold that it does, in a way that is not trivial and easy-to-correct, the Court will have pulled a bait and switch, which could undermine much of the attraction of the *Hobby Lobby* opinion. However, the Court has not yet done so, and there is much reason to hope that it will not. See *infra* notes 224–29 and accompanying text.

24. See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 878–79. One part of this may be that many liberals were never all that devoted to the abstract principle of religious liberty in the first place, and when that principle ceased to be politically useful for them, they abandoned it. The same is true in reverse on the conservative side, illustrating that devotion to abstract principles of political theory is likely not a central motivating factor for most human beings.

goals of important statutes. Preserving space for diverse beliefs and practices while advocating a vision of the corporation that stresses their use for social purposes sounds like a set of principles that liberals should find inspiring. It is too bad that political polarization and a tribal sense of politics has prevented so many from appreciating what the Court has done.

### I. LEGAL AND FACTUAL BACKGROUND

The Free Exercise Clause was incorporated against the states in 1940,<sup>25</sup> and after that, federal courts began to hear more cases in the area. It became increasingly important to determine the scope of the beliefs and behavior that the Clause protects. Clearly, statutes that explicitly discriminate or regulate religious practices were covered by the Clause. It was also possible that the Clause would apply to a statute that on its face said nothing about religion but was enacted with the clear intent to discriminate against the beliefs of a religion.<sup>26</sup> But, what of cases that involved a statute of general applicability that did not facially regulate religion and was not intended to discriminate against any religion, but as applied, would force members of a religion to behave in a way that violated significant religious beliefs? Does the Free Exercise Clause provide any protection of religious believers in such cases?

The traditional answer was no.<sup>27</sup> However, beginning with *Sherbert v. Verner*<sup>28</sup> in 1963, the Court began to apply the Free Exercise Clause in such circumstances. *Sherbert* involved a Seventh Day Adventist who refused to work on Saturdays (the Sabbath for that religion), was fired, and was denied unemployment compensation. In an opinion by Justice Brennan, the Court held that if a facially neutral statute imposed a substantial burden on genuinely held religious beliefs, that application of the statute was invalid unless it could be shown to be the least restrictive means to achieve a compelling governmental interest. The least restrictive means/compelling interest standard is used in a variety of areas of constitutional law, and is commonly called “strict scrutiny,” although there is much room to doubt whether the Court applied strict scrutiny in the same way in this context compared with others.<sup>29</sup> With *Sherbert*, the Court recognized that the Free Exercise Clause protects not just the ability to hold and proclaim religious beliefs, but also the ability to act upon those beliefs.

After *Sherbert*, the Court followed a somewhat wobbly path in applying the *Sherbert* test. In several other cases, it used the test to strike down the application of a statute, most famously in *Wisconsin v. Yoder*,<sup>30</sup> where the Court held that Amish youth could not be required to attend school until they were

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25. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

26. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 213 (1994).

27. Reynolds v. United States, 98 U.S. 145, 166 (1878); Ira C. Lupu, *Of Time and the RFRA: A Lawyers' Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 176 (1995).

28. 374 U.S. 398 (1963).

29. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1498–1501 (1999).

30. 406 U.S. 205 (1972).

sixteen. In some cases, however, the plaintiffs' claims failed.<sup>31</sup> In certain of those cases, the Court held that the statute in question did not substantially burden the plaintiffs' religious exercise.<sup>32</sup> Yet in others, it held that strict scrutiny did not apply within a certain class of regulation, notably the military.<sup>33</sup> And still in others, it applied strict scrutiny but held that the application of the law withstood that scrutiny.<sup>34</sup> Nonetheless, for several decades the Sherbert test provided potent protection of religious liberty.

That changed in 1990 with *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>35</sup> In that case, the Court effectively overturned the Sherbert test. In a blatantly forced and misleading interpretation of the post-Sherbert case law, Justice Scalia's majority opinion searched for ways to interpret away every case that seemed to be applying Sherbert's test, ultimately denying that any such test ever really existed. More plausibly, Justice Scalia warned that general application of the Sherbert test threatened the rule of law, and was suspect under the Establishment Clause. Given the incredibly wide range of modern statutes affecting almost every area of life, and the broad array of religious beliefs in the United States, it will frequently happen that someone's religious beliefs are substantially burdened by a statute. Were the Court to apply a stringent test in all such instances, it would frequently hold that statutes do not apply to particular religious groups. This would leave statutes riddled with holes, and risk benefiting the groups who are able to claim special accommodations based on their religion.<sup>36</sup> Given the subsequent politics of RFRA, it is worth noting that the author of the opinion in *Smith* was Justice Scalia, the intellectual leader of the Court's conservatives and someone very publicly guided by his Catholic faith. The three dissenters in *Smith* were Justices Blackmun, Brennan, and Marshall<sup>37</sup>—three of the most liberal justices in the history of the Supreme Court.

Given the politics currently surrounding RFRA, it should come as little surprise that many religious organizations objected to the decision in *Smith*. It is more surprising that many liberal civil rights organizations objected as well—the ACLU, Americans United for the Separation of Church and State, People for the American Way, and Americans for Democratic Action came together in a powerful coalition that proposed a statutory overturning of *Smith*.<sup>38</sup> In 1993 this coalition succeeded.<sup>39</sup> RFRA passed 97–3 in the Senate (where Ted Kennedy joined Orrin Hatch as the lead sponsor), and unanimously in the House. That is not a typo. Notably, Democrats controlled both houses at the time, and President Bill Clinton signed RFRA into law.<sup>40</sup> Thus, at the Court, in Congress, and in the White

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31. See Lupu, *supra* note 27, at 176–85.

32. *E.g.*, Bowen v. Roy, 476 U.S. 693 (1986).

33. *E.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986).

34. *E.g.*, United States v. Lee, 455 U.S. 252 (1982).

35. 494 U.S. 872 (1990).

36. *Id.* at 885.

37. *Id.* at 907 (Blackmun, J., dissenting).

38. See Laycock & Thomas, *supra* note 26, at 210 n.9.

39. *Id.* at 210.

40. *Id.* at 209.

House, a large number of liberals supported the principle of religious liberty embodied in RFRA.

RFRA was intended to reverse *Smith* and reinstate the *Sherbert* test<sup>41</sup>—although there is debate as to whether it actually did so, or went further. The statute provides that “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).”<sup>42</sup> Subsection (b) then uses the strict scrutiny language: “Government may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>43</sup>

RFRA explicitly applied to state and federal laws. However, the Supreme Court held that Congress did not have the authority to apply RFRA to state laws, so only the application to federal law remains.<sup>44</sup> In response, some states have enacted RFRA to apply to their own laws, and in others, the state supreme court has interpreted the state constitution as imposing the *Sherbert* test or something similar.<sup>45</sup>

As was the case with *Sherbert*, many questions remain as to how far RFRA’s protections extend. That brings us to the *Hobby Lobby* decision, which poses some of those questions. The case concerns a specific provision of the Affordable Care Act (“ACA”), often called Obamacare. The ACA requires employers with 50 or more full-time employees to offer health insurance that meets certain minimum coverage standards, including preventive care for women. The Health Resources and Services Administration (“HRSA”) was charged with defining the preventive care standards. HRSA’s guidelines provide that preventive services include all FDA-approved contraceptive methods.<sup>46</sup>

Here is where conflict arises: Several FDA-approved contraceptive methods work in part by preventing fertilized eggs from developing, and, according to some religious beliefs, that is a morally-prohibited taking of human life.<sup>47</sup> The Department of Health and Human Services (“HHS”) addressed the resulting conflict with a pair of exemptions. One of these exempted religious employers, including churches, from the requirement completely.<sup>48</sup> Other religious nonprofit organizations received a somewhat more complicated accommodation. If

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41. See 42 U.S.C. § 2000bb(a)(4)–(5).

42. 42 U.S.C. § 2000bb-1(a).

43. 42 U.S.C. § 2000bb-1(b).

44. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

45. As of 2010, sixteen states had enacted a “baby RFRA” statute; other states have constitutional protections that state courts have interpreted along the lines of *Sherbert*. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 479 (2010). The Baptist Joint Committee for Religious Liberty says there are now 21 states with state RFRAs. Don Byrd, *State RFRA Bill Tracker*, THE BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY (Mar. 4, 2015), <http://www.bjconline.org/state-rfra-tracker-2015/>.

46. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

47. Laycock, *supra* note 24, at 853 n.81.

48. *Burwell*, 134 S. Ct. at 2763.

an organization that fits within the terms of this accommodation objects to the contraceptive mandate, it may notify its insurer. That insurer must then separately pay to provide contraceptive services to the employees of the religious nonprofit. That may seem harsh for the insurers, but HHS has determined that the costs of providing contraceptives is balanced out by savings from the reduction of pregnancy-related expenses that follow.<sup>49</sup>

Most employers, being neither churches nor religious nonprofits, do not benefit from either of these accommodations, however, and many sued under RFRA. Two cases were consolidated for the hearing before the Supreme Court. One of these involved Conestoga Wood Specialties,<sup>50</sup> a woodworking business owned by the Hahn family—two parents and their three children who are devout members of the Mennonite Church. Conestoga Wood is a for-profit corporation incorporated under Pennsylvania law. In addition to owning all shares, the Hahns control the board of directors,<sup>51</sup> and one of the sons serves as president and CEO. As I will discuss below, the Hahns believed that complying with the contraceptive mandate would violate their religious beliefs. They pointed to the company's Vision and Values Statement and to a board-adopted Statement on the Sanctity of Human Life as evidence that they had incorporated those religious beliefs into their business. The United States District Court for the Eastern District of Pennsylvania denied the requested preliminary injunction, and the Third Circuit Court of Appeals affirmed, holding that for-profit corporations are not able to sue under RFRA.

The other case before the Supreme Court involved two corporations owned by the Green family, also two parents and their three children, and also devout Christians.<sup>52</sup> One of the corporations was Hobby Lobby, a large chain of arts and crafts stores with 500 stores and over 13,000 employees. The other corporation, Mardel, is a chain of 35 Christian bookstores. Both companies are for-profit corporations incorporated in Oklahoma. The Green family controls all shares<sup>53</sup> and its members serve as directors and top officers. As with Conestoga, and again to be explored further below, the Greens pointed to various corporate statements and practices to show that they had incorporated their religious beliefs

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49. *Id.*

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

51. They at least control the board in the sense that collectively they own all of the shares, and thus can determine who will be on the board as long as they vote together, which they appear to have done from what one can glean from the facts presented (anyone familiar with either corporate law or families will here want to insert the caveat that family members do not always continue to agree on important matters). Given that one family member is also the CEO, it would appear that the family actively monitors the business as well, although the opinion does not give much detail.

52. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

53. The family actually owns Hobby Lobby through a trust. The five family members are the trustees and beneficiaries of the trust that, in turn, owns all of the shares of Hobby Lobby. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

into the business.<sup>54</sup> The Greens had more success than the Hahns in the lower courts—they too lost in district court, but the Tenth Circuit Court of Appeals reversed, holding that for-profit corporations may sue under RFRA, and that the contraceptive mandate burdened the plaintiffs' religious exercises and was not justified under the strict scrutiny test.

These cases raise three questions to be explored in the next three sections: (1) Do for-profit corporations ever have standing to sue under RFRA (and, if so, when)?; (2) Does the contraceptive mandate substantially burden the free exercise rights of the plaintiffs?; and (3) If the answers to the previous questions are yes, can the mandate be justified under the strict scrutiny language of RFRA?

The Court answered each of these questions in favor of the plaintiffs. Yes, for-profit corporations do, in some circumstances, have standing to sue under RFRA. Yes, the contraceptive mandate substantially burdens the free exercise rights of the plaintiffs. No, that mandate is not justified under strict scrutiny.

In the next three sections, I consider in turn each of the above questions. I look at the Court's legal analysis and argue that liberal unhappiness with the decision is mostly unjustified.

## II. RFRA AND THE DILEMMA OF FOR-PROFIT CORPORATIONS

The gateway question, and most broadly important legal issue in *Hobby Lobby*, is whether for-profit corporations can ever sue to claim the protections of RFRA. And, if so, when? It is a gateway question because if the answer is no, then the case ends, at least as far as the corporate plaintiffs are concerned.<sup>55</sup> This question is important because the Court's answer that corporations can sue applies whenever a RFRA claim is asserted against the imposition of *any* federal statute, not just the ACA. There are thousands of federal statutes, and they cover just about every area of life and society. One cannot anticipate all of the different contexts in which a corporation might assert a RFRA claim. For instance, a source of anxiety for many has been a potential RFRA defense against employees who claim that their employer discriminated against them on the basis of sexual orientation. This concern is rather speculative, given that sexual orientation is not a protected category under Title VII, and the Employment Non-Discrimination Act,<sup>56</sup> which would add sexual orientation to the list, does not have a realistic prospect of passage anytime soon.<sup>57</sup> Note also that this gateway question is actually two

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54. See Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 4 (Zoë Robinson et al. eds., Oxford Univ. Press 2015), [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2609585](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2609585).

55. There is the possibility that the controlling family members could have standing to sue as shareholders, directors, or officers. The issue is important and related, but for simplicity's sake I will not address it. Because both the Court and I say that corporations have standing to invoke RFRA in appropriate circumstances, the alternative of standing for individual persons within the corporation becomes less crucial.

56. Employment Non-Discrimination Act of 2013, H.R. 1755, S. 815, 113th Cong. (2013).

57. Conflict could arise at the state level, but only in a state that has both a statute forbidding discrimination on the basis of sexual orientation and a state version of RFRA. There are not many such states, and those states are not bound by the Supreme

questions: Can for-profit corporations sue under RFRA at all? And, if so, when can they?<sup>58</sup> This section frames these questions and presents the two leading arguments against allowing for-profit corporations to sue under RFRA. The next section responds to those two arguments and presents a framework for analyzing when corporations should be able to sue for protection under RFRA—as indeed liberal and progressive principles of corporate law suggest they should be able to do.

Analysis of this corporate standing issue begins with the text of RFRA. The core text of interest to this portion of our analysis is “Government shall not substantially burden *a person’s exercise of religion* even if the burden results from a rule of general applicability.”<sup>59</sup> The issue then becomes whether corporations are persons for the purpose of this statute, and more particularly, are they persons capable of exercising religion? If so, when can we say that a particular corporation is exercising religion?

The term “person” is not defined within RFRA itself. As a result, Justice Alito’s majority opinion starts its analysis of the term by looking to the Dictionary Act, which defines the word “person” as used in federal statutes generally.<sup>60</sup> Under that Act, “the wor[d] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, society, and joint stock companies, as well as individuals.”<sup>61</sup> The context of a particular statute may indicate otherwise, but this is the starting point. That starting point accords well with general common law and corporate law, which treat corporations as persons for a host of legal issues, such as the ability to enter into contracts or to sue and be sued.<sup>62</sup>

That is the starting point, but we are *very* far from being finished. Is there something about the context of RFRA that dictates corporations should not be treated as persons? Or, even if corporations are persons under RFRA, does it make sense to say that they are capable of exercising religion? Common sense might answer no to the latter question. How can a legal entity, with no body or mind of its own, have, or act, upon religious beliefs? The thought seems comically absurd, to the benefit of writers for left-of-center comics.<sup>63</sup>

To answer this question in a nonhumorous (but one hopes not humorless) way, we must consider RFRA’s context. RFRA was enacted to protect religious liberty rights, and should be understood in the context of the Free Exercise Clause, particularly as interpreted in the pre-*Smith* case law that RFRA was intended to

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Court’s interpretation of the federal RFRA when it comes to interpreting their own state statute.

58. For convenience, I refer to both of these closely related questions as the corporate standing question. Context should make clear which of the two I am discussing where the distinction matters.

59. 42 U.S.C. § 2000bb-1(a) (emphasis added).

60. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

61. 1 U.S.C. § 1.

62. ERIC ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013).

63. See, e.g., Janet Allon, *WATCH: Jon Stewart Mocks the Hobby Lobby Ruling that Corporations Are People*, ALTERNET (July 13, 2014), <http://www.alternet.org/video/watch-jon-stewart-mocks-hobby-lobby-ruling-corporations-are-people>; *Last Week Tonight with John Oliver: Hobby Lobby (HBO)*, YOUTUBE (June 30, 2014), <http://www.youtube.com/watch?v=zSQCH1qyIDo>.

resurrect.<sup>64</sup> The majority and dissent in *Hobby Lobby* have some back and forth as to what the pre-*Smith* case law says about for-profit corporations exercising religion,<sup>65</sup> with particular focus on the various opinions in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*<sup>66</sup>

One must then ask whether granting for-profit corporations RFRA rights fits with the general purposes of RFRA and the Free Exercise Clause. The Court recognizes that corporations have constitutional rights in a variety of contexts, notably the Free Speech clause of the First Amendment.<sup>67</sup> The Court does so because individuals often exercise their rights collectively in organizations, including corporations. Protecting such corporations helps protect the individuals involved in them.

The exercise of religion is sometimes done in collective organizations as well. The most obvious example is churches, which are often legally organized as nonprofit corporations. Both First Amendment and RFRA case law recognize that such organizations have protected rights.<sup>68</sup> One might try to limit such rights only to organizations like churches that are specifically and exclusively dedicated to religious worship. However, what of nonprofit corporations that are clearly tied to a particular religious group while advancing some of that group's religiously motivated beliefs by providing services such as schooling, health care, or charitable giving? It seems pretty widely recognized that such nonprofit corporations should also be seen as having free exercise rights.<sup>69</sup>

Does involvement in commercial, for-profit business then put one outside the protections of the Free Exercise clause and RFRA? Justice Alito's opinion points out that the Court had already decided it does not. This opinion points to several Free Exercise cases in which the Court considered the rights of individual business persons.<sup>70</sup> Although in some cases the plaintiffs ultimately lost, the Court nonetheless recognized their standing to make a claim—simply holding that the law withstood strict scrutiny.<sup>71</sup>

Thus, our question has become more focused. If nonprofit corporations can claim RFRA protection, and individuals engaged in for-profit businesses can

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64. See *supra* notes 27–40 and accompanying text.

65. *Burwell*, 134 S. Ct. at 2772–73, 2794.

66. 366 U.S. 617 (1961). I would summarize the result of that back and forth as follows: the pre-*Smith* case law contains no definitive holding either that for-profit corporations can exercise protected Free Exercise rights or that they cannot. The majority and dissent draw different inferences as to the implications of this silence for interpreting RFRA. I do not think that an inference from silence in either direction is very strong or persuasive.

67. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

68. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

69. As indeed was done with the contraceptive mandate itself. See *supra* notes 46–49 and accompanying text.

70. *Burwell*, 134 S. Ct. at 2769–70 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961); *United States v. Lee*, 455 U.S. 252 (1982)).

71. *Id.*

as well, is there anything about the for-profit corporation that categorically excludes it from claiming RFRA protection?

There are two leading reasons that individuals use to argue that for-profit corporations are indeed special such that RFRA should never protect them. I think that both reasons are wrong. However, in exploring them, we will not only be answering critics of this portion of the *Hobby Lobby* opinion, but also gaining insight into both *why* for-profit corporations should be able to claim RFRA rights and, just as importantly, *when* they should be able to do so.<sup>72</sup> So let us first see those two leading arguments against RFRA standing for for-profit corporations, and then move on to why those arguments are wrong.

The first argument against RFRA protecting for-profit corporations arises from a particular understanding of the fiduciary duty of corporate directors and officers. Under this argument, officers owe a duty to corporate shareholders, and the only allowable goal of the corporation is to maximize the financial return that shareholders receive. Let us call this the “shareholder conception” of the corporation (which we shall soon contrast with the “stakeholder conception”). The *locus classicus* for legal articulations of the shareholder conception of the corporation is the old case of *Dodge v. Ford Motor Corporation*.<sup>73</sup> Recent cases that describe the shareholder conception of the corporation include *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*<sup>74</sup> and *eBay Domestic Holdings, Inc. v. Newmark*.<sup>75</sup> A number of scholars agree with this view of the purpose of the corporation.<sup>76</sup>

If a strong version of the shareholder conception is correct, it might explain why for-profit corporations are critically different from both nonprofit corporations and unincorporated for-profit businesses. Nonprofit corporations are allowed to have a wide range of purposes, including religious purposes. For-profit corporations are allowed just one purpose, maximizing returns to shareholders. This leaves no room for any other goals, including religious goals. As for unincorporated for-profit businesses, it is true that persons engaged in such businesses pursue profit. However, no legal duty requires them to *only* pursue profit. They can pursue other goals, including religious goals, along with profit. They may put religion over profit whenever the two conflict if they so desire. That is not true in for-profit corporations, where placing religion over profit would

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72. Thus, the analysis will help answer both questions linked together under the concept of corporate standing. *See supra* note 58 and accompanying text.

73. 170 N.W. 668 (Mich. 1919).

74. 506 A.2d 173 (Del. 1986). The scope of circumstances in which the *Revlon* duties apply has become quite narrow. *See* Lyman Johnson, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167 (2014).

75. 16 A.3d 1 (Del. Ch. 2010).

76. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36 (1991); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. UNIV. L. REV. 547 (2003); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266 (1999). For an overview, see David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

violate the fiduciary duties owed to shareholders. Thus, it can make no legal sense to say that a for-profit corporation has any sort of religious value as a defining goal.<sup>77</sup>

Before responding to the shareholder conception, let us consider the other leading corporate law argument for denying RFRA standing to for-profit corporations. This is the argument from corporate personhood, articulated by a number of prominent corporate law scholars in an amicus brief to the Supreme Court in *Hobby Lobby*.<sup>78</sup> The scholars argue that the corporations in *Hobby Lobby* are trying to pass through the religious beliefs of their shareholders to the corporation itself. However, one of the characteristics of a corporation is that it is legally distinct from its shareholders. Shareholders are not responsible for the liabilities of the corporation—one of the key benefits of the corporate form.<sup>79</sup> By attributing the shareholders' religious beliefs to the corporation, scholars argue, shareholders want the benefits that a separate legal personality provides through limited liability while ignoring that separate personality when seeking the protection of RFRA.<sup>80</sup>

### III. A FRAMEWORK FOR ANALYZING RFRA STANDING

Now we turn to what is wrong with these two arguments. This will lead us to both a core liberal principle underlying the *Hobby Lobby* decision and a framework for determining when corporations should be able to invoke RFRA protection. Opposing the shareholder conception of corporate purpose and duty is a liberal and progressive stakeholder vision of corporations as vehicles for pursuing a variety of public goods while still achieving a return for shareholders. Opposing the argument based on corporate personality, we will see that, although the premise of a legal separation between the shareholders and the corporation is completely correct, the conclusion that corporations cannot be vehicles for pursuing religious purposes does not follow at all. The proposed framework for analyzing RFRA standing has two dimensions. The first, and more important dimension looks at the various degrees and forms of organizational commitment to a religious purpose. The second dimension considers how the extent of shareholding concentration in a limited number of shareholders with religious commitments can also affect the analysis. Variations along each dimension can be more or less supportive of RFRA standing, with the analysis being easy where both dimensions either strongly support or discourage standing, and more difficult where the dimensions are at cross purposes.

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77. Some judges in the lower court cases made this argument. See *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385, (3d Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013).

78. Brief for Corporate and Criminal Law Professors as Amicus Curiae Supporting Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333889, [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/13-354-13-356\\_amcu\\_cclp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cclp.authcheckdam.pdf) [hereinafter *Amicus Brief*].

79. *Id.* at 6–8.

80. *Id.* at 13–16.

Let us start with the shareholder conception of the corporation and its fiduciary duty argument. First, even if one accepts that there is an immutable fiduciary duty to solely maximize shareholder returns, that need not necessarily rule out other goals as important subsidiary purposes of a corporation. There are many different ways to achieve the end of maximizing financial returns. In the vast majority of real world situations, spotting a sharp conflict between profit maximization and other plausible goals is nearly impossible because figuring out what profit maximization entails is extraordinarily complicated and subject to differing opinions. Recognizing this, courts use the business judgment rule (acknowledged even in *Dodge*)<sup>81</sup> to give boards much latitude in determining how best to maximize profit.<sup>82</sup> For instance, many believe that had Henry Ford simply said he was giving his workers high wages as a way of maintaining loyalty and high productivity, rather than explicitly saying he was ignoring profits in doing so, the court would not have second-guessed his judgment.<sup>83</sup>

Similarly, for some corporations a religious goal and reputation might be good business. If Hobby Lobby has deeply branded itself as a religious corporation, it could well justify a decision that follows religious precepts by sacrificing short-term profits. Such a decision may increase long-term profitability by making its employees and customers more loyal. It may not, of course, but courts applying the business judgment rule would defer to the judgment of the directors and officers. For such a corporation, it might be the case that its religious goal is strong and entrenched enough to grant it standing under RFRA. After all, if that goal succeeds, it does so by attracting religiously minded employees, consumers, and investors, inducing them to get involved with the corporation. It is precisely such collective involvement with a shared religious purpose that the extension of RFRA to organizations is intended to protect.<sup>84</sup>

But the fiduciary duty objection is more wrong than that. It seems highly unlikely that the duty to maximize shareholder returns is immutable. If shareholders agree to follow legally recognized methods, they should be able to waive that duty and allow their corporation to pursue other goals potentially at odds with maximizing profits. A core principle of American corporate law is that most of its rules are defaults, which the corporation may opt out of when the appropriate approval is received.<sup>85</sup> Shareholders should be able to opt out of the alleged duty by agreeing to a provision in the charter, bylaw, or shareholder

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81. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919).

82. See Claire A. Hill & Brett H. McDonnell, *Fiduciary Duties: The Emerging Jurisprudence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 133, 135–37 (2012); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

83. M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company* (Univ. of Chi. Law & Econs. Olin Working Paper No. 373, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1070284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1070284).

84. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

85. See EASTERBROOK & FISCHER, *supra* note 76; ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 277 (2014).

agreement.<sup>86</sup> Thus, a corporation that has adopted a charter provision stating that it has as a core purpose<sup>87</sup> to pursue Christian values would presumably be a prime candidate for RFRA protection.

But we have still not plumbed the depth of error in the fiduciary duty objection. The previous paragraph suggested that corporations may deviate from the exclusive focus on shareholder wealth *only if* shareholders approve. Many, including myself, do not believe that is a correct characterization.<sup>88</sup> We believe that boards may validly consider and advance the interests of a variety of persons associated with a corporation, including its employees, creditors, customers, and suppliers—even if those interests lead to a reduction in profits. Moreover, shareholders themselves may have interests other than maximizing their own financial returns, and may want corporations in which they have invested to pursue other goals.<sup>89</sup> This is the stakeholder conception of the corporation, and is often associated with those who are on the more liberal or progressive end of the political spectrum.<sup>90</sup> Here is where we see the first major liberal value embedded within the *Hobby Lobby* decision.<sup>91</sup>

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86. Meese & Oman, *supra* note 85, at 281–83.

87. I say “a core purpose,” not “its sole purpose.” Any for-profit corporation will have as one of its purposes achieving a financial return for its shareholders. If it has no intent to return any money at all to its shareholders, it can and should organize as a nonprofit corporation or some other sort of entity.

88. See Lee, *supra* note 13; LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATION, AND THE PUBLIC* (2012); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012); Johnson & Millon, *supra* note 12; McDonnell, *supra* note 12; David Millon, *Two Model of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011).

89. See Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1318 n.85 (2012).

90. PROGRESSIVE CORPORATE LAW, *supra* note 12. Several decades ago, a leading practical expression of this viewpoint was the creation of corporate constituency statutes, which explicitly allow corporations to pursue goals other than shareholder wealth maximization. See Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227 (2004); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992). Another practical expression has been the movement to encourage corporations to behave in socially responsible ways. A very recent practical expression is the creation of benefit corporation statutes, in which corporations can affirmatively commit to pursuing goals other than shareholder wealth maximization. See Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19 (2014); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 279 (2012–2013); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1021–22 (2013); William H. Clark, Jr. et al., *White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Need of Social Entrepreneurs, Investors, and, Ultimately, the Public* (on

Scholars have endlessly debated whether the stakeholder or shareholder conception of the corporation better characterizes American corporate law. As to the leading state, Delaware, Christopher Bruner's take on the enduring ambivalence of Delaware on this point is persuasive.<sup>92</sup> That is, Delaware case law vacillates between the shareholder and stakeholder conceptions, with proponents of each side able to quote authority in their favor.<sup>93</sup> But over half of the states have adopted a corporate constituency statute, which explicitly allows directors to consider the interests of enumerated stakeholders.<sup>94</sup> Although a cramped reading of these statutes is conceivable, it seems pretty clear that in these states the stakeholder conception has triumphed.

Shortly, I shall argue that it has triumphed in Justice Alito's majority opinion as well. If one accepts the stakeholder conception of the corporation, then the fiduciary duty objection to RFRA standing collapses completely. No sort of duty requires those acting on behalf of corporations to pursue shareholder wealth maximization as their only goal. Moreover, if this conception is right, it should lead courts to recognize corporations as adopting a religious purpose more readily than if one prefers the previous responses to the duty objection. There is no need to point to any sort of potential long-term benefit to shareholders in justifying the religious goal. Nor is there any need to show that shareholders have formally approved the shareholder goal. Moreover, the analysis is not limited to closely held corporations—public corporations are also allowed to pursue goals other than shareholder wealth maximization. There is still the question of determining when a corporation has actually adopted such a goal, but a broad array of indicators may point to the conclusion that it has done so. We shall explore these soon.

But first, let us consider the flaws in the argument against RFRA standing based on separate corporate personality.<sup>95</sup> A limited response to this is that occasionally corporate law disregards the separation between the shareholders and the corporation. When a court does so, it is said to have pierced the corporate veil. Courts pierce the veil where one or a few shareholders totally dominate a corporation, and where they have abused the corporate form in a way that unfairly hurts others. When this happens, the court ignores the usual rule of limited liability, and allows creditors of the corporation to collect unpaid debts from the controlling shareholder.<sup>96</sup>

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file with author). It is notable that the Court cites the example of benefit corporations to illustrate that a pure shareholder focus is not required in corporation law. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

91. Assuming that this view is indeed embedded within the majority opinion. I shall argue that it is the first major liberal value. *See infra* notes 120–43 and accompanying text.

92. Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008).

93. *See id.*

94. McDonnell, *supra* note 90; Orts, *supra* note 90; Mitchell, *supra* note 90.

95. *See Amicus Brief*, *supra* notes 78–80 and accompanying text.

96. *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 481 (2001); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the*

With RFRA, one might on occasion decide to pierce in the opposite direction. That is, instead of allowing creditors to treat a debt that belongs to the corporation as belonging to its shareholders as well, one might attribute a free exercise right that belongs to the shareholders as belonging to the corporation. One would do so only in the rare circumstances where there are a very few shareholders who are fully identified with the corporation itself. Indeed, there are a few instances outside of RFRA where courts have engaged in such “reverse veil-piercing.”<sup>97</sup> Stephen Bainbridge has argued for using reverse veil-piercing in the RFRA context.<sup>98</sup> The corporate law scholars who wrote the amicus brief think that veil-piercing is inappropriate.<sup>99</sup> Bainbridge is seemingly right in stating that we disregard corporate personality on occasion, but it is rare. If this were the only response to the corporate personhood argument, it would lead to recognizing corporate standing under RFRA in only a few extreme cases.

But, there is a much more robust response to the argument. Corporate personhood is not really an argument that corporations cannot have a religious purpose. Rather, it is an argument against inferring such a purpose from the individual beliefs of its shareholders. Doing so misconceives the relationship between shareholders and corporations. But, recognizing the importance of separate corporate personality in no way rules out the possibility that a religious purpose may be inferred via other means. In particular, the body that has most authority to make decisions and determine corporate strategies and purposes is the board of directors.<sup>100</sup> Should the board choose to declare the religious purpose of a corporation, nothing at all in the argument from corporate personality would seem to argue against recognizing that board declaration.

Pulling the discussion of fiduciary duty and corporate personality together, the best articulation of a theory of corporations that fits within a liberal or progressive vision is probably the team production model of Margaret Blair and Lynn Stout.<sup>101</sup> Under this theory, the board acts as a mediating hierarch that guides the general direction of the corporation, taking into account the shared and competing interests of a variety of groups that contribute resources to the corporation. The board’s fiduciary duty does not focus exclusively on maximizing shareholder wealth. The corporation is indeed quite separate from shareholders, and it is the board that makes the big policy decisions that define the corporation.

Is there no way in which shareholders are singled out, given that they do elect the board, and have a few other important powers, such as approving charter amendments, the ability to amend the bylaws on their own, and the ability to enter

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*Corporate Veil*, 7 BERKELEY BUS. L. J. 1, 3–4 (2010); Richard B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991).

97. See *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985); *State Bank in Eden Valley v. Euerle Farms, Inc.*, 441 N.W.2d 121 (Minn. Ct. App. 1989); see generally Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990).

98. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235 (2013).

99. *Amicus Brief*, *supra* note 78.

100. Bainbridge, *supra* note 76, at 559.

101. Blair & Stout, *supra* note 88.

into shareholder agreements that can bind the corporation? Here, I may deviate a bit from the pure team production theory, which goes pretty far in trying to minimize the import of the shareholder role.<sup>102</sup> Those just-mentioned shareholder powers are significant and go beyond what other constituent groups, such as creditors and employees, have. In fact, in closely held corporations—not the intended subject for the team production theory<sup>103</sup>—those powers often mean that a few shareholders have full control over the corporation, particularly because the same shareholders typically serve as directors and officers as well. Thus, although one should focus on the actions and statements of the board to determine a corporation's purpose, the shareholders (and officers) may matter as well—especially in closely held corporations. A corporation with just a few related shareholders who are deeply committed to the same religious beliefs may well be more deeply and effectively committed to a religious purpose than an otherwise similar corporation with a more divided and diluted group of shareholders.

This theory of the goals and power structure of corporations should be agreeable to liberals for a few reasons. It allows corporations to pursue a wide variety of goals, creating space for corporations to engage in socially responsible behavior. It also deemphasizes the importance and authority of shareholders and puts more focus on the role of other groups (such as employees) and, insofar as liberals tend to champion those with relatively less wealth and power, liberal sympathy tends to lie with some of those groups.<sup>104</sup>

Next, I shall propose a suggested framework for determining whether a corporation should have standing under RFRA. Then, I shall compare that framework with what the Court says in *Hobby Lobby*.

Consider two dimensions of religious commitment by a corporation: organizational and ownership. The more important dimension focuses on organizational rules and practices.<sup>105</sup> Consistent with the basic structure of corporate law, the board is primarily responsible for these rules and practices, although officers may determine some of them (subject to the board's oversight and approval). A few of the most formal and foundational rules are subject to shareholder approval.

Organizational rules and practices can be more or less authoritative and controlling. The most authoritative rule would be a provision in the corporate

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102. See Margaret M. Blair, *Corporate Law and the Team Production Problem*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 33, 43–44 (Claire A. Hill & Brett H. McDonnell eds., 2012).

103. Blair and Stout refer repeatedly to “public corporations” as the type of entity that they are explaining. See Blair & Stout, *supra* note 88. For a brief discussion of the distinction between closely held and public corporations, see *infra* notes 113–18 and accompanying text.

104. See Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); McDonnell, *supra* note 12; Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

105. I will call this the “organizational dimension.”

charter, which must be approved by both the board and shareholders.<sup>106</sup> Slightly less authoritative would be a provision in the bylaws, which may be approved by either the board or the shareholders on their own.<sup>107</sup> Shareholders may also enter into agreements that can bind the corporation.<sup>108</sup> These are the three main formal powers that shareholders have that are relevant for setting corporate policy, beyond electing the board. Recall that on some conceptions of corporate duty and purpose, formal shareholder approval is required to deviate from the shareholder wealth maximization default, so that only these sorts of rules would suffice to establish a religious purpose.<sup>109</sup>

A broader stakeholder theory of the corporation does not require such formal shareholder approval, and, thus, other sorts of rules and practices may be enough to establish a religious purpose. Boards may adopt policy or value statements that proclaim a corporation's commitment to religious values. Their choice of goods or services produced or sold (or not sold) may deliberately reflect religious values. They may enter into agreements that commit them to courses of action or constraints that reflect religious values. They may make charitable commitments that reflect their values. They may market themselves to consumers, employees, and/or investors based on their religious values. They may make formal disclosures or more informal public statements proclaiming their values. And so on. There is obviously a rich array of possibilities. For any particular corporation, one can consider the totality of circumstances and ask how firmly, formally, broadly, and pervasively that corporation has used this array of methods to proclaim and commit to a set of religious values.

Ownership is the other dimension of corporate religious commitment. It is less important than the organizational dimension, but it does matter given the role of shareholders within the corporation, including both their position as the body that elects the board and their role in amendments to the charter and bylaws.<sup>110</sup> There are several factors that will drive how strongly committed the shareholders are to a religious purpose. One factor is the sincerity and strength of the religious commitment of individual shareholders. Another factor is the degree that share ownership is concentrated in one or a few shareholders. A corporation with just one or two shareholders who are deeply committed to religious values is more

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106. DEL. CODE ANN. tit. 8, § 242(b) (2015); MODEL BUS. CORP. ACT § 10.03 (2010).

107. DEL. CODE ANN. tit. 8, § 109(a); MODEL BUS. CORP. ACT § 10.20.

108. What is required for such agreements to be legally binding on the corporation varies by state. Of particular note is whether the agreement must be signed by all shareholders, or only shareholders holding a majority of the outstanding shares. *See, e.g.*, DEL. CODE ANN. tit. 8, § 350 (agreement of majority of shares may bind close corporation); MODEL BUS. CORP. ACT § 7.32 (agreement must be signed by all shareholders).

109. *See Meese & Oman, supra* note 85, at 284–85; *see also* notes 85–88 and accompanying text. An interesting question would be what weight if any to give to nonauthoritative shareholder expressions of purpose, e.g., policy statement made in a nonbinding Rule 14a-8 shareholder proposal. On my approach, such a statement would carry some weight, but probably not very much. For a description of the 14a-8 shareholder proposal process, see Div. of Corp. Fin., SEC, Staff Legal Bulletin No. 14 (CF) (2001), <http://www.sec.gov/pdf/cfs1614.pdf>.

110. *See supra* notes 85–86 and accompanying text.

likely to remain committed to those values. For the same reason, the total number of shareholders is also relevant. Another factor is to what extent a liquid market exists for a corporation's shares. If there is such a market, the current shareholder base is more prone to turnover as time goes by, so that even if the current shareholders are highly religious, there is a greater chance that future shareholders may not be.

Corporate law has several related but separate concepts that help distinguish important variations in the ownership dimension. From the veil-piercing doctrine comes the notion of an alter ego, where one shareholder so dominates the corporation that there is no real distinction between that shareholder and the corporation.<sup>111</sup> Moving towards a lesser degree of concentration, there is the notion of a controlling shareholder or controlling group.<sup>112</sup> This occurs where one person or closely related group owns enough shares that they can effectively control the corporation; they can elect a majority of the board. Control of a majority of the outstanding shares is generally a sufficient but not necessary condition for such control. Another idea is that of a closely held corporation,<sup>113</sup> which the Court frequently invokes in *Hobby Lobby*. The idea of a closely held corporation is somewhat nebulous, although some states do have special rules for close corporations that provide a more precise legal definition.<sup>114</sup> The two defining features of a closely held corporation are: (1) a relatively small number of shareholders and (2) no active market for the shares (indeed, those statutes which define close corporations typically require that shares must be subject to transfer restrictions).<sup>115</sup> In contrast, shares of a public corporation are traded on a public market.<sup>116</sup> Note that a closely held corporation need not have any controlling shareholder or group,<sup>117</sup> while a public corporation may have a controlling shareholder.<sup>118</sup>

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111. See *supra* note 96 and accompanying text.

112. Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003).

113. MICHAEL S. LONG & THOMAS A. BRYANT, VALUING THE CLOSELY HELD FIRM (2007); Robert B. Thompson, *Allocating the Roles for Contracts and Judges in the Closely Held Firm*, 33 W. NEW ENG. L. REV. 369 (2011).

114. See, e.g., DEL. CODE ANN. tit. 8, § 342 (2015).

115. See, e.g., *id.* § 342(a)(2).

116. See James J. Park, *Two Trends in the Regulation of the Public Corporation*, 7 OHIO ST. ENTREPRENEURIAL BUS. L. J. 429 (2012); Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 138 (2011).

117. For instance, even with as few as two shareholders, there may be no controlling shareholder if each owns an equal number of shares (or each has the right to elect an equal number of directors) and the two shareholders are in conflict with each other (this is not an ideal share ownership situation, by the way).

118. In 2010, for instance, the two founders of Google still controlled 59% of the voting share rights of that company. Tom Krazit, *Google Founders to Sell Stock, Cede Majority Control by 2014*, CNET (Jan. 22, 2010, 5:39 PM), <http://www.cnet.com/news/google-founders-to-sell-stock-cede-majority-control-by-2014/>.

Let us bring together these two dimensions to suggest a framework for determining when a corporation should be able to claim RFRA standing. In both organizational and ownership dimensions, a corporation may show a stronger or weaker degree of commitment to a religious purpose and values. How do those two dimensions interact?

	Concentrated religious ownership	No religious ownership
Strong organizational commitment to religion	Strongest case for standing I	Possible standing II
No organizational commitment to religion	Possible standing III	No standing IV

Table 1: Framework for Determining RFRA Standing.

Consider four extreme cases, illustrated in Table 1, depending upon whether each dimension shows either a quite strong or a quite weak commitment to a religious purpose. The best case for RFRA standing occurs where both dimensions show a strong commitment, as in box I of Table 1. Imagine a family corporation with just a few family members who own all of the shares, with no history or prospect of any sort of market in those shares, and where all shareholders have a sincere and strong commitment to the same specific religion. The corporation has adopted a charter provision declaring that its decisions will be guided by the beliefs of that religion, the corporation has repeatedly and publicly proclaimed this commitment in a variety of settings, the service it provides is closely linked to a religious identity, and, as a result of all these commitments, most employees and customers identify with the same religious beliefs. This is the strongest case for granting RFRA standing. In such a corporation, it is not just the shareholders who are likely to look to the corporation as a way of acting on their religious beliefs, but also many of the employees and customers. The commitment is deep and long-lasting, making it more likely that the corporation will attract similar believers and reducing the likelihood that it is claiming a religious purpose under RFRA as a deceptive way of achieving a commercial advantage. If courts are to grant any for-profit corporation standing under RFRA (and *Hobby Lobby* indicates they will) this is the clearest kind of example of a case where doing so would be appropriate.

Consider the other end of the spectrum, a corporation with no signs of religious commitment on either dimension as in box IV of Table 1. Imagine a public corporation with no shareholder holding more than a few percentage points of the shares, and an active share market on the New York Stock Exchange with heavy turnover. No official policy, statement, or settled practice shows any sign of a commitment to any religious purpose. Clearly, such a corporation cannot claim standing under RFRA, not even if it tried to claim a sudden St. Paul conversion moment.

More interesting and difficult are the other two cases where a corporation shows a strong religious commitment on one dimension but not the other. Given that the organizational dimension is generally more important under corporate law and theory than the ownership dimension,<sup>119</sup> let us turn to the case where a corporation has a strong commitment on the organizational dimension but not the ownership dimension (as in box II of Table 1). Imagine a corporation that was owned by a religious family in its early stages, with a religious purpose bylaw, a well-publicized religious vision statement, and products and policies that show a clear commitment to religious values. As a result, the company's directors, officers, and many of its employees and customers share the founders' strong religious beliefs. However, the founders recently gave up their controlling share position, either by selling out to a company with no religious commitment or by going public and selling enough shares to divest the founding family members of a controlling block.

In this example, the lack of commitment in the ownership dimension does matter. It matters in part because it means that the shareholders themselves are not expressing their religious values through their involvement in the organization, so that is one important constituent group for which RFRA standing serves no purpose.<sup>120</sup> Moreover, the ownership situation unsettles the strength of commitment found in the organizational dimension. If the new shareholders become disillusioned with the religious commitment of this corporation, they may replace the directors with a more secularly-minded board, which in turn may revoke the various statements and practices that constitute the company's ongoing commitment to a religious purpose. Indeed, the rarity (perhaps complete nonexistence)<sup>121</sup> of a corporation fitting this hypothetical situation suggests that public corporations face strong practical pressure to focus on shareholder financial value.

However, that does not necessarily imply that RFRA standing is inappropriate in this case. If the commitments along the organizational dimension are strong enough, this may remain a religious enough corporation. Even if the shareholders are not religious, the directors, officers, employees, and customers are, so the religious values of many individuals are still being pursued through this corporation. Moreover, the commitment may remain quite strong and unlikely to

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119. See Bainbridge, *supra* note 76; Blair & Stout, *supra* note 88.

120. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

121. I am not aware of a corporation that currently fits this description. Chik-fil-A could someday do so—it is a large, profitable corporation with a strong Christian commitment. Currently it is closely held, but its finances are such that it is certainly a candidate for going public someday. However, its religious commitments may make its shareholders reluctant to do so. See Zach Spiegel, *Chik-fil-A IPO Update*, WEALTH DAILY (Oct. 27, 2014), <http://www.wealthdaily.com/articles/chick-fil-a-ipo-update/5420>. A nonreligious example from the liberal world of social responsibility may be Ben & Jerry's, which began as a corporation dedicated to various social causes, but eventually sold out to the large multinational corporation Unilever. The terms of the sale tried to maintain an independent culture of social responsibility within Ben & Jerry's as a subsidiary of Unilever. However, that arrangement has been, at best, modestly successful. See Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VA. TECH. L. REV. 211 (2010).

be changed. The shareholders may find that attacking that commitment is a suicidal business strategy. Insofar as the commitment is embodied in ongoing contracts, it may take time to be able to withdraw from them. In the case of public share ownership, the shareholders may well find the costs of organizing to replace the board prohibitive.<sup>122</sup> Depending upon the precise facts, RFRA standing may be appropriate; though, where the ownership dimension is weak, one does require particularly strong commitment on the organizational dimension.

Finally, consider the case where commitment is weak on the organizational dimension but strong in ownership. Imagine a family corporation owned by just a couple of committed Christian family members, whose shared beliefs are sincere and strong. However, they have in the past shown no particular religious purpose in their business, although they have not caused the business to behave in any way that violates their religious beliefs. Now a new law would force them to violate a strongly held belief. Of course, the corporation can always adopt a formal policy after the issue has arisen, but one should perhaps be more skeptical of such post hoc actions. *Conestoga Wood Specialties* in the *Hobby Lobby* case itself may not be too far off from this description—at least as described by the Supreme Court. Although its shareholder family was certainly composed of committed Christians, the number and formality of organizational commitments to a Christian purpose was pretty meager.<sup>123</sup> Should the corporation be able to claim standing under RFRA?

This is the hardest case of the four. The greater importance of the organizational dimension—which derives from both the stakeholder conception of the corporation with respect to duty<sup>124</sup> and from a recognition of distinct corporate personality<sup>125</sup>—suggests not giving RFRA standing here. If these owners meant to use this business as a vehicle for pursuing their religious beliefs, why have they given no sign of it among the many sorts of practices that we consider on the organizational dimension? We should be able to find *some* degree of religious commitment along the organizational dimension if we are to grant RFRA standing, although the degree of commitment can certainly be more modest where the ownership dimension shows a strong commitment.

But perhaps in rare circumstances we might want to grant RFRA standing to such a corporation. The rationale would be along veil-piercing lines, where we see the corporation as essentially an extension of the dominant owner(s).<sup>126</sup> Even if such owners are not affirmatively using the business to advance their religious values, they may see those values as imposing strong moral constraints on what they are willing to do, even if in the past those constraints have not been visibly binding. Indeed, insofar as we encourage socially responsible corporations, we want to encourage owners who recognize such moral constraints on the behavior

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122. See Sanford J. Grossman & Oliver J. Hart, *Takeover Bids, the Free Rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON. 42 (1980).

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

124. See *supra* notes 81-91 and accompanying text.

125. See *supra* notes 95-100 and accompanying text.

126. See *supra* notes 96-99 and accompanying text.

of the businesses they own.<sup>127</sup> Where the beliefs are sincere, and the burden on those beliefs is significant, we should be willing to consider an accommodation for such a corporation. But in the absence of any sort of significant commitment at the organizational level, this case is (at best) an extremely tenuous candidate for RFRA standing. Of course, once the issue has been identified, the shareholders of such a corporation can move to create the necessary organizational commitment, which could eliminate the dilemma supposed in this hypothesized situation. However, we may often be skeptical of such after-the-fact rationalizations, especially in cases (unlike *Hobby Lobby*, it appears) where the corporation may gain monetarily from seeking a religious accommodation. In such cases, a court could credit such belated commitments only where they appear to commit the corporation to profit-decreasing as well as profit-increasing actions.

I have just suggested a framework for deciding when a corporation should be able to claim standing under RFRA. The guiding concept is an inquiry into the extent to which a corporation has committed itself, legally and practically, to a religious purpose that helps shape its decision-making. One should consider both the organizational dimension and the ownership dimension in determining a corporation's degree of commitment, assigning more importance to the organizational dimension. This framework is grounded in corporate law and theory, and fits well with a perspective on corporate law that is often associated with political liberals or progressives. It provides more of a legal standard than a bright line rule, and will not always lead to clear answers. The result will depend upon the totality of the circumstances. However, it does identify the major factors one should consider, and in concert with well-understood concepts of corporate law, it should provide some handy guidance most of the time.

#### IV. THE SUPREME COURT'S OPINION FITS WITHIN THIS FRAMEWORK

To what extent does this framework reflect the approach of the *Hobby Lobby* opinion? I believe the framework fits the opinion quite well. I acknowledge that the fit is not perfect. The Supreme Court did not develop a full-fledged theory, but rather went only as far as it needed in order to address the facts in front of it. Even then, it may not have gone far enough. Supreme Court justices are not chosen for their expertise in corporate law, and it shows. The opinion is rather vague and imprecise, and contains elements of several different approaches to corporate law. In fact, a plausible claim can be made that the Court has sided with any one of several different understandings of corporations.<sup>128</sup> Nonetheless, the approach

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127. See *supra* notes 88-91 and accompanying text.

128. See Stephen J. Padfield, *Corporate Social Responsibility and Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 25 (2015); Alan Meese, *Hobby Lobby and Corporate Social Responsibility: A View from the Right*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/hobby-lobby-and-corporate-social-responsibility-a-view-from-the-right.html>.

outlined here fits the *Hobby Lobby* opinion at least as well as, and probably better than, all competing approaches.<sup>129</sup>

In attempting to decipher the majority opinion's theory of the corporation, we should look to both its general statements of how corporations should be understood within RFRA, and its description of the facts surrounding the plaintiff corporations in *Hobby Lobby* itself. As to the former, there are two extended passages of particular note. The first states:

Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. 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. . . 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.<sup>130</sup>

When this passage speaks of the people who are associated with a corporation, it lists not only shareholders, but also officers and employees.<sup>131</sup> This suggests more of a stakeholder conception of the corporation, not a shareholder conception. The end of the passage does narrow its focus to "the humans who own and control those companies."<sup>132</sup> However, that, in part, reflects the fact that the corporations in the case, to which the beginning of that sentence refers, are closely held corporations with just five shareholders, who are also the directors and officers. And even this narrower sentence points to those who "own and *control*" the companies, which includes directors and officers, not just shareholders.

Immediately following this passage, the majority opinion cites the Third Circuit Court of Appeals's opinion below,<sup>133</sup> which made the argument based on separate corporate personhood. Justice Alito replied by acknowledging the reality and importance of separate corporate personhood, but dismissed the argument as "quite beside the point," reasoning that: "Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."<sup>134</sup> The Court thereby acknowledges the law of separate corporate personhood,

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129. For a similar characterization of the decision, see Johnson & Millon, *supra* note 12.

130. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

131. Any corporate law junkie reading this will wonder why directors are not on that list, thus illustrating that the U.S. Supreme Court is most emphatically not the Delaware Supreme Court.

132. *Id.*

133. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013).

134. *Burwell*, 134 S. Ct. at 2768.

but says that law is used for various purposes to advance the interests of those involved in the corporation. In applying RFRA, the point is not to identify the corporation with its shareholders, but rather to determine whether granting RFRA standing is consistent with the goals and structure of the corporation in question. In pointing to the human beings who make up a corporation, the Court specifically mentions “the human beings who own, run, and are employed by them,”<sup>135</sup> once again going well beyond shareholders. This whole passage is highly consistent with my response above to the argument from separate corporate personality.<sup>136</sup>

The other general statement of note appears several pages later, and considers the fiduciary duty argument against RFRA standing. It too deserves extended quotation:

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. “Each American jurisdiction today either expressly or by implication authorizes corporation to be formed under its general corporation act for *any lawful purpose* or business.” While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.<sup>137</sup>

This paragraph, for the most part, works as a ringing endorsement of the stakeholder conception of the corporation that many liberals and progressives prefer. It certainly denies the existence of an immutable duty to only consider the financial interests of shareholders, requiring corporate directors and officers to justify any other sorts of goals as helping to maximize profit in the long run.<sup>138</sup>

The passage does show some ambiguity between weaker and stronger understandings of the stakeholder conception.<sup>139</sup> Recall that a weak understanding asserts that a profit-maximization-only goal is the default rule, and opting out of it requires explicit shareholder approval,<sup>140</sup> whereas a stronger stakeholder

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135. *Id.*

136. *See supra* notes 95–100 and accompanying text.

137. *Burwell*, 134 S. Ct. at 2770–71.

138. *See supra* notes 73–77 and accompanying text.

139. *See Pollman, supra* note 54.

140. *See supra* notes 85–86 and accompanying text.

conception asserts that an exclusive focus on profit-maximization is not the default rule, so that shareholder approval is not required to consider other goals.<sup>141</sup> The beginning and end of the quoted passage assert the validity of purposes other than shareholder profit without any qualifiers concerning shareholder approval, suggesting the stronger stakeholder conception. However, in the middle of the passage there are two references to “owner” approval, which could suggest a weaker conception. The first of those references states that “[f]or-profit corporations, *with ownership approval*, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.”<sup>142</sup> Although this passage could be read to suggest that ownership approval is required in order to give to charity,<sup>143</sup> it need not be understood that way. The reference to ownership approval may simply be pointing out that in many cases the shareholders themselves are happy for the corporation to behave charitably, so that shareholders and the beneficiaries can both benefit. Note that many, probably most, corporations that engage in charitable giving do not obtain any sort of explicit shareholder approval, neither for specific instances of giving nor for the general power to give. So this example is not a very good one for the weak stakeholder conception (requiring explicit shareholder approval for nonprofit goals) as an explanation of actual corporate law and behavior.

The second reference to shareholder approval is admittedly stronger evidence that the Court has in mind only the weak stakeholder conception: “*So long as its owners agree*, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires.”<sup>144</sup> That “so long as” does indeed suggest that without owner approval, a for-profit corporation could not take such profit-reducing measures.<sup>145</sup> However, that is only one sentence within the quoted passage above, and the other sentences seem to suggest the stronger stakeholder conception.

More tellingly, the Court’s application of its reasoning to the facts in the cases before it in *Hobby Lobby* is more consistent with the strong than the weak stakeholder conception. Indeed, on the weak conception, it is not at all clear that the corporations behaved appropriately, or even legally, to the extent that they reduced profits in order to advance religious goals. For the Conestoga Wood Specialties Corporation, the Court points to several statements from the shareholders themselves, apparently prepared for trial. It also points to a company “Vision and Values Statement,” with no indication that the shareholders acting as shareholders approved the statement, and to a board-adopted “Statement on the Sanctity of Human Life.”<sup>146</sup> In *Hobby Lobby*, there were two corporations owned by the same family. For these corporations, the Court points to a company statement of purpose, pledges signed by the family members to run the business in

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141. See *supra* notes 88–91 and accompanying text.  
142. *Burwell*, 134 S. Ct. at 2771 (emphasis added).  
143. See Meese, *supra* note 128; Padfield, *supra* note 128.  
144. *Burwell*, 134 S. Ct. at 2771 (emphasis added).  
145. See Meese, *supra* note 128; Padfield, *supra* note 128.  
146. *Burwell*, 134 S. Ct. at 2764–65.

accordance with their religious beliefs, and various religious practices adopted by the companies.<sup>147</sup>

Thus, for none of the three corporations does the Court point to any action taken by the shareholders, while acting as shareholders and following corporate law procedures for shareholder action (e.g., charter amendments, bylaw amendments, or shareholder agreements).<sup>148</sup> The weak stakeholder conception would seem to require such formal shareholder approval for a deviation from the profit-maximization default rule.<sup>149</sup> Perhaps that does not matter in a case like this, where the roles of shareholders, directors, and officers overlap completely, and where it is clear that each individual shareholder does agree with the religious goals. As a matter of corporate law, that should not make a difference. Corporate law prescribes the ways in which shareholders can act where their approval is required for a corporate action.<sup>150</sup> If the shareholders have not acted in such a legally recognized way, then the requisite approval has not been obtained.<sup>151</sup>

It is possible that the Court holds to the weak stakeholder conception but was simply not aware of the need for corporate formalities. Or, perhaps the Court decided that for purposes of RFRA standing, it did not need to require such formality and could recognize the necessary shareholder approval more informally, since in the cases at hand, it was clear that all of the shareholders did in fact approve.<sup>152</sup> But the Court gives no indication that it is introducing its own variant of corporate law for this particular setting. Nor would it be wise for the Court to stray from the requirements of state corporate law in interpreting RFRA. For one thing, the federal courts have no expertise in corporate law, and are unlikely to make sensible choices if they stray from the established state law system. More fundamentally, looking to state law is the conceptually proper inquiry. Recall that the point of this inquiry is to determine what the agreed-upon goals of a corporation are, because an organization that has adopted an adequately strong religious purpose will attract to it persons who want to advance that purpose through their actions within the corporation.<sup>153</sup> In determining what the purposes of *an organization* are, we do not simply add up the individual preferences of

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147. *Id.* at 2765–66.

148. The three listed mechanisms are the ways in which shareholders can exercise their collective powers. There are formal voting requirements for the adoption and amendment of both certificates and articles, *see e.g.*, DEL. CODE ANN. tit. 8, § 102 (2015); MODEL BUS. CORP. ACT § 10.03 (2010) and bylaws, *see e.g.*, DEL. CODE ANN. tit. 8, § 109; MODEL BUS. CORP. ACT § 10.20. Shareholder agreements (not contained in the articles or bylaws) that bind the corporation must be in writing and signed by the requisite number, which varies from holders of a majority of the voting power, *see e.g.*, DEL. CODE ANN. tit. 8, § 350 to a unanimity requirement, *see e.g.*, MODEL BUS. CORP. ACT § 7.32(b).

149. *See Meese & Oman, supra* note 85, at 282; Alan Meese, *Discerning Shareholder Consent to Profit-Reducing Religious Exercise*, THE CONGLOMERATE (July 18, 2014), <http://www.theconglomerate.org/2014/07/i-have-previously-suggested-along-with-my-co-author-nate-oman-that-profit-maximization-is-a-default-rule-which-shareholder.html>.

150. *See supra* note 148 and accompanying text.

151. Meese, *supra* note 128.

152. *Id.*

153. *See supra* notes 63–69 and accompanying text.

those human beings involved in the organization; we look to the defining rules of the organization to ask what its purposes are, and who has the authority to define them. For a corporation, the state corporate law statutes and case law set the core legal framework for those defining rules, and the documents and practices of particular corporations set their purposes operating within the state law rules that constitute corporations. Thus, the state law rules are precisely where the federal courts should look in determining the RFRA standing of a corporation. The majority in *Hobby Lobby* shows no sign whatsoever that it thinks it is ignoring the relevant state law rules,<sup>154</sup> and we should not lightly assume that it is doing so. The Court's attribution of a religious purpose given the facts of the case in front of it is most easily justified legally under a strong stakeholder conception of the corporation, and we should take the opinion as, at least to some extent, an endorsement of that conception.<sup>155</sup>

One other facet of the opinion worth noting is its repeated reference to closely held corporations. Some have taken this as a sign that *only* closely held corporations may claim an exemption under RFRA. Most notable of those drawing this inference are the agencies that implement the ACA. In their proposed revision to the definition of "eligible organizations" that can claim an accommodation to the contraceptive requirement, the agencies limit RFRA protection to closely held corporations.<sup>156</sup> This is certainly inconsistent with the corporate law and theory reviewed in Part III. It also does not follow from the Supreme Court's opinion. It is true that the three corporations at issue in that case were all closely held, and in a proper exercise of judicial prudence the Court did not extend its reasoning well beyond the facts of the case in front of it. The Court does note that getting shareholders in a public corporation to agree to a religious purpose is improbable, and thus it is unlikely that many, if any, public corporations will adopt the kind of commitments that would make them eligible for a RFRA accommodation.<sup>157</sup> It then states "we have no occasion in these cases to consider RFRA's applicability to such companies."<sup>158</sup> That does *not* mean the Court concluded that only closely held corporations may claim a RFRA accommodation. As we have seen, the fundamental corporate law principles that govern all U.S. business corporations, and which the Court repeatedly refers to, dictate that should a public corporation

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154. Indeed, it repeatedly points to state corporate law. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770–72, 2775 (2014).

155. It is certainly possible, indeed probable, that the Court is rather vague as to the legal and conceptual distinctions that matter to corporate law scholars such as myself, and so its factual analysis in this case may have missed the important question of whether and how formal shareholder approval was expressed. In that instance, my argument should be taken as an attempt at a deeper elaboration of the Court's position that goes more explicitly into the relevant corporate law issues and reveals the conception that best fits both what the Court does say and also the facts of the case.

156. Coverage of Certain Preventive Services under the Affordable Care Act, 79 Fed. Reg. 5118-01 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

157. *Burwell*, 134 S. Ct. at 2774.

158. *Id.*

choose to commit to a religious purpose, that would be as legitimate and valid as a closely held corporation doing so.<sup>159</sup>

Thus, the majority decision in *Hobby Lobby* fits well with the framework for determining RFRA standing elaborated here, which in turn fits well with the prevailing progressive conception of the corporation. It includes a strong stakeholder conception of corporate purpose and duty, wherein corporations and their officers and directors have much freedom to adopt and pursue goals other than maximizing the financial returns of shareholders. Separate corporate personality is recognized but not fetishized. That is, corporations are not identified with their shareholders, but rather seen as a collective organization in which a variety of constituencies work together to further their own interests and conceptions of the good. We look to how a corporation has defined its purposes to determine whether a particular corporation has adopted enough of a religious purpose for it to appropriately claim standing under RFRA. Shareholder ownership and beliefs play a role in this analysis—inevitably so, given the authority that shareholders have in corporate law (especially the authority to elect directors, as well as the authority to set rules in the charter and bylaws). While the various roles of shareholders, directors, and officers tend to blend together in corporations like Hobby Lobby, Mardel, and Conestoga Wood, other sources of organizational commitment are equally, if not more important. Corporate law liberals may not identify with the sorts of religious commitments one finds in this case. However, they should very much identify with, and approve of, corporations that have so visibly and consciously chosen to pursue their visions of the public good along with profit. As compared with the kind of socially responsible corporations that progressives lionize and want to enable through the law,<sup>160</sup> Hobby Lobby is very similar—it is just its particular vision of the public good, and the source of that vision, that differs.

It is thus a shame, and somewhat puzzling, that the prevailing liberal and progressive response to the corporate standing element of *Hobby Lobby* has been so hostile.<sup>161</sup> I note in conclusion on this element that there is serious tension between two different liberal complaints about corporate standing. One of these complaints, seen best in the corporate law professor amicus brief,<sup>162</sup> is concerned that the Court gives too much emphasis to the beliefs of individual shareholders, ignoring the importance of separate corporate personality. A more popular complaint is that the Court's rationale for granting standing is not as limited as the Court claims. Even though the Court stresses at several points that its analysis in the opinion only applies to closely held corporations, many fear that the Court's reasoning may eventually sweep further, and note that the Court does not define

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159. For a similar analysis and critique of the proposed definition of eligible organization, see Lyman Johnson et al., *Comments on the HHS' Flawed Post-Hobby Lobby Rules* (UCLA Sch. Of Law Research Paper No. 14-18, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2512860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512860).

160. See *supra* notes 88–91 and accompanying text.

161. See *supra* notes 8–9 and accompanying text.

162. See *Amicus Brief*, *supra* note 78.

what it means by “closely held.”<sup>163</sup> This second complaint is right—for the most part. The Court’s reasoning allows RFRA standing in some circumstances where a corporation is not closely held, although those circumstances are likely to be extremely rare, if not nonexistent in practice. But that shows precisely that the Court has *not* ignored separate corporate personality, as the first type of complaint asserts. Where the second sort of complaint goes wrong is that it does not have a good theory for *why* a broader conception of RFRA standing is objectionable. The underlying emotion seems to be that corporations are dodgy, profit-obsessed forces, which should not be allowed to be free of valid legal restrictions.<sup>164</sup> But that objection, in turn, ignores the whole progressive corporate law project of creating a legal and practical space for socially responsible corporations. Many corporations are indeed profit-obsessed organizations that trample on other values, but many are not, and nothing in the law requires that they be that way. The majority decision in *Hobby Lobby* recognizes this, and liberals should celebrate that.

A response to this claim that the majority opinion embodies a liberal vision of the corporation is: Progressive corporate law is about doing more than the law requires, whereas *Hobby Lobby* is about opting out of legal requirements.<sup>165</sup> But both progressive corporate law and the *Hobby Lobby* opinion agree in seeing corporations as ways for like-minded persons to come together to pursue shared goals to advance a shared vision of the common good in ways that go beyond simply complying with the law. The key issue that the RFRA context brings to the forefront is that different groups and corporations may have different conceptions of the common good and how to pursue it—indeed, in a diverse society, that happens all of the time. What, then, should we do when a corporation pursuing a religiously grounded view of the good runs into conflict with a legal rule? Can we make room for both the group’s vision and achieving the purposes of the law? That brings us to the operation of RFRA once one has determined that a particular organization’s objection to following a law is indeed grounded in the exercise of religion—the subject to which we now turn.

## V. SUBSTANTIAL BURDEN

The Court’s holding on corporate standing has received the most attention, and for good reason, as that holding applies to a multitude of federal statutes. However, the opinion does not end with the discussion of corporate standing (nor does its criticism). Once the Court holds that the corporate plaintiffs may invoke the protection of RFRA, it must then go on to apply the statute. That happens in two steps. First, the Court must decide whether or not the complained-of ACA mandate imposes a substantial burden on the plaintiffs’ exercise of religion. If it determines the answer is yes, as the majority does in *Hobby Lobby*, it must then ask whether this application of the ACA can be justified under the strict

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163. See, e.g., Greenfield, *supra* note 7. This line of argument begins with Justice Ginsburg’s dissent. *Burwell*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) (“Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.”).

164. *Id.*

165. Pollman, *supra* note 54, at 21 (responding to this Article).

scrutiny standard, i.e., as the least restrictive means for achieving a compelling governmental interest.

Both of these steps have produced widespread scorn and fear from liberal commentators. In some cases that reaction stems from ignorance about what the Court actually said and did, but certainly not always. Indeed, Justice Ginsburg's dissent nicely illustrates the strength of the reaction. The opening of that dissent deserves extended quotation:

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least where there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab.

... In the Court's view, RFRA demands accommodation of for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.<sup>166</sup>

There is no "respectfully" in that "I dissent." It is strong stuff, and it is far from just the holding on corporate standing that Justice Ginsburg finds so disturbing.

In much of the reaction to *Hobby Lobby*, it seems easy to detect some resistance to RFRA itself, with a desire to limit the reach of that statute. Why might one find such resistance, given the strong support of liberals at RFRA's origin, and given RFRA's roots in earlier Supreme Court opinions endorsed by many of the most liberal justices in the history of the Court?<sup>167</sup>

One concern may be the great potential breadth of RFRA. It applies to all statutes, even though they say nothing about religion, and have no purpose of burdening religion.<sup>168</sup> The federal government has a huge number of statutes, and there are a huge variety of competing religious groups in the United States.<sup>169</sup> If "significant burden" is interpreted expansively, then it could easily happen that even the most well intentioned of statutes significantly burden some persons'

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166. *Burwell*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

167. *Supra* notes 37–40 and accompanying text.

168. *Burwell*, 134 S. Ct. at 2761.

169. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990); Laycock, *supra* note 24, at 842.

religious beliefs under some circumstances.<sup>170</sup> Moreover, if the strict scrutiny language is interpreted as being strict in theory, but fatal in fact, that will lead to a large number of accommodations. Insofar as liberals are more generally positive than conservatives about the large number of restrictions on private behavior contained in our modern administrative state, they might be more attuned to a threat to the wide web of federal statutes and regulations.

However, this critique of the RFRA principle was well understood before the passage of RFRA—it forms the core of Justice Scalia’s decision in *Smith*.<sup>171</sup> And yet, that critique obviously did not stop liberal dissents in that case or liberal support of RFRA.<sup>172</sup> In what follows, I will give due regard for this concern about an overly aggressive use of RFRA, but I do not think it adequately explains the highly polarized reaction to *Hobby Lobby*. I am afraid that another part of the reaction is that liberals today see RFRA primarily as an assertion of power by conservative Christians against laws that reflect liberal victories in the ongoing culture wars.<sup>173</sup> The ACA is one such victory and much comment on *Hobby Lobby* has focused on speculation about the implications for protections against discrimination on the basis of sexual orientation, another major battle site in the culture wars.<sup>174</sup> Why the change from when RFRA passed in 1993? The answer may be that the perceived beneficiaries of the RFRA principle have shifted. In the old Free Exercise cases, the plaintiffs were religious groups that were generally on the fringes of society—Amish, Seventh Day Adventists, and persons engaged in traditional Native American rituals. Liberals were more inclined to sympathize with such relative social outcasts. In *Hobby Lobby*, the ACA provision was objectionable to a wider array of more mainstream religious organizations, which is also true for the much discussed possible application of RFRA to anti-gay discrimination laws.<sup>175</sup> Conservatives on the Court, most prominently Justice Scalia himself, have hence switched from Justice Scalia’s position in *Smith* to strong support of RFRA, while liberals have made the opposite switch.

If this is a part of the explanation for the reaction to *Hobby Lobby*, it is a shame. It represents a repudiation of some of the core values of the liberal tradition.<sup>176</sup> Many who would call themselves liberals seem to have forgotten that the word is derived from “liberty,” and support for liberty includes support for religious liberty.<sup>177</sup> The United States is a large and diverse country, with many religious groups holding deeply opposed core beliefs. Whenever a law forces believers of some religion to violate strongly held beliefs in order to comply with that law, we have made it harder for such diversity to thrive.<sup>178</sup> That is a loss to those who value being part of a diverse society—which should be understood as a core commitment of liberalism.

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170. Lupu, *supra* note 27, at 180.

171. *See supra* notes 35–36 and accompanying text.

172. *See supra* notes 37–40 and accompanying text.

173. Laycock, *supra* note 24, at 870.

174. *Id.* at 848–51.

175. *Id.*

176. NUSSBAUM, *supra* note 14, at 125.

177. *Id.*

178. Laycock, *supra* note 24, at 841–42.

Of course, sometimes there is no way to avoid a conflict between genuine beliefs and the imperatives driving a law. But some laws may reflect the views of a majority that at the time of enactment had the power to pass the law, and which majority did little to consider the effect on those who did not share some core beliefs.<sup>179</sup> Even for laws that do not reflect such a one-sided imposition of contested beliefs, the laws may be applied in a variety of circumstances that were not anticipated, and may cause distress to some religious believers in ways that the drafters would have wanted to avoid had they anticipated it.<sup>180</sup>

For these reasons, it makes sense to ask whether a law causes some people to act against religious beliefs that are important to them, and when the answer is yes, to ask further whether there is some accommodation that can eliminate or reduce the conflict while still achieving the legitimate goals of the law. That is what RFRA does. There are dangers if one applies this principle too vigorously, but also a loss if we do not apply it vigorously enough. So, let us examine how the Court applies RFRA in *Hobby Lobby*, and see if it strikes a proper balance. The remainder of this section considers the substantial burden inquiry, and the following section considers the strict scrutiny inquiry. To anticipate my conclusions, I think the Court reaches the right results in both inquiries, with generally good arguments. In both sections, I see some potential concerns for future cases, and I suggest modifications that may strike a better balance.

How should a court determine whether a law substantially burdens a person's religious beliefs? I find this to be the hardest part of *Hobby Lobby* to get a handle on, and I have swung back and forth on how best to think about it. It provides somewhat chilly comfort to realize that the substantial burden prong seems to have been problematic for both courts and scholars for decades.<sup>181</sup> The majority opinion in *Hobby Lobby* takes a subjective approach to this question, while the dissent takes an objective approach. Each approach has complementary strengths and weaknesses.

The substantial burden puzzle in *Hobby Lobby* comes from the oddly indirect nature of the burden. The corporations are not being forced to buy contraceptives for themselves,<sup>182</sup> nor are they supplying contraceptives directly to their employees. They are paying insurers to provide payment for medical services and items. If an employee asks for contraception and her doctor chooses to write a prescription, the insurer will then pay for them. The employer is pretty far removed from the decision to use the contraceptives. Even if the employer objects to their use because it believes them to be an abortifacient, does this indirect tie to the objectionable actions mean there is no substantial burden on the employer?

On this issue, persons and religions may differ both as to the morality of the contraceptives and also as to the hard moral question of how much moral

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179. *Id.*

180. Laycock & Thomas, *supra* note 26, at 217.

181. W. Cole Durham, *State RFRA's and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 689–711 (1999); Laycock & Thomas, *supra* note 26, at 228–30; Lund, *supra* note 45, at 488.

182. Corporations are certainly not persons for *that* purpose.

agency one must have in a particular action in order to be complicit in that action. Imagine persons belonging to three religions. According to religion A, there is nothing wrong with the contraceptives. According to religion B, the contraceptives are wrong, but not drastically so, and it has a fairly relaxed understanding of causal complicity, so the employer's role in this situation is a minor transgression. According to religion C, the contraceptives are profoundly evil, and it has a strict understanding of causal complicity, so the employer's role would be seen as deeply wrong, in ways that strike at core beliefs. How should we analyze the burden in these three cases?

Using the subjective approach of the *Hobby Lobby* majority, there is no burden for believers of religion A, because there is no violation of religious belief at all. However, believers of religions B and C are treated the same. The Court simply asks whether the employer's proscribed actions violate sincerely held beliefs, as they do for both religions. It does not ask about how strongly held those beliefs are.<sup>183</sup> The only question it asks about degree of burden concerns the legal penalty involved for violating the law. Here, the fines imposed are quite substantial—and of course, the fines are the same for B and C.

Why treat the two cases as the same? The Court does not want to be drawn into debates as to the reasonableness of competing moral views. The question of complicity is a hard moral question,<sup>184</sup> and the Court does not want to say that some religions have a better answer than others<sup>185</sup> (as we shall see, the dissent's approach does that). The core purpose of RFRA is to respect the variety of religious beliefs; were the Court to start treating the beliefs of one religion as less substantial than the beliefs of another, it would be acting at odds with that purpose.<sup>186</sup>

But this approach has a weakness. It forces the Court to take any assertion of a burden as substantial, as long as that assertion is sincere. If a plaintiff says the burden is substantial, and does not seem to be lying, that ends the inquiry on this question. But that seems problematic, for at least two reasons. First, it extends significantly the number of circumstances in which courts may find substantial burdens, thus increasing the tension between RFRA and legitimate and important statutory goals.<sup>187</sup> And second, cases like believers in religion B above seem pretty peripheral to the concerns that motivate RFRA. RFRA is meant to ease the burden where believers are forced to go against important beliefs if they are to obey a statute. It is aimed at reducing moral dilemmas, not inconveniences.<sup>188</sup> The

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183. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–79 (2014).

184. The law struggles with the question of complicity in many areas. An example is the standard to impose for when aiding a crime becomes criminal or tortious. See Eugene Volokh, *The Religious Freedom Restoration Act and Complicity in Sin*, WASH. POST (June 30, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin/>.

185. *Burwell*, 134 S. Ct. at 2778.

186. Durham, *supra* note 181, at 708; Laycock, *supra* note 24, at 874–75.

187. See *supra* notes 27–28 and accompanying text.

188. This objection suggests that courts consider how central the religious belief at issue in a case is to the belief system of the party claiming RFRA protection. Such a

potential for abuse is even worse if courts are reluctant to examine the sincerity of RFRA plaintiffs.

To avoid these problems, the dissent takes an objective approach. It asserts that the link between the religious beliefs and the ACA requirement is “too attenuated to rank as substantial.”<sup>189</sup> It treats this question of attenuated or not too attenuated as an objective matter of law. But of course drawing the line involves making moral and philosophical distinctions, and different religions will differ as to how they draw the line. In drawing the line where it does, the dissent is taking sides on a deep religious debate, and telling those who disagree with its conclusions that their deeply held feelings of moral violation at being forced to behave in a way they find reprehensible simply do not count. That goes against the spirit of RFRA<sup>190</sup>—not surprisingly, since Justice Ginsburg seems none too moved by that spirit.

This is a hard problem, and no approach is free from serious objection. Forced to choose, I would take the majority’s subjective approach over the dissent’s objective approach. At least the former takes seriously the internal perspective of the religious plaintiffs, which is critical to the purpose of RFRA.<sup>191</sup> However, if I redesigned the statute, I would implement what one might call an inter-subjective approach. This approach would not only look at sincerity, but also ask how important a particular belief is within the relevant belief system.<sup>192</sup> Note, the court must work within the religious belief system of the plaintiff, taking the system’s beliefs and internal logic as given, and then try to determine how much weight a person acting within that system would assign to violating the belief in question. This takes the internal perspective of religions seriously, while limiting somewhat the application of RFRA and avoiding its use in situations where plaintiffs experience mere inconvenience rather than a serious moral dilemma. I think that such an approach has some support in the pre-*Smith* Free Exercise case law. Most notable is *Yoder*, in which the Court went into much detail as to how much harm to the Amish religion a requirement to attend school until age sixteen might cause.<sup>193</sup>

However, the Supreme Court was probably not free to adopt this approach in *Hobby Lobby*. The Religious Land Use and Institutionalized Persons Act of 2000 added language that specifies that the exercise of religion covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>194</sup> That seems to rule out my preferred inter-subjective approach, which looks to the centrality of a particular belief within the broader system. I

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centrality approach has been considered and rejected for good reasons related to the discussion here.

189. *Burwell*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

190. *See supra* note 174 and accompanying text.

191. *See supra* note 174 and accompanying text.

192. A number of circuit courts followed a similar approach in early RFRA cases.

*See Durham, supra* note 181, at 704–08.

193. *Wisconsin v. Yoder*, 406 U.S. 205, 210–13 (1972).

194. 42 U.S.C. § 2000cc-5(7)(A) (2000).

think this statutory language is unwise, but the Court must work within it.<sup>195</sup> Forced to choose, it is probably right to choose the subjective approach. However, in the future the Court may want to look more closely at the sincerity of asserted religious beliefs, especially where a business will benefit financially from avoiding application of a law, raising concern that its real motivation is financial. In *Hobby Lobby*, that does not seem to be a concern, because insurance coverage should be no cheaper if the contraceptive coverage is dropped. This would also seem to alleviate any Establishment Clause concern in the case—religious corporations like Hobby Lobby are not gaining any competitive or financial advantage.<sup>196</sup>

## VI. LEAST RESTRICTIVE MEANS

Having decided that the corporate plaintiffs had standing to sue under RFRA and that the ACA contraceptive mandate imposed a substantial burden on their exercise of religion, the Court had to face a final question. That question was whether the government could justify the mandate as the least restrictive means to achieve a compelling governmental interest.<sup>197</sup> The proper way of applying this strict scrutiny standard has been a point of contention since the passage of RFRA,<sup>198</sup> and the way in which the Court applied it in *Hobby Lobby* has been a source of anxiety for those who are suspicious of an aggressive use of the statute.<sup>199</sup>

The strict scrutiny language of RFRA was taken from the pre-*Smith* case law.<sup>200</sup> In general, the strict scrutiny standard is quite hard to meet. Once a statute is subjected to the standard, it is unlikely to pass the scrutiny. However, in the Free Exercise context, the Court wobbled somewhat over time. In some cases, it applied strict scrutiny in the usual rigorous way, but in other cases, it engaged in a much less rigorous balancing in which the government was able to justify statutes without too much trouble.<sup>201</sup>

The rigor of strict scrutiny is the key reason why the Court decided to stop applying that standard in *Smith*, the case that RFRA (partially) overturned. Justice Scalia's opinion in *Smith* noted that applying the substantial burden test to all facially-neutral standards would lead to applying strict scrutiny on many occasions, and if the strict scrutiny standard were honestly applied, it would lead to

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195. For a strong argument against considering the centrality of beliefs, see Durham, *supra* note 180, at 708–09.

196. Religious belief must be the dominant or principal motivation for action in order for a burden to be substantial. See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 151 (1995). In the commercial setting, this requirement is useful to weed out situations where businesses may be seeking an accommodation to gain a financial advantage over rivals.

197. 42 U.S.C. § 2000bb-1(b) (1993).

198. Durham, *supra* note 181, at 713–21.

199. See, e.g., Hamilton, *supra* note 5; Ford, *supra* note 5.

200. See *supra* notes 28–41 and accompanying text.

201. See James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992); Laycock & Thomas, *supra* note 26, at 222; Lupu, *supra* note 27, at 182–85; Volokh, *supra* note 29, at 1494–98.

requiring religious accommodations on most of those occasions.<sup>202</sup> This critique has some merit, but imposing only rational basis scrutiny instead leads to weak protection of religious liberty, as Justice O'Connor in her concurrence<sup>203</sup> and Justice Blackmun in his dissent<sup>204</sup> point out.

Given the validity of both perspectives, it is perhaps unfortunate (and a bit puzzling) that the Court did not find a rather obvious compromise. If strict scrutiny was too strong and rational basis was too weak, why not use the intermediate scrutiny standard?<sup>205</sup> Under that standard, a law is justified if the means chosen are substantially related to furthering an important government interest.<sup>206</sup> The whole point of this standard is to allow courts to balance competing concerns in circumstances where both sides are likely to have interests that the Court finds sympathetic, as is generally the case in Free Exercise claims. The failure to adopt the intermediate scrutiny standard is particularly puzzling given that a close analogy was easily available. In so-called time, place, and manner cases under the Free Speech clause, the Court applies intermediate scrutiny.<sup>207</sup> These are cases where a law does not directly regulate speech, but where its application in the circumstances at hand restricts speech. This is directly analogous to the *Smith* and RFRA circumstances, where a law that does not regulate religion directly operates to burden religious exercise in the circumstances at hand. Much subsequent complication could have been avoided had the Court adopted this middle ground. Using intermediate scrutiny to engage in the hard case-by-case balancing required to properly adjudicate in this area would be more intellectually honest than applying a weakened form of strict scrutiny. An intermediate scrutiny analysis would also avoid the problem of courts slipping into applying a strict standard, which creates practical and political difficulties, but which is suggested by the statutory language.

For whatever reason, the *Smith* Court did not adopt intermediate scrutiny, and when Congress decided to overturn *Smith*, it simply adopted the strict scrutiny standard from the pre-*Smith* cases. Given the politics that now surround RFRA, this language seems likely to remain in place for the foreseeable future. Presumably Democrats would be happy to replace the strict scrutiny language with an intermediate scrutiny standard. However, Republicans would not agree, and so RFRA will not be amended as long as Republicans retain enough power within the House, the Senate, or the Presidency.

And so, much depends upon how courts apply the strict scrutiny standard. Has the Court in *Hobby Lobby* really applied strict scrutiny in an aggressive and

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202. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886–89 (1990).

203. *Id.* at 891 (O'Connor, J., concurring).

204. *Id.* at 908–09 (Blackmun, J., dissenting).

205. Others have suggested this. See Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925 (1998). Eugene Volokh has a somewhat similar proposal calling for a common law approach to judicial scrutiny in Free Exercise cases. See Volokh, *supra* note 29, at 1502–05.

206. See Smolla, *supra* note 205, at 940–41.

207. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

reckless way, as some fear?<sup>208</sup> I think not, although it is not completely free of doubt. The majority opinion assumes guaranteeing all women access to contraceptives is a compelling interest. Before doing so, it notes in passing that the existence of a number of exemptions calls into question how compelling that interest really is.<sup>209</sup> That point on exemptions was the source of much argument in the briefs for the case,<sup>210</sup> and there is some logic to the concern—if the government is willing to grant a large number of exemptions to a requirement, how compelling does it really find the interest underlying that requirement?<sup>211</sup> The Ginsburg dissent attacks this argument concerning exemptions, noting that such exemptions are a common way to account for various competing interests.<sup>212</sup> Both sides have a point here—one should not automatically infer from the existence of exemptions that the interest underlying a statute is not compelling, and yet at some point a proliferation of exemptions may help show that the government does not really see the asserted interest as all that compelling. At any rate, Justice Alito’s opinion does not pursue the exemption argument, because it assumes the asserted interest is compelling.<sup>213</sup>

That leads to the question of whether the contraceptive mandate is the least restrictive means to achieve the compelling interest of guaranteeing women access to contraceptives. The Court considers two alternative means that might achieve that goal while restricting religious liberty less. The first of these is to have the government itself pay to provide the contraceptives at issue where employers object on religious grounds.<sup>214</sup> Justice Alito appears quite taken with this alternative. Alas, it potentially opens up a can of worms: How much cost might the government be forced to bear in order to avoid imposing a burden on the religious exercise of some? Justice Alito argues that the answer is not zero cost,<sup>215</sup> and yet admits that cost may be a legitimate consideration,<sup>216</sup> and Justice Ginsburg rightly points out that the question of how much cost is too much has no clear dividing line.<sup>217</sup> Moreover, how well can courts evaluate likely costs in determining whether RFRA may require government to pay? There is also an Establishment Clause concern lurking: If the government were required to pay a substantial

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208. See, e.g., Hamilton, *supra* note 5; Ford, *supra* note 5.

209. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).

210. Brief for Petitioners at 58–60, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-356), 2014 WL 173487, at \*58–60; Brief for the Petitioners at 51–57, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 173486, at \*51–57; Brief for the Respondents at 49–55, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-356), 2014 WL 546900, at \*49–55; Brief for Respondents at 50–54, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 546899, at \*50–54; Reply Brief for the Petitioners at 19–24, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 985095, at \*19–24; Petitioners’ Reply Brief at 17–19, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-356), 2014 WL 975500, at \*17–19.

211. Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 254 (1995); Laycock, *supra* note 24, at 873.

212. *Burwell*, 134 S. Ct. at 2800–01 (Ginsburg, J., dissenting).

213. *Id.* at 2780.

214. *Id.* at 2780–81.

215. *Id.* at 2781.

216. *Id.*

217. *Id.* at 2802.

amount to support the employees of religious employers, would that give such employers a financial advantage over competitors who did not receive such a governmental subsidy? In that case, wouldn't the employers with a specific religious belief be benefiting at the expense of others?<sup>218</sup>

Perhaps because of these problems, Justice Alito does not rely on the government pays alternative<sup>219</sup>—although he may give more credence to that alternative than he should. Rather, the majority opinion ultimately relies upon a better alternative accommodation. Encouragingly, Justice Kennedy's concurrence seems to put almost all of its weight upon this alternative, rather than on the option of having the government pay.<sup>220</sup>

That alternative accommodation is one that HHS had already devised for more clearly religious employers. If an organization that HHS has designated as eligible for this arrangement certifies that it objects to providing coverage for some contraceptives, then the organization's insurers must exclude coverage from that employer's health plan and instead itself provide separate payments for the excluded contraceptives.<sup>221</sup> Apparently insurers are willing to go along with this because the expected savings in reduced services for pregnant women balances the cost of the contraceptives.

That fact is important because it means this particular accommodation has extremely limited scope. If one imagines, for instance, a corporation run by Christian scientists that objects to coverage for a broad range of medical procedures that violate their beliefs, even though they are willing to cover a limited range of medical procedures, insurers would certainly not be willing or able to pay for such a wide range of procedures on their own, without someone paying the related premiums.

But as for the contraceptive accommodation, were the government to simply extend this already existing accommodation to the broader range of protected organizations recognized as due RFRA protection under the first part of the opinion, then everyone wins.<sup>222</sup> The employers have at least less of a burden on their religious liberty, insurers apparently break even, and the employees will still get coverage of all contraceptives specified by HHS regulation at no additional cost.

Justice Kennedy's concurrence puts great stress on how well this accommodation balances all competing interests, on how narrow it is, and on how much tougher the questions become where insurers are not willing to step into the gap.<sup>223</sup> In both tone and substance, this concurrence creates much less of a sense of

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218. The RFRA principle has long been noted to be in tension with the Establishment Clause. *See, e.g.*, *Thomas v. Review Bd. of Indep. Emp. Sec. Div.*, 450 U.S. 707, 724–26 (1981) (Rehnquist, J., dissenting).

219. *Burwell*, 134 S. Ct. at 2781–82.

220. *Id.* at 2786–87.

221. *Id.* at 2782.

222. Douglas Laycock, *The Law Worked the Way It Should*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/the-religious-freedom-act-worked-the-way-it-should>.

223. *Burwell*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring).

aggressively imposing the strict scrutiny language of RFRA. Rather, it engages in a nuanced and context-specific balancing act. The result of that balancing is highly persuasive, given the unique circumstances surrounding the accommodation that had already been created for other organizations.<sup>224</sup> To anyone who finds the principle underlying RFRA at all compelling, the balance here should be quite persuasive. The extreme reaction against the opinion seems either a misunderstanding of the opinion, a mistrustful fear of what is to follow, or a sign that many on the political left nowadays do not find the principle underlying RFRA at all compelling.

There is, however, one complication in the Court's use of this existing accommodation to argue that the imposition on religious corporations is not justified. That complication: the possibility that in the future the Court may hold that this accommodation itself violates RFRA. If it does so, it may have pulled off a nasty bait and switch. And there is some possibility that the Court will do so. Organizations subject to the special accommodation have sued claiming that it too violates RFRA.<sup>225</sup> The majority opinion notes this, and refuses to commit as to how it might decide those cases.<sup>226</sup> Several days after delivering the *Hobby Lobby* case, the Court granted a preliminary injunction in one of the cases involving this accommodation.<sup>227</sup> In doing so the Court at least acknowledged that the plaintiffs had an argument of some strength, although it does not give any of its own analysis of the merits.<sup>228</sup>

How should we understand this injunction in the *Wheaton College* case? Is the Court about to pull a bait and switch, using the availability of this limited accommodation to strike down the contraceptive mandate in *Hobby Lobby* but then striking down the accommodation in turn, leaving no good way to advance the compelling interest at stake in the mandate? It is possible, and if so, that would undermine much of the merit of the decision in *Hobby Lobby*. However, I do not expect such a sad outcome. *Wheaton College* is a preliminary injunction—one possibility is that the Court is just trying to maintain the status quo, but will ultimately side with the government. The apparent presence of Justice Breyer in the *Wheaton College* majority suggests that—it would seem very unlikely that Justice Breyer plans to side with the plaintiff in *Wheaton College* after joining the dissent in *Hobby Lobby*.

If the Court does ultimately decide for the plaintiffs on the merits in *Wheaton College*, much will depend upon what it points to as a less restrictive alternative. One possibility is that the plaintiff's victory will be Pyrrhic. Some language in the short order in *Wheaton College* suggests that the Court may decide that the precise procedure devised by HHS to accommodate religious employers imposes an unnecessary burden, but that a small tweak in the procedure would

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224. Laycock, *supra* note 222.

225. See, e.g., *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013); *Wheaton Coll. v. Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014).

226. *Burwell*, 134 S. Ct. at 2782.

227. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

228. For an argument that this accommodation should suffice from a strong supporter of RFRA, see Laycock, *supra* note 24, at 853–62.

make it acceptable.<sup>229</sup> That result would be fine as well, even if it does slice the bologna a bit thin. If instead the Court points to a more problematic alternative, such as the government paying for contraceptive coverage,<sup>230</sup> the result would be more disturbing, and more indicative of an aggressive use of the strict scrutiny language in RFRA in a way that does little to acknowledge the important goals of statutes subject to a RFRA claim. I can certainly see some of the justices in the *Hobby Lobby* majority going that route, but given his concurrence, it is hard to see Justice Kennedy doing so.

Thus, there are some elements in Justice Alito's least restrictive means analysis that could point to unwelcome developments down the line. However, other elements of that analysis are quite strong, especially when viewed through the lens of Justice Kennedy's concurrence.<sup>231</sup> The result in the case itself is fully justified. Those who are objecting so vigorously need to explain why we should not be making this low-cost, win-win accommodation available. Yes, the ACA is an important statute—it promotes many important goals, and represents probably the most important liberal achievement within the federal government since the presidency of Lyndon Johnson. The contraception mandate in particular advances goals that most liberals do and should affirm as compelling. But, all that should not stop us from understanding that some persons do deeply object to that mandate, and where they act as employers they do honestly believe that providing insurance on such terms is profoundly at odds with their personal religious commitments. If we can readily respond to those objections so that female employees will still get the mandated coverage at no extra cost, why on earth not do so? Doesn't the opposition to this accommodation show a complete lack of any empathy with the religious beliefs and strivings of those like the plaintiffs in *Hobby Lobby*? And is that lack of empathy at all consistent with the traditional liberal commitment to a diverse society and religious liberty?

### CONCLUSION

In case you hadn't noticed, those last few questions are rhetorical. I find the emotional reaction against the *Hobby Lobby* case dispiriting. It shows no empathy for persons with differing worldviews, mostly ignores the detailed facts and reasoning in the case, and shows a desire to crush all opposition,<sup>232</sup> even where a highly limited and reasonable accommodation that should hurt no one is available. In part this flows from suspicion about what is to follow. That suspicion is not groundless—we have seen various points where Justice Alito's opinion could be taken in disturbing directions, particularly in a potential willingness to

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229. *Wheaton*, 134 S. Ct. at 2807 (“[T]he applicant has already notified the Government—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act.”).

230. *See supra* notes 214–20 and accompanying text.

231. And recall, Justice Kennedy did join Justice Alito's opinion, so that opinion and the concurrence should not be inconsistent with each other.

232. *Laycock*, *supra* note 24, at 879 (noting, correctly, that the desire of each side for a “total win” has made RFRA into a nasty battleground).

take all professions of being burdened as automatically self-authenticating,<sup>233</sup> his toying with the government-pays option as a less restrictive alternative,<sup>234</sup> and the possibility that he and his colleagues may pull a bait and switch by invalidating the compromise accommodation used to show that something better could be done for the plaintiffs in *Hobby Lobby*.<sup>235</sup> I too have some worries about where many members of the majority of the opinion will side on these matters in the future, although Justice Kennedy's concurrence makes me fairly optimistic that for now a majority of the Court will not move in that direction. Liberal suspicion also reflects the highly polarized politics surrounding the Court, and indeed the United States in general.

But the strength of the anti-*Hobby Lobby* outrage seems to go well beyond these somewhat reasonable sources of concern to an underlying suspicion of RFRA itself. I suggest above my take on why the politics on RFRA have shifted from strong initial support to current opposition.<sup>236</sup> Originally, RFRA and the old Free Exercise Clause case law it resurrected were seen as supporting nonmainstream religious minorities, and such support fit well with liberal support for diversity and the disempowered. Now, RFRA seems to have become a tool for more mainstream conservative religious groups who are fighting rearguard actions in the culture wars after losses in the legislature.<sup>237</sup> As the victors in the legislature, many liberals are unwilling to give aid to their enemies, especially because those enemies are still politically powerful and trying to limit the liberties of others, such as pregnant women and gay people.<sup>238</sup> Not only does this reflect poorly on the depth of their commitment to core values of liberty, it is probably politically unwise as well. In the current climate, a robust use of RFRA can help turn down the intensity of the culture wars. If religious conservatives feel they have some protection against statutes that may force them to act against deeply held beliefs,

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233. See *supra* notes 182–88 and accompanying text.

234. See *supra* notes 214–20 and accompanying text.

235. See *supra* notes 225–29 and accompanying text.

236. See *supra* notes 167–78 and accompanying text.

237. For what it's worth, this story may also explain how some conservatives have also switched from the *Smith* opinion and many of the decisions leading up to *Smith*, where conservative justices were more skeptical of strong religious liberty protection, to today where conservatives aggressively push RFRA. When they were clearly in power, many mainstream religious conservatives were none too concerned about the free exercise rights of odd outlier groups. Now that they themselves are losing control, they are happy to seek protection by invoking the principle of religious liberty. Neither side of the aisle comes out looking too good in the evolution of the politics of RFRA, although it is worth noting that many conservative political groups supported RFRA in Congress in 1993—the phenomenon of conservative opposition to RFRA's principle may have been stronger within the Court in the sixties through eighties than in politics. It is worth noting, though, that RFRA is still sometimes used to protect less mainstream religious believers. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (protecting use of hallucinogenic sacramental tea by a Brazilian church).

238. Laycock, *supra* note 24, at 879.

they have less incentive to follow a scorched earth legislative and political strategy.<sup>239</sup>

The other main source of the outrage pertaining to the *Hobby Lobby* decision stems from its corporate standing holding. There is some legitimate cause for misgiving there as well. The majority opinion is rather hazy on the details of corporate law and structure, and some language puts too much emphasis on the views of individual shareholders rather than on the statements and actions of the corporation itself.<sup>240</sup> There is room for corporate law scholars of all stripes to argue over what exactly the opinion says and how it may be applied in future situations. But the core of popular reaction against this part of the decision seems to be populist distrust of corporations and ridicule over the idea of corporations as persons. That reaction is rooted in some highly genuine concerns about the role of corporations in modern society and politics;<sup>241</sup> still, those concerns are completely misplaced in this instance. The liberal and progressive agenda within corporate law is to create as much legal, practical, and ideological space as possible for corporations that pursue a variety of social values while still looking to make some money. Justice Alito's opinion fits readily within that agenda.

Thus, Justice Alito's majority opinion rests on two core principles: (1) a broad understanding of the potential social purposes of corporations; and (2) a commitment to reducing the burden on diverse religious groups within society. How sad it is to see so many liberals condemning a decision based on values they have traditionally held dear.

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239. Ross Douthat, *The Terms of Our Surrender*, N.Y. TIMES, Mar. 2, 2014, at SR12.

240. See *supra* notes 132, 139–45 and accompanying text.

241. To stress again, these are concerns I very much share. See McDonnell, *supra* note 12.