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IS *HOBBY LOBBY* A TOOL FOR LIMITING CORPORATE CONSTITUTIONAL RIGHTS?

Jennifer S. Taub *

Critics lament that with *Burwell v. Hobby Lobby Stores, Inc.*,¹ the Supreme Court further expanded corporate personhood powers. This Article offers an alternative reading. It suggests that *Hobby Lobby* might actually provide a tool for limiting previously recognized corporate constitutional rights. To those who oppose the decision, this assertion might seem unduly optimistic. After all, the Court did determine that three family-owned business corporations were “persons” with sincere religious beliefs entitled to use the Religious Freedom Restoration Act (“RFRA”)² to deprive employees of federally mandated healthcare insurance coverage. Given that the Court determined that certain “closely held”³ business corporations possessed statutory rights previously thought reserved to real human beings, it would not seem to presage the future restriction of corporate constitutional rights. However, by designating (thus far) just closely-held corporations as persons with free-exercise rights under RFRA the Court invites us to question whether other corporations (that lack similar attributes) would be denied such personhood. And, if so, whether a distinction between closely-held corporations and others could be applied to curtail corporate constitutional rights.

* Professor of Law, Vermont Law School. I would like to thank John Coates for the invitation to the November 7, 2014, “Advancing a New Jurisprudence for American Self-Governance” symposium co-sponsored by Harvard Law School and Free Speech for People, as well as the other organizers, panelists, and participants. I am also grateful for comments and suggestions from Caroline Corbin, Ron Fein, Michelle Harner, Heidi Kitrosser, Tamara Piety, Elizabeth Pollman, and Jasper Tran, and to Jill Hasday and Tom Boyle for coordinating this *Constitutional Commentary* symposium issue. I would also like to thank the members of the University of Illinois School of Law community who provided feedback during a faculty workshop on March 10, 2015, and organizers, panelists, and participants at the University of Maryland, Francis King Carey School of Law symposium on “The Impact of the First Amendment on American Business,” held on March 27, 2015.

1. 134 S. Ct. 2751 (2014).

2. Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb (1993).

3. 134 S. Ct. at 2769.

Determining how *Hobby Lobby* restricts corporate personhood rights is not a mere thought experiment. It has become immediately necessary as a practical matter. Because the Court held that the contraceptive mandate⁴ under the Patient Protection and Affordable Care Act (“ACA”)⁵ as applied to the three corporate litigants violated RFRA, the Department of Health and Human Services (“HHS”) was obligated to fashion an exemption for them and similar organizations. Yet, notwithstanding the apparent importance of the term to its central holding, the Court majority failed to define what it meant by a “closely-held corporation.”⁶ Moreover, there is no uniform state⁷ or federal law defining this now critical category. Further, the decision seemed to discourage “discriminating” between classes of corporate entities.⁸ Wrestling with this apparent indefiniteness, HHS sought through a proposed rulemaking to create a diagnostic test (what I will refer to as a type of “Hobby Lobby Tool”) to identify the circumstances when business corporations could become eligible for the exemption from the contraceptive mandate.

4. See *infra* Section I.

5. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. § 18001.

6. Anne Tucker, *No Clear Lines in the Sand*, BUS. L. PROF. BLOG (June 30, 2014), http://lawprofessors.typepad.com/business_law/2014/06/no-clear-lines-in-the-sand.html; Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, THE RISE OF CORPORATE RELIGIOUS LIBERTY (forthcoming 2015) (on file with the author) (“although the Court extensively relied on the ‘closely held’ terminology in seemingly cabining its holding, the Court never defined this term for its purposes and no singular definition exists in corporate law to clearly limit the scope of *Hobby Lobby*’s reach”).

7. Approximately twenty states and also the District of Columbia have statutes that provide for the “close corporation” form. 1 WILLIAM M. FLETCHER, FLETCHER CORP. FORMS ANN. § 6:22 (5th ed. 2015). In those states that do not have statutory close corporations, business corporations can often structure themselves to be a “close corporation,” however, what that entails can vary from state to state. See F. HODGE O’NEAL & ROBERT B. THOMPSON, 1 CLOSE CORP. AND LLCs: LAW AND PRAC. § 1:19 (3d ed. 2014); see also Pollman, *Corporate Law and Theory*, *supra* note 6 (while there is no “singular definition . . . [i]t is typically understood to refer to a corporation with a small number of shareholders whose shares are not readily transferable and who are often involved in managing the corporation”).

8. The Court suggests that no distinction should be made between one type of corporation and another. “No known understanding of the term ‘person’ includes some but not all corporations. The term ‘person’ sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.” (134 S. Ct. at 2769). In addition, the majority did not close the door to publicly traded corporations claiming to be persons for purposes of RFRA.

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The *Hobby Lobby* majority opinion does provide some guidance.⁹ The Court's threshold determination that the three corporations were persons under RFRA appears to have depended upon the existence of three conditions. First, upon looking through the corporate entity,¹⁰ the Court was able to see human owners that were co-extensive with the corporation. This move ignored the "separateness" that state corporate law recognizes between a corporation and its owners.¹¹ Second, it appears that only because the identified human owners held (or agreed to share) the same sincere religious beliefs, and third, openly ran the corporation in accordance with those beliefs, did the Court conclude the beliefs of these human beings could be attributed to the corporate entity.¹² Arguably, only with these three factors present, did the Court determine that the contraceptive mandate substantially burdened the sincere religious beliefs of each corporation. The majority opinion, written by Justice Samuel Alito, suggests that to be deemed a person under RFRA, a corporation would not need to be closely held. Thus, so long as each of these three conditions was met a corporation could be considered a person under RFRA. Conversely, not all closely held corporations could meet the test.¹³

9. Many corporate law scholars have studied the opinion seeking guidance to distinguish between those business corporations that could or should have free exercise rights. *See, e.g.*, Brett McDonnell, *The Liberal Case for Hobby Lobby*, Minnesota Legal Studies Research Paper No. 14-39, at 1, 6 (Oct. 22, 2014) (After contending that "Where religious beliefs shape a corporation's purposes, the protections of RFRA may rightly apply," the author suggests a framework. "The framework considers two dimensions: organization and ownership. Along each dimension, a corporation can vary from no to high religious commitment. Ownership looks to the number and concentration of shareholders and the degree to which they share strongly held religious beliefs."), available at <http://ssrn.com/abstract=2513380> or <http://dx.doi.org/10.2139/ssrn.2513380>.

10. The Court also looked through trusts for Mardel and Hobby Lobby to see the owners.

11. The Court has previously recognized the separateness of the corporation and its owners. *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (Justice Breyer for the majority wrote: "the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs"); *United States v. Bestfoods*, 524 U.S. 51 (1998) (corporate parent entity separate from subsidiary).

12. *Cf.* Lyman P. Q. Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 *BUS. LAWYER* 1, 16-17 (2015) ("The Court thus upheld the institutional heft of the corporation as a distinct person under RFRA, and did not simply disregard it making it indistinguishable from its human participants.").

13. *Cf.* Paul Horwitz, *The Hobby Lobby Moment*, 128 *HARV. L. REV.* 154, 184 (2014) ("Despite the fears that were voiced on this issue during the litigation, the Court did not do for the Free Exercise Clause what *Citizens United* did for the Speech Clause, although nothing in the majority's opinion suggests that it would not do so in the proper case . . .

Evidence of the first condition can be found in Justice Alito's explanation that rights arising from the designation of a corporation as a fictional person were designed to protect the rights of real human beings associated with the entity. Depending upon the nature of the statutory or constitutional right, his opinion acknowledged that some, but not all, such rights derived from looking through the entity¹⁴ to the owners to find such human beings deserving of protection. For other rights, he indicated that the Court might look around to protect a wider group of stakeholders.¹⁵ Justice Alito noted that corporate free exercise rights were designed to protect "the religious liberty of the humans who own and control those companies."¹⁶ Given this framework, it seems that looking through to the owners¹⁷ to find an identity of interest with the corporate entity is a necessary, but insufficient condition. Further evidence from the opinion also suggests that the aforementioned second and third conditions—that the owners shared the same, or agreed to share the same

despite the possible ramifications of the opinion, the Court does not extend its holding beyond closely held corporations").

14. Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, IOWA L. REV. (forthcoming 2015) ("When the Court ascribes to corporations a right otherwise attributable to natural persons, it typically invokes a version of the 'aggregate' theory as justification.").

15. Note that corporate law scholars are accustomed to inconsistency in how the Court sees corporate identity. See Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconciled*, 42 SETON HALL L. REV. 879, 883 (2012) ("[T]he argument made here is not for convergence in perspectives on corporate groups across all areas of law. Rather, it is that in different areas of law, theories of the corporation, and, by extension, of corporate groups can be used to evaluate or legitimate particular legal rules"); Buccola, *supra* note 14, at 3–4 ("Over the course of two hundred years, the Court has articulated inconsistent and mutually incompatible theories of the corporation, theories which seem to yield predictably unpredictable judgments about the existence of a corporate right . . . Apparently incompatible conceptions of the firm might feature, without comment, in a single opinion. In *Hale v. Henkel*, for example, the Court held that corporations may not invoke the fifth-amendment privilege against self-incrimination, but also that they may rely on the fourth amendment's protection against unreasonable searches and seizures."); Charles R.T. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979) (The Court lacks "any expressly enunciated common rationale [in cases concerning corporate rights]. Many cases appear to involve an ad hoc determination rather than the development or application of a general principle"); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. (forthcoming 2015) ("the Court has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way").

16. 134 S. Ct. at 2768.

17. Note that Justice Alito alludes to the improbability of institutional owners meeting the second condition (agreement to run the corporation under the same religious beliefs), thus indicating that perhaps exclusively human owners is not necessary.

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religious beliefs, and agreed to run the corporation openly according to those beliefs—would also need to be present in order to treat a corporation as a person under RFRA.¹⁸

Based upon this understanding of *Hobby Lobby*, this Article contemplates whether the three putative preconditions to finding corporate statutory free exercise rights could be adapted for a constitutional rights context. Given that the Court has not yet found that corporations have free exercise rights under the First Amendment, we would need to look for another illustration. A suitable example would be a Supreme Court decision in which corporate constitutional rights were recognized based upon looking through the entity to the owners. The reasoning in such an opinion should be reexamined to determine whether the Court did, should have, or might in the future apply a Hobby Lobby Tool. In other words, we could inquire whether recognition of the look through right should depend upon the existence of the second and third conditions (relating to consent, control, and public notice). If so, then that corporate personhood right might also be limited to entities with identifiable human owners that share (or agree to share) the same perspectives related to the exercise of that right and to openly disclose those views.

An ideal case to revisit—that recognized a look-through-to-owners-derived constitutional right—is *Citizens United v. FEC*.¹⁹ In *Citizens*, the Court greatly expanded corporations' rights to engage in political spending²⁰ when it struck down provisions of the Bipartisan Campaign Reform Act²¹ ("BCRA") that were designed to limit corporate influence on federal elections. Justice Anthony Kennedy reasoned that corporations were associations of individuals,²² and therefore those individual human beings should not lose their constitutional rights simply because they joined together as owners to form a corporation. Perhaps, the *Hobby Lobby* decision (which came down four years later) marked a shift in the Court's reasoning concerning conditions necessary for corporations to gain look-through derived

18. Evidence can be found where Justice Alito notes that an agreement among shareholders "to run a corporation under the same religious beliefs" would be necessary should a non-closely held corporation seek the same protection under RFRA.

19. 130 S. Ct. 876 (2010).

20. See *id.* at 886 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), which held "that political speech may be banned based on the speaker's corporate identity").

21. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

22. *Citizens United*, 130 S. Ct. at 904, 907–08; see also *id.* at 925, 928–29 (Scalia, J., concurring).

personhood rights. If so, a future federal or state law limiting corporate political spending to those entities that meet conditions similar to the three from *Hobby Lobby* might be upheld. Successful use of a Hobby Lobby Tool to craft new campaign finance laws might allow citizens through our representative government to once again place meaningful limits on the power of large publicly held business corporations to influence elections.

Toward examining whether *Hobby Lobby* could be used to restrict corporate political spending rights, this Article will cover the following territory. First, it will review the *Hobby Lobby* decision. Next, it will show how we can identify the three conditions that were instrumental in the majority's finding that business corporations could exercise religion as persons under RFRA. The Article will also examine the proposed post-*Hobby Lobby* rulemaking by HHS. In particular, it will review three comment letters submitted by separate groups of law professors that recommend how HHS could decide when business corporations should (and should not) be treated as persons entitled to the exemption from the contraceptive mandate.²³

Thirdly, this piece will revisit *Citizens United* to apply a Hobby Lobby Tool by proposing the conditions that should be present for a corporation's political spending to be protected under the First Amendment. This could include (1) look through to identify human owners; (2) notice and consent²⁴ of the owners to engage in particular political spending; and (3) public disclosure of the spending. A new statute that made such elements preconditions to engaging in corporate political spending or in receiving an exemption from a general prohibition on corporate political spending could be upheld. In addition to aligning with *Hobby Lobby*, such a law could be viewed as acceptable under *Citizens United*. The preconditions could be seen as appropriate "procedures of corporate democracy" that the Court in *Citizens*

23. See Letter from Law Professors to Centers for Medicare and Medicaid Services, Department of Health and Human Services on Comment on the Definition of "Eligible Organization" for Purposes of Coverage of Certain Preventative Services Under the Affordable Care Act [File Code CMS-9940-P] (Oct. 21, 2014) [hereinafter Law Professors' Comment Letter on Definition], available at https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_corp_law_profs_for_submission.pdf.

24. As discussed herein, such consent might be on a majority, supermajority, or unanimous basis.

sanctioned, designed to mitigate the agency problem that arises from the separation of ownership from control.²⁵

Finally, this Article will identify problems that would stem from reliance on a Hobby Lobby Tool to curtail corporate constitutional rights. To begin, it leaves in tact the questionable conclusion from *Hobby Lobby* that a business corporation is a person with sincere religious beliefs with statutory (and potential constitutional) free exercise rights. In addition, the described analysis would not apply to those corporate constitutional rights that are not dependent upon look through. Also, treating shareholders as “owners” and conflating owners with the corporation is contestable as a legal and policy matter.²⁶ We should be concerned that the First Amendment could be used to undermine or evade regulation²⁷ and to intrude upon workers’ autonomy and freedom.²⁸ Such actions impacting the public should not be acceptable simply because of shareholder consent. Thus, cutting back to a slight degree corporate political spending would not address broader and more pernicious problems.²⁹ Moreover, this approach concedes too much ground, given the relatively recent recognition by the Supreme Court of corporate First Amendment rights.³⁰ Further, there are more direct critiques

25. The majority also noted that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’” *Citizens United*, 130 S. Ct. at 911.

26. LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 47 (2012).

27. See Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015).

28. See Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. (forthcoming 2015) (“In holding that an employer’s religious objection can override the essential rights of its employees, the decision represents a judicial revival of corporate paternalism, potentially subjecting millions of American workers to restrictions that had seemingly been eliminated long ago by our elected representatives.”).

29. John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 269 (2015) (“The corporate takeover of the First Amendment is at its heart the use by elite members of society of specific legal tools to degrade the rule of law.”).

30. *Id.* at 229, 240 (“[N]one of the corporations in existence at the time the First Amendment was adopted was legally authorized to engage in speech as a business activity, particularly political speech. Newspapers—which if organized as corporations would have been so authorized—by virtue of their very purpose, were not organized as corporations. . . . The Supreme Court did not rely on the First Amendment to strike down a law of any kind until 1931—that is, 140 years after the First Amendment was adopted, and no federal law until 1965.” (footnotes omitted)); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (“Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”).

of *Citizens United*³¹ that could be used to “overturn” the decision, restore campaign finance limits, and/or justify public funding of elections, as well as fend off growing attempts to use the “personhood” label to rollback regulation in the area of public health, welfare and safety.³² Finally, relying on a Hobby Lobby Tool could result in the expansion instead of the contraction of corporate constitutional rights. Perhaps rights previously denied to corporations due to being personal in nature could now be expanded due to look through treatment.

I. THE *HOBBY LOBBY* DECISION

The *Hobby Lobby* case arose from objections by three family-owned businesses to compliance with the Patient Protection and Affordable Care Act of 2010 on the grounds that certain provisions violated each corporation’s (and their respective owners’) rights under Religious Freedom Restoration Act of 1993. The ACA requires most employers with fifty or more employees to provide in their group health insurance plans “minimum essential coverage,” including “preventative care and screenings” for women. Such plans must furnish this preventative care without imposing upon employees any “cost-sharing requirements.”³³ The ACA did not list the preventative care that must be covered, but instead empowered a division of HHS to identify such essential coverage. Under this authority, HHS issued rules requiring covered employers to provide as part of the “preventative care,” twenty methods of contraception, each of which have been approved by the Food and Drug Administration (the “contraceptive mandate”). Included were two types of emergency contraception (sometimes referred to as “the morning after pill”) and two types of intrauterine devices (“IUDs”). Despite medical opinion to the contrary,³⁴ many religious

31. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 9, 10 (2014).

32. Piety, *supra* note 27; Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 97–98 (2014) (“Corporate constitutional litigation is pervasive. . . . Those constitutional claims have little in common with each other, but just those examples indicate the sheer breadth and importance of corporate constitutional litigation.”).

33. 42 U.S.C. § 300gg–13(a)(4) (2010).

34. Jen Gunter, *The Medical Facts About Birth Control and Hobby Lobby – From an OB/GYN*, THE NEW REPUBLIC (Jul. 6, 2014) (While some religious conservatives define pregnancy as beginning at the moment of fertilization, the medical community considers implantation in the uterus as when pregnancy begins. The morning-after pills and IUDs work to either prevent ovulation or fertilization. Only one of the IUDs could, under rare circumstances, also prevent implantation).

conservatives asserted that each of these methods acted to end pregnancies instead of simply working to prevent them.

Built into the initial regulations was a narrow exemption from the contraceptive mandate for churches and other religious orders. Later, HHS provided an accommodation for other religious nonprofit organizations that had religious objections to the mandate. The accommodation required the elimination by the insurance provider of the objectionable contraceptive coverage from the employer's healthcare plan and also the establishment of a separate payment by the insurance provider. Under the exemption, the insurance firm was not to impose any cost sharing on the employer, the employee, or the healthcare plan for the separate coverage. Not eligible for this accommodation however, were for-profit corporations ("business corporations").³⁵

Three business corporations, Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation, and their owners challenged the contraceptive mandate, including under RFRA. Enacted in response³⁶ to the 1990 Supreme Court decision in *Employment Division v. Smith*,³⁷ RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."³⁸ There is an exception to this prohibition if the government "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."³⁹ The law, as amended, broadly protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."⁴⁰ While the term "person" is not defined in the statute, the Dictionary Act states that, "[i]n determining the meaning of any Act of Congress,

35. Throughout, I will refer to these as business corporations. State law varies on whether a business corporation is defined as "for-profit." See Johnson & Millon, *supra* note 12, at n.32.

36. See 42 U.S.C. § 2000bb(a)(4) ("[I]n *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").

37. *Id.* at § 2000bb (b)(1)–(2) (RFRA, was designed to "restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government").

38. *Id.* at § 2000bb-1(a).

39. *Id.* at § 2000bb-1(b). The law also provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* at § 2000bb-1(c).

40. *Id.* at § 2000cc-5(7)(A).

unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁴¹

The owners of the three corporations claimed to have sincere Christian beliefs that life begins at conception and that it would violate such beliefs and substantially burden their exercise of religion to provide employees of the corporations they owned and controlled with access to contraceptive methods and devices that they believe operated after conception. The Hahns⁴² and Conestoga Wood Specialties, the corporation they owned and controlled, asked the federal district court for the Eastern District of Pennsylvania to enjoin application of the contraceptive mandate so that the corporation would not have to provide the four contraceptive devices.⁴³ The district court denied their request for a preliminary injunction and the Third Circuit Court of Appeals affirmed, agreeing with the position of HHS, holding that a for-profit corporation could not “engage in religious exercise and that the Hahns in their personal capacities had no mandate imposed upon them.”⁴⁴ The Third Circuit decision focused on the separateness between the corporate entity and the human beings associated with it, writing that:

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.⁴⁵

The Greens⁴⁶ and the corporations they owned and controlled, Hobby Lobby and Mardel, were initially denied a preliminary

41. 1 U.S.C. § 1.

42. The Hahn family comprised parents and children who owned voting stock of Conestoga and controlled the board. One of the sons served as its president and CEO. 134 S. Ct. at 2764.

43. Failure to comply with the contraceptive mandate would have apparently resulted in penalties of about \$33 million per year for Conestoga. 134 S. Ct. at 2775–76.

44. 134 S. Ct. at 2776. Hobby Lobby apparently faced an approximately \$475 million per year fine and Mardel about \$15 million.

45. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir.), *rev’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

46. The Green family controlled the stock of Hobby Lobby and Mardel (both Oklahoma business corporations) through a family trust for which the family members were trustees and beneficiaries. Family members served on the board of directors and also as senior management of the corporations.. 134 S. Ct. at 2765 (including n.15).

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injunction by the federal district court for the Western District of Oklahoma. The Tenth Circuit Court of Appeals reversed, however, finding that the Greens were “persons” under RFRA and that they had established a likelihood of success on their RFRA claim.

The cases were consolidated and the Supreme Court ruled in a 5-4 decision in favor of all three business corporations, concluding that by using the term “persons” to include corporations, the law protected the religious liberty of the human beings that own and control them. And the Court attributed to each corporation the religious beliefs of their respective owners.⁴⁷ While the majority decision noted that these were closely held corporations, it did not exclude the possibility of other firms, including publicly held ones from being persons under RFRA. Implicit in its decision was the notion that for religious identity purposes, human owners are coextensive with the entity itself and have control over its exercise of religion.

Thus the Court did not appear to pay heed to the nearly century old work by Adolph Berle and Gardiner Means concerning the separation of ownership from control in the modern corporation,⁴⁸ nor did it expressly acknowledge that the largest U.S. corporations are publicly traded with more than seventy percent of corporate shares held by institutions, not human beings.⁴⁹ Indeed, as described below, blurring the line between the corporate entity and its owners was an essential condition toward finding that the corporations were each persons for purposes of RFRA.

The *Hobby Lobby* decision stirred up longstanding debates about the nature of corporate personhood, purpose, and power.⁵⁰ Some scholars praised the decision as affirming that business

47. Garrett, *supra* note 32, at 144 (“The Hobby Lobby majority suggested that corporations can exercise religion on behalf of their owners, or as a pass-through for the rights of the owners.”).

48. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4 (2d ed. 1991).

49. See BEN W. HEINEMAN, JR. & STEPHEN DAVIS, ARE INSTITUTIONAL INVESTORS PART OF THE PROBLEM OR PART OF THE SOLUTION? KEY DESCRIPTIVE AND PRESCRIPTIVE QUESTIONS ABOUT SHAREHOLDERS’ ROLE IN U.S. PUBLIC EQUITY MARKETS 9 (Oct. 2011) (citing CONFERENCE BOARD, *THE 2010 INSTITUTIONAL INVESTOR REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION* (2010)); Jill E. Fisch, Symposium, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1963 (2010) (“[A]s of the end of 2007, institutional investors owned an unprecedented 76.4% of the largest 1000 corporations.”).

50. Corporate law scholars vary on whether they see the opinion as affirming, defeating, or furthering existing theories.

corporations were free to pursue non-profit maximizing goals,⁵¹ whereas others condemned it for allowing businesses to use claims of conscience to avoid complying with the law. Numerous scholars wondered how Justice Alito could have brushed aside a foundational tenet of corporate law—that the corporation is separate from its owners,⁵² particularly given the carefully argued amicus curiae brief submitted by forty-four law corporate and criminal professors on this very topic.⁵³

Many critics considered the practical implications of the *Hobby Lobby* decision, worrying that it provided a pathway for any and all types of business corporations unilaterally to deprive employees of legal protections and circumvent the democratic process. Questions arose as to the limits of the holding. Would employers—as HHS and Justice Ruth Bader Ginsburg’s dissent suggested—attempt to exclude from healthcare insurance coverage blood transfusions or vaccinations?⁵⁴ Would *Hobby Lobby’s* holding reach outside the health insurance context and

51. Johnson & Millon, *supra* note 12, at 1 (“Rejecting the federal government’s position that for-profit business corporations cannot ‘exercise religion’ because their sole purpose is to make money, the Court in *Burwell v. Hobby Lobby Stores, Inc.* construed state corporate law as permitting a broad array of non-monetary objectives.”); *see also* 134 S. Ct. at 2771–72 (“Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. ‘Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for any lawful purpose or business.’ 1 J. Cox & T. Hazen, *Treatise of the Law of Corporations* §4:1, p. 224 (3d ed. 2010).”)

52. *See, e.g.*, Kent Greenfield, *Hobby Lobby, “Unconstitutional Conditions,” and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes/> (“A distinction between shareholders and the company lies at the very foundation of corporate law. . . . *Hobby Lobby’s* presumption that shareholders can be seen as distinct from the company for purposes of, say, limited liability, but identified with the company for purposes of religious freedom changes the nature of the government benefit itself”).

53. *See* Brief of Corporate and Criminal Law Professors in Support of Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356 (Jan. 28, 2014) (“Allowing a corporation, through either shareholder vote or board resolution, to take on and assert the religious beliefs of its shareholders in order to avoid having to comply with a generally-applicable law with a secular purpose is fundamentally at odds with the entire concept of incorporation.”). Note that this author is a signatory to that brief.

54. 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting (“Would the exemption the Court holds RFRA demands for employers with religious grounded objections to the use of certain contraceptives extend to employers’ religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?”).

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permit employment discrimination on the basis of sexual orientation or gender identity?⁵⁵

Others disappointed in the decision included members of faith-based organizations, including the Anti-Defamation League, who asserted that given our “increasingly diverse workplaces,” allowing “for-profit employers to impose their owners’ religious beliefs on employees” undermined religious liberty.⁵⁶ Linking the case to *Citizens United*, some decried what they viewed as the Court’s further expansion of the rights of large business enterprises in the democratic process. While the Court only ruled on statutory grounds, opponents viewed the opinion as establishing the framework for a future ruling that business corporations have rights under the Free Exercise Clause of the U.S. Constitution.

Naturally, missing from those initial reactions was a deeper study of the opinion. A more deliberate and perhaps optimistic reading suggests that by drawing a distinction for statutory purposes between closely-held corporations and others (that do not share the same unified ownership and control features), *Hobby Lobby* may have provided a tool for limiting some corporate constitutional rights.

However, in coming up with such a test, we must be mindful that the Court did not actually define the term “closely-held corporation” nor did it limit its holding to just that category of entities. Thus a diagnostic test or “Hobby Lobby Tool” would need to be based upon the particular conditions and attributes recognized in the majority opinion. Such a task is not merely theoretical, but necessary now, in light of the requirement that HHS come up with a means for providing an exemption to the contraceptive mandate for certain business corporations. Drawing on that process, we might also arrive at test that could be adapted to other corporate personhood rights.

Use of such a Hobby Lobby Tool might result in the reduction or non-recognition of particular rights for certain business corporations. Most obviously, the decision invites us to revisit those constitutional rights the Court has recognized based upon the theory that a corporation is an association of owners who

55. Elizabeth Deutsch, *What Does Hobby Lobby Mean for LGBT Employment Discrimination?*, FEMINISTING, (July 3, 2014), <http://feministing.com/2014/07/03/what-does-hobby-lobby-mean-for-lgbt-employment-discrimination/>.

56. See, e.g., Letter from Anti-Defamation League to Centers for Medicare and Medicaid Services, Department of Health and Human Services on Comment Solicited for CMS-9940-P (Oct. 21, 2014) (published in the *Federal Register* on Aug. 27, 2014).

are natural persons⁵⁷ and that those persons should not forfeit their rights simply because they choose to associate together (as owners) in a corporate form. This theory was articulated in *Citizens United*, but is also central to the holding in *Hobby Lobby*.

II. CRAFTING A “HOBBY LOBBY TOOL”

Using the *Hobby Lobby* decision to limit corporate rights is not an ivory-tower exercise. It is a very practical pursuit. In light of the decision, HHS has proposed a rule to provide an exemption from the contraceptive mandate for certain business corporations. Both this proposed rulemaking and comment letters submitted in response demonstrate efforts to convert the Court’s reasoning into a useful diagnostic test. This section will discuss three comment letters submitted by separate groups of law professors. Before doing so, however, Alito’s majority opinion will first be examined to identify the three conditions that were arguably necessary toward the determination that a business corporation could be a person under RFRA with the personal religious belief of the owners attributed to the corporation. By comparing the language in *Hobby Lobby* to the alternatives offered by the groups of law professors, we can arrive at what the elements would be for the Hobby Lobby Tool. Finally, this section will propose an adaptable tool that could apply to previously recognized corporate constitutional rights.

A. THREE CONDITIONS

Three conditions can be identified that appear instrumental in the Court’s finding that business corporations could exercise religion as persons under RFRA. First, the Court looked-through each corporate entity to identify human owners and treated those owners as co-extensive with the corporation. This required the Court to ignore the “separateness” that state corporate law recognizes between a corporation and its owners⁵⁸ for purposes including shielding shareholders from personal liability for the entity’s debts. The decision also appears to rest upon a second condition. Only because the identified human owners held (or agree to share) the same sincere religious beliefs could those beliefs be attributed to the corporate entity. Finally, it seems that

57. Conversely, as discussed herein, there is the less rational possibility that those “purely personal” rights that the Court has denied to corporations generally would somehow now be granted to closely-held ones.

58. See Greenfield, *supra* note 52.

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only because the owners had the power to and actually did openly operate the corporation in accordance with those beliefs, did the Court conclude the beliefs of the owners could be attributed to the corporate entity. With all three conditions present, the Court could determine that the contraceptive mandate substantially burdened the sincere religious beliefs of each corporation. Arguably, to be deemed a person under RFRA, a corporation would not need to be closely held, so long as each of these conditions were met. Conversely, not all closely-held corporations would automatically be considered persons under RFRA, as they would not necessarily demonstrate all three conditions. Evidence from the decision to support the necessity of each of these conditions is set out below.

Although Justice Alito wrote in the majority opinion that the notion of corporate separateness was “quite beside the point,”⁵⁹ the decision to look through the corporate form to the individual human owners is the logical and legal foundation upon which the decision rests. Very clearly, the holding in *Hobby Lobby* depends upon the three business corporations being family-run and owned. As the opinion stated, “In holding that the HHS mandate is unlawful, we reject HHS’s argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships.”⁶⁰ In this instance, the Court sees the business as co-extensive with the owners. This conceptualization appears throughout the decision, including in statements such as “Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.”⁶¹

Much to the dismay of many corporate law professors,⁶² Justice Alito conflated the corporate entity itself with the various human beings associated with it. In response to the Third Circuit’s

59. 134 S. Ct. at 2768 .

60. *Id.* at 2759.

61. *Id.*

62. To other legal scholars, this was far from controversial. See Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature* (January 10, 2015), U. of Chicago, Public Law Working Paper No. 519 (deeming the following one of the three “banal” aspects of the decision: “that the free exercise of religion of a closely held corporation is not meaningfully distinguishable from the free exercise of religion by the individuals who closely own the corporation.”), available at <http://ssrn.com/abstract=2547972> or <http://dx.doi.org/10.2139/ssrn.2547972>.

assertion that separateness matters,⁶³ Justice Alito wrote: “All of this is true—but quite beside the point. Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”⁶⁴ With regard to free-exercise rights, however, Justice Alito narrows his scope. It is not employees’ religious beliefs that are attributed to the corporation; it is only the owners’. With these rights the Court looks through to the owners, and does not look around to the managers or employees.

This look-through approach is apparent in a final sentence of a long passage explaining corporate personhood rights (whether statutory or constitutional) as being anchored in or deriving from human beings associated with the corporation. The opinion reads: “As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of ‘persons.’”⁶⁵ The opinion continues on to qualify this statement as if addressing a skeptical public audience. “But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.”⁶⁶

The Court aligns each listed right of a corporation with some natural person. “When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”⁶⁷ For each right mentioned the Court identifies one or more stakeholders all of whom appear to be natural persons. As Justice Alito explains:

For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations’ financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga,

63. 724 F.3d 377, 385.

64. 134 S. Ct. at 2768.

65. *Id.*

66. *Id.*

67. *Id.*

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and Mardel protects the religious liberty of the humans who own and control those companies.⁶⁸

The last sentence in the above paragraph demonstrates that in the Court's view, free-exercise rights of corporations protect the owners as opposed to the employees or other human stakeholders. It also suggests that it only applies to the extent the owners actually "control" the entity. While Justice Alito proclaims that separateness is "quite beside the point," this passage above shows the opposite. Ignoring separateness was entirely the point. The *Hobby Lobby* decision depends upon a particular view of corporate personality—as an association of individual owners—to find justification. Looking-through to owners is more easily accomplished with family-owned and operated businesses, and is perhaps what the court means with the descriptor "closely held."⁶⁹

Justice Alito's opinion also supports the need for the aforementioned second and third conditions—that the owners shared (or agreed) to share the same religious beliefs, and that they had the authority and power to operate the corporation according to those beliefs. For example, the Court mentions that the owners of each corporation agreed to commit the entity to fulfill their own religious objectives. Each member of the Green family had "signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries."⁷⁰ And, the Court noted that the Hahn family provided evidence of the Conestoga's board-adopted statement of the Hahn family belief that "human life begins at conception."⁷¹

This evidence that being a "person" under RFRA turned also on conditions two (owners sharing or agreeing to share the same religious beliefs) and three (owners operating the corporation in accordance with those beliefs) is seen where the Court suggests that not all corporations will be considered persons under RFRA. Dismissing HHS's concern that publicly traded firms like IBM or General Electric could claim to have sincere beliefs, Justice Alito

68. *Id.*

69. The Court suggests that drawing a line between closely held and other corporations for corporate free-exercise rights purposes is not a proper method. See, note 8 *supra*. As such, we need to look at the attributes of the three corporate litigants, not merely the fact that they are closely held, to determine which types of corporations could be persons under RFRA and which could not. Not all closely-held corporations would pass the test and some that are not closely held could.

70. 134 S. Ct. at 2766.

71. *Id.* at 2764.

responds that, “it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims . . . numerous practical restraints would likely prevent that from occurring.”⁷² He offers the following reasoning, “[T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.” The Court also notes that “we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.” This provides additional evidence that at the very least, ownership and control by a limited number of identifiable human beings is essential toward claiming personhood under RFRA.

B. COMMENT LETTERS TO HHS

Columbia Law School professor Katherine Franke and research fellow Kara Loewentheil organized a comment letter to HHS.⁷³ The letter, which was signed by more than forty additional law professors, sought to provide a “thorough, practical and clear set of guidelines for for-profit entities wishing to seek an accommodation that is consistent with state corporate law principles and the *Hobby Lobby* ruling in both spirit and form.”⁷⁴ The letter distilled the key features of the closely-held business corporations that prevailed in the case. It was careful to note that the Court was not likely being exact in its use of the “closely-held” descriptor, but instead meant to evoke “a perception of intimacy of ownership rather than a reliance on a formalistic statutory form in state law.”⁷⁵ Under the umbrella of “identity of interests” between the three corporations and their owners, the Franke letter highlighted the following attributes of all three respondent corporations:

- (1) they were entirely family-owned,
- (2) they consisted of a small number of shareholders,
- (3) the shareholders and the board of directors were co-extensive,
- (4) the family/shareholders/directors were unanimous in their religious convictions,
- (5) the family/shareholders/directors

72. 134 S. Ct. at 2774.

73. Law Professors’ Comment Letter on Definition, *supra* note 23 (This author is a signatory to the comment letter).

74. *Id.* at 11.

75. *Id.* at 3

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were unanimous in wishing to seek an exemption from the contraceptive coverage requirement, and (6) the companies had long held themselves out to employees, customers, and the public as companies operating under religious principles that constrained their business behavior in accordance with the religious beliefs of equity holders/owners, thereby providing concrete evidence of their religious commitments.⁷⁶

Accordingly, the Franke letter recommended that HHS “limit any accommodation for for-profit entities only to those companies that meet each of these criteria, including being family-owned; the close ties between family members who share a religious faith and operate a religiously-influenced business are the best assurance of the close nexus on which corporate religious rights depend.” However, the letter also offered an alternative to limiting the eligibility for an accommodation to just family-owned businesses. It suggested the HHS might instead limit the accommodation to entities:

(1) with a limited number of equity holders/owners, (2) that demonstrate religious commitment, and (3) submit evidence of unanimous consent of equity holders to seek an accommodation on an annual basis.⁷⁷

These three requirements parallel the three conditions upon which the decision arguably depended. They acknowledge a corporate ownership, governance and operational structure that gives the owners full knowledge and control over the religious identity and commitment of the corporation.

Six professors at the University of California, Berkeley School of Law submitted a comment letter⁷⁸ recommending how HHS could determine what for-profit entities should be able to claim exemptions from the ACA contraceptive mandate. The Berkeley letter asserted that *Hobby Lobby* “held that the nexus of identity between several closely-held, for-profit corporations and their shareholders holding ‘a sincere religious belief that life begins at conception’ was sufficiently close to justify granting such corporations an exemption” from the ACA’s contraceptive mandate under RFRA. The letter proposed that the exemption

76. *Id.* at 2.

77. *Id.* at 2–3.

78. Robert P. Bartlett III, Richard M. Buxbaum, Stavros Gadinis, Justin McCrary, Steven Davidoff Solomon, & Eric L. Talley, Comment on the Definition of “Eligible Organization” for Purposes of Coverage of Certain Preventive Services under the Affordable Care Act, Oct. 8, 2014 [hereinafter Berkeley Letter on Definition], available at <http://ssrn.com/abstract=2507305> or <http://dx.doi.org/10.2139/ssrn.2507305>.

be available only if a corporation and its shareholders certify that they “have a unity in identity and interests, and therefore the corporation should be viewed as the shareholders’ alter ego.”⁷⁹ Accordingly such entities could be vulnerable to veil piercing⁸⁰ whereby the shareholders could be personally liable for the debts of the corporation, as one example.

The letter suggested that shareholders would need to affirm that “(1) the corporate entity has an expressed religious identity or principle, (2) this principle should be recognized because the corporate entity is the alter ego of the shareholders with indistinguishable interests and commitments, and (3) the assertion of this principle does not conflict with the corporation’s governing documents or state law.”⁸¹ This approach also aligns with the three conditions (discussed above) upon which the decision in *Hobby Lobby* was arguably based.

Another letter entitled, “Comments on the HHS’ Flawed Post-*Hobby Lobby* Rules,” submitted by seven law professors,⁸² differs substantially from the other two. The authors contend that because under state corporate law the board of directors direct the business of the corporation, the shareholders should have little influence over a corporation’s religious identity. It would be the directors, not the shareholders, who should decide whether a corporation would or would not “exercise religion.”

These commentators recommend that HHS create a safe harbor under which an eligible organization would be “any corporation that is not a publicly reporting company under federal securities laws, the board of directors of which has

79. *Id.* at 2.

80. Veil-piercing is a court-made exception to one of the central tenets of state corporate law, of limited personal liability for shareholders. For example, § 6.22(b) of the Model Business Corporation Act provides that “a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct;” also see ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 157 (2013) (“With respect to large corporations with many public shareholders, the business entity is pierced to find individual equity owners liable very rarely, if ever.”).

81. Berkeley Letter on Definition at 6 -7.

82. Lyman Johnson, David Millon, Stephen Bainbridge, Ronald J. Colombo, Brett McDonnell, Alan J. Meese, & Nathan B., Oman, Comment on the Definition of “Eligible Organization” for Purposes of Coverage of Certain Preventive Services under the Affordable Care Act, Oct. 20, 2014 (also titled, Comments on the HHS’ Flawed Post-*Hobby Lobby* Rules) [hereinafter Flawed Rules Letter], available at <http://ssrn.com/abstract=2512860>.

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determined will exercise religion in its business affairs.”⁸³ The safe harbor approach would also mean that other firms (including reporting companies) could still seek to gain eligibility for the exemption.

Though the Court opined that “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies,” these commentators saw limited to no direct input available to shareholders. Dissenting shareholders could “remove directors at the annual election of directors or at a special meeting held for that purpose.” Yet, removing members of the board of directors at large publicly held corporations is extremely difficult. Generally candidates for the board are nominated⁸⁴ by a committee of the board and typically run uncontested.⁸⁵ With plurality voting, a director need only receive one vote to get elected and even where majority voting is in place, if an incumbent nominee does not receive a majority, he or she is still not required to step down.

The seven commentators also stated that “Absent an unusual charter or by-law provision, directors are the key decision-makers in corporations and neither they nor shareholders (where they do get to vote) must act with unanimity.” They explained Justice Alito’s repeated use of language such as “if owners agree” to mean at the very most a “simple majority vote.”⁸⁶

Considering together the majority opinion and the comment letters, we can observe that the Court indeed meant to restrict – based upon ownership, control, and religious commitment – the types of corporations that could be considered persons under RFRA and thus be eligible for an exemption from the contraceptive mandate. Thus a sound standard would require that business corporations can only be considered persons under

83. If a corporation met the conditions of the safe harbor, such as having no more than 2,000 shareholders (which could be institutional investors) it would be eligible for the exemption.

84. See LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS* 352 (7th ed. 2010) (“Historically, as a matter of general practice, a corporation’s incumbent board nominates directors for elections and presents its nominations in annual proxy statements produced at the corporation’s expense.”).

85. See Paul E. Fischer et al., *Investor Perceptions of Board Performance: Evidence from Uncontested Director Elections 1* (Working Paper, 2009), available at <http://ssrn.com/abstract=928843> (“Every year the vast majority of publicly traded firms’ shareholders vote to approve members of the board of directors in uncontested elections (i.e., elections not involving proxy fights or vote-no campaigns).”).

86. Flawed Rules Letter at 9.

RFRA if (1) the court looks-through the entity to see human owners whose free exercise rights are to be protected and who are intimately linked to the identity, ownership and control of the entity; (2) such owners share or agreed to share the same sincere religious beliefs as evidenced by consent of at least a majority (and possible all owners); and (3) owners openly operating the corporation in accordance with those beliefs.⁸⁷

III. USING A HOBBY LOBBY TOOL TO CURTAIL CORPORATE POLITICAL SPENDING RIGHTS

This section contemplates whether a form of Hobby Lobby Tool used for statutory free-exercise rights could apply in a constitutional rights context. As the Court has not yet found that corporations have free-exercise rights under the First Amendment, we must search for another example. A Supreme Court decision in which corporate constitutional rights were recognized based upon looking-through the entity to the owners would function well for this purpose. *Citizens United* is such a case. This is a good choice as it has quite a bit in common with *Hobby Lobby*.⁸⁸

A. *CITIZENS UNITED*

In *Citizens United*, the Supreme Court greatly expanded the First Amendment rights of corporations to engage in political spending activities. The Court's reasoning included an assumption similar to the thinking in *Hobby Lobby*—that a corporation was an association of individual owners who should each not lose their rights simply because they joined together in corporate form to exercise them. As such, corporations deserved the same political “speech”⁸⁹ rights under the First Amendment as real people. Justice Kennedy's majority opinion was clear on this point and rejected the notion that the decision depended upon treating the corporation itself as a person. As Boston

87. Compare similarities and differences of these three conditions to Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of incorporated Employers*, 16 GREEN BAG 2d 235 (2013).

88. Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases* 65 S. CAR. L. REV. 1, at 36 (2013) (“Hence, Hobby Lobby is more akin to *Citizens United v. Federal Election Commission*, in which the Court recognized corporate speech rights as being personal to the speaker, but allowing a corporation to assert them because a corporation can speak.”).

89. Without endorsing the notion that spending money on politics equates with speech, this Article simply acknowledges that the Court has made this connection beginning with *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“virtually every means of communicating ideas in today's mass society requires the expenditure of money”).

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College Law School Professor Kent Greenfield recently reaffirmed, “The court did not . . . say that Citizens United, the corporate entity, had rights that were violated. What it said was that Citizens United was an association of citizens, and in constraining that organization’s ability to . . . to release its movie, it was violating the rights of its members.”⁹⁰

The Court in *Citizens United* assumed that a corporation does express the voice of empowered shareholders who could monitor and object to political spending decisions that depart from their interests. The Court expected that disclosure of corporate political spending would be prompt and complete.⁹¹ With these assumptions in mind, the Court found unconstitutional legislation that had prohibited the use of unlimited corporate treasury funds to influence elections.

The Court left open the question of which individuals associated with the corporation would have the power to decide how and when to engage in political spending. Recognizing the possibility that corporate managers might spend in ways that were misaligned with shareholders’ interest, Justice Kennedy suggested that any abuses could be corrected through “the procedures of corporate democracy.”⁹² Congress, state legislatures, and the SEC, for example, would have a role in enhancing such procedures to cure disclosure shortages and to help enhance how shareholders could better exercise their rights through their corporation.

The Court also quite clearly created an opening for further disclosure of corporate political spending. While only five justices signed on to most of Justice Kennedy’s opinion, eight joined part IV which held that mandating further disclosure of corporate political spending would be permissible under the Constitution.

90. *Should McDonald’s & Monsanto Have the Same Rights as People? A Debate on Corporate Personhood*, DEMOCRACY NOW! (Mar. 13, 2015), transcript and video available at http://www.democracynow.org/2015/3/13/should_mcdonalds_monsanto_have_the_same.

91. In the majority opinion, Justice Kennedy wrote that “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” *Citizens United*, 558 U.S. at 370.

92. 130 S. Ct. at 911.

B. APPLYING A HOBBY LOBBY TOOL TO LIMIT CORPORATE POLITICAL SPENDING

This next subsection considers whether the three putative *Hobby Lobby* pre-conditions to finding corporate statutory free-exercise rights could apply to corporate constitutional rights. In particular it examines whether a Hobby Lobby Tool could be adapted to apply to corporate First Amendment political spending rights that were recognized in *Citizens United*. This inquiry has practical implications. Just as HHS is working to establish criteria to divide those business corporations that may gain a religious exemption to the ACA's contraceptive mandate and those that may not, a legislator might wish to craft a bill that draws a line between business corporations that may engage in unlimited political spending and those that may not.

This is an appropriate analogy given that both personhood rights under RFRA and corporate political spending rights under the First Amendment are look-through rights. They appear to derive from the owners that associate in the corporate form, and not from the entity itself or from other stakeholders. Moreover, to the extent that such a tool would encourage disclosure and shareholder voting rights, it would align well with the Court's invitation to enact disclosure requirements. It would also reflect the Court's recognition that shareholders' interests in meaningful "procedures of corporate" democracy that would help check managerial abuses,

However, directly applying a Hobby Lobby Tool used for purposes of free-exercise rights to political spending rights is slightly awkward. We would need to adapt the attributes of look-through, consent and disclosure to fit the corporate political spending context. The elements of this adapted tool could include (1) look-through to identify human owners that are coextensive with the corporation; (2) notice and consent of owners to engage in particular political spending (on a majority, supermajority, or unanimous basis); and (3) public disclosure of the spending. A new statute that made these elements preconditions to receiving an exemption from a general prohibition on corporate political spending could be viewed as appropriate "procedures of corporate democracy" designed to mitigate the agency problem that arises from the separation of ownership from control. And, it would align well with the three conditions set out in *Hobby Lobby*.

Whether an adaptable Hobby Lobby Tool like this one could be used to curtail corporate political speech rights might depend upon whether a future Court majority would view the *Hobby Lobby* decision as a shift from or clarification of *Citizens United*. It may be too bold quite yet to expect the Court to uphold a statute enacted that restored verbatim the pre-Citizen's restrictions on corporate political spending found in BCRA simply because it provided carve-outs. However, at some point, a Court could take this approach, quite rationally.

One way to nearly meet the three conditions of the Hobby Lobby Tool would be to restrict corporate political spending to those entities that on an annual basis provide advance notice and obtain the unanimous vote of shareholders (including institutional shareholders) to support political spending activities. Short of unanimous support, supermajority approval by shareholders (by voting shares) plus oversight by independent directors, as suggested by corporate law scholars Lucian Bebchuk and Robert Jackson,⁹³ would be advisable. Another method might be to only allow political spending by those corporations that have charters that (or that are incorporated in states that) require the consent of the human beings who own shares. Such a method might require unanimous consent, or if not could be a supermajority or majority vote on a per capita or per share basis.

There are a variety of related approaches, some of which are being attempted by policymakers. For example, in early 2015, Maryland state senator, Jamie Raskin introduced a bill⁹⁴ that if enacted would require Maryland corporations to disclose on their websites political expenditures⁹⁵ within 48 hours. It would also require corporations to obtain annual shareholder consent (by a

93. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Spending*, 101 GEO. L.J. 923 (2013); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84–85, 97–107 (2010) (suggesting that “lawmakers should develop special rules to govern who may make political speech decisions on behalf of corporations” and that because *Citizens United* expanded “the scope of constitutionally protected corporate political speech,” “the need for such rules [is] all the more pressing.” Such proposals would include the mandatory disclosure of political expenditures subject to a supermajority of shareholders voting to approve the spending and overseen by independent directors).

94. S.B. 153, 2015 S., 435th Sess. (Md. 2015), available at <http://mgaleg.maryland.gov/2015RS/bills/sb/sb0153f.pdf>; Lasio Boyd, *Jamie Raskin's Challenge to 'Citizens United'*, CTR. MD. BLOG (Feb. 19, 2015), http://www.centermaryland.org/index.php?option=com_easyblog&view=entry&id=1191.

95. The term “political expenditure” is defined to mean “a contribution, gift, transfer, disbursement, or promise of money or a thing of value to promote or assist in the promotion of the success or defeat of a candidate, political party, or question in any state or federal election.” S.B. 153, 2015 S., 435th Sess. (Md. 2015).

majority of votes entitled to be cast) of the political expenditure budget⁹⁶ as well as consent to where the money or property is directed, such as specific candidates, causes, parties, and PACs. Senator Raskin has suggested that if certain institutional investors are not legally permitted to cast their votes approving the direction of political expenditures, this may result in the failure to gain a majority approval and thus prohibit the campaign-related spending.⁹⁷

IV. CONCLUSION

The *Hobby Lobby* decision arguably provides tools to curtail certain corporate constitutional rights. The rights that could be subject to restriction are those that the Court has recognized as deriving from looking through the entity to the owners. This would include the First Amendment corporate political spending rights recognized in *Citizens United*. A statute should be upheld that limits corporate political spending to those entities where there is an identity of interest between the human owners and the corporation, where there is majority shareholder consent to the specific spending, and where there is public disclosure of such spending.

Even if a future Court majority might be willing to rely on a Hobby Lobby Tool to curtail corporate political spending or other corporate constitutional rights, this may be an undesirable response to a bigger problem. Treating shareholders as “owners” and conflating owners with the corporation is not fully supported as a matter of law or policy.⁹⁸ Even with shareholder approval of political spending (or to the exercise of other First Amendment or statutory personhood rights), we should be concerned that the

96. See S.B. 153, 2015 S., 435 Sess. (Md. 2015).

97. Jamie B. Raskin, *A Shareholder Solution to ‘Citizens United’*, WASH. POST. (Oct. 3, 2014), http://www.washingtonpost.com/opinions/a-shareholder-solution-to-citizens-united/2014/10/03/5e07c3ee-48be-11e4-b72e-d60a9229cc10_story.html (“I am introducing legislation . . . that will require managers of Maryland-registered corporations who wish to engage in political spending for their shareholders to post all political expenditures on company Web sites within 48 hours and confirm that any political spending fairly reflects the explicit preference of shareholders owning a majority interest in the company. Further, if no ‘majority will’ of the shareholders can form to spend money for political candidates—because most shares are owned by institutions forbidden to participate in partisan campaigns—then the corporation will be prohibited from using its resources on political campaigns.”).

98. STOUT, *supra* note 26 at 93; see also Pollman, *supra* note 6 (questions persist as to “whether the corporation has a separate existence, reified or real, from the persons connected with it and whether the emphasis in understanding the nature of the corporation should be on the separate legal entity or on the aggregate of individuals involved.”).

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First Amendment could be used to undermine or evade regulation.⁹⁹ Importantly, there are more direct critiques of *Citizens United*.¹⁰⁰ Such approaches could be used restore campaign finance limits or gain support for public funding of elections. Finally, relying on a Hobby Lobby Tool might result in the expansion instead of the contraction of corporate constitutional rights. Perhaps rights previously denied to corporations due to their being personal in nature could now be expanded with look-through treatment. With those objections in mind, on balance, however, it seems wise to explore legislation that prohibits certain corporate political spending with exemptions for those corporations that meet the three-part test of: (1) look-through to identify owners that are coextensive with the corporation; (2) notice and consent of shareholders (on at least a majority basis) to engage in particular political spending; and (3) public disclosure of the spending.

99. Piety, *supra* note 27, at 366 (“[T]here is almost no case that can’t, with creative lawyering, be turned into a First Amendment case and many of these cases depend upon some version of the equal protection argument.”)

100. David A. Westbrook, *If Not a Commercial Republic? Political Economy in the United States after Citizens United*, 50 U. LOUISVILLE L. REV. 35, 36 (2011) (“What makes *Citizens United* disturbing is that the case signals a rupture in our constitutional tradition”); Coates, *supra* note 29, at 234 (“[C]ommercial and corporate speech—in the most important activities of every business, including contract formation, retention and regulation of agents, and engaging in risk-taking activities—was pervasively regulated and structured by law long before the modern, expansive version of the First Amendment, which . . . was invented only recently.”); TEACHOUT, *supra* note 31.