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Shall Businesses Profit If Their Owners Lose Their Souls? Examining Whether Closely Held Corporations May Seek Exemptions from the Contraceptive Mandate

Christopher S. Ross

SHALL BUSINESSES PROFIT IF THEIR OWNERS LOSE THEIR SOULS? EXAMINING WHETHER CLOSELY HELD CORPORATIONS MAY SEEK EXEMPTIONS FROM THE CONTRACEPTIVE MANDATE

*Christopher S. Ross**

May for-profit, secular corporations claim the protection of the Religious Freedom Restoration Act (RFRA)?

This question is central to numerous lawsuits against the federal government in which business owners argue that certain regulations under the Patient Protection & Affordable Care Act substantially burden the exercise of their religion. This Note examines the threshold hurdle that for-profit business owners must clear to successfully state a claim under RFRA: the question of whether the businesses are "persons" the statute protects. This is an issue of first impression for the U.S. Supreme Court, and it has split the circuit courts of appeal.

First, this Note provides an overview of free exercise jurisprudence, with a focus on the ebbs and flows of the Supreme Court's exemption doctrine. This overview includes a discussion of the Religious Freedom Restoration Act and the laws, regulations, and religious objections that form the basis of the current disputes. Second, this Note introduces the conflict among circuit courts and their varying interpretations of whether for-profit corporations are "persons" under RFRA. Third, this Note assesses this conflict by examining RFRA's text and the context in which Congress enacted the statute. Nothing within this context precludes corporations from stating RFRA claims. In addition, this Note examines legislative history that supports application of the Dictionary Act, which explains that the word "person" in federal statutes includes corporations. This Note ultimately concludes that RFRA does indeed grant corporations the ability to seek exemptions, but that the statute will require courts to undertake the task of ascertaining the proper contours of the law as applied to different corporate forms.

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* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2010, The King's College. I am grateful to my family and my friends for their constant love and support. I would like to thank my adviser, Professor Abner Greene, for his guidance as I wrote this Note.

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> "In reality, the [Religious Freedom Restoration Act] will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight."[1]

INTRODUCTION

Religious observers typically act according to their religion's view of the ultimate good.[2] This pursuit of the good can affect how an individual orders his or her entire life.[3] Sometimes, however, obedience to religious

1. H.R. REP. NO. 103-88, at 17 (1993) (Additional Views of Hon. Henry J. Hyde, Hon. F. James Sensenbrenner, Hon. Bill McCollum, Hon. Howard Coble, Hon. Charles T. Canady, Hon. Bob Inglis, Hon. Robert W. Goodlatte).

2. *See* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 86 (2006).

3. *See id.*

dictates might require action that appears questionable to others or is even against the law. Some Native American traditions, for example, suggest that followers ingest certain hallucinogens as part of sacramental ceremonies, even though the government classifies these hallucinogens as controlled substances.[4] In addition, many faiths require action outside of ritualistic exercise. Thus, members of pacifist religions might refuse to produce weapons in their work.[5] Some religious acts, such as a Roman Catholic nurse objecting to performing abortions,[6] even offend the sensibilities of those with different opinions on social or religious matters.[7] For each of these religious actors, faith governs more than merely association with the divine; it governs relationships, interactions with society, personal development, and even careers.

A law or regulation might hinder or restrict religious exercise.[8] Following a shift in the U.S. Supreme Court's jurisprudence that Congress believed might result in increased burdens on religion, Congress enacted the Religious Freedom Restoration Act[9] (RFRA). RFRA sought to minimize the burdens that the nation could place on religious believers and gave courts the ability to review burdensome laws and exempt claimants burdened by those laws.[10] But Congress was silent on exactly who it envisioned could take refuge within RFRA. Federal courts now face a novel interpretive question: whether for-profit, closely held[11] corporations may claim the protection of this law. Indeed, in March of 2014, the U.S. Supreme Court will hear a consolidated appeal of cases from the Third and Tenth Circuits, which disagreed on the approach to this question.[12]

Plaintiffs in these cases object to a regulation promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act[13] (ACA). Over 300 plaintiffs claim

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

5. *See* Thomas v. Review Bd., 450 U.S. 707, 710 (1981).

6. *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 696 (2d Cir. 2010).

7. *See The Opposition Is Overwhelming but Will the Administration Listen?*, PLANNED PARENTHOOD (Sept. 27, 2008), http://www.plannedparenthood.org/about-us/newsroom/press-releases/opposition-overwhelming-but-will-administration-listen-22389.htm.

8. *See, e.g.*, *Smith*, 494 U.S. at 874 (examining whether a state law classifying peyote possession as a felony burdened the free exercise of the claimants' religion).

9. 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

10. *See infra* Part I.C.

11. This Note's analysis focuses on closely held corporations, *see infra* note 241, in discussing corporate RFRA claims. It does not analyze whether other business organizations can also state RFRA claims. For a discussion of the relevance of corporate form to issues of standing, see generally Steven J. Willis, *Corporations, Taxes, and Religion: The* Hobby Lobby *and* Conestoga *Contraceptive Cases*, 65 S.C. L. REV. 1 (2013).

12. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

13. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 26 and 42 U.S.C.).

that the HHS regulation burdens their religious exercise.[14] The regulation, known colloquially as "the HHS mandate,"[15] requires employer-sponsored insurance plans to provide some women's preventive services, including contraceptives and sterilization procedures, without requiring the employee to share the cost.[16] But it exempts companies below a certain size, as well as religious and nonprofit organizations that meet a stringent test.[17] Both for-profit and nonprofit organizations have made religious objections to the HHS mandate[18]—most coming from various Christian traditions that have long opposed the use and distribution of contraception, particularly methods that they believe have an abortive tendency.[19]

This Note examines a threshold hurdle that stands in the way of for-profit corporations' ability to state RFRA claims: the question of whether corporations are "persons" under the statute. This is an issue of first impression for the Supreme Court, and it has split the circuits.[20] Part I of this Note provides an overview of free exercise jurisprudence, with a focus on the ebbs and flows of the Supreme Court's exemption doctrine and Congress's legislative response. Part I also explains the laws and regulations—and the religious objections—that form the basis of the current disputes. Part II introduces this conflict more thoroughly by analyzing four appellate decisions with differing opinions. Part III assesses this conflict, concludes that the purposes anticipated by RFRA do not exclude corporations, and provides the outline of a basic framework for courts as they begin the daunting task of ascertaining RFRA's contours for corporate claimants.

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14. *See HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Feb. 24, 2014).

15. *See id.*

16. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); *see also* 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

17. *See Hobby Lobby*, 723 F.3d at 1122. For a description of the nonprofit exemption, see *infra* notes 269–71.

18. *See, e.g.*, Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1112 (D. Colo. 2013) (confronting the argument that a for-profit corporation run by an Evangelical Christian was bound by faith not to provide access to abortion); Univ. of Notre Dame v. Sebelius, No. 3:12-CV-253(RLM), 2012 WL 6756332, at *1 (N.D. Ind. Dec. 31, 2012) (confronting the argument that a nonprofit, Catholic educational institution was bound by religious doctrine not to provide access to abortion, sterilization, or contraception).

19. *See, e.g.*, POPE PAUL VI, HUMANAE VITAE ¶ 14 (1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html ("[T]he *direct interruption of the generative process already begun* and, above all, *all direct abortion*, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children. Equally to be condemned . . . is *direct sterilization* . . . ." (emphasis added)).

20. *See infra* Part II.

I. FREE EXERCISE JURISPRUDENCE, LEGISLATIVE EXEMPTIONS, AND CORPORATE CONSTITUTIONAL RIGHTS: A BACKGROUND

The Supreme Court's free exercise jurisprudence and Congress's subsequent reactions create a complex ebb and flow of tests and doctrines. This Part first examines the history of free exercise and the Court's cases that established and then disestablished a regime of exempting religious adherents from laws that burdened their religious exercise. It then examines the legislative response to this line of cases and introduces how corporations fit into the picture.

A. The Historical Understanding of the Free Exercise Clause

The question of exemptions for religious believers has roots in the historical understanding of the Free Exercise Clause, which represents a fusion of various political theories.[21] A number of American colonies protected religious dissenters and afforded members of religious sects the opportunity to escape the religious persecution of both England and the other colonies.[22] The most protective colonies were the first to formulate the free exercise of religion as a legal principle.[23] Eventually, certain colonial charters also allowed colonial proprietors to grant "indulgences and dispensations" to religious believers burdened by the colony's laws.[24] This exemption power was discretionary.[25]

Following the Revolutionary War, the new states and eventually the federal government had to determine how best to protect religious liberty.[26] For example, James Madison successfully[27] proposed that Virginia's Bill of Rights protect "the full and free exercise of [religion]."[28] The American system would no longer be based on mere tolerance—religion was not a gift from government, but rather a duty to God that no government could abridge.[29] By 1789, every state except Connecticut provided some protection of religious freedom.[30] This generally extended to religious

21. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377–89 (1996).

22. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424–25 (1990).

23. *See id.* at 1425.

24. *See id.* at 1428 (quoting CAROLINA CHARTER OF 1665, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1328, 1338 (Benjamin Perley Poore ed., Washington, Gov't Printing Office 2d ed. 1878)). For examples of legislatures and executives granting exemptions, see *id.* at 1467–73.

25. *See id.* at 1428.

26. *See id.* at 1455, 1473.

27. *See id.* at 1443.

28. *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 303 (alteration in original) (quoting Gaillard Hunt, *James Madison and Religious Liberty*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 163, 165–66 (1902)).

29. *See* McConnell, *supra* note 22, at 1443–44.

30. *See id.* at 1455.

practice, in addition to belief.[31] Accordingly, some states offered accommodations[32] to minorities whose beliefs were at odds with societal mores.[33] Free exercise rights, however, were subject to certain limitations that served the interests of the states.[34] For example, a state might allow free exercise rights for peaceable actions, but not for licentious ones.[35]

When the several states joined to form the federal government, they drafted a Constitution banning religious tests for office[36] and allowing for either oaths or affirmations.[37] Beyond these, however, the Federalists writing the Constitution saw little need to enact protection of religious rights, as they believed that the nature of the federal system, checks and balances between government branches, and the numerous religious sects would ensure the protection of religious minorities.[38] This argument did not convince such groups as the Quakers, who feared the effects of laws passed without consideration of minority beliefs.[39] Later, to protect individual liberty expressly, Congress enacted the Bill of Rights[40] and, within this set of amendments, the Religion Clause.[41] Initially, the delegates discussed religious liberty in terms of the "rights of conscience"

31. *See id.* at 1459 (explaining that the dictionaries of the day included "action" in their definitions of "exercise").

32. McConnell acknowledges that his examples of religious accommodation "were initiated by the legislature." *Id.* at 1473. He suggests, however, that it is reasonable to suppose that framers of state and the federal free exercise provisions understood that courts would create and enforce similar protections. *Id.*

33. *See id.* at 1467. For example, an oath requirement might ensure honest testimony in court, but it would violate the religious beliefs of Quakers. *Id.* A Quaker in a lawsuit, therefore, would not be able to testify in court. *See id.* To protect conscientious objectors, most state governments allowed alternative procedures. *Id.*

34. *See id.* at 1461–62.

35. *See id.*

36. *See* U.S. CONST. art. VI.

37. *See* U.S. CONST. art. II, § 1 (providing the text of an oath or affirmation the president must take before entering office); U.S. CONST. art. VI (requiring that all government officials take an oath or affirmation to support the U.S. Constitution).

38. *See* McConnell, *supra* note 22, at 1475–80; *see also* THE FEDERALIST NO. 84 (Alexander Hamilton).

39. *See* McConnell, *supra* note 22, at 1480. The Quakers' concern comports with a view of the Free Exercise Clause described by Christopher Eisgruber and Lawrence Sager, who propose that the Free Exercise Clause should protect minority viewpoints rather than privilege religion. *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

40. *See* U.S. CONST. amends. I–X.

41. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Scholars divide this section of the First Amendment into two bodies of law. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1612 (1993); Ira C. Lupu, *Threading Between the Religion Clauses*, 63 LAW & CONTEMP. PROBS. 439, 439 (2000). Each clause has its own corresponding jurisprudence. *Compare* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (explaining a test for whether a law violates the Establishment Clause), *with* Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990) (holding that neutral laws of general applicability do not violate the Free Exercise Clause).

but eventually decided on the "free exercise of religion."[42] As used in the colonies and states, "free exercise" protected public conduct emanating from religious motivation, including religious speech, worship, assembly, publication, and education.[43] Exercise also included the right to join with other members of the faith to worship.[44] This understanding of the Free Exercise Clause fused views of both the importance of protecting religion and the prevailing Enlightenment philosophy of the day by allowing individuals to worship according to their conscience and restricting government from interfering with religious practice.[45]

B. The Court Giveth and the Court Taketh Away: A History of Exemptions in the Supreme Court

At its core, the Free Exercise Clause, made applicable to the states through the Fourteenth Amendment,[46] means the right to believe and to profess religious doctrine.[47] The Clause therefore prohibits the government from any regulation of religious beliefs,[48] such as compelling beliefs or punishing religious expression.[49]

The extent to which the Clause protects conduct, however, has been the subject of much debate.[50] The Supreme Court initially protected matters of belief, but not necessarily conduct.[51] For example, the Mormon practice of polygamy was religious, and Mormons sought to use religion as a defense while on trial for violating an antipolygamy statute.[52] The Court disagreed and held that the Constitution did not require the government to allow

42. *See* McConnell, *supra* note 22, at 1482–83 (internal quotation marks omitted). "Free exercise" protects more than the "rights of conscience," according to McConnell. *See id.* at 1490. The former denotes the application of the religious belief, while the latter indicates the knowledge or rationale of the belief. *Id.* at 1489. For the First Amendment, this is a key distinction. Beliefs are definitively protected, but it would appear that actions undertaken as a matter of sincere, religious belief receive protection too. *See id.* at 1491–96.

43. *See* Witte, *supra* note 21, at 394–95.

44. *See id.* at 395. The liberty to join in religious association included the liberty to govern the religious body without governmental interference. *See id.*

45. *See* McConnell, *supra* note 22, at 1498–99 ("The religious view emphasizes the importance of the individual; the Enlightenment, the incapacity of the government."). For a description of additional political and theological understandings that form the foundation of the American conception and dedication to religious liberty, see generally Witte, *supra* note 21 (describing theories that yielded principles of liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion).

46. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

47. *See* Emp't Div. v. Smith, 494 U.S. 872, 877 (1990).

48. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963).

49. *See Smith*, 494 U.S. at 877.

50. *See infra* Part I.B–D.

51. *See* Davis v. Beason, 133 U.S. 333, 345 (1890) ("Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."); Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that laws banning polygamy were within Congress's legislative power).

52. *See Reynolds*, 98 U.S. at 161.

Mormons to state this belief as a defense before a jury.[53] This distinction between belief and conduct did not stand, however, in the latter half of the twentieth century.[54] Beginning in *Sherbert v. Verner*,[55] the Court construed the First Amendment to require exemptions from otherwise valid laws that substantially burdened individuals' religious beliefs or practice.[56] *Sherbert* and its progeny, including *Wisconsin v. Yoder*,[57] presented cases where an individual claimed that a law had the effect of hampering his or her religious practice.

1. The Creation of the Exemption Regime: *Sherbert v. Verner* and *Wisconsin v. Yoder*

The Supreme Court first articulated a standard for exemptions in *Sherbert*.[58] Adell Sherbert was a member of the Seventh-Day Adventist Church when her employer adjusted the number of days in its work week.[59] Because Sherbert refused to report to work on the Adventists's holy day, her employer discharged her.[60] She sought unemployment benefits from South Carolina's Employment Security Commission, but the agency found that her refusal to take Saturday work disqualified her.[61] In response to Sherbert's free exercise challenge, the South Carolina Supreme Court upheld the commission's decision, holding that the unemployment statute did not restrict her ability to observe her religious beliefs.[62]

The U.S. Supreme Court reversed South Carolina's court, noting that the Free Exercise Clause prevents the government from regulating "religious *beliefs* as such."[63] It also acknowledged that it had rejected free exercise challenges on the ground that legislation may restrict religious practices if such practices threaten public safety, peace, or order.[64] Despite this precedent, the Court found that South Carolina's withholding of unemployment benefits was a substantial burden on the free exercise of Sherbert's religion.[65] The state denied benefits because of her religiously motivated action, and the pressure to forego her beliefs to obtain the benefit was a substantial burden.[66]

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53. *See id.* at 164, 166 (explaining that Congress's legislation was "free to reach actions which were in violation of social duties or subversive of good order" and that a person may not "excuse his practices . . . because of his religious belief").
54. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963).
55. *Id.*
56. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1473 (1999).
57. 406 U.S. 205 (1972).
58. *See* 374 U.S. at 410.
59. *Id.* at 399.
60. *Id.*
61. *Id.* at 399–401.
62. *See id.* at 401.
63. *Id.* at 402.
64. *Id.* at 402–03.
65. *Id.* at 403.
66. *Id.*

Because the law substantially burdened Sherbert's religion, the Court examined whether South Carolina had a compelling interest to justify infringing upon her First Amendment rights.[67] In light of the claim's constitutional basis, the Court explained that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[68] The state argued that its interests were to prevent fraudulent claims that might cause a dilution of the unemployment fund,[69] but the Court stated that this interest did not justify abridging Sherbert's free exercise rights.[70] The state, therefore, had to exempt Sherbert from its law and provide unemployment benefits.[71]

The Supreme Court later affirmed this analysis in *Wisconsin v. Yoder*.[72] There, Amish parents declined to send their children to school after their children completed the eighth grade.[73] Wisconsin's compulsory attendance law required parents to send their children to school through age sixteen.[74] The Amish parents were convicted of violating this law and fined $5.00 each.[75]

The Court noted that education is a strong state interest, but even such strong interests are still subject to a balancing process.[76] To determine the balance in this case, the Court examined the Amish religion and found that its commitment to not sending children to school beyond the eighth grade was religiously motivated behavior.[77] Indeed, despite increasing regulation that had encroached upon the traditional Amish way of life, the religion's traditions had not changed.[78] Amish families continued to believe that additional schooling interfered with their way of life.[79] The Court held that the Wisconsin compulsory attendance law, which carried the threat of criminal sanction, substantially burdened the petitioners' religion.[80] To

67. *See id.* at 406.
68. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
69. *See id.* at 407.
70. *See id.*
71. *Id.* The Court did not directly state an intent to create a constitutionally compelled exemption regime. In dissent, however, Justice John Marshall Harlan II explained that the Court's holding meant that "if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions." *Id.* at 420 (Harlan, J., dissenting).
72. 406 U.S. 205 (1972).
73. *Id.* at 207. The Amish "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children." *Id.* at 209.
74. *Id.* at 207.
75. *Id.* at 208.
76. *Id.* at 214–15 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").
77. *See id.* at 216–18.
78. *Id.* at 217.
79. *Id.* at 218.
80. *See id.*

require compliance, the Court explained, would endanger or destroy Amish religious exercise.[81]

Wisconsin argued that its interest in compulsory education was sufficiently compelling to override the Amish religious practices.[82] The Court did not accept such a sweeping claim, however, and stated that the government must present a specific interest and the harm that would result if the government granted an exemption.[83] The resulting analysis showed that, as applied to the Amish petitioners, the additional years of school required by the law would do little to serve the state's interests, because the Amish way of life centered around a separate agrarian community.[84] Therefore, even though Wisconsin had a strong interest in education, the Amish families satisfactorily demonstrated a need for an exemption from the education law.[85]

Together, *Sherbert* and *Yoder* stood for the proposition that a religious believer may obtain an exemption from a law by showing that the law substantially burdens his or her free exercise of religion, and that the state has no compelling interest that outweighs the burden in question.[86] This protection of religious faith extended to matters of action or conduct, and not just belief.[87] Moreover, if the state action could not withstand a court's scrutiny, the Constitution compelled the exemption.[88]

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81. *Id.* at 219.

82. *Id.* at 221.

83. *See id.* In other words, the Court established that it would view free exercise exemption claims with strict scrutiny. *See* Volokh, *supra* note 56, at 1467. In cases concerning constitutional law, the Court views different types of claims with various levels of scrutiny. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 551 (4th ed. 2011). When important rights are at stake, the government must meet a heavy burden and show that the law is "necessary to achieve a compelling government purpose." *See id.* at 554 (emphasis omitted). This is the strict scrutiny explained in *Sherbert* and *Yoder*, as well as the test codified in RFRA. *See infra* Part I.C. The Court uses a more deferential level of review in other contexts. The rational basis test requires that the government show that it is "rationally related to a legitimate government purpose." *See* CHEMERINSKY, *supra*, at 552 (emphasis omitted).

84. *See Yoder*, 406 U.S. at 222. Wisconsin also attacked the "ignorance" that Amish parents would bequeath to their children. *See id.* The Court rebuked this critique of a minority religion. *Id.* at 224 ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

85. *See id.* at 235.

86. *See id.* at 240 (Stewart, J., concurring) ("Decisions in cases such as this . . . will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid."). *But see* Eisgruber & Sager, *supra* note 39 (arguing that religion should not receive special privilege, but rather that the law should regard religions equally). In a context in which administrative schemes provide discretion to decisionmakers, therefore, courts should have discretion to grant exemptions to protect religious minorities from veiled discrimination. *See* Eisgruber & Sager, *supra* note 39, at 1299–1300.

87. *See Yoder*, 406 U.S. at 216; Sherbert v. Verner, 374 U.S. 398, 402–03 (1963); *see also* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 65 n.40 (2013) (explaining that the key for protected activity is motivation by religious belief).

88. *See* Volokh, *supra* note 56, at 1473 (explaining that before *Sherbert*, it was for legislatures to grant exemptions, but that *Sherbert* "launched the constitutional exemption

Following *Sherbert* and *Yoder*, courts heard a variety of cases in which petitioners sought exemptions, claiming that laws burdened their religious practice.[89] For example, the Court granted an exemption to a Jehovah's Witness who was denied unemployment insurance after he quit his job in a metal factory when he discovered that he was producing armaments.[90] The Court explained that it would not "dissect" his beliefs in order to determine whether his understanding of his religion was "unreasonable."[91] Instead, the Court found that Indiana's law would require Thomas to modify his beliefs in order to continue working, and that conditioning unemployment benefits on this choice substantially burdened his religious exercise.[92] Similarly, a woman who changed religions during the course of her employment stated a valid free exercise claim when the unemployment commission denied her benefits for failing to work on her Sabbath day.[93]

Claimants did not, however, always find success before the Supreme Court.[94] For example, claimants who were part of the armed forces could not seek the same level of protection as civilians, even if a law substantially burdened their religion, because of the military's compelling interest in "instinctive obedience" and the "esprit de corps."[95] A Jewish claimant, therefore, could not challenge a regulation prohibiting his religious use of a yarmulke.[96] The Court also denied free exercise claims when the exemption would require the government to adjust its internal affairs to account for interference with—and not necessarily a burden on—an individual's spiritual development.[97] For example, the government's use of social security numbers for administrative efficiency did not amount to impairing religious beliefs or exercise.[98] Finally, the meaning of "burden" was in flux, and different interpretations of the term yielded different results

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regime" under which the Constitution would compel an exemption if a law failed to pass strict scrutiny).

89. *See, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987) (explaining that requiring students to read certain materials without requiring them to affirm or deny a belief or to participate in an objectionable practice is not an unconstitutional violation of students' free exercise); Bethel Baptist Church v. United States, 629 F. Supp. 1073, 1085–87 (M.D. Pa. 1986) (holding that requiring churches to pay social security taxes was an indirect burden justified by a compelling governmental interest in a sound tax program).

90. *See* Thomas v. Review Bd., 450 U.S. 707, 710–12, 720 (1981).

91. *See id.* at 715.

92. *See id.* at 717–18.

93. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138, 141–42 (1987).

94. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (holding that a member of the Old Order Amish religion could not receive an exemption from requirements to pay Social Security taxes).

95. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

96. *See id.* at 510 (Stevens, J., concurring).

97. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that while construction on government land that was sacred to Native Americans might hinder spiritual development, it did not burden religious beliefs or exercise); *see also* Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (explaining that the First Amendment did not "require the Government *itself* to behave in ways" to further individuals' spiritual development).

98. *See Bowen*, 476 U.S. at 700.

for claimants.[99] These inconsistences in the application of the doctrine caused some scholars to state that it rarely operated as strict scrutiny.[100]

2. The Fall of the Exemption Regime: *Employment Division v. Smith*

The *Sherbert* and *Yoder* exemption regime appeared to end in 1990, when the Court shifted its Free Exercise Clause analysis to hold that neutral laws of general applicability did not violate claimants' free exercise rights.[101] In *Employment Division v. Smith*, two members of the Native American Church lost their jobs at a drug rehabilitation facility after ingesting peyote,[102] a felony offense in Oregon, as part of a religious ceremony.[103] Relying on the *Sherbert* line of cases, the respondents sought an exemption from Oregon's law classifying possession of a controlled substance as a felony.[104] The Court distinguished their case from *Sherbert*, however, where the religious behavior was not criminal.[105] The Court explained that granting respondents' exemption claim would result in a large expansion of free exercise rights because the law did not target their religious practice and was otherwise constitutional against other peyote users.[106]

The Court stated that it had never allowed an individual's beliefs to excuse that person from complying with valid laws within the state's purview.[107] When it previously held that the First Amendment required exemption from a neutral law of general applicability, such as in *Yoder*, it was "in conjunction with other constitutional protections," such as the right to free speech or parental rights.[108] The Court limited *Sherbert* to

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99. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 961 (1989).

100. *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 852 (2001); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 852–53 (1995).

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

102. Peyote is a hallucinogen that comes from the plant *Lophophora williamsii Lemaire*. *See id.* at 874.

103. *See id.* The Court accepted that the *Smith* petitioners were members of the Native American Church. *See id.* A *New York Times* article, however, indicates that Alfred Smith and Galen Black were guests at the ceremony in which they ingested peyote and that they did so to learn about the religious practice, not to participate in a sacrament. *See Oregon Peyote Law Leaves 1983 Defendant Unvindicated*, N.Y. TIMES, July 9, 1991, at A14.

104. *See Smith*, 494 U.S. at 876.

105. *See id.*

106. *See id.* at 878.

107. *See id.* at 878–79; *see also id.* at 880 (explaining that recent cases upheld neutral laws of general applicability against free exercise challenges in Braunfeld v. Brown, 366 U.S. 599 (1961), and United States v. Lee, 455 U.S. 252 (1982)).

108. *Id.* at 881. Some, however, critique this "hybrid rights" view of the Court's free exercise jurisprudence, stating that it represents a misreading of such cases as *Yoder*. *See* James G. Dwyer, *The Good, the Bad, and the Ugly of* Employment Division v. Smith *for Family Law*, 32 CARDOZO L. REV. 1781, 1784–85 (2011) (explaining that *Yoder* rejected substantive due process claims as the basis of its holding and relied wholly upon free exercise).

unemployment cases, and explained that where state unemployment benefits programs allowed for individual exemptions, the state must describe a compelling reason for extending the system to cases of religious hardship.[109] Outside of this limited scope, the Free Exercise Clause did not require court-created exemptions from otherwise neutral, generally applicable laws.[110] The Court thus rejected the idea that the Constitution compelled application of the *Sherbert* balancing test to general laws that incidentally burdened individuals' free exercise of religion.[111] Free exercise claims that challenged neutral laws of general applicability would receive only rational basis review going forward.[112]

Justice Antonin Scalia bolstered his *Smith* holding in two additional ways. First, he explained the problems associated with judicial determination of questions about religion, even in case-by-case proceedings.[113] Second, he explained that subjecting generally applicable laws to the compelling interest test whenever such a law burdened a person's religious exercise "would be courting anarchy."[114] He did, however, note that even if the First Amendment did not require judicially crafted exemptions for these reasons, the legislature might be more accommodating.[115] Indeed, he pointed to state accommodations of sacramental peyote use as a "solicitous" protection of the value of religious freedom.[116]

Between 1963 and 1990, the Court created a process of exempting religious behavior from burdensome laws and then later claimed not to have such power. Legal scholars fiercely debated whether the First Amendment required such exemptions.[117] Following *Smith*, however, free exercise

109. *Smith*, 494 U.S. at 882–85.

110. *See id.*; *see also* Eisgruber & Sager, *supra* note 39, at 1247.

111. *Smith*, 494 U.S. at 884–85.

112. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 671 (7th Cir. 2013); Fortress Bible Church v. Feiner, 694 F.3d 208, 220 (2d Cir. 2012).

113. *See Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

114. *See id.* at 888.

115. *See id.* at 890.

116. *Id.* ("It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

117. *Compare* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991) (arguing that constitutionally compelled exemptions are "manifestly contrary to the plain meaning of the Free Exercise Clause"), *and* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 940 (1992) (asserting that individuals historically sought occasional exemptions from certain laws but that this did not amount to a general or a constitutional right to an exemption), *with* McConnell, *supra* note 22, at 1513–16 (arguing that the First Amendment requires religious exemptions).

claims required courts to analyze whether a law was neutral[118] and generally applicable.[119] The Constitution did not allow for exemptions.

C. Congress Restores the Exemption Regime: The Religious Freedom Restoration Act

Justice Scalia's opinion in *Employment Division v. Smith* inspired intense debate.[120] In response, a strongly bipartisan Congress[121] passed RFRA, which reinstated the *Sherbert* regime and instructed the courts to analyze laws burdening religious practice with strict scrutiny.[122] Professor Douglas Laycock, a major academic force behind the law, explained that the drafters intended RFRA to ensure that people need not abandon their religious beliefs to comply with the law.[123] In its findings, Congress explained that neutral laws "may burden religious exercise as surely as laws intended to interfere with religious exercise,"[124] that "governments should not substantially burden religious exercise without compelling justification,"[125] and that the *Smith* Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[126] The Act's purpose, then, was to restore *Sherbert* and *Yoder*'s compelling interest test.[127]

To achieve its goals, RFRA provided in its operative section as follows:

> (a) In General—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

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118. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a law directly targeting religious practices was unconstitutional).

119. *See* Duncan, *supra* note 100, at 851 ("[T]he key to understanding the Constitution's protection of religious liberty in the post-*Smith* world is to locate the boundary line between neutral laws of general applicability and those that fall short of this standard.").

120. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308 (1991) (defending *Smith* against McConnell and others); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) (critiquing the analysis in *Smith*).

121. *See* Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377–78 (Nov. 16, 1993) (explaining that the bill passed in the Senate ninety-seven to three and had overwhelming support in the House of Representatives on a voice vote).

122. *See* The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *amended by* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

123. *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 146 (1995) (explaining, among other examples, that RFRA might protect those who run a day care, because the government might not see day care management as religious exercise).

124. *See* 42 U.S.C. § 2000bb(a)(2).

125. *See id.* § 2000bb(a)(3).

126. *See id.* § 2000bb(a)(4); *see also* Korte v. Sebelius, 735 F.3d 654, 671 (7th Cir. 2013) ("RFRA represents a congressional judgment that the rule of *Smith* is insufficiently protective of religious liberty.").

127. *See* 42 U.S.C. § 2000bb-1(b).

> (b) Exception—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[128]

To apply this test, courts must examine the application of the interest to the individual claimant, rather than to the general population.[129] In addition, the nature of compelling interest as articulated in *Yoder*, *Sherbert*, and other pre-*Smith* cases places a high burden on the government to articulate concrete reasons for the law's application.[130] This strict scrutiny applies only if a law is a substantial burden of religious exercise.[131] Thus, neither an insubstantial burden nor a burden on nonreligious activities qualifies for the protection afforded by RFRA.[132]

In the committee report that accompanied RFRA, Congress explained that it expected courts to rely on free exercise cases decided before *Smith* to determine whether religious exercise has been burdened.[133] Moreover, the committee explained that it did not intend to codify any specific free exercise decision, but rather to restore the Court's legal standard in those cases.[134] A court must still consider relevant facts and circumstances.[135] Federal courts have interpreted RFRA to expressly require accommodation instead of insisting on *Smith* neutrality.[136]

Congress defined certain operative terms in RFRA.[137] Its broad scope was clear through its definition of "government," which included the various parts of federal, state, and local governing bodies.[138] In addition, Congress defined the "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."[139] Scholars noted that defining "religion" any other way would prove difficult to adjudicate, and that courts had already shown the ability to differentiate between religiously

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128. *See id.* § 2000bb-1. Any person may state a claim for judicial relief if a law burdens the exercise of their religion. *See id.* § 2000bb-1(c).

129. *See* Laycock, *supra* note 123, at 148.

130. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222–26 (1994).

131. *See id.* at 228.

132. *See id.*

133. H.R. REP. NO. 103-88, at 7 (1993).

134. *See id.*; *see also* Laycock & Thomas, *supra* note 130, at 218.

135. *See* Laycock & Thomas, *supra* note 130, at 218.

136. *See* Korte v. Sebelius, 735 F.3d 654, 671–72 (7th Cir. 2013) (quoting O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003)).

137. *See* 42 U.S.C. § 2000bb-2 (2006). Notably, Congress did not define "person." *See infra* Part II.

138. *See* The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 § 5, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *amended by* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (current version at 42 U.S.C. § 2000bb-2).

139. *See id.* This language was amended by the Religious Land Use and Institutionalized Persons Act of 2000. The current version can be found at 42 U.S.C. § 2000cc-5(7)(A).

motivated and nonreligious behavior.[140] Principal organizers of RFRA indicated, however, that it would protect individuals and that the Dictionary Act's default definition of "person"[141] meant it would also cover religious organizations.[142] Defining the statute in such broad terms was not only a political necessity to keep Congress out of the weeds of specific applications; it was also a matter of principle because the statute performed a constitutional function by enacting the congressional understanding of the Free Exercise Clause.[143]

The statute's sweep was also clear from its broad applicability; as originally enacted, RFRA "applie[d] to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [November 16, 1993]," unless Congress excluded applicability through explicit reference to 42 U.S.C. § 2000bb-3.[144] Because of its applicability to every law passed by any local, state, or federal government, RFRA garnered a reputation as a "super-statute."[145] Because the law had such breadth and swept across the entirety of American law, it was not simply a change from *Smith*.[146] Rather, it represented a substantially different vision of religious liberty and indicated Congress's intent to allow people of all religious persuasions to enjoy a fundamental right by restoring pre-*Smith* free exercise protection.[147]

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140. *See* Laycock & Thomas, *supra* note 130, at 233–34.

141. *See* 1 U.S.C. § 1 (2012). For further explanation of the Dictionary Act, see *infra* note 215.

142. *See* Laycock & Thomas, *supra* note 130, at 234. Interestingly, early drafts of RFRA defined "person," whereas the enacted version did not. *See* H.R. 5377, 101st Cong. § 4(4) (1990) (defining person as "natural persons and religious organizations, associations, or corporations); H.R. 4040, 102d Cong. § 5(4) (1991) (defining person as "natural persons and organizations, association [sic], corporations, or other entities"). The use of legislative history in statutory interpretation is frequently suspect, especially when the history is unexplained, prior versions of a statute. *See* JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 22 (2007); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 (1930). The difficulty lies in weighing the relative value of various sources. *See* CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 66 (2002). If a judge can determine a reason for the change, however, it might be useful in interpreting the statute. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 159–60 (1st ed. 2010).

143. *See* Laycock & Thomas, *supra* note 130, at 219.

144. *See* The Religious Freedom Restoration Act of 1993 § 6.

145. *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253–54 (1995) ("RFRA is thus a powerful current running through the entire landscape of the U.S. Code.").

146. *See* Laycock & Thomas, *supra* note 130, at 244–45.

147. *See id.* There is some debate about whether Congress intended to expand pre-*Smith* protection through RFRA, or whether it intended to restore this protection. *Compare* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996) ("RFRA does not, however, simply restore the pre-*Smith* law."), *with* H.R. REP. 103-88, at 15 (Additional Views of Hon. Henry J. Hyde, Hon. F. James Sensenbrenner, Hon. Bill McCollum, Hon. Howard Coble, Hon. Charles T. Canady, Hon. Bob Inglis, Hon. Robert W. Goodlatte) ("[T]he bill does not reinstate the free exercise standard to the high water mark as found in *Sherbert v. Verner* and *Wisconsin v. Yoder*, but merely returns the law to the state it existed prior to *Smith*."). Because the Court frequently rejected pre-*Smith* free exercise claims using the *Sherbert* test, *see supra* notes 94–100 and accompanying text, the difference between expanding and restoring pre-*Smith* protection matters for resolving the merits of

Professor Eugene Volokh explained that RFRA sought to restore the courts as decisionmakers on claims of religious freedom, contrary to *Smith*'s claim that courts were not the proper body to make such decisions.[148] *Sherbert* launched a constitutional model in which courts decided who would receive exemptions, but *Smith* instructed that exemptions should be purely statutory.[149] RFRA, then, adopted a model in which courts would evaluate claims individually and continue to build upon *Sherbert* and its progeny.[150] Volokh called this the "common-law exemption model" because it granted courts the "*initial* discretionary decision-making power" and asked them to design a jurisprudence in accordance with Congress's vision for religious liberty.[151]

In addition, RFRA claimed that the pre-*Smith* compelling interest test provided a sensible balance between religious liberty and the government's interests.[152] A judge striking this balance does not necessarily have the final say, however, because the decision would be statutory and not constitutional.[153] In matters of statutory interpretation, judges must interpret the law and might make incremental changes, but legislatures retain ultimate authority to reverse judicial action.[154] If Congress determined that a court was "too stingy" in withholding an exemption from a statute that substantially burdens a person's religious exercise, then it could enact a specific exemption to address that situation.[155] Conversely, if Congress found that a court overreached in granting an exemption, it could amend the relevant statute to withhold exemptions.[156] Although the decisions in individual RFRA cases would be final, the underlying statute could be amended for future application, placing claims for religious liberty into the political process, which is how American law generally developed in a common law system.[157] Thus, the law acts to overcome legislative inertia by granting individuals the ability to petition courts for redress rather than wait for legislatures to act.[158] RFRA may also encourage courts to

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RFRA claims. This Note, however, does not address the substance of the HHS mandate claims and therefore does not attempt to resolve this issue.

148. *See* Volokh, *supra* note 56, at 1468.

149. *See id.*

150. *See id.*

151. *See id.* at 1470.

152. *See* 42 U.S.C. § 2000bb(a)(5) (2006).

153. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 253 ("If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.").

154. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5–6 (1982).

155. *See* Volokh, *supra* note 56, at 1476.

156. *See id.*

157. *See id.* at 1469. Like Volokh, this Note does not refer to common law "in the specific sense of the particular body of contract, tort, and property law" developed over centuries by Anglo-American courts, but rather "in the general sense of 'law made initially by judges but subject to statutory override.'" *Id.* at 1469 n.10.

158. *See id.* at 1481.

grant exemptions more generously, sound in the knowledge that the legislature possesses an additional level of review.[159]

D. An Overstep of Authority: The Court Limits RFRA's Reach

Although Congress enacted RFRA with strong bipartisan support, the Supreme Court held that Congress exceeded its power by extending the law's reach to local and state governments.[160] In *City of Boerne v. Flores*,[161] a Catholic church in Texas sought review of a local zoning board decision denying its application for a building permit.[162] In response, the city challenged the constitutionality of the law.[163] The Court explained that Congress relied on its enforcement power in section five of the Fourteenth Amendment,[164] which Congress can use to address constitutional violations in the states.[165] This enforcement power, however, has limits.[166] Any enforcement mechanism passed pursuant to section five must actually enforce the Constitution, not substantively change its meaning.[167] The Court defined this requirement by saying there must be congruence and proportionality between the injury the law seeks to prevent and the means it adopts to effect that end.[168] Without congruence and proportionality, a legislative act effects a substantive change beyond enforcement.[169] For RFRA, specifically, the Court found a dearth of examples where legislatures passed laws because of religious bigotry.[170] Rather, the Court found that RFRA addressed occasional, incidental effects that general laws can have on religious exercise.[171]

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159. *See id.* at 1487. Critics of RFRA suggested that Congress asked the Court to do precisely what the Court rejected in *Smith*: to engage in a balancing of religious claims with governmental interests. For examples of such critiques, see *id.* at 1491 n.70 (quoting various scholars critiquing RFRA).

160. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 86–87.

161. 521 U.S. 507.

162. *See id.* at 511.

163. *See id.* at 517. The Court's analysis in *Boerne* appeared to limit the constitutional question to RFRA's legitimacy as applied to state and local governments. The Court later applied RFRA to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

164. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

165. *See Boerne*, 521 U.S. at 517–18.

166. *See id.* at 518.

167. *See id.* at 519 ("Congress does not enforce a constitutional right by changing what the right is.").

168. *See id.* at 520; *see also* Eisgruber & Sager, *supra* note 160, at 87.

169. *See* Eisgruber & Sager, *supra* note 160, at 88. The Court confirmed this analysis by analyzing the history of the Fourteenth Amendment's adoption, *see Boerne*, 521 U.S. at 520–26, as well as its early section five jurisprudence. *Id.* at 524–25 (explaining that in The Civil Rights Cases, 109 U.S. 3 (1883), the Court held that section five allowed for legislation that corrects state constitutional violations, but does not allow general legislation).

170. *See id.* at 530.

171. *Id.* at 530–31 (citing examples from the legislative history, including "anecdotal evidence of autopsies performed . . . in violation of" certain religious beliefs).

RFRA, it held, was not proportional to what it sought to remedy.[172] Instead, its "[s]weeping coverage" included local, state, and federal laws without temporal limitation.[173] For these reasons, the congruence and proportionality required by section five were not present.[174] According to the Court and some scholars, this decision was necessary on federalism grounds because it protected the states from overweening action by the federal government.[175] On the other hand, Justice Anthony Kennedy's opinion elevated the Court's interpretation of the Constitution above the interpretation of the other branches and gave little to support his assertions that the other branches cannot engage with the Court on the meaning of a constitutional provision.[176]

The Court did note, however, that in its proper spheres of responsibility, Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[177] Thus, the Court's precedent compelled the application of *Smith* in *Boerne*, but the Court's reasoning left the possibility that if RFRA were enacted in accordance with Congress's powers, then it could apply to the federal government.[178] *Boerne*'s federalism rationale also inspired a wave of state analogues to RFRA that reflected what the Court stripped from the federal RFRA.[179]

The Court confirmed RFRA's applicability to federal laws and regulations in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[180]. There, the Court entertained a claim by a Brazilian Christian Spiritist sect, O Centro Espirita Beneficente Uniao do Vegtal (UDV), seeking an exemption from the federal Controlled Substances Act[181] (CSA). Part of the sect's worship was ingesting hoasca, a tea brewed from two plants.[182] One of the plants in the tea contained dimethyltryptamine, which the CSA classified as a Schedule I drug.[183] The tea was central to UDV's rituals, and banning it indisputably burdened the church's religious exercise.[184]

The Court explained that RFRA requires the government to justify a compelling interest to burden a person seeking an exemption.[185] The

172. *See id.* at 532.
173. *Id.*
174. *Id.* at 533 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.").
175. *See, e.g.*, Marci A. Hamilton, City of Boerne v. Flores, *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 711–12 (1998).
176. *See* ABNER S. GREENE, AGAINST OBLIGATION 238 (2012).
177. *Boerne*, 521 U.S. at 535.
178. *Id.* at 536.
179. *See* Volokh, *supra* note 56, at 1468 n.6 (compiling state analogues to RFRA).
180. 546 U.S. 418, 428 (2006).
181. *See id.* at 425 (citing 21 U.S.C. §§ 801–971 (2006)).
182. *See id.*
183. *See* 21 U.S.C. § 812(c) sched. 1(c)(6).
184. *See Gonzales*, 546 U.S. at 426.
185. *See id.* at 430.

government must state more than "broadly formulated interests," and the Court "must searchingly examine" the government's interests, as well as any impediments flowing from granting an exemption.[186] This level of strict scrutiny results in a highly fact-intensive analysis for each claim.[187] In *Gonzales*, the Court held that the government's argument for a compelling interest in uniform application of the law failed.[188] The CSA contained a provision allowing for nonuniform enforcement, so the government could not claim uniform enforcement as a compelling interest.[189] The Court thus found that the law could support exemptions and held that the application of the CSA to the 140 members of the UDV sect violated RFRA.[190] RFRA granted the power of exemption to judges, and the Court used this power to exempt the UDV.[191]

E. Free Exercise Claims by Profit-Seeking Individuals and Corporations

The Court has not yet used its RFRA exemption power to entertain a claim from a secular corporation.[192] The Court has heard, however, free exercise claims from individuals involved in the pursuit of profit[193] and corporations organized around religious ends.[194] In addition, it has articulated a standard for applying First Amendment rights to corporations, which have long been considered "persons" in many aspects of statutory law.[195] This section briefly explores each of these aspects.

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186. *Id.* at 431 (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).

187. *See id.* at 430.

188. *See id.* at 434–37.

189. *See id.* Similarly, a longstanding exemption on the use of peyote for religious purposes supported the argument that uniform application of the Controlled Substances Act was a weak argument. It showed that Congress expected certain limitations on the Act and that the Act did not require uniform application. *Id.* at 434–35.

190. *See id.* at 438–39.

191. *See id.* The *Gonzales* case did not challenge the constitutionality of RFRA, so whether the law violates the Establishment Clause or represents an overreach of Congress's powers applied to the federal government is still a possible source of future litigation.

192. *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012) (Sotomayor, Circuit Justice) (denying application for an injunction pending appellate review).

193. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (adjudicating a claim by merchants who believed a law burdened their religious exercise).

194. *See, e.g.*, *Gonzales*, 546 U.S. at 425 (adjudicating free exercise claim by incorporated church group); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (same); *see also* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. (forthcoming) (manuscript at 40), *available at* http://ssrn.com/abstract=2237630.

195. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); *see also* Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1723–47 (2008) (explaining three theories of corporations and the availability of corporate speech under each).

1. Claims from Individuals in the Pursuit of Profit

In several cases, the Supreme Court has heard free exercise challenges to laws that allegedly burdened the religion of individuals engaged in business.[196] The Court decided *Braunfeld v. Brown* before it created the *Sherbert* regime, but it contained seeds of the compelling interest test.[197] The plaintiffs were Orthodox Jews who claimed that a law requiring their stores to close on Sundays violated their free exercise of religion; the plaintiffs already closed for the Sabbath on Saturdays, and would therefore lose further economic benefit.[198] Although the Court accepted that this would be a result, it held that the state had a compelling interest in Sunday closing laws, and that the interest in a uniform day of rest outweighed the business owners' free exercise claims.[199]

In *United States v. Lee*,[200] decided after *Sherbert* and *Yoder*, the Court examined the claims of an Old Order Amish farmer and carpenter who did not pay Social Security taxes for several employees on the grounds that the Amish faith forbids receipt of and contributions to Social Security.[201] The Court held that the law burdened Lee's religious exercise, but it also found that the government's interest in a uniform Social Security system justified this burden.[202] The Court distinguished the feasibility of exemptions from Social Security from *Yoder*, where the exemption was from an education system.[203] In short, the Court found that exemptions from a tax system would be difficult to manage if myriad faith groups sought exemptions.[204]

In these cases, an individual in his capacity as either an employee or an employer sought judicial protection from a law that burdened the exercise of his religion.[205] Without that protection, the petitioners would face the choice of following the instructions of their religion and losing a government benefit, or abandoning their religion to gain a benefit.[206]

196. *See* United States v. Lee, 455 U.S. 252, 254 (1982); Thomas v. Review Bd., 450 U.S. 707, 710 (1981); *Braunfeld*, 366 U.S. at 601.

197. *See Braunfeld*, 366 U.S. at 603–04 ("[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.").

198. *See id.* at 601.

199. *See id.* at 608–09 (explaining that allowing an exemption from the single day of rest for business owners of other religions could create enforcement problems or unfair economic advantage); *see also Gonzales*, 546 U.S. at 435 (explaining the meaning of *Braunfeld* for the Court's analysis of individual exemptions to state's interests).

200. 455 U.S. 252.

201. *See id.* at 254–55.

202. *See id.* at 257–60.

203. *Id.* at 259–60.

204. *See id.*

205. *See supra* notes 196–204 and accompanying text; *see also* Korte v. Sebelius, 735 F.3d 654, 679–81 (7th Cir. 2013).

206. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987).

2. Claims from Religious Nonprofit Corporations

In addition to claims from individuals in the pursuit of profit, the Supreme Court has entertained claims from corporations organized for religious purposes, even though such nonprofit corporations do not pray, worship, or undertake any act independent of the individuals comprising them.[207] *Gonzales* was the most recent RFRA claim by a nonprofit organization.[208] There, the petitioner was a New Mexico corporation.[209] Thirteen years earlier, the Court heard a free exercise claim from a Florida nonprofit corporation in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[210] The church in that case was part of the Santeria religion[211] and sued the city over an ordinance forbidding the sacrifice of animals in the town.[212] The Court held that such laws intentionally targeting religious exercise were not neutral, and therefore received strict scrutiny rather than *Smith*'s rational basis review.[213] Ultimately, the law did not survive that level of scrutiny.[214]

In each of the cases described in Part I.E.1 and I.E.2, the Court did not question whether the religious person or corporation had the ability to assert a claim. Both individuals in the search of profit and corporations organized around religious principles could equally seek exemptions under the Free Exercise Clause, and a religious corporation could state a claim under RFRA. The Court did not always grant such exemptions, but when it did, the availability of an exemption hinged on the balancing test rather than on who stated the claim.

3. Theories of the Corporation and Corporate First Amendment Claims

American law regularly considers corporations to be "persons" for purposes of statutory construction.[215] Corporations are separate legal entities with rights, obligations, and liabilities that are different from those of their owners and operators.[216] The Court has explained that a

207. *See* Gaylord, *supra* note 194, at 55. Rather, nonprofits act according to their directors' instructions. *See id.* at 65.

208. *See supra* notes 180–91 and accompanying text.

209. Joint Appendix at 18, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435 (2006) (No. 04-1084), 2005 WL 1628869 (reproducing plaintiff's complaint).

210. 508 U.S. 520 (1993).

211. *See id.* at 524.

212. *See id.* at 525–28 (explaining the town's distaste for the religion's practices of ritualistic animal slaughter and the process by which it created laws curtailing the practice).

213. *See id.* at 542–46.

214. *Id.* at 546. *But cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (rejecting a religious freedom claim on the grounds of compelling interest, not standing).

215. *See, e.g.*, 1 U.S.C. § 1 (2012) (defining the word "person" in the U.S. Code as inclusive of corporations, partnerships, trusts, and other entities unless the context of the law dictates otherwise); 18 AM. JUR. 2D *Corporations* § 72 (2013); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 273 (2012) (explaining the artificial person canon of construction, which mirrors the Dictionary Act).

216. 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1 (rev. vol. 2006).

corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law."[217] *Black's Law Dictionary* defines "corporation" as an entity "having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely."[218] A corporation, therefore, is a separate legal entity with distinct rights and obligations and is the product of positive law.[219] Corporations do business through a board of directors, not through shareholders.[220] Many corporations elect to make business decisions based on values and principles outside of the bottom line, and many corporations have adopted a theory of corporate social responsibility as a meaningful purpose of doing business.[221]

A corporation might be a "person" for purposes of a statute if such a construction will give effect to the purpose or the spirit of the law.[222] The U.S. Code recognizes this in the Dictionary Act[223] by providing a rebuttable presumption that the word "person" in a statute includes corporations, and courts have held that a corporation does not literally need to be the actor for such statutes, because corporations do nothing without human actors.[224] Language imparting personhood to corporations has existed as long as corporations have,[225] although the prevailing theories of corporations have changed.[226] Three dominant theories of corporations include the artificial person theory, the contractual theory, and the real entity theory.[227]

The artificial person theory was the earliest theory of corporations in American law.[228] It taught that a corporation was an artificial entity created through legislative grant and controlled by the state for public reasons.[229]

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217. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 517, 636 (1819).

218. BLACK'S LAW DICTIONARY 391 (9th ed. 2009) (listing and defining numerous types of corporations).

219. *See* Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. (forthcoming) (manuscript at 20–23), *available at* http://ssrn.com/abstract=2294582. *But see* Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1355 (2013) (arguing that the separate legal status of a corporation is true for both nonprofit and for-profit corporations).

220. *See* Rutledge, *supra* note 219, at 21; *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 87 (2010).

221. *See* Rienzi, *supra* note 87, at 83–84 (providing the examples of Whole Foods and Chipotle that have adopted social purposes as part of their business platforms).

222. *See* FLETCHER ET AL., *supra* note 216, § 7.05.

223. 1 U.S.C. § 1 (2012).

224. *See* Jeremy M. Christiansen, Note, *"The Word[] 'Person' . . . Includes Corporations": Why the Religious Freedom Restoration Act Protects Both For- and Nonprofit Corporations*, 2013 UTAH L. REV 623, 645–46.

225. *See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 796.

226. *See id.* at 798–808 (explaining three theories of corporations).

227. *See id.*

228. *See* Katherine Lepard, Note, *Standing Their Ground: Corporations' Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH L. REV. 1041, 1044 (2013).

229. *See* Baworowsky, *supra* note 195, at 1725.

Indeed, corporate charters frequently went to the politically connected elite.[230] Under this theory, the corporation, with purposes dictated by the state, could not assert a claim against the entity that allowed its existence.[231]

The contractual theory arose in backlash to the artificial person theory, which granted corporate status as a privilege.[232] Corporations desired protection from the regulatory power of the government, so states created statutes through which individuals could join together and incorporate businesses to pursue legal business activities.[233] This theory asserted that the sole goal of a corporation is profit[234] and ostensibly viewed corporate rights as those of the individuals joined together for sake of the business.[235] The contractual theory crumbled, however, as publicly traded companies increased the number of shareholders involved in a business venture.[236]

The real entity theory replaced the dying contractual theory and is a middle ground between the contractual and the artificial entity theories.[237] The theory accounts for the natural human inclination to associate and to form purposeful groups, and it holds that individual owners are different from the directors.[238] Under this theory, a corporation can develop an identity, pursue certain purposes defined by its board of directors, and serve a mediating function in society between individuals and government.[239]

The real entity theory provides a framework for conceiving corporations as more than mere profit-generating machines.[240] Especially in closely held corporations,[241] where individual owners also participate in the

230. *See* Blair, *supra* note 225, at 799.

231. *See* Baworowsky, *supra* note 195, at 1726.

232. *See id.* at 1727–28.

233. *See id.*; *see also* Blair, *supra* note 225, at 801–02.

234. *See* Baworowsky, *supra* note 195, at 1731; *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. the Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

235. *See* Blair, *supra* note 225, at 804.

236. *See id.*

237. *See* Baworowsky, *supra* note 195, at 1736.

238. *See id.* at 1737 (calling the corporation "a new group body naturally forming from the cooperation of its individual members"); *see also* Blair, *supra* note 225, at 807 (explaining that scholars and courts developed this theory to account for the shareholder becoming more of an investor than a owner).

239. *See* Baworowsky, *supra* note 195, at 1740–41 (citing ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 180 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835)). This position is far from gaining universal acceptance, however, as many view corporations as a source of economic inequality and societal injustice. *See, e.g.*, Kent Greenfield, Daniel J.H. Greenwood & Erik S. Jaffe, *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 877–81 (2007); *We the People, Not We the Corporations*, MOVE TO AMEND, https://movetoamend.org (last visited Feb. 24, 2014).

240. *See* Blair, *supra* note 225, at 819–20 (explaining that the existence of a corporate person is necessary for companies like Facebook and Google to achieve their goals of emphasizing "the importance of such factors as 'culture' and 'reputation' and 'innovativeness' in the value creating process" rather than simply acting in accordance with a number of contracts).

241. *See* 1A FLETCHER ET AL., *supra* note 216, § 70.10 (rev. vol. 2002) ("Courts generally identify common law close corporations by three characteristics: (1) a small number of

management of the company, a corporate identity can emerge from the deliberate actions of those directing the corporation.[242] In the context of a company run by those sharing a religion, "these individuals can choose to maintain a religious identity."[243]

The Supreme Court has relied on each of these theories in its various decisions on corporate rights, so it is unclear which theory it will use to examine corporate exercise of religion under either the Constitution or RFRA.[244] The best compass for its potential treatment of corporate religion is its treatment of corporate speech.[245] In *First National Bank of Boston v. Bellotti*,[246] the Court heard an argument by a corporation alleging that a Massachusetts statute restricting use of corporate funds to influence elections violated its free speech rights.[247] At the outset of its analysis, the Court instructed that the proper framing of the question was not whether the corporation has the right, but rather whether the regulated activity was something "that the First Amendment was meant to protect."[248] Certain constitutional rights are "purely personal," meaning that historically, only individuals received protection under that right.[249] To determine whether the right was purely personal, the Court examined "the nature, history, and purpose of the particular constitutional provision."[250] In its analysis of the Free Speech Clause, the Court explained that First Amendment freedoms comprise "fundamental components of liberty" and that speech has no "separate source" when asserted by a corporation.[251] Because of this, the Court held that the First Amendment protected the bank and struck down the state statute as unconstitutional.[252]

The Court recently upheld *Bellotti* in *Citizens United v. Federal Election Commission*.[253] The *Citizens United* Court held that the Free Speech Clause protects a corporation's ability to speak in the electoral context.[254] Specifically, it overturned a statute that limited corporate expenditures on

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shareholders; (2) no ready market for corporate stock; and (3) active shareholder participation in the business.").

242. *See* Baworowsky, *supra* note 195, at 1744.

243. *Id.*

244. *See* Lepard, *supra* note 228, at 1046.

245. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

246. 435 U.S. 765 (1978).

247. *See id.* at 767–69.

248. *Id.* at 776; *see also* Gaylord, *supra* note 194, at 30. In *Bellotti*, the Court explained that the issue was whether "the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *Bellotti*, 435 U.S. at 778.

249. *See Bellotti*, 435 U.S. at 778 n.14 (citing United States v. White, 322 U.S. 694, 698–701 (1944), for the example that the right against self-incrimination applied only to individuals).

250. *See id.*

251. *See id.* at 780.

252. *See id.* at 795.

253. 558 U.S. 310 (2010).

254. *See id.* at 365.

speech related to elections.[255] Justice Anthony Kennedy explained that the First Amendment's protections extend to corporations and that *Bellotti*'s holding means that corporate speech does not lose constitutional protection merely because it comes from a corporation.[256] In the corporate context, political speech decisions are made by directors through "the same rules as ordinary business decisions."[257] In *Citizens United*, the corporation was a nonprofit, but the Court explicitly stated that the Constitution forbids suppression of the freedom of speech, regardless of whether the corporation is for profit or not for profit.[258]

The *Citizens United* holding reflected two views of corporate personhood: that corporations possess the aggregate rights of their shareholders and that corporations possess autonomous rights separate from their shareholders.[259] The Court used the aggregate rights theory to determine that corporations are essentially associations of individuals and that restrictions on corporate speech are not permissible simply because the source of the speech is a corporation.[260] The Court also used the entity theory of corporations by explaining that corporate political speech can have value in the marketplace of ideas.[261] Thus, under either theory, the First Amendment protects corporate speech.

F. A New Challenge: The Affordable Care Act and Its Perceived Threat to Religious Liberty

Current litigation alleges that certain provisions of the Affordable Care Act substantially burden the free exercise of religion by those who provide insurance plans to employees and students.[262] The Affordable Care Act requires group insurance plans provided by employers to ensure certain levels of health services, including coverage without cost-sharing of preventive care and screenings for women, according to regulations promulgated by the Health Resource and Services Administration (HRSA) and HHS.[263] HHS sought the recommendations of the Institute of Medicine (IOM), an arm of the National Academy of Sciences, to define guidelines

255. *See id.* at 365–66.
256. *See id.* at 342.
257. *See* Bebchuk & Jackson, *supra* note 220, at 87.
258. *See Citizens United*, 558 U.S. at 365.
259. *See* Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 502–03 (2010).
260. *See id.* at 519; *see also Citizens United*, 558 U.S. at 342 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).
261. *See* Tucker, *supra* note 259, at 516–17; *see also Citizens United*, 558 U.S. at 364 ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").
262. *See infra* Part II. For an overview of litigation in the federal district courts and the early stages of appellate litigation, see generally Tan, *supra* note 219.
263. *See* 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011); 29 U.S.C. § 1185d.

for women's preventive care and screening.[264] The IOM recommended that any FDA-approved contraceptive method be part of the coverage,[265] and HHS adopted this recommendation in its rulemaking process.[266]

The FDA has approved twenty contraceptive methods.[267] These include barrier methods (such as condoms), hormonal methods (such as oral contraceptives), emergency contraception (such as Plan B or ella), implanted devices (such as intrauterine devices (IUDs)), and permanent methods (such as vasectomies).[268]

The ACA and the regulatory agencies enforcing it have provided authority for the HRSA to exempt religious employers from complying with this law if they object to providing contraception.[269] The regulation provides that a "religious employer" is an organization that: (1) has a purpose of inculcating religious values, (2) primarily employs those who share its religious tenets, (3) primarily serves those who share its religious tenets, and (4) meets the Internal Revenue Code's definition of a nonprofit organization.[270] For these reasons, it does not cover for-profit corporations, including closely held corporations.[271]

Like religious nonprofit corporations, some for-profit corporations also state religious objections to providing contraception on the grounds that some methods can cause a fertilized egg to fail to implant in the uterus and that this is equivalent to facilitating an elective abortion.[272] The methods to which plaintiffs in the Tenth Circuit object, for example, include Plan B, ella, and two IUDs.[273] Other methods, which simply prevent fertilization, may not be objectionable, depending on the religious background of the plaintiff.[274] There is medical and scientific debate concerning whether these devices actually prevent implantation, but in *Hobby Lobby Stores, Inc. v. Sebelius*,[275] the government conceded that certain contraceptive methods

264. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013).

265. *See id.*

266. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

267. *See Birth Control: Medicines To Help You*, FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Feb. 24, 2014).

268. *Id.*

269. *See* 45 C.F.R. § 147.130(1)(a)(iv)(A) (2013).

270. *Id.* § 147.130(1)(a)(iv)(B).

271. *See id.*

272. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124–25 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013).

273. *See id.*

274. S*ee* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 381–82 (3d Cir.) (explaining that the Mennonite plaintiffs object to providing Plan B and ella), *cert. granted*, 134 S. Ct. 678 (2013); Univ. of Notre Dame v. Sebelius, No. 3:12-CV-253(RLM), 2012 WL 6756332, at *1 (N.D. Ind. Dec. 31, 2012) (explaining that the Catholic plaintiffs object to all "abortifacients, contraception (when prescribed for contraceptive purposes), and sterilization").

275. 723 F.3d 1114.

can prevent uterine implantation, rendering a full scientific analysis unnecessary.[276] Nevertheless, amici to the Tenth Circuit disagreed about the effect that Plan B, ella, and IUDs have on ovulation, conception, and implantation.[277] In the brief for the Physicians for Reproductive Health and other groups, amici explained that the scientific and legal definition of pregnancy is implantation in the uterine lining, which can occur up to five to nine days after fertilization of an egg by a sperm.[278] Because the emergency contraceptives at issue in *Hobby Lobby* almost always act before implantation, labeling the methods "abortifacients" was improper.[279] Amici also explained that a copper, FDA-approved IUD creates a toxic environment for sperm and that any changes to the endometrial lining would only prevent, not disrupt, the implantation necessary to create a scientific pregnancy.[280] In contrast, amici for the plaintiff explained that FDA-approved contraceptive methods might prevent either conception or implantation.[281] These amici explained various studies in an effort to persuade the court that certain contraceptive methods might prevent implantation of a fertilized cell.[282] For example, they cited studies showing that ella has the potential to impair or prevent a fertilized egg from implanting in the uterine wall.[283] They also argued that the scientific definition of pregnancy as a fully implanted embryo does not negate the fact that certain contraceptive methods might prevent the implantation of an embryo.[284] The plaintiffs in the HHS mandate litigation have stated that their opposition to the HHS regulation is that it requires them to pay for contraception that they believe can cause the death of a fertilized embryo.[285]

The plaintiffs in these cases claim that requiring them to pay even part of the fees for insurance plans that cover contraception constitutes a substantial burden on the exercise of their religion.[286] The *Hobby Lobby* plaintiffs, for example, stated that their religion barred causing the death of an embryo, and, by extension, providing certain contraceptives that could cause an embryo to fail to implant.[287] The regulation imposes a burden

276. *See id.* at 1123 n.3.

277. *Compare* Brief for Physicians for Reproductive Health et al. As Amici Curiae Supporting Appellees, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294), 2013 WL 1291178 [hereinafter Brief for Physicians for Reproductive Health et al.], *with* Brief for Ass'n of American Physicians & Surgeons et al. As Amici Curiae Supporting Appellants, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294), 2013 WL 656598 [hereinafter Brief for Ass'n of American Physicians & Surgeons et al.].

278. *See* Brief for Physicians for Reproductive Health et al., *supra* note 277, at *9–10.

279. *Id.* at *11–16.

280. *See id.* at *16.

281. *See* Brief for Ass'n of American Physicians & Surgeons et al., *supra* note 277, at *6.

282. *See id.* at *7–14.

283. *See id.* at *11.

284. *See id.* *7–14.

285. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013).

286. *See* Brief of Appellants at 20, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294), 2013 WL 656599, at *20.

287. *See Hobby Lobby*, 723 F.3d at 1140.

because it requires the company to participate in an activity prohibited by a sincere religious belief, or, at the very least, substantially pressures the company to act contrary to sincere religious beliefs.[288] Such pressure comes as a result of large, annual fines for a corporation that fails to comply with the regulation.[289] The government, in contrast, argues that the regulation's burden is too attenuated to be a substantial burden because the requirement is to provide many types of insurance and because the decision to use contraceptives is between a woman and her doctor.[290]

II. DISSENSION IN THE RANKS: THE CIRCUITS DIFFER ON CORPORATE RFRA CLAIMS

The HHS mandate cases have led to deeply fractured opinions in the circuits.[291] For-profit corporate plaintiffs have sought injunctions against application of the HHS mandate to varying degrees of success.[292] Some courts have found that corporations will not succeed on a RFRA claim.[293] Other courts have found the possibility of success.[294] The major source of conflict is whether corporations are "persons" exercising religion. The answer to this question is crucial, as RFRA contemplates strict scrutiny of laws that substantially burden a person's religion. The issue in these cases, then, is a matter of statutory interpretation of the term "person" in RFRA.[295] This Part examines four circuits' answers to this question. The Tenth and Seventh Circuits each held that secular corporations may state claims under RFRA.[296] In contrast, the Third Circuit held that corporations could not exercise religion, barring them from stating claims under RFRA.[297] The D.C. Circuit fell between these two approaches, holding that individual plaintiffs may state the RFRA claims of a closely held corporation.[298]

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288. *See* Brief of Appellants, *supra* note 286, at *20–21.

289. *See Hobby Lobby*, 723 F.3d at 1125 (explaining that Hobby Lobby's fine for failing to comply would be $475 million annually).

290. *See* Petition for Writ of Certiorari, *Hobby Lobby*, 723 F.3d 1114 (No. 13-354), 2013 WL 5290575, at *26.

291. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1114 (sitting en banc and resulting in six different opinions).

292. Among other factors, a litigant seeking a preliminary injunction must prove a likelihood of success on the merits of the claim. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. the Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

293. *See generally Conestoga Wood*, 724 F.3d at 377; Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013); Eden Foods, Inc. v. Sebelius, 733 F.3d 626 (6th Cir. 2013).

294. *See generally* Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013); *Hobby Lobby*, 723 F.3d at 1114.

295. *See Korte*, 735 F.3d at 682. An additional question is whether the distinction between for-profit and nonprofit corporations is relevant for RFRA. *See id.* at 674–76.

296. *See infra* Part II.A.

297. *See infra* Part II.B.

298. *See infra* Part II.C.

A. The Tenth and Seventh Circuits Hold That a For-Profit Corporation May State a Claim Under RFRA

The Tenth and the Seventh Circuit each held that for-profit corporate plaintiffs were "persons" exercising religion and therefore protected by RFRA. This section examines each circuit's opinion.

1. The Tenth Circuit Finds That RFRA Protects Corporations Through a Textual Analysis

In *Hobby Lobby Stores, Inc. v. Sebelius*,[299] the Court considered a RFRA claim brought by Hobby Lobby Stores, a chain of craft stores; Mardel, Inc., a chain of book stores; and the family members who own both corporations.[300] Together, these corporations employed over 13,000 people.[301] Five members of the Green family owned and ran both chains according to their Christian beliefs, as described in Hobby Lobby's statement of purpose, which recited the family's commitment to operating their business according to biblical principles.[302] Their managerial decisions stemmed from their faith.[303] For example, the stores did not open on Sundays, and Hobby Lobby placed evangelistic advertisements in newspapers.[304] Moreover, their corporate structure included a management trust that had religious requirements: "The trust exists 'to honor God with all that has been entrusted' to the Greens and to 'use the Green family assets to create, support, and leverage the efforts of Christian ministries.'"[305]

The plaintiffs objected to the HHS mandate because their faith included the belief that the fertilization of an egg by a sperm is the beginning of human life and that facilitating acts that cause a human embryo to die was immoral.[306] In light of this belief, the plaintiffs sought relief from enforcement of the mandate as applied to four[307] of the FDA-approved contraceptive methods that they believed prevented uterine implantation.[308] If Hobby Lobby and Mardel failed to comply with the regulation, each would be exposed to tax penalties, regulatory activity, and possible lawsuits.[309] The regulatory taxes, for example, would amount to $100 per day for each uncovered individual.[310] Because the plan covered more than

299. 723 F.3d 1114.
300. *See id.* 1120.
301. *See id.* at 1122.
302. *See id.*
303. *See id.*
304. *See id.*
305. *See id.*
306. *See id.* at 1122–23.
307. The plaintiffs did not object to contraception generally, as a Catholic organization might, *see supra* note 18, but rather objected only to four of the twenty FDA-approved methods. *See Hobby Lobby*, 723 F.3d at 1144.
308. *See Hobby Lobby*, 723 F.3d at 1125. The government did not dispute the sincerity of this belief. *See id.*
309. *See id.* (citing 26 U.S.C. §§ 4980D, 4980H (Supp. V 2011); 29 U.S.C. §§ 1132, 1185d).
310. *See id.* (citing 26 U.S.C. § 4980D(b)(1)).

13,000 individuals, this would be a fine of almost $475 million annually.[311] Alternatively, the plaintiffs could have eliminated health insurance coverage and would face penalties of $26 million annually.[312]

a. Statutory Analysis Indicates That RFRA's "Person" Includes Corporations

The Tenth Circuit held that the corporate plaintiffs were "persons" who may state a claim under RFRA, and a plurality found that these plaintiffs were likely to succeed on the merits of their claim.[313] The government advanced two arguments that Hobby Lobby and Mardel did not fall under RFRA's scope. First, it argued that the existence of religious exemptions for nonprofit organizations in civil rights and labor laws indicated that Congress intended RFRA to carry forward a distinction between for-profit and nonprofit organizations.[314] Second, the government argued that the for-profit/nonprofit distinction came from the Supreme Court's jurisprudence and that Congress did not intend for RFRA to expand the Free Exercise Clause's scope.[315]

The court rejected both arguments as a matter of statutory interpretation.[316] Because RFRA did not specifically define "person," the court relied on the Dictionary Act's default definition, which includes corporations unless the statute's context dictates otherwise.[317] Contrary to the government's position, RFRA's context did not include statutes that explicitly provided only for religious nonprofit exemptions.[318] The court explained that exemptions for religious organizations in such acts as Title VII of the Civil Rights Act of 1964[319] and the Americans with Disabilities Act[320] (ADA) show that Congress "knows how to craft a corporate religious exemption."[321] The court claimed that to state that Congress intended to carry forward Title VII and the ADA's distinction without expressly providing so is to strain the text.[322] Thus, the default Dictionary Act definition applied, and RFRA protected the corporate plaintiffs.[323]

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311. *Id.*

312. *See id.* (citing 26 U.S.C. § 4980H).

313. *Id.* at 1120–21. The Tenth Circuit remanded to the district court to evaluate the other preliminary injunction factors, which it did, granting the injunction. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-1000-HE, 2013 WL 3869832, at *2 (W.D. Okla. July 19, 2013).

314. *See Hobby Lobby*, 723 F.3d at 1128–29.

315. *See id.*

316. *See id.* at 1129.

317. *See id.*; *see also* 1 U.S.C. § 1 (2012).

318. *See Hobby Lobby*, 723 F.3d at 1129–30.

319. *See* 42 U.S.C. §§ 2000e to 2000e-17 (2006).

320. *See* 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008).

321. *See Hobby Lobby*, 723 F.3d at 1130; *cf.* Korte v. Sebelius, 735 F.3d 654, 676 (7th Cir. 2013) ("If Congress intended a nonprofit limitation in RFRA, surely that would be some hint of it in the statutory text.").

322. *See Hobby Lobby*, 723 F.3d at 1129–30. The Court characterized this reading this way: "In short, the government believes Congress used 'person' in RFRA as extreme shorthand for something like 'natural person or 'religious organization' as that term was

b. Constitutional Principles of Free Exercise Do Not Require Excluding For-Profit Corporations From RFRA's Protection

The court next addressed the argument that Congress's understanding of the Free Exercise Clause informed its passage of RFRA, and that this understanding precluded protection of for-profit corporations.[324] The court rejected this analysis on the grounds that RFRA's purpose was to restore the pre-*Smith* balancing test for whether a neutral law of general applicability can withstand a strict scrutiny analysis to justifiably burden religious exercise.[325] Congress did not intend to alter who could bring a claim under pre-*Smith* free exercise jurisprudence, which included the guarantee to protect associations and not just individuals.[326] The protection of associational freedom is important for protecting other individual liberties.[327] Moreover, the First Amendment protects such associations as churches, which incorporate.[328]

The court rejected the government's bright-line approach that precludes a RFRA claim for a corporation that does not have nonprofit status through the Internal Revenue Service.[329] This, the court explained, cannot be a position rooted in the First Amendment, because its drafters rejected the term "conscience" in favor of "exercise."[330] The chosen term carried a connotation of action and thus protected "religiously motivated *conduct*, as well as religious belief."[331] In light of this action-oriented history, the court rejected the argument that incorporation alters First Amendment rights while individuals maintain protection.[332] The court also rejected the district court's argument that a business corporation cannot partake in "religiously-motivated actions separate and apart from the intention and direction of

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used in exemptions for religious organizations as set forth in Title VII, the ADA, and the NLRA.'" *Id.* at 1130.

323. *See id.* at 1132.

324. *See id.* at 1133.

325. *See id.*

326. *See id.* ("An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984))).

327. *Id.* at 1133; *see also* Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) (explaining that the Court does not accept the argument that corporate First Amendment rights do not differ "simply because such associations are not 'natural persons'").

328. *Hobby Lobby*, 723 F.3d at 1134. (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993)). In addition, the Supreme Court has decided free exercise cases for individuals running for-profit businesses. *See supra* Part I.E.1.

329. *See Hobby Lobby*, 723 F.3d at 1134.

330. *See id.*

331. *See id.* (citing McConnell, *supra* note 22, at 1488–89). An additional distinction between conscience and religion is the corporate or institutional aspect of religious belief. *See id.* at 1134–35 (citing McConnell, *supra* note 22, at 1490). The court also noted that free exercise includes proselytizing. *See id.* (citing Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)).

332. *See id.* at 1134–35 ("[W]e see no reason why one must orient one's business toward a religious community to preserve Free Exercise protections.").

their individual actors."[333] This could not be right, according to the court, because churches and other entities that incorporate clearly exercise religion.[334] RFRA thus includes corporations in its definitions, because the for-profit/nonprofit distinction is irrelevant.

2. The Seventh Circuit Agreed That a Secular Corporation Could Invoke RFRA's Protection

Using a similar analysis to the *Hobby Lobby* court, the Seventh Circuit held that secular corporations could challenge the HHS mandate.[335] In *Korte v. Sebelius*,[336] the court heard a consolidated appeal involving two for-profit corporations.[337] The first, Korte & Luitjohan Contractors, Inc., was a closely held construction company that employs ninety full-time workers.[338] Cyril and Jane Korte were the majority shareholders of K&L Contractors, as well as its only officers and directors.[339] As Catholics, they believed that artificial contraception and abortifacient drugs were contrary to their religion and objected to providing any health plan that facilitated the use of such contraceptive methods.[340] To emphasize this objection, the couple, acting in their managerial capacity, enacted ethical guidelines describing limits on employee healthcare benefits.[341] Failing to comply with the HHS mandate would result in penalties totaling $730,000 annually.[342]

In the second case, the corporate plaintiffs were Grote Industries, Inc., which acted as the managing member for Grote Industries, LLC, which manufactures vehicle safety systems.[343] Six individually named plaintiffs, along with other family members, fully owned Grote Industries, Inc.[344] The individual plaintiffs were the officers and directors of the corporation.[345] Grote Industries employed 464 employees in the United States and provided a self-insured healthcare plan that did not carry contraception and sterilization procedures before the HHS mandate became law.[346] The plaintiffs managed Grote in accordance with their Catholic faith, objected to the mandate in light of that faith, and would face an annual penalty of nearly $17 million for failing to comply.[347]

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333. *Id.* at 1136 (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012)).
334. *See id.* (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006)).
335. *See* Korte v. Sebelius, 735 F.3d 654, 659 (7th Cir. 2013).
336. 735 F.3d 654.
337. *See id.* at 659.
338. *See id.* at 662.
339. *See id.*
340. *Id.* at 662–63.
341. *See id.* at 663.
342. *See id.*
343. *See id.* at 663–64.
344. *See id.* at 663 n.6.
345. *See id.* at 664.
346. *See id.*
347. *See id.*

Judge Diane S. Sykes began her opinion by explaining the breadth of RFRA, including its applicability to all federal law unless Congress explicitly excludes application of RFRA to a statute.[348] RFRA, she explained, should alleviate "the inevitable clashes between religious freedom and the realities of the modern welfare state."[349] Against this backdrop, the court examined the meaning of "person" in RFRA by invoking the Dictionary Act.[350] In its analysis, the court sought to determine whether allowing secular corporations to be "persons" for RFRA would be a poor fit with the statute's purposes, and it held that because some corporations qualify for RFRA protection, the corporations in this litigation could qualify as well.[351] As evidence of this claim, the court pointed to *Gonzales*,[352] *Church of the Lukumi Babalu Aye, Inc.*,[353] and the HHS mandate exemption for religious organizations.[354] Like the Tenth Circuit, Judge Sykes rejected the government's argument that RFRA carried forward the for-profit/nonprofit distinction within Title VII and the ADA.[355]

Instead, the court examined the history of RFRA and free exercise more broadly to see if any pre-*Smith* cases rejected secular corporations' ability to exercise religion.[356] Recognizing that the question of secular corporate religious exercise was novel,[357] the *Korte* court nonetheless explained that unless something about seeking profit hinders the ability to practice religion, "a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated."[358] An examination of *Thomas*, *Sherbert*, *Braunfeld*, and *Lee* showed that individuals in the pursuit of profit had their claims examined by the Supreme Court—not for standing, but on the merits of the argument.[359]

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348. *See id.* at 673 ("The Affordable Care Act does not explicitly exclude application of RFRA.").

349. *See id.* (citing Thomas C. Berg, *What Hath Congress Wrought? An Interpretative Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 25–26 (1994)).

350. *See id.* at 673–74.

351. *See id.* at 674 ("A corporation is just a special form of organizational association. No one doubts that organizational associations can engage in religious practice. The government accepts that *some* corporations—religious nonprofits—have religious-exercise rights under both RFRA and the Free-Exercise Clause.").

352. 546 U.S. 418 (2006) (incorporated religious sect).

353. 508 U.S. 520 (1993) (incorporated church).

354. *See* 45 C.F.R. § 147.131(a) (2013) (granting an exemption with or without incorporated status).

355. *See Korte*, 735 F.3d at 675–79 (explaining that Title VII and the ADA's nonprofit exemptions rely on the church autonomy doctrine that provides complete immunity to religious organizations from compliance with these laws); *cf.* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704 (2012).

356. *See Korte*, 735 F.3d at 679.

357. *See id.* (citing Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, Circuit Justice) (denying an extraordinary writ on grounds including the novelty of the issue presented)).

358. *See id.*

359. *See id.* at 679–80.

The court further rejected the government's argument by rebuking its attempt to cast *United States v. Lee* as dispositive of the claim that for-profit corporations cannot pursue religious exercise.[360] The *Lee* Court stated:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. *When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.*[361]

Judge Sykes called the government's interpretation of this passage "a far-too-narrow view of religious freedom," because it assumes that the religious believer compartmentalizes his or her life.[362]

Having explained that neither the Supreme Court's free exercise jurisprudence nor RFRA's text precluded for-profit corporate religious exercise, the court turned to the Supreme Court's "general jurisprudence of corporate constitutional rights" and found that nothing automatically limits such rights to nonprofit corporations.[363] The *Korte* court took note of the Supreme Court's decisions granting and withholding certain constitutional rights to all corporations[364] and explained that *Bellotti* was the closest thing to a proper decision framework.[365] Namely, if the right in question has a historical function of guaranteeing rights to individuals only, the provision in question will not be available to corporations.[366] Because the issue at bar, however, was strictly statutory, the court declined to further analyze the free exercise rights of the corporate plaintiffs.[367]

Based on all of these findings, the *Korte* court held that K&L Contractors and Grote Industries could state RFRA claims.[368] In dicta, the court seemed to limit its holding to closely held corporations, because the individual owners set company policy as its directors, and they are intimately involved in directing the company.[369] Both the Seventh and the Tenth Circuits, therefore, held that RFRA covered corporate claimants in light of the statute's text and purpose.

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360. *See id.* at 680.

361. United States v. Lee, 455 U.S. 252, 261 (1982) (emphasis added).

362. *See Korte*, 735 F.3d at 681; *see also* Christiansen, *supra* note 224, at 30 (explaining that the business judgment rule allows directors to make decisions in the interests of nonshareholders).

363. *See Korte*, 735 F.3d at 681.

364. *See id.* at 681–82.

365. *See id.* at 682 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978)).

366. *See id.*

367. *See id.*

368. *See id.*

369. *See id.* at 682 n.17 (dictum). Judge Sykes implied that in a larger corporation, ownership will be separate from controllers, and will have more members of the board, presumably making it more difficult to define religious beliefs. *See id.*

B. The Third Circuit Holds That a For-Profit Corporation Cannot Exercise Religion

In contrast to the *Hobby Lobby* and *Korte* courts, the Third Circuit disagreed that for-profit corporations receive RFRA's protection.[370] In *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*,[371] the individual plaintiffs were members of the Hahn family, which was Mennonite.[372] The family owned 100 percent of the shares of a corporation that manufactured wood cabinets and employed 950 workers.[373] As Mennonites, the Hahns believed that it was intrinsically evil and a sin to take a human life, including the termination of a fertilized embryo.[374] In light of this belief, the Hahns and Conestoga objected to providing Plan B and ella, which the plaintiffs believed could cause a fertilized embryo to fail to implant in a woman's uterus.[375]

1. The Third Circuit Rejects For-Profit Corporations' Ability To Exercise Religion Under the First Amendment

The Third Circuit began its analysis with the issue of whether corporations can exercise religion under the First Amendment. The plaintiffs suggested two theories: (1) that a corporation can exercise religion directly under the First Amendment, and (2) that a corporation can exercise religion indirectly by asserting the owners' rights under a theory established by the Ninth Circuit.[376]

a. The Direct Exercise of Religion by a Corporation

Conestoga premised its direct exercise theory on *Citizens United*, which held that the First Amendment applied to corporations in the context of a free speech case.[377] Corporations may exercise a number of constitutional rights,[378] but the guarantee must not be one that is "purely personal."[379] The Third Circuit examined *Bellotti*'s relationship to *Citizens United* and explained that the latter's holding was specific to the Court's history of protecting corporate free speech.[380] Moreover, free speech cases pose a

370. *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).
371. 724 F.3d 377.
372. *See id.* at 381.
373. *See id.*
374. *Id.* at 381–82; *see also* First Amended Verified Complaint ¶ 92, *Conestoga Wood*, 724 F.3d 377 (No. 13-1144), 2013 WL 6181041 (explaining that the Board of Directors of Conestoga adopted "The Hahn Family Statement on the Sanctity of Human Life," which explains the family's belief that life begins at conception and their moral opposition to participating in any act involving the termination of human life).
375. *See Conestoga Wood*, 724 F.3d at 382.
376. *See id.* at 383.
377. *See id.*
378. *See id.*
379. *See id.* at 384 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978)).
380. *See id.*

separate analytical and interpretive framework than free exercise cases.[381] The *Conestoga* court, therefore, found that *Bellotti* had no influence on the HHS mandate cases.[382] For these reasons, it found that *Bellotti*'s "nature, history, and purpose" test was not met for corporate free exercise rights.[383]

The court particularly emphasized a corporation's inability to hold religious beliefs.[384] In addition, it distinguished cases relied on in the petitioners' and dissent's arguments that showed recent Supreme Court cases allowing free exercise claims by religious organizations.[385] These cases were inapposite for the majority because none involved a for-profit corporation.[386] Religious organizations are a means through which individuals can practice their religion, and that such organizations receive protection within the Free Exercise Clause is not determinative for for-profit corporations.[387]

b. The Third Circuit Rejects the Ninth Circuit's Pass-Through Method

After dispensing with the plaintiffs' first theory, the Court examined their second theory. The plaintiffs cited two cases from the Ninth Circuit[388] that allowed closely held corporations to state the free exercise claims of their owners.[389] Under this "pass-through theory," the Ninth Circuit explained that closely held corporations may convey by extension the beliefs of the family members who own them.[390] The corporate plaintiffs in these cases did not have any free exercise rights separate from or greater than their

381. *See id.* at 386.

382. *See id.* at 385.

383. *See id.* ("We do not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' that was created to make money could exercise such an inherently 'human' right." (quoting Consol. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338, 346 (2d Cir. 2002))).

384. *See id.* ("It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires." (quoting Citizens United v. FEC, 588 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part))); Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."), *rev'd*, 723 F.3d 1114 (10th Cir.) (en banc), *cert. granted*, 134 S. Ct. 678 (2013).

385. *See Conestoga Wood*, 724 F.3d at 385–86.

386. *See id.*

387. *See id.* at 386.

388. *See id.* at 386–87 (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), which held that for-profit corporations can assert the free exercise claims of their owners, and Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009), which affirmed *Townley*).

389. *See id.*

390. *See Townley*, 859 F.2d at 619 ("Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs."); *Stormans*, 586 F.3d at 1120 ("Stormans, Inc. does not present any free exercise rights of its own different from or greater than its owners' rights. We hold that, as in *Townley*, Stormans has standing to assert the free exercise rights of its owners.").

owners' rights.[391] The Third Circuit rejected this analysis, claiming it rested on a faulty analysis of the corporate form, which creates a distinct entity.[392] In exchange for limited liability, the corporate owner gives up certain prerogatives.[393] The pass-through theory, in contrast, ignores this separate legal entity.[394] On this basis, the Third Circuit found that the pass-through theory was legally incorrect, and that the mandate's burden falls squarely on Conestoga and not the Hahns.[395] Because Conestoga itself cannot exercise religion, it has no free exercise recourse to seek an exemption from the mandate.[396]

2. The Third Circuit Rejects Corporate Personhood for Purposes of RFRA

The Third Circuit also rejected Conestoga's ability to state a RFRA claim with a brief, plain-language analysis. Because the statute is for a "person's exercise of religion," and because the court held that a corporation cannot exercise religion under the Free Exercise Clause,[397] it also held that a corporation is unable to state a claim under RFRA.[398]

C. The D.C. Circuit Holds That the Owners of a Closely Held Corporation Can Assert a RFRA Claim on Behalf of the Corporation

In *Gilardi v. United States Department of Health & Human Services*,[399] the D.C. Circuit held that the individual plaintiffs who owned the corporate plaintiff could state a RFRA claim on behalf of their corporation, although it rejected the Ninth Circuit's pass-through theory.[400] The individual plaintiffs were two brothers who owned two companies equally.[401] Freshway Foods and Freshway Logistics together employed 400 people, who could participate in a self-insured health plan.[402] As Catholics, the Gilardi brothers opposed the coverage mandated by the HHS regulation, but failure to provide it to their employers would result in fines amounting to over $14 million annually.[403]

Judge Janice Rogers Brown first analyzed whether the corporate plaintiffs could state a claim under RFRA.[404] She took note of the *Hobby Lobby* court's opinion but explained that its analysis of the term "person," relying on the Dictionary Act, was too narrow.[405] Rather, she explained,

391. *See Conestoga Wood*, 724 F.3d at 387–88 (citing *Stormans*, 586 F.3d at 1120).
392. *Id.*
393. *See id.*
394. *See id.*
395. *See id.* at 388.
396. *See id.*
397. *See id.*
398. *See id.*
399. 733 F.3d 1208 (D.C. Cir. 2013).
400. *See id.* at 1214–15.
401. *See id.* at 1210.
402. *See id.*
403. *See id.*
404. *See id.* at 1211.
405. *See id.*

the proper focus is on a "*person's* exercise of religion"[406] rather than "person" alone.[407] The court therefore examined the full free exercise jurisprudence to determine the "nature, history, and purpose" of the Free Exercise Clause and whether it applied to a secular corporation.[408] Noting that the clause protected "exercise" rather than merely "conscience,"[409] the court found that the clause's protection extended to conduct undertaken either individually or institutionally.[410] Indeed, the clause regularly protected individuals and religious organizations.[411] No Supreme Court case had yet held, however, that a secular corporation could exercise religion.[412] The *Gilardi* court thus refused to extend the free exercise right directly to the secular corporations, even if corporations might receive that right in the future.[413] Here, Judge Brown noted that *Citizens United* was the culmination of decades of case law.[414] The free exercise cases, on the other hand, militated against extending the free exercise right directly to corporations.[415]

Like the Third Circuit, the D.C. Circuit rejected the Ninth Circuit's pass-through theory[416] as legally "dubious."[417] Rather, the court held that the Gilardis have standing to sue because they are shareholders of the corporation injured separately from the corporation, and because the corporation did not have the capacity to sue for relief separately.[418] Although the government argued that incorporation always involves creating a distinct legal entity for which the owners forego certain rights, the court explained that an important part of this rights bargain is that corporations "can generally exercise some analogue of the forgone right."[419] In the case of free exercise, then, if the corporation cannot exercise that right, the shareholder should not give up the right upon incorporation.[420] To hold otherwise would cause an important right to "disappear[] into the ether" depending on how a person ran his or her

406. RFRA defines the exercise of religion by referring to the Religious Land Use and Institutionalized Persons Act, which states that "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2006).

407. *See Gilardi*, 733 F.3d at 1211 (citing Rasul v. Myers, 512 F.3d 644, 668 (D.C. Cir. 2008)).

408. *See id.* at 1212.

409. *Id.*

410. *See id.* at 1212–13 (explaining that the word "religion" carries a connotation of a community of believers).

411. *See id.* at 1212–14 (collecting free exercise cases).

412. *See id.* at 1213. *But see id.* ("But that the Court has never seriously considered such a claim by a secular corporation or other organizational entity is not to say it never will.").

413. *Id.* at 1214.

414. *See id.*

415. *See id.*

416. *See id.* at 1214–15.

417. *See id.* at 1215.

418. *See id.* at 1215–16.

419. *See id.* at 1218.

420. *See id.*

business.[421] Judge Brown rejected the government's argument because she could not believe that Congress intended free exercise rights to disappear when it instituted RFRA's compelling interest balancing test.[422]

III. FINDING THE PROPER FRAMEWORK: PUTTING STATUTORY INTERPRETATION BEFORE CONSTITUTIONAL INTERPRETATION

This Note proposes two approaches for the issue of whether secular corporations are "persons" protected by RFRA. First, agreeing with the Tenth and Seventh Circuits, it proposes that the absence of case law examining free exercise claims by for-profit corporations is not, as some suggest, dispositive of the cases currently under review in the federal courts.[423] Based on the Dictionary Act's "context" requirement and a proper *Bellotti* analysis, certain for-profit corporations should be able to state RFRA claims, and the federal courts should continue building a jurisprudence to determine the contours of such claims. Second, this Note proposes that even if the Supreme Court completely forecloses the possibility for any corporation to have rights under RFRA, the D.C. Circuit's approach to allowing the shareholders to state a claim under RFRA is correct, because it comports with the nation's broad protections of religious freedom in accordance with formal theories of corporate law.[424]

A. The Context of RFRA and the Nature, History, and Purpose of the Free Exercise Clause Do Not Preclude Corporate RFRA Claims

RFRA is a "super-statute" implementing Congress's interpretation of the Free Exercise Clause by incorporating a particular jurisprudence of the Supreme Court.[425] Interpreters of the statute, then, must be careful not to intertwine the necessary statutory and constitutional analyses. Courts will properly take notice of pre-*Smith* jurisprudence and adjudicate the HHS mandate cases according to principles of substantial burden and compelling interests that are outside the scope of this Note.[426] In terms of who can bring claims under the statute, however, RFRA's terms must govern, and RFRA grants judicial relief to persons burdened in their religious exercise.[427] Unless the government can rebut the Dictionary Act's presumption that the word "person" includes corporations, the corporate plaintiffs should be able to directly state RFRA claims.[428] This section explains why congressional intent, textual interpretation, and legislative history support corporations' ability to state RFRA claims and concludes that the federal judiciary should begin developing a jurisprudence of corporate RFRA rights.

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421. *See id.*
422. *See id.* at 1218–19.
423. *See supra* Part II.A.
424. *See supra* Part II.C.
425. *See supra* note 145 and accompanying text.
426. *See supra* note 128 and accompanying text.
427. *See supra* note 128 and accompanying text.
428. *See supra* note 224 and accompanying text.

1. Context Matters: Congress's Intent To Restore the Pre-*Smith* Regime

Determining who are the "persons" exercising religion under RFRA requires a proper statutory analysis. This Note suggests that the analytic frameworks of the Seventh and Tenth Circuits and the Third Circuit present opposite forms of analysis, and that the former frames the issue correctly. The *Hobby Lobby* and *Korte* courts first approached the HHS mandate issue by determining what RFRA protected and then by analyzing its text and purpose.[429] In contrast, the *Conestoga* court proceeded directly to the Free Exercise Clause, determined that the clause failed the *Bellotti* test for protecting corporations, and determined that corporations could receive neither constitutional nor statutory protection.[430] The framework matters because RFRA appears to place a wider fence around religious liberty than the *Smith* Court did in its explanation of the Free Exercise Clause.[431] In theory, this will help religious actors avoid clashes between their beliefs and the regulatory state.[432]

The context of a RFRA analysis should include an understanding of what the statute aimed to restore.[433] From *Sherbert* to *Smith*, the courts engaged in an enterprise that looked similar to a common law adjudicative process[434] that entertained individual claims, resulting in a jurisprudence that later courts could apply.[435] Unlike a true common law system, however, the *Sherbert* line of cases carried the imprimatur of constitutional prescription.[436] The *Smith* Court rejected the *Sherbert* compelling interest test in part because it believed that judges were not suited to make the type of case-by-case balancing determinations required by *Sherbert*.[437] Using its own considered judgment of the Constitution, Congress enacted RFRA against the background of *Smith* precisely to instruct courts that they should make such determinations in the first instance, because Congress believed that *Smith* would not otherwise provide satisfactory protection of Americans' religious liberty.[438] To rectify the wrong it perceived, Congress's legislation instructed courts to use a balancing test that measured the government's compelling interest against the alleged burden on believers' exercise of their religion.[439] This concept of legislative accommodation has existed since colonial days[440] and reinforces the

429. *See supra* Part II.A.
430. *See supra* Part II.B.1.
431. *See supra* notes 127–28 and accompanying text. *But see* discussion *supra* note 147 (explaining that whether Congress intended to expand or restore pre-*Smith* doctrine is a subject of debate that could affect the resolution of the merits of the HHS mandate cases).
432. *See supra* note 349.
433. *See supra* note 147.
434. *See supra* note 157 and accompanying text.
435. *See supra* Part I.B.1.
436. *See supra* note 88.
437. *See supra* note 113 and accompanying text.
438. *See supra* Part I.C.
439. *See supra* Part I.C.
440. *See supra* notes 23–25 and accompanying text.

American dedication to religious liberty beyond mere toleration.[441] In addition, it mirrors the understanding—again dating from colonial times—that compelling government interests justify burdening religious exercise.[442]

RFRA thus restores not only the strict scrutiny regime articulated in *Sherbert* and *Yoder*, but also restores the common law model in which courts can and should examine particular claims in light of previous claims.[443] This determination involves asking whether the new claim is similar enough to previous claims, and, if so, to extend the law's protection.[444] If it is not similar enough, a court can distinguish and dismiss the claim. Courts making such determinations should take account of cases in which courts granted exemptions,[445] in addition to cases where courts found that a law was not a substantial burden or where the government satisfied the compelling interest test.[446]

2. "Person" v. "Person's Exercise of Religion": The Result Is the Same

By understanding this background, it becomes clear that the Seventh and Tenth Circuits' analysis of persons covered by RFRA is stronger than the Third Circuit's approach. The analysis at this phase of the HHS mandate litigation requires statutory interpretation of RFRA rather than a discussion of the Free Exercise Clause's contours. The key issue in each case is whether RFRA's "person" exercising religion includes secular, for-profit corporations. Because the statute does not define this operative term, courts must analyze RFRA's context to determine if the default definition[447] that includes corporations, partnerships, trusts, and other associations is appropriate, in accordance with the Dictionary Act. Regardless of how broadly courts construe RFRA's "context," corporations arguably fall within RFRA's reach.

a. Most Narrow Interpretation: Purely Textual Analysis and the Dictionary Act

At the most narrow level of interpretation, a court will look purely within the statute's text.[448] "Person" standing alone would clearly receive the Dictionary Act's default definition, because nothing in the text explicitly disclaims application to corporations.[449] The Court's artificial person canon bolsters this position.[450] As used in RFRA, however, the word person includes the modification "person's exercise of religion," so the

441. *See supra* note 29 and accompanying text.
442. *See supra* notes 34–35 and accompanying text.
443. *See supra* notes 148–51 and accompanying text.
444. *See supra* notes 150–51, 154 and accompanying text.
445. *See supra* Part I.B.1.
446. *See supra* notes 94–100 and accompanying text.
447. *See supra* note 215 and accompanying text.
448. *See supra* Part II.A.1.a.
449. *See supra* note 317 and accompanying text.
450. *See supra* note 215.

Dictionary's Act context requirement might entail a broader approach.[451] The federal courts' definition of exercise of religion is any conduct that is motivated by a religious belief,[452] and the Free Exercise Clause undoubtedly protects both individual and institutional religious exercise.[453] The corporations involved in this litigation pass this test through their actions, which include proselytization, charitable giving, closing on holy days, and providing health insurance plans that may withhold drugs and devices contrary to certain religious beliefs.[454] These are religiously motivated actions that either for-profit or nonprofit corporations can take. In addition, protecting corporations generally fits within the purposes of RFRA: among other things, Congress intended to protect those who engaged in activities that a secular government would not deem "religious" but which might be important to the claimant acting in accordance with a belief.[455]

The obvious objection here is that the corporation itself does not have beliefs.[456] This objection, however, fails to appreciate that a board of directors can direct—and many in this litigation have directed—the corporation's bylaws, ethical statements, or statements of purpose to include religious tenets in accordance with which the corporation operates. This is similar to the free speech context, where a corporation's "speech" comes from the direction of its officers and directors in their decisionmaking capacity.[457] No special rules or laws govern corporate speech; it is the corporation itself that "speaks" at the direction of its board.[458] Similarly, here, when corporate directors institute bylaws, statements, or guidelines, they define corporate beliefs upon which a corporation can act. This is true of secular corporations, such as Whole Foods, Chipotle, and Facebook, seeking to institute a specific moral culture, and it is true of faith-based corporations, such as Hobby Lobby, seeking to institute a specific religious culture.[459] An imperfect analogy is that the directors and officers are the "conscience" of the corporation because they direct conduct in accordance with religious belief.[460]

b. Most Broad Interpretation: The Entire Free Exercise Jurisprudence and Bellotti

Even at the broadest possible level of context—the Supreme Court's entire free exercise jurisprudence—the argument that RFRA can include corporations succeeds. Because application of RFRA to for-profit

451. *See supra* notes 405–07 and accompanying text.
452. *See supra* notes 330–32 and accompanying text.
453. *See supra* note 410 and accompanying text.
454. *See supra* Part II.
455. *See supra* note 123.
456. *See supra* Part II.B.
457. *See supra* notes 220–21 and accompanying text.
458. *See supra* note 257 and accompanying text.
459. *See supra* notes 221, 240–43, 302 and accompanying text.
460. *See supra* notes 221, 242 and accompanying text.

corporations is a novel question, the best indication of how the Court would analyze this approach is the *Bellotti* test.[461] Here, again, the Tenth and Seventh Circuits more fully captured the spirit of religious liberty than the Third Circuit. *Bellotti* instructs that application of a certain constitutional provision depends on whether the provision is "purely personal," as measured by the nature, history, and purpose of the clause.[462] The Third Circuit examined the history of the Free Exercise Clause and correctly found that the Supreme Court has never found that a secular corporation can exercise religion.[463] This analysis, however, is incomplete because it fails to consider the nature and purpose prongs of *Bellotti* and relies almost exclusively on the history prong.[464] This leads to a weak appreciation of instances in which individuals pursuing profit successfully petitioned courts for relief from laws that burdened their religious practice.[465] In addition, the Third Circuit's analysis of the nature and purpose of religious liberty is lacking, because it fails to appreciate that the nature of free exercise is to protect conduct more broadly than conscience.[466] Moreover, additional purposes of religious liberty are to ensure that government does not encroach on religion[467] and to maintain the vibrant pluralism that has been part of the American fabric since the nation's founding.[468] Instead, the *Conestoga* court simply held that no prior cases of constitutional corporate religious exercise[469] meant no future cases of statutory corporate religious exercise.[470] The *Conestoga* court's rejection of *Bellotti*[471] was premature because *Bellotti* contained language about corporate First Amendment rights generally, and not just about the Free Speech Clause.[472] RFRA, in turn, explicitly instructs courts to engage in an assessment of free exercise claims according to pre-*Smith* jurisprudence, which includes the potential for a *Bellotti* analysis. The Third Circuit, therefore, missed a crucial part of the analysis by engaging in a purely constitutional and historical discussion and not engaging with RFRA's text.

The *Hobby Lobby*, *Korte*, and *Gilardi* courts provided a more robust analysis of the nature, history, and purpose of what the right to free exercise protects.[473] Indeed, they addressed the issue in the manner that the *Bellotti* court instructed: by analyzing what the right protects, rather than whether a corporation can claim that right.[474] The *Conestoga* court did exactly the opposite. A *Bellotti* analysis should take account of what Congress would

461. *See supra* notes 221, 242 and accompanying text.
462. *See supra* note 249 and accompanying text.
463. *See supra* Part II.B.1.a.
464. *See supra* Part II.B.
465. *See supra* Part I.E.2.
466. *See supra* note 42 and accompanying text.
467. *See supra* note 45 and accompanying text.
468. *See supra* Part I.A.
469. *See supra* Part II.B.1.
470. *See supra* Part II.B.2.
471. *See supra* note 382 and accompanying text.
472. *See supra* note 248 and accompanying text.
473. *See supra* Part II.A.
474. *See supra* note 248 and accompanying text.

know in legislating RFRA: America's commitment to religious liberty from colonial days,[475] the fact that free exercise protects conduct over conscience,[476] the long-standing definition of "persons" as including corporations unless otherwise specified,[477] and past statutes that show Congress knows how to create corporate or religious exemptions.[478] The Tenth and Seventh Circuits incorporate these principles and show how RFRA can and should cover at least some corporations.

The government's position includes distinguishing between for-profit and nonprofit corporations and calling that distinction determinative.[479] The practice of allowing nonprofit corporations to state claims for violations of their free exercise of religion during the *Sherbert* regime, however, shows that the mere act of incorporation does not destroy religious liberty.[480] Moreover, a profit motive cannot be determinative, as the Supreme Court has allowed individual business owners to state free exercise claims.[481] In addition, as a normative matter, First Amendment issues can trump formal issues concerning the corporate form.[482] Each of these points form a part of the pre-*Smith* jurisprudence that Congress restored with RFRA, and nothing in that jurisprudence expressly excludes for-profit corporations.

Rather, Congress wanted courts to engage in a balancing act of RFRA's contours, and it firmly offered its support to religious liberty by enacting a strict scrutiny test. This is the important context for *Bellotti* purposes and should inform any analysis of RFRA.

3. A Brief Note on Legislative History

Some have noted that RFRA's legislative history, such as its committee reports, does not mention its application to corporations.[483] Few, however, have noted that prior versions of RFRA introduced in Congress did, in fact, define the persons the statute meant to protect.[484] Prior legislative history is frequently an unreliable source of legislative intent,[485] especially in the absence of materials explaining changes and amendments, but RFRA's history may present a plausible lesson to a judge willing to engage in this form of analysis. At a minimum, the prior versions of the statute show that

475. *See supra* Part I.A.
476. *See supra* Part I.B.
477. *See supra* note 215 and accompanying text.
478. *See supra* notes 319–21 and accompanying text.
479. *See supra* notes 314–15 and accompanying text.
480. *See supra* Part I.E.2.
481. *See supra* Part I.E.1.
482. *See supra* notes 246–61 and accompanying text.
483. *See* Steven D. Smith & Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 270 (2013), *available at* http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf.
484. *See supra* note 142. For others recognizing the definition of "persons" in proposed RFRAs, see Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1211 (2009), and Caroline Mala Corbin, *Corporate Religious Liberty* (August 2013) (manuscript at 19–20), *available at* http://ssrn.com/abstract=2327919.
485. *See supra* note 142.

Congress at times contemplated defining "person." In the initial draft, RFRA protected individuals and religious organizations, corporations, and associations.[486] The next version omitted the religious modifier and, without any modification, protected individuals, corporations, organizations, associations, and other entities.[487] This analysis yields the argument that successive versions of the proposed statute protected respectively larger categories of potential claimants. The initial version protected individuals and religious groups; the next version dropped the religious modifier, seemingly offering the proposed statute's protection to a broader constituency. Indeed, the potential claimants in the second version would largely mirror those protected if the word "person" were not defined and the default Dictionary Act definition applied. Congress plausibly dropped the definition to avoid excess language where the Dictionary Act would apply.

4. The Corporate Form and Its Relevance to the HHS Mandate

Notably, the Court's corporate First Amendment jurisprudence has not settled on a theory of corporate personhood. Indeed, in 2010, the *Citizens United* Court appeared to rely on two different theories to reach its holding.[488] RFRA could accommodate either theory. If the Court relies on the contractual theory that views a corporation as an association of shareholders, it could hold that a closely held corporation can exercise religion in much the same way it has allowed churches or religious groups to state RFRA and free exercise claims.[489] The Court has not previously held that the mere act of incorporation restricts such a claim. If the Court uses the real entity theory of corporations, then corporate religious exercise, such as proselytizing through advertisements or refusing to fund contraception through insurance plans, is religious conduct performed directly by the corporation.[490] The individuals who direct the corporation would elect to maintain such a religious entity.[491]

5. Why the Common Law Model Is Crucial

Having explored whether RFRA's context precludes corporations from stating RFRA claims, this Note returns again to the common law model Congress directed the courts to create. Two points will reinforce that this analysis of corporate RFRA rights has important limits.

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486. *See supra* note 142.
487. *See supra* note 142.
488. *See supra* notes 259–61 and accompanying text.
489. *See supra* notes 259–61 and accompanying text.
490. *See supra* notes 259–61 and accompanying text.
491. *See supra* note 243 and accompanying text.

a. Congress Has the Final Say

First, if courts allow secular corporations to state RFRA claims, then Congress can react. It did, after all, expressly legislate a balancing test to replace the Supreme Court's abandoned, constitutionally compelled *Sherbert* jurisprudence. Moreover, it seemingly did so in response to *Smith*'s invitation to be solicitous of religious liberty[492] and in accordance with *Boerne*'s allowance for congressional action based on its own interpretation of the Constitution.[493] Congress, however, retained final say over courts' decisionmaking, at least for federal purposes, as it always does when courts interpret its laws.[494] As enacted, RFRA appears to grant protection to corporations. If the Supreme Court holds this to be true and Congress disagrees, then Congress can amend the law accordingly. Conversely, if the Court denies standing under RFRA, then Congress can determine otherwise and adjust the law as needed. The important point is that the Court should examine this claim as a statutory matter and not a constitutional one.

b. Courts Should Develop a Jurisprudence To Determine the Contours of Corporate RFRA Claims

Second, RFRA allows the Court to develop a statutory jurisprudence. This is in contrast to the *Sherbert* regime, which was based in the Constitution. As Justice Sotomayor explained in her in-chambers opinion, the HHS mandate litigation presents a novel claim for religious liberty.[495] The Court should not attempt to answer the RFRA question for all corporate forms[496] in one fell swoop. Corporate free speech provides an analogue to this point. As the D.C. Circuit noted, *Citizens United* only emerged after decades of excruciating analysis of the corporate speech right.[497] The Court did not allow corporations to claim the protections of the Free Speech Clause overnight. Similarly, courts addressing the HHS mandate cases should not define these cases as determining whether all—or even most—corporations have RFRA rights.

The corporate plaintiffs in the cases percolating in the federal courts are organized as closely held corporations.[498] The owners of such corporations also frequently tend to be the directors and managers, and they might make business decisions that subvert their desire for profit to follow the commands of their religion.[499] For this reason, a closely held corporation might state a claim under RFRA if its directors and owners instruct it to follow religious conduct, and a law burdens that conduct. As Judge Sykes

492. *See supra* note 116 and accompanying text.
493. *See supra* note 177 and accompanying text.
494. *See supra* note 154 and accompanying text.
495. *See supra* note 192 and accompanying text.
496. *See supra* note 218.
497. *See supra* note 414 and accompanying text.
498. *See supra* Part II.
499. *See supra* notes 241–43 and accompanying text.

indicated, the individual owners do not compartmentalize their lives into business and religion, so RFRA's purposes could plausibly accommodate an expansion of existing law to cover certain business.[500] In fact, the Court might find that allowing closely held corporations to state RFRA claims will encourage individual flourishing, support religious pluralism, and provide an important mediating layer between persons and government—all of which are purposes of religious liberty.[501]

For the same reasons, a multinational, publicly held corporation will likely struggle to have the same dedication to a religious belief and could very easily fall outside of RFRA's protection.[502] Its owners and directors likely will not present a unified religious face, and the profit-generating capacity of the business will act by necessity to compartmentalize the individual shareholders and directors' religious and business lives. Simply put, a more diverse ownership will likely not tolerate a religious accommodation in its pursuit of profit. Moreover, such corporations are unlikely to be seen as promoting human flourishing or religious pluralism in the way that small, community-oriented businesses might be.[503] Only after a developed jurisprudence emerges, however, will the full contours of this issue be visible. To cut such a nascent jurisprudence off now, however, would be an injustice to religious liberty and those religious believers who see their small businesses as an extension of their religious life. Corporations should have the ability to state RFRA claims, and the Court should allow the federal judiciary to engage in an adjudicative process that seeks to determine the contours between religious liberty and corporate form.

B. If the Court Precludes All Corporations From RFRA, Then the D.C. Circuit Provides an Alternative Approach

If the Supreme Court rejects the above analysis, it should affirm the D.C. Circuit's shareholder-standing exception.[504] Although the details of this standing rule are beyond the scope of this Note, the *Gilardi* court provided a persuasive reason for why a close corporation should be able to state the claims of its shareholders. Incorporation should not equal the disappearance of a constitutional or statutory right without a corporate analogue.[505] If a sole proprietor or a nonprofit corporation may claim protection, then it is a perverse incentive to religious believers to withhold protection upon incorporation. This shareholder exception would allow owners to state claims that their corporations are otherwise precluded from litigating. Doing this would preserve the American tradition of protecting

500. *See supra* note 362 and accompanying text.
501. *See supra* note 239 and accompanying text.
502. *See* Willis, *supra* note 11, at 71–72.
503. *Cf. supra* note 239 (listing scholars and an activist group that reject the notion of rights for corporations).
504. *See supra* Part II.C.
505. *See supra* notes 421–22 and accompanying text.

religious liberty while also maintaining a formal respect for the corporate form.

CONCLUSION

Some other aspect of the RFRA analysis might conceivably doom Hobby Lobby and other for-profit corporations in their quest for an exemption from the HHS mandate. Courts might find that providing the contraceptives to which they object may not be a substantial burden or that the government has a compelling interest to override the plaintiffs' objections. This will undoubtedly be the source of much future litigation. The question of these corporations' ability to exercise religion and their standing under RFRA, however, should not be the fatal aspect. The support given to religious liberty by Congress, the Supreme Court, the Founders, and, ultimately, the American people is simply too great for such a result to be satisfactory.