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Do Corporations Have Religious Beliefs?

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Despite two hundred years of jurisprudence on the topic of corporate personhood, the Supreme Court has failed to endorse a philosophically defensible theory of the corporation. In this Article, I attempt to fill that void. Drawing upon the extensive philosophical literature on personhood and group agency, I argue that corporations qualify as persons in their own right. This leads me to answer the titular question with an emphatic yes. Contrary to how it first seems, that conclusion does not warrant granting expansive constitutional rights to corporations. It actually suggests the opposite. Using the Affordable Care Act's contraception mandate as a case study, I develop this theory of corporate personhood and explore some of its constitutional implications.

INTRODUCTION

Do corporations have religious beliefs? In a word, yes. They also have fears, hopes, desires, and worries. Some even love; others get angry. Truth be told, corporations are a pretty emotional bunch. Open any newspaper, and you will see corporate intentionality on full display, such as in the following excerpts:

- "Facebook *wants* to go head-to-head with Google in the fight for small-business advertising."[1]

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1. Nick Bilton, *Facebook Will Allow Users To Share Location*, N.Y. TIMES BITS (Mar. 9, 2010, 1:44 PM), http://bits.blogs.nytimes.com/2010/03/09/facebook-will-allow-users-to

- "Verizon *worries* that, without instruction from lawmakers, the [FCC] will continue to be pressured to expand its authority in this area . . . ."[2]
- "Microsoft *fears* that Google could become a kind of operating system of the Internet . . . ."[3]
- "The Big Ten *is angry* at Comcast. And Comcast *is angry* at the Big Ten. The conference needs the cable operator, the nation's largest, to carry its fledgling network."[4]

In this Article, I seek to defend the claim that corporations actually possess these emotions. They genuinely do have worries, fears, and other mental states. These ascriptions are not mere metaphors. They are identifications of legitimate intentional states.[5] If I am correct in my assertion, this observation has important implications for corporate personhood. In particular, it shows that corporations are agents in their own right; they possess mental states that are independent of the mental states of their members. In other words, corporations have minds of their own.

Moreover, corporations have very sophisticated minds of their own. They exhibit rationality and, accordingly, are able to acquire information from the outside world and update their beliefs and actions in light of such information. In line with today's prevailing philosophical theories of group agency, I argue that the intentionality and rationality exhibited by corporations is sufficient for them to qualify as persons.

Many judges have strongly rejected this claim, defending their denial of corporate personhood by appealing to the belief that corporations lack intentionality.[6] Most notably, perhaps, in his *Citizens United* dissent, Justice Stevens wrote that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires."[7] In this Article, I argue that Justice Stevens's sentiment is mistaken. I defend the view that corporations *are* intentional agents and, going even further, that they are persons. They are not flesh-and-blood humans like you and me. Nonetheless, they are persons in a very real sense. Importantly, my argument does not require that corporations be granted the same range of constitutional rights that natural persons enjoy. Instead, its primary purpose is to illustrate that corporations are not mere reflections of their shareholders or employees. As philosophical theories show, they are persons in their own right.

-share-location (emphasis added).

2. Eliza Krigman, *Verizon: FCC Suit Not Tied to a Plan*, POLITICO, Feb. 3, 2011, at 6 (emphasis added).

3. Steve Lohr & Saul Hansell, *Microsoft and Google Set To Wage Arms Race*, N.Y. TIMES, May, 2, 2006, at C1 (emphasis added).

4. Richard Sandomir, *Tempers Flare over Network for Big Ten*, N.Y. TIMES, June 23, 2007, at D5 (emphasis added).

5. For a discussion of intentionality, see *infra* Part III.

6. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion."), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *see also infra* Part I.C.

7. Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part).

To illustrate the practical import of my theory, I center the discussion on *Burwell v. Hobby Lobby Stores, Inc.*—a corporate personhood case recently decided by the Supreme Court.[8] Prior to *Hobby Lobby*, the Justices had never decided whether for-profit corporations were entitled to protection under the Free Exercise Clause[9] or the Religious Freedom Restoration Act (RFRA).[10] This case provided the first opportunity to rule on those issues. The problem at hand arose in light of the contraception mandate, a provision within the Patient Protection and Affordable Care Act.[11] Specifically, the contraception mandate forces corporations to carry health insurance plans that provide their employees with contraceptive coverage.[12]

Many business owners have objected on religious grounds, asserting that this mandate infringes upon their free exercise rights and the free exercise rights of their corporations.[13] To many observers, this latter claim seems particularly absurd. These observers deny the intentionality of corporations and, accordingly, the ability of corporations to hold religious beliefs. Perhaps the *New York Times* summed up this argument best: "The lawsuits share a basic flaw: Profit-making corporations are not human beings capable of engaging in religious exercise to begin with."[14]

In my defense of corporate personhood, I attempt to refute this conception by showing that corporations, indeed, can hold religious beliefs. From here, I argue that they do qualify for protection under the Free Exercise Clause and the RFRA. I reach this conclusion by a different path than the Supreme Court. Whereas the majority in *Hobby Lobby* reduced a corporation's beliefs to the beliefs of its owners,[15] I maintain that corporations possess beliefs that are truly their own. They are distinct entities with distinct intentional states.

In some ways, my theory is more extreme than the one adopted by the *Hobby Lobby* majority. After all, I posit that corporations are entitled to constitutional protections in their own right. In other respects, however, my theory is almost as restrictive as the view endorsed by the dissent—namely, that for-profit corporations

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8. 134 S. Ct. 2751.

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

10. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)); *see also Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."); Lyle Denniston, *Court To Rule on Birth-Control Mandate*, SCOTUSBLOG (Nov. 26, 2013, 3:47 PM), http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/ ("[I]t is not clear that a business that is formed as a corporation, and engages in a strictly commercial kind of activity, can have religious beliefs and can actually base its commercial actions upon such faith principles . . . . The Court has never ruled on that issue, but that is one of the core issues it has now agreed to consider.").

11. 42 U.S.C. § 300gg-13(a) (2012).

12. For a detailed discussion of this provision, see *infra* Part I.A.

13. For a comprehensive listing of cases filed so far, see *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral.

14. Editorial, *Contraception and Corporations*, N.Y. TIMES, Aug. 3, 2013, at A18.

15. *See* 134 S. Ct at 2774–75.

are ineligible for religious protections.[16] I reach this conclusion by observing that for-profit corporations are unlikely to hold sincere religious beliefs.

In order to receive protection under the Free Exercise Clause or the RFRA, corporations—like natural persons—must prove that their religious beliefs are sincere.[17] Insincere beliefs are unworthy of constitutional protection.[18] It seems quite clear that any religious beliefs that are driven by a desire to maximize profits, as certain corporations are legally required to do, cannot possibly be sincere. This understanding of the corporation provides a clear way to delimit the types of corporations that can succeed in their religious claims.

At one extreme exist for-profit corporations that are organized solely for the purpose of maximizing shareholder value. These corporations cannot possibly satisfy the test by advancing sincere religious claims. After all, any actions that conflict with maximizing wealth (including adhering to religious beliefs) would be incompatible with their mission statements, charters, and bylaws. At the other extreme sit religious nonprofit corporations such as churches. The Supreme Court has very clearly held that these organizations are entitled to free exercise protections.[19] Under my analysis, these nonprofit corporations would still be able to advance sincere religious claims.

Due to the competing goals of the corporate claimant, *Hobby Lobby* lies somewhere in the middle. In particular, the corporation is tasked with both maximizing profit and upholding religious values. In these instances, courts must examine the case-specific facts to determine which goal is dominant. The courts have done a respectable job ferreting out insincere religious claims of individuals.[20] Therefore, I believe they have the skill to tell the difference between disingenuous corporate claimants and those that are seeking to protect sincere religious beliefs. Companies that assert free exercise claims for the purpose of increasing profits will simply not succeed. Given the requirements imposed by the sincerity test, there is little reason to believe that corporate free exercise protections will be abused. Despite receiving no discussion in the litigation surrounding the contraception cases, the sincerity test really is the true hurdle for corporate free exercise and RFRA claims.

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16. *See id.* at 2794 (Ginsburg, J., dissenting) ("There is . . . no support for the notion that free exercise rights pertain to for-profit corporations.").

17. The Supreme Court has long recognized that only sincerely held religious beliefs fall within the Free Exercise Clause. For a thorough discussion of the sincerity test, see *infra* Part V; *see also* Thomas v. Review Bd., 450 U.S. 707, 714–16 (1981) (holding that denying unemployment compensation benefits to a petitioner who had terminated his employment because of an "honest conviction that such work was forbidden by his religion" would violate the petitioner's First Amendment right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205, 216–219 (1972) (finding that an Amish claimant's religious conviction was sincerely held).

18. *See, e.g.*, United States v. Kuch, 288 F. Supp. 439, 444–45 (D.D.C. 1968); Hansell v. Purnell, 1 F.2d 266 (6th Cir. 1924); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1242–51 (2d ed. 1988) (noting that a free exercise claimant must show that the law imposes a burden on a sincerely held religious belief).

19. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

20. *See infra* Part V.

The rest of this Article proceeds as follows. In Part I, I detail the dispute over the contraception mandate's constitutionality. After providing a historical review of the Supreme Court's corporate personhood jurisprudence, I examine how contraception mandate cases have employed that doctrine. In Part II, I discuss the major philosophical theories of personhood. Following a line of argument that extends back to Thomas Hobbes, I show how corporations could be characterized as persons. In Parts III and IV, I draw upon philosophical arguments in the areas of joint intentionality and group agency. Insights in these domains further clarify why corporations should be regarded as persons in their own right. Finally, in Part V, I examine existing case law on the free exercise sincerity test. I conclude by arguing that this test offers an important limitation that can be used to prevent disingenuous corporate claimants from obtaining protection under the Free Exercise Clause or the RFRA.

I. THE CONTRACEPTION MANDATE

A. The Issue

On March 23, 2010, Congress passed the Patient Protection and Affordable Care Act (ACA).[21] The provision in the ACA at issue here requires employer-sponsored group health plans to cover "preventive care and screenings" for women.[22] Congress failed to define "preventive care and screenings," instead choosing to delegate that task to the Health Resources and Services Administration (HRSA).[23]

After consulting with the Institute of Medicine at the National Academy of Science, HRSA promulgated guidelines that defined "preventive care and screenings" as including, among other things, "contraceptive methods and counseling."[24] HRSA further clarified that, to fulfill the requirements under this section, insurance plans must cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[25] FDA-approved birth control includes barrier methods, hormonal methods, emergency contraceptives,

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21. Pub. L. No. 111–148, 124 Stat. 119 (2010).

22. 42 U.S.C. § 300gg-13(a) (2012).

23. The relevant passage reads as follows:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [an agency within the U.S. Department of Health and Human Services (HHS)] for purposes of this paragraph.

Id.

24. *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HRSA.GOV, http://www.hrsa.gov/womensguidelines.

25. *Id.*

intrauterine devices, and sterilization.[26] Several of these methods—the emergency contraceptives and intrauterine devices—work by preventing implantation of a fertilized egg,[27] while the rest function by preventing fertilization. In February 2012, HHS adopted the HRSA guidelines.[28] These guidelines took effect on August 1 of that same year.[29]

Employers who offer health plans that fail to comply with the contraception mandate face a federal tax of $100 per day per employee.[30] Over the course of a single year, this adds up to $36,500 per employee. Alternatively, an employer who forgoes offering health plans altogether is assessed a tax of $2000 per year for each employee.[31]

Like most provisions within the ACA, these taxes apply to employers with fifty or more full-time employees.[32] There are, however, a few exceptions. One such exception allows health plans that existed prior to March 24, 2010, to be grandfathered into the current system. So long as these plans do not undergo certain changes, they will remain exempt from many of the minimum coverage requirements (including the contraception mandate).[33]

HHS also granted religious employers an exemption from the mandate. Initially, HHS defined a "religious employer" as "an organization that meets all of the following criteria":

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.

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26. *Birth Control: Medicines To Help You*, FDA.GOV, http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last updated Aug. 27, 2013).

27. There is a debate in the medical community over whether these methods of contraception work by preventing implantation or fertilization. For a summary of this debate, see Pam Belluck & Erik Eckholm, *Groups Equate Abortion with Some Contraceptives*, N.Y. TIMES, Feb. 17, 2012, at A13. For purposes of the *Hobby Lobby* dispute, however, it is not necessary to resolve the exact mechanism by which each of the contraceptive methods works. Both parties to the dispute agreed that at least some of the contraceptive methods have the potential to disrupt implantation. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 n.3 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

28. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed Reg. 8725 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130 (2013)).

29. 77 Fed. Reg. 8725, 8726.

30. 26 U.S.C. § 4980D(a), (b)(1) (2012).

31. 26 U.S.C. § 4980H(a), (c) (2012).

32. *See* 26 U.S.C. § 4980H(c)(2)(A).

33. *See* 42 U.S.C. § 18011 (2012). For a list of changes that trigger loss of grandfathered status, see CIGNA, INFORMED ON REFORM: GRANDFATHERED STATUS FACT SHEET 2 (2014), *available at* http://www.cigna.com/assets/docs/about-cigna/informed-on-reform/grandfathered-plan-fact-sheet.pdf.

> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.[34]

Opponents of the contraception mandate immediately derided these criteria as too restrictive.[35] They feared that, without a broader exemption, Americans' First Amendment free exercise rights would be trampled.[36] Religious hospitals, universities, charities, faith-based nonprofits, and for-profit corporations run according to religious principles would all be forced to violate their religious faith to abide by the contraception mandate.[37]

To allow time to work out a solution, HHS granted religious nonprofit organizations a one-year safe harbor from enforcement.[38] During that period, HHS adopted a revised definition of "religious employer," dropping the first three criteria completely and modifying the last criterion to include any "organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."[39] HHS pointedly noted that this new formulation does not materially change the meaning of "religious employer" but merely serves to clarify the agency's original intent.[40] During the same period, HHS also adopted rules that allow some religiously affiliated organizations to obtain an "accommodation"—basically a workaround that requires organizations' insurers to provide contraceptive coverage free of charge if the organization objects to paying for coverage itself.[41] Notably, the

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34. 45 C.F.R. § 147.130(a)(1)(iv)(B).

35. *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, SWEEPING HHS MANDATE STANDS, VIOLATING CONSCIENCE RIGHTS AND RELIGIOUS LIBERTY (2012), *available at* http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/HHS_Mandate_English-Bulletin-Insert_Feb2012.pdf ("The exemption provided for 'religious employers' was so narrow that it failed to cover the vast majority of faith-based organizations—including Catholic hospitals, universities, and charities—that help millions every year. Ironically, not even Jesus and his disciples would have qualified for the exemption, because it excludes those who mainly serve people of another faith.").

36. *See* Letter from Anthony R. Picarello, Jr., Assoc. Gen. Sec'y & Gen. Counsel, and Michael F. Moses, Assoc. Gen. Counsel, U.S. Conference of Catholic Bishops, to Centers for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

37. *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 35.

38. *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, 8728 (Feb. 15, 2012) ("With respect to certain non-exempted, non-profit organizations with religious objections to covering contraceptive services whose group health plans are not grandfathered health plans, guidance is being issued contemporaneous with these final regulations that provides a one-year safe harbor from enforcement by the Departments.").

39. 45 C.F.R. § 147.131(a) (2013).

40. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) ("[T]he simplified and clarified definition of religious employer does not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations . . . .").

41. *See* Coverage of Certain Preventive Services Under the Affordable Care Act,

accommodation does not extend to for-profit corporations run according to religious principles that directly conflict with the contraception mandate.[42]

The lack of an exemption for for-profit entities has caused a backlash among religious business owners and led to a proliferation of lawsuits involving the mandate.[43] Since HHS promulgated its contraception insurance regulations, more than one hundred lawsuits have been filed challenging the mandate on statutory and constitutional grounds.[44] Opponents of the mandate have been quite successful in court. Of the eighty-one cases decided prior to the Supreme Court ruling, seventy-one resulted in injunctive relief.[45] The courts denied injunctive relief in only seven cases.[46] Six U.S. courts of appeals examined the issue.[47] Four ruled in favor of striking down the contraception mandate, while two ruled against doing so. Undoubtedly due in part to this circuit split, the Supreme Court granted certiorari in two of these cases: *Hobby Lobby*[48] and *Conestoga*.[49] In its decision last Term, the Supreme Court sided with a majority of the appellate courts by providing a constitutional exemption to the mandate for closely held corporations with religious objections.

In these cases, the main issues were (1) whether shareholders have standing to challenge the mandate and (2) whether corporations are "persons" capable of exercising religious rights for purposes of the Free Exercise Clause and the

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78 Fed. Reg. 8456, 8458–68 (Feb. 6, 2013).

42. Only organizations that satisfy the following conditions are eligible for the accommodation:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies criteria in paragraphs (b)(1) through (3) of this section . . . .

45 C.F.R. § 147.131(b)

43. Religious leaders have argued that the accommodation provides inadequate relief. *See* Letter from Cardinal Timothy Dolan, Archbishop of N.Y., to U.S. Conference of Catholic Bishops (Sept. 17, 2013), *available at* http://archphila.org/HHS/pdf/USCCB13-237.pdf ("[T]he final version of the mandate still suffers from the same three basic problems we have highlighted from the start: its narrow definition of 'religious employer' reduces religious freedom to the freedom of worship by dividing our community between houses of worship and ministries of service; its second-class treatment of those great ministries—the so-called 'accommodation'—leaves them without adequate relief; and its failure to offer any relief at all to for-profit businesses run by so many of our faithful in the pews.").

44. *See HHS Mandate Information Central*, *supra* note 13 (listing cases that have been filed to date).

45. *See id.*

46. *See id.* Three other cases were dismissed on procedural grounds.

47. See *infra* Parts I.C and I.D for a discussion of these cases.

48. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354).

49. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356).

RFRA.[50] Table 1 summarizes how the courts of appeals and the Supreme Court have answered these two questions.

Table 1. Case summary

	Shareholder standing?	Corporations are "persons"?	Injunction granted?
Circuit cases			
Hobby Lobby v. Sebelius	Unresolved	Yes	Yes
Korte	Yes	Yes	Yes
Gilardi	Yes	No	Yes
O'Brien / *Annex Med.*	Unresolved	Unresolved	Yes
Conestoga Wood	No	No	No
Autocam / *Eden Foods*	No	No	No
Supreme Court			
Burwell v. Hobby Lobby	Yes	Yes	Yes

In this Article, I am primarily interested in the topic of corporate personhood, so my emphasis will be on how the courts resolved the second issue. Before reviewing the reasoning employed in the cases summarized in Table 1, I first examine Supreme Court jurisprudence on corporate personhood. This task will help to contextualize the debate that drove the circuit split; therefore, it is the focus of the following subpart. Only once that project is complete do I turn my attention to the specifics of the contraception mandate decisions.

B. Legal Theories of Corporate Personhood

Over the past two hundred years, three distinct theories of corporate personhood have influenced U.S. legal doctrine. Those theories are (1) the artificial entity theory, (2) the aggregate entity theory, and (3) the real entity theory. Under the

50. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)). The Act was passed to roll back the Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment. *Id.* at 885. The public's outrage over this decision motivated Congress to pass the RFRA. In the RFRA, Congress forced the Supreme Court to return to its earlier Free Exercise standard known as the *Sherbert* test. *See* § 2(b), 107 Stat. at 1488. The *Sherbert* test was first articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later reapplied in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For laws burdening religion, the *Sherbert* test requires the government to show (1) that it is acting to further a "compelling state interest" and (2) that the state interest cannot be achieved by a less burdensome law. *See Sherbert*, 374 U.S. at 403–09. The Supreme Court found that the RFRA is unconstitutional with respect to its application against state and local governments. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). However, the RFRA is still valid as applied to federal laws. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

artificial entity theory,[51] corporations are treated as inventions of the state. Because they owe their existence to the state, corporations have no rights other than those explicitly granted in their charters.[52]

Under the aggregate entity theory,[53] corporations are viewed as collections of shareholders.[54] Corporate powers and rights are derived not from the state but from corporations' shareholder-creators.

Finally, under the real entity theory,[55] corporations are treated as subjects in their own right.[56] As creatures distinct from both their shareholders and the state, corporations are entitled to exercise their own set of rights. The real entity theory maintains that corporations are intentional actors; they are persons, distinct from, but nonetheless tied to, their shareholders. This is the strongest form of corporate personhood and is the theory that I endorse in this Article. It is also the theory that provides the firmest legal support for the decisions holding that corporations are "persons" under the Free Exercise Clause and the RFRA. In the following sections, I will examine each of these theories and the foundational Supreme Court cases associated with them.

1. Artificial Entity Theory

For much of the nineteenth century, the artificial entity theory dominated.[57] Under this view, corporations were mere creatures of the state. They owed their existence to and derived their rights from the government.[58] As lifeless, artificial entities, they were incapable of exercising religion, engaging in speech, or pursuing other "liberty" interests; accordingly, the Court deemed corporations ineligible for such constitutional protections.[59] In most states, the legislatures had to specifically authorize every single case of incorporation.[60] Chief Justice Marshall underscored

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51. The artificial entity theory is occasionally referred to as the "grant" theory. *See, e.g.*, Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1424 (2006).

52. *See infra* Part I.B.1.

53. Less frequently, this theory is called the "contractual" or "associational" theory of corporate personhood. *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 136 n.42 (2013).

54. *See infra* Part I.B.2.

55. The real entity theory is sometimes referred to as the "natural entity" theory or "realism" theory. *See* Michalski, *supra* note 53, at 140 n.58.

56. *See infra* Part I.B.3.

57. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–11.

58. *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 235 (1981) (writing that the corporation started as "an entity that the state allowed to be created only as a special privilege").

59. *See, e.g.*, Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906) (holding that corporations are not guaranteed liberty rights under the Fourteenth Amendment because "[t]he liberty referred to in that Amendment is the liberty of natural, not artificial persons").

60. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129 (3d ed. 2005) (noting that corporate charters were initially conceived as "grant[s] of authority from the sovereign" and that "charters were statutes . . . doled out one by one" in the early nineteenth

this reliance on the state when he defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[61]

Due in part to this legislative supervision, the resulting special charters were narrowly tailored. Corporations were not set up to engage in any and all lawful business purposes, as they are today. Instead, their operating domains were precisely circumscribed, and the courts were quick to use the *ultra vires* doctrine to strike down any actions taken beyond these limits.[62]

Another distinct feature of the artificial entity theory is that corporations were thought to provide a primarily public, not private, benefit. Legislators did not view themselves as granting charters for the benefit of the incorporating individuals but rather believed that corporations would promote the public welfare by serving as "socially useful instrument[s] of economic growth."[63]

Under the artificial entity theory, corporations were not persons in any real sense. They were guaranteed the rights granted by their charters but little else.[64] At first, this

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century).

61. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

62. *See* Clyde L. Colson, *The Doctrine of* Ultra Vires *in United States Supreme Court Decisions*, 42 W. VA. L.Q. 179, 184–89 (1936) (discussing Supreme Court cases invoking the *ultra vires* doctrine). For a specific case example, see *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127 (1804). Chief Justice Marshall articulates the *ultra vires* doctrine in the following passage:

> Without ascribing to this body, which in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.
>
> To this source of its being, then, we must recur to ascertain its powers, and to determine whether it can complete a contract by such communications as are in this record.

Id. at 167; *see also* Chewacla Lime-Works v. Dismukes, Frierson & Co., 6 So. 122 (Ala. 1889) (mining company violated its charter when it engaged in general retail business).

63. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 47 (The Lawbook Exch., Ltd. 2004) (1970).

64. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 74–75 (1906) (denying a corporation the Fifth Amendment right against self-incrimination on the basis that it is only entitled to rights granted in its charter: "[T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused . . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.").

simply meant that the corporation was protected by the Contracts Clause of the Constitution. In the 1819 case of *Trustees of Dartmouth College v. Woodward*, the Supreme Court solidified this protection by holding that the state of New Hampshire could not invalidate a private contract entered into between Dartmouth College and King George III.[65] In doing so, the Court ensured that states would be unable to terminate contracts to which corporations had validly agreed.[66] Corporations had been granted the same constitutional right to contract as private individuals.

Although this case was a large step forward for corporate personhood, it did not immediately open the gate for other corporate constitutional rights. Corporations did not have First Amendment free speech rights, nor did they have Fourth Amendment protections against unreasonable searches and seizures or Fifth Amendment protections against double jeopardy, among others.[67] The Justices in *Dartmouth College* were concerned with safeguarding the powers that had been explicitly granted to corporations by state charters, not with extending more indirect constitutional rights to corporate persons.[68] Because corporations were not viewed as ontologically independent entities, they had no claim to any rights not explicitly derived from their charters. As creatures of the state, they were entitled only to those protections that the state deigned to grant them.[69] In the second half of the nineteenth century, this restricted view of corporate personhood gave way to a more expansive interpretation known as the aggregate entity theory.

2. Aggregate Entity Theory

During the late nineteenth century, corporations were reconceived as objects of private, not government, creation.[70] Shareholders replaced states as the providers of corporate rights and privileges.[71] Corporations had become collective entities that derived their powers from the individuals who comprised them. This conception underscored the necessity of human action in both forming and running corporations. Corporations were no longer artificial entities tightly controlled by states; they were now aggregate entities whose rights were extensions of their human creators' rights.[72]

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65. *See* 17 U.S. at 657–59 (holding that the land grant by King George III to Dartmouth College is a "contract, within the meaning of the constitution of the United States," and therefore cannot be impaired by state law).

66. *See id*. at 666.

67. *See infra* notes 82–83 and accompanying text.

68. *See Dartmouth Coll.*, 17 U.S. at 636.

69. *See id*. at 712 (Story, J., concurring) (observing the authority of the state to "reserve" power for itself and prevent corporations from acting beyond the scope of their charters).

70. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985) ("Gradually, by making the corporate form universally available, free incorporation undermined the grant theory. Incorporation eventually came to be regarded not as a special state-conferred privilege but as a normal and regular mode of doing business.").

71. *See id.* at 181–82.

72. *See* 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1, at 3 (2d ed. 1886) ("[T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being."); Millon, *supra* note

Under this new theory, states loosened many of the economic restrictions that were characteristic of the artificial entity period of corporate personhood. Most notably, the *ultra vires* doctrine lost much of its force.[73] States also shifted from passing special charters for each instance of incorporation to a general charter system in which people could register corporations for nearly any legal purpose. This led to the practice, still in use today, of chartering corporations to engage in any lawful business activity.[74]

Another major expansion of rights came in 1910 when the Supreme Court overturned the longstanding rule that corporations could only conduct business in the state in which they were chartered.[75] During this period, states also abolished capitalization limits and began allowing corporations to own shares of other corporations, both actions paving the way for the emergence of the large corporate entities of today.[76] By the 1930s, the transition away from the artificial entity theory had been largely completed, and the public welfare aspects of corporate law had been discarded.[77] Corporate law was now thoroughly within the domain of private law, and with this transition came new constitutional protections for corporate persons.

The seminal cases defining corporate personhood in this period are *Santa Clara County v. Southern Pacific Railroad Co.* and *Pembina Consolidated Silver Mining & Drilling Co. v. Pennsylvania*. In the 1886 case of *Santa Clara*, the Supreme Court infamously concluded that corporations are persons for purposes of the Fourteenth Amendment.[78] Although this case was resolved on other grounds, the Chief Justice nonetheless addressed the issue of corporate personhood. In the court reporter, he is quoted as saying: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."[79] Despite providing no reasons to support its conclusion that corporations

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57, at 211 ("The conception of the corporation as an artificial creation entirely dependent on the state for its powers gradually gave way to the view that corporations are the natural products of individual initiative and possess powers conferred by their constituent shareholders.").

73. Horwitz, *supra* note 70, at 186–87 (noting that "[b]y 1930, the ultra vires doctrine was, if not dead, substantially eroded in practice").

74. *See* WILLIAM J. GRANGE, CORPORATION LAW FOR OFFICERS AND DIRECTORS 44–45 (1935) ("The modern statutes . . . in describing the purposes for which corporations may be formed, use such general phrases as 'for any lawful business purpose or purposes' or 'to promote or conduct any legitimate objects or purposes.' By these statutes, persons forming a corporation are in effect invited to adopt for the corporation an unlimited range of permissible business activity." (footnotes omitted)).

75. *See* S. Ry. Co. v. Greene, 216 U.S. 400, 416–17 (1910); *see also* Ludwig v. W. Union Tel. Co., 216 U.S. 146, 164 (1910); Pullman Co. v. Kansas *ex rel.* Coleman, 216 U.S. 56, 65–66 (1910) (White, J., concurring); W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 18 (1910).

76. *See* Liggett Co. v. Lee, 288 U.S. 517, 550–54 & nn.5–26 (1933) (Brandeis, J., dissenting) (noting that "[l]imitation upon the amount of the authorized capital of business corporations was long universal," listing historical state statutes mandating capitalization limits, and observing the recent trend towards abolishing these limits).

77. *See* Millon, *supra* note 57, at 203.

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

79. *Id.*

are persons, the *Santa Clara* Court paved the way for future cases to declare the matter "well settled."[80] From that point on, corporations would have the constitutional rights of due process and equal protection under the laws.

In *Pembina*, decided two years after *Santa Clara*, the Court explicitly affirmed the aggregate entity theory of corporate personhood for the first time, writing that "[u]nder the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose . . . ."[81] Relying upon the theory of personhood endorsed in *Pembina*, the Supreme Court quickly conferred additional constitutional protections on corporations, granting them Fifth Amendment due process protections in 1893[82] and Fourth Amendment protections against unreasonable searches and seizures in 1909.[83]

Despite this influx of new rights, many constitutional protections still remained beyond the grasp of the corporation. Under the aggregate entity theory, corporations were only capable of possessing rights that could be attributed to a collection of individuals. This meant that corporations were still ineligible for "purely personal" protections,[84] such as the privilege against self-incrimination[85] or

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80. *See* Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations." (citations omitted)); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now well settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.").

81. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888). Courts of appeals had previously endorsed the aggregate entity theory, such as in the Ninth Circuit's *Railroad Tax Cases*, which stated that "[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value . . . . [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name." 13 F. 722, 747–48 (C.C.D. Cal. 1882).

82. Noble v. Union River Logging R.R. Co., 147 U.S. 165, 176–77 (1893) (invalidating the Secretary of Interior's attempt "to deprive the plaintiff [corporation] of its property without due process of law").

83. Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding that a corporation is "entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures" and endorsing the aggregate entity theory by stating that "[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body." (emphasis in original)).

84. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." (quoting United States v. White, 322 U.S. 694, 698–701 (1944))).

85. *White*, 322 U.S. at 699 ("Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.").

the free exercise of religion.[86]

Although the aggregate entity theory yielded many gains for corporations, it was soon challenged by an even more expansive conception of corporate personhood—the real entity theory of the firm. I trace this view in the following section. Unlike the aggregate entity theory, the real entity theory acknowledges the corporate person as an intentional agent in its own right.

3. Real Entity Theory

In the early twentieth century, the real entity theory emerged as an alternative to the aggregate entity theory.[87] This theory frames corporations as entities that are independently deserving of constitutional protections.[88] They derive their rights from neither the state nor their constituent shareholders. Under the real entity theory, corporations are *real* persons with *real* rights.[89] Proponents of this view argue that the state is powerless to create corporations. All that the state can do is "recognize, or refuse to recognize" their existence.[90] As one scholar put it,

> The law can no more create [a corporation] than it can create a house out of a collection of loose bricks. If the bricks are put together so as to form a house, the law can refuse to recognize the existence of that house—can act as if it did not exist; but the law has nothing whatever to do with putting the bricks together in such a way that, if the law is not to shut its eyes to facts, it must recognize that a house exists and not merely a number of bricks.[91]

Legal theorists who advanced the real entity theory were heavily influenced by philosophical accounts of ontological emergence, the idea that a superordinate being springs forth when individuals form a collective.[92] Despite the supernatural foundations of real entity theory, it has managed to influence court doctrine. Its effects have been most apparent in the area of corporate criminal liability. The seminal case on the matter is *New York Central & Hudson River Railroad Co. v.*

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86. *See* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013) (calling the Free Exercise Clause a "uniquely 'human'" and "purely personal" right); *see also* Millon, *supra* note 57, at 231 (writing that supporters of the aggregate entity theory maintain that regulations "lack legitimacy" when they "intrude upon individual autonomy").

87. *See* Horwitz, *supra* note 70, at 179.

88. *See* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 295 (1990) (The real entity theory maintains that a corporation is "an organic social reality with an existence independent of, and constituting something more than, its changing shareholders."); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 892 (2012) (This theory "sees the corporation, not as an extension of the state or of its many constituencies, but as having a separate identity independent of both.").

89. *See* W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L.Q. REV. 365, 370 (1905).

90. Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 260 (1911).

91. *Id.*

92. *See infra* Part III.B.

United States.[93] Decided by the Supreme Court in 1909, this case is notable for holding that corporations themselves can be subject to criminal sanctions.[94]

More recent cases have taken this doctrine even further by holding that corporations can be guilty of crimes that require a mens rea.[95] In 1939, a corporation was convicted of conspiring to defraud the U.S. government by obtaining payment for goods that were not delivered in full.[96] Conspiracy, at its heart, requires the perpetrators to be intentional agents. *Black's Law Dictionary* defines conspiracy as "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective."[97] As the definition shows, it would be impossible for a party to engage in a conspiracy if that party were not an intentional agent. Try to imagine yourself committing a conspiracy with your car to rob a bank or a conspiracy with your gym bag to distribute narcotics. It just isn't possible. You can, however, envision someone engaging in a conspiracy with a corporation. Indeed, the courts have routinely held that corporations possess the necessary intent to engage in criminal conspiracies.[98]

In another case, the Fourth Circuit upheld a jury's finding that the Old Monastery Company had engaged in a conspiracy to violate the Emergency Price Control Act of 1942 by attempting to sell alcohol at prices in excess of the maximum established by the Act.[99] More recently, in 1985, the Fourth Circuit affirmed a corporation's conviction for conspiracy and for making and using false documents in a matter within the jurisdiction of a federal agency.[100] These cases are representative of the many others in which corporations have been held criminally liable for their intentional actions.

As these cases illustrate, the real entity theory supports the idea that "[c]orporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault."[101] As persons in their own right, they are capable of having beliefs and desires that differ from the beliefs and desires of their constituent members.

Unfortunately, courts and scholars that have previously endorsed the real entity theory have failed to provide strong metaphysical support for their claims. In Parts II through IV, I attempt to rectify this problem. Drawing upon recent work in group

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93. 212 U.S. 481 (1909).

94. *Id.* at 493 ("We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element." (quoting Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 297 (1899))).

95. *See generally* Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 103–10 (discussing how nonhuman entities can be guilty of human crimes).

96. Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939).

97. BLACK'S LAW DICTIONARY 375 (10th ed. 2014).

98. *See, e.g.*, United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009) (affirming the conviction of the Stop Huntingdon Animal Cruelty USA corporation for conspiracy to violate the Animal Enterprise Protection Act); C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945) (upholding the conviction of the C.I.T. Corporation for conspiracy to make and pass a false statement for purposes of influencing the Federal Housing Administration).

99. Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945).

100. United States v. Automated Med. Labs. Inc., 770 F.2d 399 (4th Cir. 1985).

101. *See* Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 2 (1995).

agency, I argue that it is right to conceive of corporations as real persons who act independently of their human agents. But first, I return to the contraception mandate cases and examine how the courts of appeals have applied corporate personhood doctrine to their present analyses.

C. Cases Denying Injunction

Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services is the leading case denying plaintiffs injunctive relief from the contraception mandate.[102] As such, it makes sense to start there. This Third Circuit case was brought by the Conestoga Wood Specialties Corporation and its shareholder-owners, the Hahn family. As members of the Mennonite religion, the Hahn family believes "that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable."[103] The plaintiffs further believe that it is "immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs."[104] Accordingly, the Hahn family sought relief from the contraception mandate, claiming it infringed upon their free exercise rights.

As the Third Circuit noted, the question presented was "whether Conestoga, a for-profit, secular corporation, can exercise religion."[105] The Supreme Court has consistently held that religious corporations can exercise religion,[106] so the emphasis here was on the "for-profit, secular" part of the equation. The Hahn family presented two theories to explain how the corporation can exercise religion: (1) directly, as an independent entity; and (2) indirectly, by adopting the religious beliefs of its owners.[107]

These two arguments should call to mind the real entity theory and the aggregate entity theory, respectively.[108] In the first argument, the Hahn family appeals to *Citizens United*, the case that established broad First Amendment free speech rights for corporations.[109] In particular, the *Citizens United* Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity."[110] Here, the Court strongly endorsed the real entity theory, and

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102. 724 F.3d 377, 389 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

103. *Id.* at 381–82.

104. *Id.* at 382.

105. *Id.* at 383.

106. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993) (holding that a "not-for-profit corporation organized under Florida law" succeeded on its free exercise claim); Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (Courts have long "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the *exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." (emphasis added)).

107. *Conestoga Wood*, 724 F.3d at 383.

108. *See supra* Parts I.B.3 & I.B.2.

109. *See* Citizens United v. FEC, 558 U.S. 310 (2010).

110. *Id.* at 365.

the Hahn family wished to apply this theory to the Free Exercise Clause. The Third Circuit, however, was unwilling. Instead, the appellate court chose to adopt the artificial entity theory of corporate personhood. Quoting *Dartmouth College*, the court stated that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law."[111] This led the Third Circuit to conclude that corporations are ineligible for free exercise protections because they have no independent existence.[112]

To further buttress its claim, the Third Circuit appealed to *First National Bank of Boston v. Bellotti*.[113] In that case, the Supreme Court held that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations."[114] To the Third Circuit, it was undeniable that religion was another "purely personal" guarantee. The majority wrote that "[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution."[115] Therefore, an artificial profit-seeking corporation would obviously be ineligible for protection under the Free Exercise Clause.

Next, the Court turned to the Hahn family's second argument. Recall that this argument appealed to the aggregate entity theory, claiming that shareholders exercise their religious rights through corporations. This line of reasoning, known as the pass-through theory, was adopted by the Ninth Circuit in two cases. First, in *EEOC v. Townley Engineering & Manufacturing Co.*, the Ninth Circuit held that secular, for-profit corporations can assert free exercise claims on behalf of their owners.[116] The court reasoned that, because "Townley is merely the instrument through and by which [the shareholders] express their religious beliefs," it was eligible to advance the free exercise claims of its shareholders.[117] The *Townley* court declined to decide whether a corporation could sue to protect its own independent free exercise rights, finding the answer to that question unnecessary for resolving the case.[118]

The Ninth Circuit reaffirmed the pass-through theory in *Stormans, Inc. v. Selecky*.[119] The facts of this case are quite similar to the facts in *Conestoga*. In *Stormans*, a pharmacy brought a free exercise challenge to a state regulation

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111. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) (quoting Consol. Edison Co. of N.Y, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002)), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

112. *Id.* at 385.

113. 435 U.S. 765 (1978).

114. *Id.* at 778 n.14.

115. *Conestoga Wood*, 724 F.3d at 385 (quoting Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013)).

116. 859 F.2d 610 (9th Cir. 1988) (In this case, a private corporation sought an exemption from a provision within Title VII of the Civil Rights Act that required it to accommodate employees who objected to attending the company's compulsory devotional services.).

117. *Id.* at 619.

118. *Id.* at 619–20 (It is "unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers.").

119. 586 F.3d 1109 (9th Cir. 2009).

requiring it to dispense Plan B (i.e., the morning-after pill). As in *Townley*, the Ninth Circuit adopted the aggregate entity theory, holding that the corporation is "an extension of the beliefs of members of the Stormans family, and that the beliefs of the Stormans family are the beliefs of" the pharmacy.[120] Therefore, the corporation has "standing to assert the free exercise rights of its owners."[121] Like in *Townley*, the Ninth Circuit declined to reach the question of whether corporations can assert their own free exercise claims.

In *Conestoga*, the Third Circuit rejected the Ninth Circuit's pass-through theory and, consequently, the aggregate entity theory of corporate personhood. Instead, the Third Circuit reiterated its support for the artificial entity theory, arguing that "[i]t is a fundamental principle that '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' the corporation."[122] Lest this be taken as an endorsement of the real entity theory, *Conestoga* also stated that "[g]eneral 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."[123] With that, the court found the matter settled. In the Third Circuit's view, for-profit corporations should not be eligible for protection under the Free Exercise Clause of the Constitution.[124]

The only other court of appeals to deny an injunction is the Sixth Circuit. This court addressed the contraception mandate in two cases: *Autocam Corp. v. Sebelius*[125] and *Eden Food, Inc. v. Sebelius*.[126] The *Autocam* suit was brought by the Kennedy family, the owners of Autocam Corporation and Autocam Medical, LLC. As in *Conestoga*, the plaintiffs were devout Christians who "believe that they are called to live out the teachings of Christ in their daily activity and witness to the truth of the Gospel by treating others in a manner that reflects their commitment to human dignity."[127] The Kennedy family treats the corporations as one "form through which [they] endeavor to live their vocation as Christians in the world."[128] The plaintiffs contended that the government infringed on their religious beliefs by forcing them to provide health insurance that covers artificial contraception.[129]

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120. *Id.* at 1120.

121. *Id.*

122. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 387 (3d Cir. 2013) (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

123. *Id.* at 385 (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012)).

124. *See id.* at 388 ("We hold—contrary to *Townley* and *Stormans*—that the free exercise claims of a company's owners cannot 'pass through' to the corporation.").

125. 730 F.3d 618 (6th Cir. 2013), *vacated*, 134 S. Ct. 2901 (2014) (mem.).

126. 733 F.3d 626 (6th Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (mem.).

127. *Autocam*, 730 F.3d at 620.

128. *Id.*

129. *Id.* at 621.

Because failure to comply with the mandate would lead to fines of nearly nineteen million dollars per year, the Kennedys had no choice but to seek an exemption.[130]

Relying heavily on *Conestoga*, the Sixth Circuit denied the Kennedy family's request for a preliminary injunction.[131] Just as the Third Circuit had found free exercise to be a "purely personal" right, the Sixth Circuit deemed the Free Exercise Clause to be an "individual" right that "defines nothing less than the respective relationships in our constitutional democracy of the *individual* to government and to God."[132]

Just a month after *Autocam*, the Sixth Circuit denied a preliminary injunction on similar grounds in the case of *Eden Foods*.[133] Here, the court ruled that, because "a secular, for-profit corporation[] cannot establish that it can exercise religion," such corporations are ineligible for protection under the Free Exercise Clause or the RFRA.[134] The Sixth Circuit's denial of corporate intentionality is again in line with the artificial entity theory. In the next subpart, I focus on those courts that endorsed a stronger theory of corporate personhood and, ultimately, granted a preliminary injunction.

D. Cases Granting Injunction

I begin this subpart with *Hobby Lobby v. Sebelius*, since it is far and away the best-known contraception mandate case.[135] The facts of this case are quite straightforward. Hobby Lobby is a chain of arts-and-crafts stores with over five hundred locations and thirteen thousand employees. The company is a closely held for-profit business that was organized as an S corporation.[136] David Green, Hobby Lobby's founder, intended for his company to be run according to Christian doctrine, and so his family, which still owns and operates the business today, set out to promote that mission.[137] This religious commitment is evidenced in many of Hobby Lobby's actions and decisions. For instance, Hobby Lobby is closed on Sundays and purchases newspaper ads encouraging people to "know Jesus as Lord and Savior."[138] Additionally, Hobby Lobby's mission statement affirms the

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130. *Id.*

131. *Id.* at 625 ("In this case, we agree with the government that Autocam is not a 'person' capable of 'religious exercise' as intended by RFRA and affirm the district court's judgment on this basis.").

132. *Id.* at 627 (emphasis in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in the judgment)).

133. Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 627–28 (6th Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (mem.).

134. *Id.* at 633.

135. *See, e.g.*, Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, N.Y. TIMES, Aug. 3, 2013, at A14 (predicting that the *Hobby Lobby* "challenge to the Affordable Care Act will surely go to the Supreme Court").

136. An S corporation is a closely held corporation that passes through its income or loss to its shareholders, who then must declare the income or loss on their individual tax returns. *See* 26 U.S.C. § 1361 (2012).

137. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

138. *Id.*

company's commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with biblical principles."[139] Of particular importance to the contraception issue is the Green family's belief that it is against their religion to "facilitate any act that causes the death of a human embryo."[140]

This is where the conflict with the contraception mandate began. The Green family argued that being forced to provide their employees with insurance that covers morning-after pills, such as Plan B and Ella, would violate their free exercise rights. If the plaintiffs had refused to provide such contraception coverage, they would have been subject to an annual fine of $475 million.[141] The district court found in favor of the government and refused to grant an injunction.[142] However, on appeal, the Tenth Circuit reversed, finding that Hobby Lobby was likely to succeed on the merits and, accordingly, that an injunction should be granted.[143]

As to the specific issues, the court of appeals found that Hobby Lobby was a "person" for purposes of the Free Exercise Clause and the RFRA and therefore had standing to challenge the mandate in its own right.[144] Having settled this issue, the court found it unnecessary to decide whether, as shareholders, the Green family had standing to challenge the mandate.[145]

In contrast to the cases denying injunctive relief,[146] the Tenth Circuit held that "the Free Exercise Clause is *not* a '"purely personal" guarantee[] . . . unavailable to corporations and other organizations.'"[147] The Court did not believe that "the 'historic function' of the [Free Exercise Clause] has been limited to the protection of individuals."[148] The Tenth Circuit based its decision on two premises.

First, the Supreme Court has previously "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[149] In particular, the Supreme Court has ruled that the Free Exercise Clause extends to nonprofit corporations.[150] The second premise

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139. *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company.

140. *Hobby Lobby*, 723 F.3d at 1122.

141. *Id.* at 1125.

142. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114, *aff'd sub nom. Burwell*, 134 S. Ct. 2751.

143. *Hobby Lobby*, 723 F.3d at 1145.

144. *Id.* at 1126.

145. *Id.* at 1121.

146. *See supra* Part I.C.

147. *Hobby Lobby*, 723 F.3d at 1133 (emphasis in original) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978)).

148. *Id.* at 1133–34 (quoting *First Nat'l Bank of Boston*, 435 U.S. at 778 n.14).

149. *Id.* at 1133 (emphasis in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984)).

150. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525, 547 (1993) (finding that free exercise rights extend to a not-for-profit corporation incorporated in Florida); *see also* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.) ("[The] legislature may . . . enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns.").

endorsed by the Tenth Circuit is that the Supreme Court has held that individuals do not lose their free exercise rights when they engage in for-profit activities.[151]

From these two premises, the Tenth Circuit reached the conclusion that closely held, for-profit corporations can have free exercise rights.[152] This seems like a reasonable extension of Supreme Court jurisprudence. The Free Exercise Clause is available to nonprofit corporations, and it is available to people who engage in for-profit activities. Why should it not be available to for-profit corporations?

Indeed, this line of reasoning was also persuasive to the Seventh Circuit in *Korte v. Sebelius*.[153] The facts of this case are similar to *Hobby Lobby*. Cyril and Jane Korte are the owners and operators of Korte & Luitjohan Contractors, Inc., an Illinois construction company. The Kortes are Catholic and run their company according to their religious beliefs. Like the Green family in *Hobby Lobby*, the Kortes maintain that providing their employees with insurance that covers morning-after pills would violate their religious beliefs.[154] The Kortes held this belief so strongly that they incorporated it into their company's ethical guidelines: "As adherents of the Catholic faith, we hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. We believe that actions intended to terminate an innocent human life by abortion, including abortion-inducing drugs, are gravely sinful."[155] Failure to comply with the contraception mandate would subject the Kortes to an annual penalty of seventeen million dollars.[156] In an effort to avoid such a harsh fine, the Kortes brought suit seeking an exemption.

The Seventh Circuit began its inquiry by appealing to the Dictionary Act.[157] This Act states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . the word[] 'person' . . . include[s] *corporations* . . . ."[158] From here, the Seventh Circuit examined earlier cases involving free exercise claims by religious corporations. They found that the

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151. The Tenth Circuit relied upon *United States v. Lee*, 455 U.S. 252 (1982), and *Braunfeld v. Brown*, 366 U.S. 599 (1961). In *Lee*, the Court considered the free exercise claim of an Amish employer who argued it was against his religion to pay Social Security taxes for his employees. The Court ruled against the Amish employer but did not do so because he was engaged in a for-profit enterprise. *Lee*, 455 U.S. at 257–61. In *Braunfeld*, Jewish merchants claimed that Sunday closing laws violated their free exercise rights. The Court held against the merchants, but as in *Lee*, it did not do so because the merchants were running for-profit businesses. *Braunfeld*, 366 U.S. at 600–09.

152. In addition to drawing this syllogistic conclusion, the Tenth Circuit also drew analogues to the Supreme Court's freedom of speech jurisprudence. At one point, the Court stated, "We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression." *Hobby Lobby*, 723 F.3d at 1135 (citing Citizens United v. FEC, 558 U.S. 310, 342–55 (2010)).

153. 735 F.3d 654 (2013), *cert. denied*, 134 S. Ct. 2903 (2014).

154. *Id.* at 662–63.

155. *Id.* at 663 n.5.

156. *Id.* at 664.

157. The Dictionary Act contains general definitions and rules of construction that apply to the United States Code. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2110 (2002).

158. 1 U.S.C. § 1 (2012) (emphasis added).

Supreme Court has consistently granted free exercise rights to religious corporations,[159] observing that

> [i]t's common ground that *nonprofit* religious corporations exercise religion in the sense that their activities are religiously motivated. So unless there is something disabling about mixing profit-seeking and religious practice, it follows that a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated.[160]

Next, the Seventh Circuit determined that individuals retain their free exercise rights when engaged in for-profit activities.[161] Putting these two premises together, the court of appeals concluded that there is, in fact, nothing disabling about mixing profit-seeking and religious practice.[162] Therefore, the Seventh Circuit held that the "corporate plaintiffs are 'persons' under RFRA and may invoke the statute's protection."[163]

A more recent case to raise the contraception mandate issue is *Gilardi v. U.S. Department of Health & Human Services.*[164] Again, the facts are similar to *Hobby Lobby* and *Korte*, so they do not bear repeating.[165] However, the legal outcome is slightly different. Whereas the previous two cases that granted injunctions ruled both that the shareholders had standing to sue and that the corporation is a "person" under the RFRA, in *Gilardi*, the D.C. Circuit affirmed shareholder standing but denied corporate personhood.[166] Unlike the Tenth and Seventh Circuits, the D.C. Circuit did not feel comfortable combining two separate streams of Supreme Court jurisprudence to find a free exercise right for for-profit corporations. Instead, the D.C. Circuit merely searched for prior case law explicitly allowing for-profit corporations to advance free exercise claims. Finding none, the court of appeals held that only religious organizations are entitled to free exercise protections in their own right.[167] The shareholders, however, did have standing to sue, and so the injunction was granted.

The fourth and final court of appeals to grant an injunction was the Eighth Circuit. Unfortunately, its opinions do not cast any light on the issue of corporate personhood. In *O'Brien v. U.S. Department of Health & Human Services*, the court of appeals filed

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159. The Seventh Circuit relied heavily on *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

160. *Korte*, 735 F.3d at 679 (emphasis in original).

161. Like *Hobby Lobby*, the court in *Korte* relied upon *Lee* and *Braunfeld*. *See id.* at 680.

162. *See id.* at 680–81.

163. *Id.* at 666 (The court also held that "the contraception mandate substantially burdens the religious-exercise rights of all of the plaintiffs [including the corporation]; and the government has not carried its burden under strict scrutiny.").

164. 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014).

165. For a restatement of the facts, see *id*. at 1210.

166. *Id.* at 1214.

167. *Id.* ("No such *corpus juris* exists to suggest a free-exercise right for secular corporations. Thus, we read the 'nature, history, and purpose' of the Free Exercise Clause as militating against the discernment of such a right. When it comes to corporate entities, only religious organizations are accorded the protections of the Clause.").

an order that stated in its entirety, "Appellants' motion for stay pending appeal has been considered by the court, and the motion is granted. Judge Arnold dissents."[168] In *Annex Medical, Inc. v. Sebelius*, the Eighth Circuit provided little more justification for its decision, simply citing to the *O'Brien* decision as precedent.[169]

The final word on the matter came a few months later when the Supreme Court ruled on *Burwell v. Hobby Lobby Stores, Inc.*[170] This case was a consolidation of the Third Circuit *Conestoga* case and the Tenth Circuit *Hobby Lobby* case. In its opinion, the Supreme Court held that the plaintiffs were eligible for an exemption from the contraception mandate.[171] More broadly, the majority ruled that closely held for-profit corporations are entitled to free exercise protections under the RFRA.[172] The Supreme Court's justification was identical to that adopted by the Seventh and Tenth Circuits. Reviewing precedent, the Court found that both nonprofit corporations and profit-seeking individuals receive protection under the Free Exercise Clause and the RFRA.[173] Because neither corporate status nor profit-seeking nature disqualifies one from religious protections, the majority concluded that mixing the two characteristics should not be disqualifying.[174]

Having reviewed these decisions, I want to draw particular attention to one point. As opposed to the circuit courts that denied injunctive relief, neither these courts of appeals nor the Supreme Court directly confronted the issue of corporate intentions or beliefs. By and large, these courts remained agnostic. *Hobby Lobby* and *Korte* did find that closely held, for-profit corporations could sue to protect the religious interests of their shareholders. However, they did not determine whether for-profit corporations could make a free exercise claim independent of the existence of unified religious beliefs among their shareholders. Such a ruling would have spoken to whether large public corporations can advance free exercise claims of their own.

In Parts II, III, and IV, I draw upon the philosophical literature on personhood and group agency to argue for a strong form of corporate personhood, one that would grant corporations free exercise protections so long as their beliefs are sincerely held. The extensive philosophical work on this topic provides substantial evidence for the claim that corporations are "persons" in their own right. This literature also shows how corporations can have their own beliefs, desires, intentions, and other mental states, independent of the people who animate them. This claim goes against the dominant legal paradigms of the day;[175] however, it is consistent with and, indeed, derived from the prevailing philosophical theories of the day.

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168. No. 12-3357 (8th Cir. Nov. 28, 2012), *available at* https://www.aclu.org/files/assets/obrien_cir_ct_order_to_stay.pdf.

169. No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013).

170. 134 S. Ct. 2751 (2014).

171. *Id.* at 2785.

172. *Id.*

173. *Id.* at 2768–72.

174. *Id.* at 2770.

175. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part) (criticizing the majority for failing to show how "a corporation can 'believe' at all" and questioning "whether a for-profit corporation has 'cognizable religious liberties independent of the people who animate' it" (quoting Grote v. Sebelius, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting))).

II. PHILOSOPHICAL THEORIES OF PERSONHOOD

Two competing theories of personhood have dominated the philosophical literature. The first account maintains that persons are distinguished by certain intrinsic characteristics, that there is some innate substance that captures personhood. This theory is known as the "intrinsicist account."[176] The second theory holds that persons are distinguished by certain external characteristics. According to this account, any agent that performs in a certain manner qualifies as a person. This second theory is known as the "performative account."[177] In short, the debate between these two positions centers on whether persons are defined by what they are (intrinsicist) or by what they do (performative).[178]

For much of history, the intrinsicist conception of personhood was the dominant position in philosophy. The first person to clearly lay out this account was Boethius, a Christian philosopher who lived during the sixth century.[179] Boethius offered a now classic formulation of the intrinsicist theory when he wrote that a person is "an individual substance of a rational nature: *naturae rationalis individua substantia*."[180] Notably, in his *Summa Theologica*, Thomas Aquinas adopted Boethius's definition of "persons."[181] Given Aquinas's endorsement, it is unsurprising that many later philosophers have taken up this view. Perhaps one of the most important to do so was Descartes, who advanced a similar conception of personhood while developing his theory of mind-body dualism.[182] In the following passage, taken from Descartes's Sixth Meditation, he famously sets forth an argument for the existence of rational substance ("minds") independent of bodies:

> Next I examined attentively what I was. I saw that while I could pretend that I had no body and that there was no world and no place for me to be in, I could not for all that pretend that I did not exist. I saw on the contrary that from the mere fact that I thought of doubting the truth

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176. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 171 (2011) (According to the intrinsicist conception of personhood, "there is something about the 'stuff' that persons are made off [sic] that distinguishes them from non-persons: something that makes persons stand out.").

177. *See id.* (According to the performative conception of personhood, "what makes an agent a person is not what the agent is but what the agent does; the mark of personhood is the ability to play a certain role, to perform in a certain way.").

178. I follow List and Pettit in referring to these two theories of personhood as "intrinsicist" and "performative." *See id.* at 170–74 (describing the difference between the "intrinsicist" and "performative" conceptions of personhood).

179. *See id.* at 171 (noting that the intrinsicist conception "went back to Boethius, a Christian philosopher around AD 500, whom Dante described as the last of the Romans and the first of the scholastics").

180. *Id.*; *see also* Anicus Manlius Severinus Boethius, A Treatise Against Eutyches and Nestorius, *in* THE THEOLOGICAL TRACTATES 73, 84–90 (H.F. Stewart & E.K. Rand eds., Harvard University Press 1918) (512).

181. *See* 1 THOMAS AQUINAS, THE SUMMA THEOLOGICA question 29, art. 1, at 161–63 (Mortimer J. Adler ed., Laurence Shapcote trans., Encyclopaedia Britannica, Inc., 1994).

182. *See* LIST & PETTIT, *supra* note 176, at 170–72 (comparing Descartes's *res cogitans* to the intrinsicist conception of personhood).

> of other things, it followed quite evidently and certainly that I existed; whereas if I had merely ceased thinking, even if everything else I had ever imagined had been true, I should have had no reason to believe that I existed. From this I knew I was a substance whose whole essence or nature is simply to think, and which does not require any place, or depend on any material thing, in order to exist.[183]

In the above passage, Descartes writes that he can doubt the existence of the material world but cannot doubt his existence as a thinking thing. From these observations, Descartes concludes that there must be two fundamental substances: one that gives rise to the mental world and one that gives rise to the physical world. This viewpoint is traditionally called "substance dualism" or "Cartesian dualism."[184] In this tradition, the mental substance (normally likened to an ephemeral soul) is at the heart of personhood. If a body is animated by mental substance, it is a person; if a body is governed by the purely physical world, as a mechanical clock is guided by springs, it is not a person.

The first major figure to offer an alternative, performative conception of personhood was Thomas Hobbes.[185] Hobbes's definition of "person" is built on materialism, a philosophical theory founded on the idea that the only things that exist are material substances and that all phenomena are caused by the interactions of material substances.[186] In other words, mental substance does not exist. Everything is caused by and can be explained in reference to the purely material world. Hobbes offers several critiques of incorporeal souls, one of which comes in the following passage from *Leviathan*:

> All other names are but insignificant sounds; and those of two sorts. One when they are new, and yet their meaning not explained by definition; whereof there have been abundance coined by Schoolmen, and puzzled philosophers.
>
> Another, when men make a name of two names, whose significations are contradictory and inconsistent; as this name, an *incorporeal body*, or, which is all one, an *incorporeal substance*, and a great number more. For whensoever any affirmation is false, the two names of which it is composed, put together and made one, signify nothing at all.[187]

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183. RENÉ DESCARTES, DISCOURSE ON THE METHOD pt. 4 (1637), *reprinted in* 1 THE PHILOSOPHICAL WRITINGS OF DESCARTES 111, 127 (John Cottingham, Robert Stoothoff & Dugald Murdoch trans., 1985).

184. For a fuller treatment of dualism and its varieties, see Howard Robinson, *Dualism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2012), *available at* http://plato.stanford.edu/archives/win2012/entries/dualism.

185. *See generally* PHILIP PETTIT, MADE WITH WORDS: HOBBES ON LANGUAGE, MIND, AND POLITICS (2008).

186. For a review of the different varieties of materialism, see PAUL M. CHURCHLAND, MATTER AND CONSCIOUSNESS 40–85 (3d ed. 2013) (discussing reductive materialism, functionalism, and eliminative materialism).

187. THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL 23–24 (Michael Oakeshott ed., Basil

Here, Hobbes claims that it is nonsense to talk of incorporeal bodies. The terms are paradoxical and, therefore, unintelligible. This argument has been subject to the criticism that it presupposes what it seeks to prove (namely that there cannot be incorporeal bodies). Fortunately, in *De Corpore*, Hobbes lays out an additional reason for his disbelief in the existence of immaterial substances:

> The gross errors of certain metaphysicians take their origin from this; for from the fact that it is possible to consider thinking without considering body, they want to infer that there is no need for a thinking body; and from the fact that it is possible to consider quantity without considering body, they also think that quantity can exist without body and body without quantity, so that a quantitative body is made only after quantity has been added to a body. These meaningless vocal sounds, "abstract substances," "separated essence," and other similar ones, spring from the same fountain.[188]

This passage reads as a direct rebuttal to Descartes. In it, Hobbes maintains that our ability to consider thought and body independently does not provide a justification for believing that thought can exist without body. After arguing against the existence of mental substances, Hobbes turns his attention to developing a theory of the mind that does not rest on incorporeal substances. He accomplishes this by likening reasoning to computation. "By reasoning," Hobbes writes, "I understand computation."

> And to compute is to collect the sum of many things added together at the same time, or to know the remainder when one thing has been taken from another. To reason therefore is the same as to add or to subtract . . . . Therefore all reasoning reduces to these two questions of the mind, addition and subtraction.[189]

Here, Hobbes is arguing that reasoning is a form of computation that can be done by purely material entities. It is "nothing but reckoning, that is adding and subtracting, of the consequences of general names agreed upon for the marking and signifying of our thoughts."[190] By reducing the mind to a series of computations performed by material substances, Hobbes does not have to posit the existence of a mental substance to explain thought. Instead, he can maintain that it is caused by purely physical interactions. Further, Hobbes believes that the mind and all of the

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Blackwell 1960) (1651) (emphasis in original).

188. THOMAS HOBBES, DE CORPORE pt. 1, ch. 3, § 4, at 231 (Aloysius Martinich trans., Abaris Books 1981) (1655).

189. *Id.* at 177 (emphases omitted); *see also* GOTTFRIED WILHELM LEIBNIZ, OF THE ART OF COMBINATION (1666), *reprinted in* LEIBNIZ: LOGICAL PAPERS 1, 2–4 (G.H.R. Parkinson ed. & trans., 1966) ("Thomas Hobbes, everywhere a profound examiner of principles, rightly stated that everything done by our mind is a computation, by which is to be understood either the addition of a sum or the subtraction of a difference. So just as there are two primary signs of algebra and analytics, + and −, in the same way there are as it were two copulas, 'is' and 'is not . . . .'" (emphasis and citation omitted)).

190. HOBBES, *supra* note 187, at 25–26 (emphases omitted).

properties associated with it (e.g., reasoning, imagining, sensing, and deliberating) can be caused by many different physical systems. As Hobbes writes in *Leviathan*:

> [W]hy may we not say, that all automata (engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the heart, but a spring; and the nerves, but so many strings; and the joints, but so many wheels, giving motion to the whole body, such as was intended by the artificer?[191]

Hobbes's conception of the mind as nothing more than a "calculating machine"[192] has proven extremely influential. In recent times, it has served as an intellectual foundation for functionalism, a view that has become "the most widely held theory of mind among philosophers, cognitive psychologists, and artificial intelligence researchers."[193] Proponents of functionalism define a mental state not by its internal characteristics but by the way it functions or the role it plays in a given cognitive system.[194]

As a simple example, take the concept of pain. A functionalist might define pain as a state that is brought about by bodily harm, that is unpleasant, and that produces a desire within the entity to remove itself from the state.[195] According to functionalism, only entities with parts that function to produce these pain criteria have the capacity to be in pain.

Crucially, an entity need not have certain physical arrangements to be capable of experiencing pain. A silicon-based life form that met the pain criteria would have the ability to be in pain. Believing, desiring, fearing, hoping, and every other mental state can be represented in this functionalist framework. If an entity has certain internal features that cause it to function according to certain belief-state criteria or desire-state criteria, then it is appropriate to say the entity has beliefs or desires.[196] There is a clear analogy between this functionalist account of the mind and Hobbes's performative account of personhood. Just as a mental state is constituted by its functional role, a person is constituted by its ability to perform in a certain way. In Part IV, I argue that under the functionalist account, corporations have certain mental properties that are defining characteristics of personhood (notably the ability to act rationally and update their belief states as new information is acquired). Because corporations have these properties, they are able to function as persons and therefore fulfill the performative conception of personhood.

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191. *Id.* at 5 (emphases omitted).

192. CAROLYN MERCHANT, THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION 232–33 (1980) (arguing that Hobbes believed the mind was simply a "calculating machine").

193. CHURCHLAND, *supra* note 186, at 66.

194. *See id.* at 63–72.

195. *See* Janet Levin, *Functionalism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2013), *available at* http://plato.stanford.edu/archives/fall2013/entries/functionalism.

196. For further discussion of functionalism, see Ned Block, *What is Functionalism?*, *in* PHILOSOPHY OF MIND: A GUIDE AND ANTHOLOGY 183, 183–99 (John Heil ed., 2004).

Before reaching that conclusion, however, I must first work my way through the philosophical literature on joint intentionality. This body of work will show how it is metaphysically possible for corporations to possess any type of mental properties, let alone the requisite mental properties to be deemed a person.

III. JOINT INTENTIONALITY

"Intentionality" is a philosopher's term. It is mental directedness, "the power of minds to be about, to represent, or to stand for, things, properties and states of affairs."[197] Paradigmatic intentional states include, among others, believing, desiring, wanting, fearing, and hoping. One can identify an intentional state by its need to be directed toward an object or state of the world.[198]

For example, if I have a belief, it must be a belief about something. In order for me to have a desire, there must be something that I desire. Likewise, I cannot have fear unless there is something or some event that I fear. Nor can I want unless there is something that I want. Notably, the object of directedness need not be real. A child can fear the boogeyman. A man can believe that aliens abducted him. A young girl can tell Santa that she wants a unicorn for Christmas. All of these are valid intentional states because they are characterized by their directedness toward something.

Like the child who fears the bogeyman or the young girl who wants a unicorn, corporations, too, can possess intentional states. When we say things like, "Time Warner regrets purchasing AOL," "Amazon wants to build new distribution warehouses," or any of the examples in the introduction,[199] we attribute intentional states to corporations. In the following subparts, I explore four possible meanings of these intentional ascriptions:

(1) The first is that our ascriptions are not meant to be taken literally. Corporations do not actually possess intentional states, and any utterance that suggests they do should be understood as a mere

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197. Pierre Jacob, *Intentionality*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), *available at* http://plato.stanford.edu/archives/fall2010/entries/intentionality. Franz Brentano provides this classic formulation of intentionality:

> Every mental phenomenon is characterized by what the Scholastics of the Middle Ages called the intentional (or mental) inexistence of an object, and what we might call, though not wholly unambiguously, reference to a content, direction toward an object (which is not to be understood here as meaning a thing), or immanent objectivity. Every mental phenomenon includes something as object within itself, although they do not all do so in the same way. In presentation something is presented, in judgment something is affirmed or denied, in love loved, in hate hated, in desire desired and so on.
>
> This intentional in-existence is characteristic exclusively of mental phenomena. No physical phenomenon exhibits anything like it. We can, therefore, define mental phenomena by saying that they are those phenomena which contain an object intentionally within themselves.

FRANZ BRENTANO, PSYCHOLOGY FROM AN EMPIRICAL STANDPOINT 88–89 (Oskar Kraus & Linda L. McAlister eds., Antos C. Rancurello et al. trans., Routledge 1995) (1874) (footnotes omitted).

198. JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 1 (1983).

199. *See supra* notes 1–4 and accompanying text.

linguistic shortcut.

(2) At the other extreme, one could maintain that the corporation is a case of ontological emergence. The corporation does indeed possess intentional states, and its intentional states are irreducible with respect to what happens at the individual level.

(3) A middle-ground alternative is that the speaker might simply mean that a majority of the members or some crucial subset of that corporation (e.g., executives) possesses that intentional state.

(4) Finally, it is possible that corporations derive their intentionality from the actions of their individual members but do not necessarily replicate the intentional states of their members or any subset of those members.

Which of these theories we accept will tell us which legal theory of the corporation to endorse. After rejecting the first three possibilities, I argue in favor of the fourth position and show why this view should lead us to believe that corporations satisfy the performative conception of personhood. From accepting corporations as persons under the performative conception, it is only a short step to adopting the real entity theory of corporate personhood.

A. Linguistic Shortcut

When people attribute intentional states to a corporation, they may intend that their utterances be understood metaphorically. A proponent of this view would maintain that anyone who holds that corporations have intentional states is simply being misled by the grammatical nuances of our language. In other words, when we make these ascriptions, "[w]e create a metaphysics out of an accident of metaphor."[200]

The corporation does not actually possess intentional states, but speaking as if it does allows one to transmit information more quickly. After all, it is easier to say "Microsoft wants to unveil a new operating system next month" than "Certain members of the Microsoft Corporation who have the requisite decision-making authority within the company want certain company employees to unveil a new operating system next month."

Despite the superficial appeal of this explanation, abduction provides a strong reason for us to doubt that our ascriptions of intentional states to corporations are purely metaphorical. Abductive reasoning is a type of logical inference that privileges explanatory power.[201] The process is frequently referred to as "inference to the best explanation."[202]

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200. William G. Weaver, *Corporations as Intentional Systems*, 17 J. BUS. ETHICS 87, 88 (1998).

201. Igor Douven, *Abduction*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), *available at* http://plato.stanford.edu/entries/abduction.

202. For the seminal discussion of inference to the best explanation, see Gilbert H. Harman, *The Inference to the Best Explanation*, 74 PHIL. REV. 88 (1965).

To see how abduction works in practice, consider the following example.[203] You wake up one morning and head downstairs to pour yourself a bowl of Cheerios. Upon entering the kitchen, you find a plate with breadcrumbs and a jar of peanut butter and jelly sitting on the counter. From this, you infer that your roommate got home late and made a peanut butter and jelly sandwich before heading to bed, too tired to clean up the mess. This explanation could very well be wrong. Perhaps a robber broke into your house and decided to have a snack before fleeing the crime scene. Maybe you experienced an episode of sleepwalking in which you made yourself a sandwich before returning to bed. Although these alternative explanations are possible, you believe it is more probable that your roommate made the sandwich. By accepting this version of events, you have made an inference to the best explanation. You could be wrong, but because this explanation best fits the available evidence, you infer that it is true.

A standard formulation of abduction reads as follows:

> Given evidence E and candidate explanations $H_1, \ldots, H_n$ of E, infer the truth of *that* H_i which best explains E.[204]

In our example, you took in all the available evidence regarding the situation (perhaps this included the fact that nothing was stolen from your house, you have never sleepwalked before, and your roommate really likes peanut butter and jelly sandwiches), considered the various hypotheses, and determined that your roommate having made the sandwich is the hypothesis which best explains the evidence.

As this example shows, we engage in abduction every day; our proclivity for inferring the truth of a hypothesis based on the available evidence is so strong that we frequently do not even realize we are performing abductive reasoning. As we used abduction to infer that your roommate made a sandwich, so, too, can we use abduction to infer that corporate intentionality is not the product of a linguistic shortcut. Abduction cannot definitively show that our ascriptions are not metaphors, but it can provide strong evidence that our ascriptions should be understood nonmetaphorically.

The key piece of evidence here is that our interactions with corporations suggest that they possess intentionality. This is most obvious in our frequent attributions of moral blame to corporations.[205] It would make no sense to hold a corporation morally responsible for its actions if a corporation could not *intend* to commit its actions. Attributing moral blame to an intentionless corporation would be no different than attributing moral blame to a toaster that overcooked your toast.

At this point, one might object that we do not actually hold corporations morally responsible. Instead, this is just another example of the linguistic shortcut at work. When we ascribe blame to a corporation, we are merely indicating that certain

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203. This example is drawn from Douven, *supra* note 201.

204. *Id.*

205. For a strong defense of the view that corporations are moral agents, see generally PETER A. FRENCH, JEFFREY NESTERUK & DAVID T. RISSER, CORPORATIONS IN THE MORAL COMMUNITY (1992). *But see* Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, BUS. & PROF. ETHICS J., Spring 1983, at 1 (arguing that our attributions of moral blame to corporations are simply metaphors).

members of the corporation have acted in a blameworthy manner.[206] However, this understanding does not fit with our legal treatment of corporations. Companies themselves are frequently brought up on criminal charges and are found guilty even when none of their human agents is found guilty.[207] Indeed, a Department of Justice memorandum issued by Eric Holder provides detailed advice for U.S. attorneys about bringing criminal charges against corporations themselves.[208] The memorandum observes that corporations are "legal persons" capable of committing crimes; it emphasizes that corporate entities "should not be treated leniently" because they are not natural persons.[209] Noting the similarity between the potential wrongdoing of corporations and natural persons, the memorandum goes on to state that "prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals."[210] Importantly, this Department of Justice memorandum is not advancing a novel or radical legal argument. As I discussed earlier in the context of real entity theory, courts have long accepted the positions advanced by the memo and found corporations guilty of criminal wrongdoing.[211]

Given how the legal system treats corporations in criminal contexts, the process of abduction gives us good reason for believing that corporations are intentional agents. It is true that our attributions of intentionality could be nothing more than "false" linguistic shortcuts. However, the explanatory power derived from viewing our ascriptions as nonmetaphorical provides substantial evidence for us to take seriously the claim that corporations are intentional agents. In the next subpart, I consider, and ultimately reject, an extreme form of this claim—namely, that corporations are a case of ontological emergence.

B. Ontological Emergence

Emergentist theories have traditionally been invoked to support the real entity theory of corporate personhood. These theories hold that superordinate entities spring forth from more fundamental properties but are not reducible to these properties. John Stuart Mill spoke of emergentism as follows:

> All organised bodies are composed of parts similar to those composing inorganic nature, and which have even themselves existed in an inorganic state; but the phenomena of life which result from the juxtaposition of those parts in a certain manner bear no analogy to any of the effects which would be produced by the action of the component substances considered as mere physical agents. To whatever degree we

206. *See* Raymond S. Pfeiffer, *The Central Distinction in the Theory of Corporate Moral Personhood*, 9 J. BUS. ETHICS 473, 474 (1990) ("Statements which appear to ascribe blame to an aggregate must be understood as a shorthand device summarizing the blame attributable to each member of the aggregate.").

207. *See supra* Part I.B.3 for a discussion of court cases involving corporate criminal liability.

208. Memorandum from U.S. Deputy Attorney Gen. Eric H. Holder, Jr. to Component Heads and U.S. Attorneys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

209. *Id.* at 1.

210. *Id.* at 3.

211. *See supra* notes 93–96 and accompanying text.

> might imagine our knowledge of the properties of the several ingredients of a living body to be extended and perfected, it is certain that no mere summing up of the separate actions of those elements will ever amount to the action of the living body itself.[212]

In this passage, Mill has highlighted two basic emergentist principles. First, higher-order properties supervene upon lower-order properties, and second, knowledge of lower-order properties does not provide knowledge of higher-order properties. In other words, every lower-order arrangement of elements is associated with a specific higher-order output. However, simply knowing the lower-order arrangement does not permit one to derive the higher-order outputs unless the higher-order output has previously been observed.

More specifically, emergentists hold that the world can be divided into distinct levels of complexity, generally corresponding to the focus of the scientific disciplines. Physics serves as the foundational level, and chemistry, biology, psychology, and sociology each occupy increasingly complex levels. Emergentists hold that knowledge of lower-level properties, such as physics, does not allow one to predict the higher-level properties, such as psychology. Even someone who knew everything regarding the lower-level properties would be incapable of predicting the higher-level properties that a specific lower-level structure would cause.[213] In other words, emergent properties are features of complex systems that no one, no matter how well informed, can know from the position of a preemergent state.

The early emergentists were primarily concerned with the emergence of life through a type of *vis vitalis* or the emergence of the human mind through a *res*

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212. 3 JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE ch. 6, § 1, at 243 (Longmans, Green & Co. 1947) (1843).

213. C.D. Broad, another British emergentist, emphasizes this aspect in his talk of transordinal laws:

> A trans-ordinal law would be one which connects the properties of aggregates of adjacent orders. A and B would be adjacent, and in ascending order, if every aggregate of order B is composed of aggregates of order A, and if it has certain properties which no aggregate of order A possesses and which cannot be deduced from the A-properties and the structure of the B-complex by any law of composition which has manifested itself at lower levels. . . . A trans-ordinal law would be a statement of the irreducible fact that an aggregate composed of aggregates of the next lower order in such and such proportions and arrangements has such and such characteristic and non-deducible properties. . . .
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> . . . .
>
> There is nothing, so far as I can see, mysterious or unscientific about a trans-ordinal law or about the notion of ultimate characteristics of a given order. A trans-ordinal law is as good a law as any other; and, once it has been discovered, it can be used like any other to suggest experiments, to make predictions, and to give us practical control over external objects. The only peculiarity of it is that we must wait till we meet with an actual instance of an object of the higher order before we can discover such a law; and that we cannot possibly deduce it beforehand from any combination of laws which we have discovered by observing aggregates of a lower order.

C.D. BROAD, THE MIND AND ITS PLACE IN NATURE 77–79 (1925).

cogitans, but in the latter half of the nineteenth century, emergentism became popular as a way of analyzing groups. Otto von Gierke and Frederic Maitland are two of the most notable thinkers who advanced the position that group agents are emergent entities.[214] According to them, a collective consciousness springs forth from the associations of individuals within corporations.[215] Although this collective consciousness is caused by the interactions of individual members, it cannot be predicted purely by observing their actions.[216] In other words, complete knowledge of individual actors within the group is not sufficient to give one knowledge of what actions the group itself will take. Despite knowing the intentional states of all the individuals within a corporation and how those individuals will interact with each other, one still cannot predict the corporation's intentional states.[217] Although the corporation's intentionality requires the existence of lower-order properties (in this case the actions of individuals), its intentionality is not deducible from knowledge of these lower-order properties.[218] Emergentists hold that some type of mysterious power, not unlike the *vis vitalis* or *res cogitans*, imbues a corporation with a life force of its own.[219] As one legal scholar suggested, to deny this is to deny an "objective fact."[220]

However, this conception of corporations is ultimately unsatisfying because it posits the existence of a scientifically unexplainable and unverifiable force. For the same reasons that mainstream biologists have thoroughly rejected vitalism (the existence of a *vis vitalis*)[221] and mainstream philosophers have thoroughly rejected Cartesian dualism

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214. *See* DAVID RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE 34–63, 89–123 (1997).

215. *See* George Heiman, *The Nature of Associations and Fellowships*, *in* OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 3, 7 (George Heiman ed. & trans., 1977) ("The association, or group, is a living entity . . . . Every group has a real and independent communal life, a conscious will, and an ability to act that are distinct from the lives and wills of its individual members.").

216. *Id.*

217. *See* Brown, *supra* note 89, at 379 (treating corporations as organic entities that are greater than the sum of their parts).

218. *See* Machen, *supra* note 90, at 258–62.

219. Victor Morawetz writes of the naturalness and inevitability of conceiving of corporations and many other associations as distinct entities in this manner:

> The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. An ordinary copartnership or firm is constantly treated as a united or corporate body in the actual transaction of business, though it is not recognized in that light in the procedure of the courts of law. So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, courts.

1 MORAWETZ, *supra* note 72, § 1, at 2–3.

220. *See* Machen, *supra* note 90, at 260.

221. ERNST MAYR, THE GROWTH OF BIOLOGICAL THOUGHT: DIVERSITY, EVOLUTION, AND

(the existence of a *res cogitans*),[222] so, too, should legal theorists reject the idea that a ghostly entity emerges when individuals join together to form a corporation.

Nonetheless, it should be clear that the actions and intentions of a corporation's members have some bearing on the actions and intentions of the corporation itself. For this reason, we should look to more moderate theories. Ultimately, the theories discussed in the following subparts show that one can still accept the claim that corporations are intentional agents without needing to rely upon the ghostly emergence of a supernatural mind to support this position.

C. Summative Accounts

First, I argued that ascriptions of intentional states to corporations are not merely metaphors. They do mean that the corporate entity possesses an intentional state. Next, I argued against the possibility that the corporation itself has an independent mind that emerges from an aggregation of individuals. This leaves only the possibility that corporations are intentional agents whose intentionality is derived from the actions of their members.

In the next two subparts, I explore two major variants of this type of joint intentionality. I first look at summative accounts. These theories maintain that groups believe whatever a majority of their members believes. As anyone who has interacted with corporations knows, they are not democracies. Employees do not vote to determine what actions a corporation should take or what beliefs it should possess. More than this, certain decision-making procedures exist such that the corporation's intentional states do not mirror the intentional states of any subset of its members. With this in mind, I quickly reject summative accounts as being unrepresentative of how corporations function. In the following subpart, I turn to nonsummative accounts. These are theories that allow for group beliefs to differ from the beliefs of their individual members. Nonsummative accounts can be broken down into individualistic and group-centered approaches. Ultimately, I argue that the group-centered approaches best explain how corporations function.

In the following excerpt, the philosopher Anthony Quinton introduces the term "summative":

> In some cases, which may be called summative, statements about social objects are equivalent to statements otherwise the same that refer explicitly, if at some level of generality, to individual people. To say that the French middle class is thrifty is to say that most French middle class people are.[223]

INHERITANCE 52 (1982) ("[B]y the 1920s or 1930s biologists had almost universally rejected vitalism, primarily for two reasons. First, because it virtually leaves the realm of science by falling back on an unknown and presumably unknowable factor, and second, because it became eventually possible to explain in physico-chemical terms all the phenomena which according to the vitalists 'demanded' a vitalistic explanation.").

222. RICHARD H. JONES, REDUCTIONISM: ANALYSIS AND THE FULLNESS OF REALITY 71 (2000) ("Most philosophers today unconditionally reject any dualism of irreducible, fundamental ontological categories of matter and a disembodied mind, soul, spirit, or consciousness.").

223. Anthony Quinton, Presidential Address, *Social Objects*, 76 PROC. ARISTOTELIAN

Quinton goes on to formulate what Margaret Gilbert calls the "simple summative account"[224]:

> We do, of course, speak freely of the mental properties and acts of a group in the way we do of individual people. Groups are said to have beliefs, emotions and attitudes and to take decisions and make promises. But these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members. With such mental states as beliefs and attitudes the ascriptions are of what I have called a summative kind. To say that the industrial working class is determined to resist anti-trade-union laws is to say that all or most industrial workers are so minded.[225]

According to the simple summative account, Group G believes that *p* if and only if all or most of the members believe that *p*. To see why the simple summative account fails to adequately describe group beliefs, consider the following example. Suppose that the Supreme Court has just issued a ruling on X.[226] All of the Justices agree that the doctrine should eventually be applied to scenario Y; however, because that situation is too far removed from the current controversy, none of the Justices raises the issue. They do not even discuss scenario Y with each other. In this context, it would be very strange to say that the Supreme Court believes that the doctrine should apply in case Y. Nevertheless, the simple summative account would hold that the Supreme Court does, in fact, believe that the doctrine should be extended to scenario Y. This critique argues that the mere existence of a certain intentional state in a majority of group members is insufficient for one to ascribe that state to the group as a whole.

To avoid this problem, some philosophers have proposed the complex summative account. It states that

> Group G believes that *p* if and only if (1) most of the members of G believe that *p* and (2) it is common knowledge in G that (1).[227]

Unfortunately, this reformulation leaves us little better off. If we change the previous example by stipulating that the Justices discussed their preferences and are aware that each of them believes the doctrine should extend to case Y, does that affect our ability to attribute belief to the Supreme Court? The answer seems to be no. Only if the Justices issue a majority opinion containing this belief should we ascribe the belief to the Supreme Court. Because of this intuition, we should be suspect of any account of group intentionality that endorses a contrary outcome.[228]

SOC'Y 1, 9 (1975).

224. *See* MARGARET GILBERT, ON SOCIAL FACTS 257–60 (1989) (explaining the simple summative account).

225. Quinton, *supra* note 223, at 17.

226. In drafting this example, I rely upon Margaret Gilbert's decisive refutation of this account. *See* GILBERT, *supra* note 224, at 257–60.

227. *See id.* at 260–73 (explaining the complex summative account).

228. For a more extensive critique along these lines, see *id.* at 257–60.

The critiques I have offered so far show why the criteria advanced by summative accounts are too weak to provide a model for understanding corporate intentionality. In another sense, however, the summative models are too strong. This is because these models would require a majority of a corporation's members to hold a belief in order for us to attribute that belief to the corporation.[229] As anyone familiar with corporate decision making knows, majoritarian decision making is not the rule. Corporations frequently possess intentional states with which a majority of their members disagrees. Indeed, corporations can even possess states that none of their members hold.[230]

The philosopher John Searle offers another compelling critique of the theory that group intentions are nothing more than the summation of individual intentions.[231] Picture a group of people having a picnic on the beach under the warm sun. Suddenly it grows dark and rain clouds move in. Everyone gets up, grabs their belongings, and dashes towards shelter. Each individual independently holds the intention, "I am running to shelter." Now, instead, imagine that the people are actors in a play. They undertake the exact same actions as our other group of beachgoers. However, according to Searle, the actors have the joint intention, "We are running to shelter." This intention is distinct from the intentions held by the random assortment of beachgoers. Searle emphasizes that there is a difference between "we intend to J" and "I intend to J" and that the former does not result from summing up instances of the latter. Similarly, we cannot identify a corporation's beliefs simply by summing up the beliefs of the individual employees. Due to these deficiencies in the summative accounts of joint intentionality, we must look elsewhere for an account of corporate intentionality. The nonsummative accounts discussed in the next subpart provide a better solution.

D. Nonsummative Accounts

Nonsummative accounts do not propose that group intentions come about simply by summing the intentions of individuals who constitute the group. Indeed, many theories do not even require a single individual to hold an intention in order for the group to hold it.[232] If, as I show, this type of account best maps onto corporate activity, it should provide compelling evidence that corporations have intentional states of their own and, accordingly, should be treated as individuals in their own right.

There are two main categories of nonsummative accounts: (1) those which hold a commitment to individualism, denying that joint intentions are the intentions of a group agent, and (2) those which maintain that joint intentions create a group agent to whom we can ascribe intentional action and other psychological attributes. I review each of these in turn and ultimately conclude that the latter theories better explain the actions of corporations.

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229. *See id.* at 270–73 (explaining why the complex summative account is too "strong").

230. *See infra* Part IV.

231. The following example is drawn from John R. Searle, *Collective Intentions and Actions*, *in* INTENTIONS IN COMMUNICATION 401, 403 (Philip R. Cohen et al. eds., 1990).

232. *See infra* Part III.D.2.

1. Individualistic

Two major proponents of individualistic accounts of joint intentionality are John Searle and Michael Bratman. Searle draws a distinction between I-intentions and we-intentions.[233] However, he does so in an interesting manner. Searle's theory is both nonsummative and atomistic (i.e., starts from the supposition that the individual should serve as the basic unit of analysis for social life).[234] In an effort to maintain these two aspects, Searle argues that joint intentions exist in individual minds. Essentially, Searle claims that the individual belief "we intend to x" is sufficient to constitute joint intentionality.[235]

Searle's account has been criticized for its failure to incorporate the normative relations that seemingly pervade joint intentions.[236] To see why, suppose that you and I are painting a house, and each of us forms the we-intention—"we intend to paint the house." It seems clear that we have created obligations to each other. You have the right to expect that I will work to advance our we-intention; likewise, I have the right to expect that you will work to advance our we-intention. If either you or I fail to do our part, the other has the right to admonish the slacker. Because Searle's view is solipsistic, it does not capture this element of collective intentions.

Michael Bratman's theory presents a slightly different version of joint intentionality.[237] Although Bratman's theory remains individualistic and nonsummative, it stresses the importance of interrelations between the individuals who form the joint intention. A slightly condensed version of Bratman's account runs as follows:

> We intend to J if and only if:
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> (1) I intend that we J;
>
> (2) You intend that we J;
>
> (3) I intend that we J in accordance with and because of meshing subplans of 1 and 2, and you intend the same; and
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> (4) It is common knowledge between us that 1, 2, and 3.[238]

If we map these criteria onto our house-painting endeavor, we would have a joint intention only if (1) I intend that we paint the house, (2) you intend that we paint the house, (3) I intend that we paint the house in accordance with and because

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233. *See* Searle, *supra* note 231, at 401–08.

234. *Id.* at 407 ("I could have all the intentionality I do have even if I am radically mistaken, even if the apparent presence and cooperation of other people is an illusion, even if I am suffering a total hallucination, even if I am a brain in a vat.").

235. *Id.* at 401–08.

236. *See* GILBERT, *supra* note 224; Margaret Gilbert, *Remarks on Collective Belief*, *in* SOCIALIZING EPISTEMOLOGY: THE SOCIAL DIMENSIONS OF KNOWLEDGE 235 (Frederick F. Schmitt ed., 1994); Anthonie W. M. Meijers, *Can Collective Intentionality Be Individualized?*, 62 AM. J. ECON. & SOC. 167 (2003).

237. Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 333–36 (1992).

238. *Id.* at 333–34.

of meshing subplans of 1 and 2, and you intend the same, and (4) all three of these conditions are common knowledge between us. We would have meshing subplans so long as our goals do not directly conflict. Importantly, our goals need not be identical; they need only be nonconflicting.

Suppose I want to paint the house white, and you are indifferent as to the color—but you want to use semigloss paint, and I have no preference on that matter. Even though our intentions are not identical, our subplans mesh because they are compatible. We can use white, semigloss paint, and both of us will be satisfied with the result. If, however, I wanted to use satin paint and would not compromise, our subplans would not mesh, and we would be unable to form a joint intention.

Despite an emphasis on interrelations between individuals, Bratman's theory still falls prey to one critique levied at Searle's account—namely, that it fails to consider the normativity of joint intentions. In addition, Bratman's account has been attacked on the ground that individuals cannot have an intention "that we J."[239] The argument goes that only the subject responsible for deciding whether to undertake an action can form the intention to do such an action.[240] In other words, I can have an intention that I paint the house, but unless I have control over your behavior, I cannot form an intention that we paint the house. My having an intention that we paint the house cannot ensure that we will, in fact, paint the house; therefore, it makes no sense to speak of me as having a we-intention. Ultimately, since I am not a "we," I cannot have a we-intention. Only a group agent would be capable of having such an intention. The theories discussed in the following section avoid these critiques and show how group agents can solve our dilemma and provide insight into the workings of corporations.

2. Plural Subject

In her work, Margaret Gilbert describes collective belief as a "plural subject concept."[241] This is "the idea that a plurality of persons may in certain special contexts be seen as constituting the subject (as opposed to the subjects) of a certain psychological attribute."[242] The group should be thought of as an entity above and beyond its constituent parts. Gilbert writes that "A and B form a plural subject of believing that *p* if and only if A and B are jointly committed to believing that *p* as a body."[243] Joint commitment requires willingness, "at least in relation to certain conditions, to put one's own will into a 'pool of wills' dedicated, as one, to a single goal (or whatever it is that the pool is dedicated to)."[244]

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239. *Id.* at 333. For criticism of Bratman's account, see ANNETTE C. BAIER, THE COMMONS OF THE MIND 26 (1997); Frederick Stoutland, *Why Are Philosophers of Action So Anti-Social?*, *in* COMMONALITY AND PARTICULARITY IN ETHICS 45, 58 (Lilli Alanen, Sara Heinämaa & Thomas Wallgren eds., 1997); J. David Velleman, *How To Share an Intention*, 57 PHIL. & PHENOMENOLOGICAL RES. 29, 33–34 (1997).

240. *See* Velleman, *supra* note 239, at 33–34.

241. Gilbert, *supra* note 236, at 244.

242. *Id.*

243. *Id.* at 249. (emphases omitted).

244. GILBERT, *supra* note 224, at 18; *see also id.* at 431 ("In order for individual human beings to form collectivities, they must take on a special character, a 'new' character, in so

Margaret Gilbert gives an example of a plural subject in a basic form that she calls the "simple interpersonal."[245] George and Mary are two parents who have to decide how late their son Johnnie can stay out. Whereas George believes that Johnnie should be able to stay out until 2:00 a.m., Mary thinks the boy should be home by 10:00 p.m. After a long discussion, Mary proposes that they should tell Johnnie to be home by midnight. Even though he does not believe midnight is the best time, George agrees to this compromise and tells Johnnie, "We think you should be home by midnight." Neither George nor Mary holds this belief, yet the plural subject "we" does. George and Mary are jointly committed to believe as a body that Johnnie should be home by midnight, and their joint commitment informs their dealings with Johnnie. If George tells Johnnie that he can stay out until two, Mary would have a right to rebuke George for failing to uphold his obligation in his dealings with Johnnie. However, if George said to Mary later that night, "I still don't see why Johnnie can't stay out until two," Mary would not have the same right to rebuke George. The obligations that extend from the beliefs of the plural subject are context sensitive.

This example illustrates two core features of Gilbert's theory: (1) If A and B "form a plural subject of believing that *p*, each of them is obligated to the other to do her part in believing that *p* as a body";[246] and (2) A and B "have a basis for rebuking one another should the appropriate behavior not occur."[247]

Gilbert's theory goes far in explaining the obligations of corporate employees. By agreeing to work for a company, the employees form a joint commitment to put their individual wills into a pool of wills dedicated to advancing the interests of the corporation. Doing one's part in believing that *p* as a body entails accepting the corporation's judgments as one's own in matters relating to the company. If an employee fails to do his part in adopting the company's positions, he can be subject to legitimate rebuke by other members of the group. A rebuke could be as inconsequential as an admonishment from fellow coworkers or as significant as being fired by a supervisor. Although Gilbert's account takes us in the right direction, it does not completely explain corporate intentionality.

For a fuller account, we need to incorporate aspects of Raimo Tuomela's theory of joint intentionality, which he calls the positional account of group beliefs.[248] Tuomela writes that "[p]ositional beliefs are views that a position-holder has *qua* a position-holder or has internalized and accepted as a basis of his performances of aforementioned kinds of social tasks."[249] In other words, group beliefs are not derived from what individual members of the group actually believe; they are derived from what individual members of the group accept as true given their obligations to the group entity. For example, each member of the board of directors of an oil company may individually believe that drilling in Alaska is bad because it destroys a beautiful natural habitat and endangers many interesting and important

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far as they need not, *qua* human beings, have that character. Moreover, humans must form a whole or unit of a special kind . . . a plural subject.").

245. Gilbert, *supra* note 236, at 249–50.

246. *Id.* at 249 (emphases omitted).

247. *Id.* (emphases omitted).

248. *See* RAIMO TUOMELA, THE IMPORTANCE OF US 34 (1995); Raimo Tuomela, *Group Beliefs*, 91 SYNTHESE 285 (1992).

249. TUOMELA, *supra* note 248, at 312.

species. At the same time, each of these board members may positionally accept that the oil company should continue to support drilling in Alaska. According to Tuomela's account, it would be appropriate to say that the company has the belief that it should drill in Alaska.

Tuomela also draws a distinction between operative and nonoperative members. The operative members are those decision makers who influence the firm's intentional states.[250] These are generally high-level managers and directors who form desires and define goals that the corporation will act to achieve. Nonoperative members are those who merely take action to fulfill the corporation's goals. They do not have decision-making authority.[251]

As one can see, Tuomela's theory relies upon a distinction both between individual belief and acceptance and between operative and nonoperative members. This distinction between individual belief and acceptance is vital to understanding how corporations can act in ways that are independent of their members. When board members or executives make decisions, they are not reporting what they personally believe to be true; they are reporting what they positionally accept as true given their position within the corporation.

The fact that the intentional states of corporations and the intentional states of their members can diverge in such a manner allows Tuomela to explain how firms can possess intentionality. Specifically, he writes that "a group intentionally performs an action *X* if the relevant operative members, acting in the right way in their positions and carrying out the group intention that the authority system of the group has produced . . . jointly perform an action *Y* which brings about *X*."[252]

In the next Part, I build upon Tuomela's theory to defend the position that corporations satisfy Hobbes's performative conception of personhood. Specifically, I use Tuomela's understanding of positional beliefs and operative members to augment a judgment-aggregation dilemma developed by Christian List and Philip Pettit.

IV. CORPORATIONS AS PERFORMATIVE PERSONS

In this Part, I build upon the previously discussed theories of joint intentionality to argue that corporations meet the performative conception of personhood. In particular, I rely upon work by the philosophers Christian List and Philip Pettit, who argue that the performative core of personhood is (1) mutual awareness and (2) rational unity.[253] Aggregations of people that display these two features should be conceived of as persons in their own right.[254] In this Part, I will argue that, because corporations fulfill both conditions, they meet the qualifications for personhood. It is

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250. Raimo Tuomela, *Corporate Intention and Corporate Action*, 15 ANALYSE & KRITIK 11, 18 (1993).

251. *See* TUOMELA, *supra* note 248, at 228–269.

252. *Id.* at 19.

253. *See, e.g.*, LIST & PETTIT, *supra* note 176; Philip Pettit, *Groups with Minds of Their Own*, *in* SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY 167 (Frederick F. Schmitt ed., 2003); Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89 (2002); Christian List & Philip Pettit, *Aggregating Sets of Judgments: Two Impossibility Results Compared*, 140 SYNTHESE 207 (2004).

254. Pettit, *supra* note 253, at 179–80.

important to note that their personhood is not ghostly in nature. Instead, it comes about due to the decision-making procedures employed by corporations.

Mutual awareness, the first condition, occurs through the formation of unified intentions.[255] To see why this requirement is necessary, envision a natural person (let's call him Dave) whose intentional states are entirely in conflict. Dave wants to have dinner and wants to not have dinner. He fears clowns and does not fear clowns. He likes cats and does not like cats. I want to emphasize that these are not superficial conflicts. We have all been in situations where our preferences and desires are pulled in opposite directions. It is not the case that Dave wants to have dinner because he is hungry and does not want to have dinner because it is only 4:00 p.m. Rather, it is the case that he wants to have dinner *simpliciter* and simultaneously does not want to have dinner *simpliciter*. In other words, I mean that Dave's thoughts are contradictory all the way down. In fact, such mental paralysis leaves him unable to function in any sort of coherent or rational manner. At this point, we would likely start to doubt whether Dave should qualify as a "person" in our community. Certainly, he would still be a human and therefore deserving of human rights; however, given Dave's severe irrationality, it is unclear whether he would deserve constitutional protections such as First Amendment free speech or free exercise rights. At the very least, we would certainly want to deny Dave rights under the Second Amendment.[256]

In a corporate context, mutual awareness can be met when the individuals within the system have a shared purpose and form intentions consistent with advancing that purpose. The joint-intentionality literature reviewed in the last Part illustrates how corporations fulfill this requirement. Indeed, all of the theories of joint intentionality have, as their foundation, the existence of some sort of shared understanding or common purpose. They also require actors within the group to form intentions consistent with advancing that common purpose. Recall Bratman's discussion on painting the house.[257] If we both have the intent to paint the house, but you want to paint the house blue and I want to paint the house red, then we do not have any sort of collective mental state. Our goals are incompatible. Collectively, we are the same as Dave. Our conflicting intentional states leave us incapable of meeting the mutual awareness condition. However, if we adjust our intentions (let's say I change my mind and now want to paint the house blue), we can form a collective agent.

Margaret Gilbert's conception of joint commitment[258] is particularly analogous to mutual awareness. Just as Johnnie's parents formed a joint commitment to set his curfew to midnight, individuals within a corporation form joint commitments to advance the shared goals of the corporation. Whenever an employee performs his job, he is lending stability to the intentional states of the corporation and helping fulfill the requirements for mutual awareness.

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255. *See id.* at 179–81; LIST & PETTIT, *supra* note 176, at 173–74.

256. In fact, there is a statute that does just that. *See* 18 U.S.C. § 922(d) (2012) ("It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution . . . .").

257. *See supra* Part III.D.1.

258. *See supra* Part III.D.2.

The first condition seems satisfied. But what about rational unity, the second condition? List and Pettit argue that any system that (1) has intentional attitudes, (2) updates its intentional attitudes as new information is introduced, and (3) qualifies as a subject of legitimate rebuke meets the burden of rational unity. While explaining this concept in a related paper, Pettit writes that "a system will count as an intentional subject only if it preserves intentional attitudes over time and forms, unforms, and acts on those attitudes . . . in a rationally permissible manner."[259] For example, "If the system believes that *p* and comes across evidence that not-*p*, it must tend to unform that belief. If the system believes that *p* and learns that if *p* then *q*, it must come to form the belief that *q* or to unform one of the other beliefs."[260]

Decision structures lead corporations to fulfill the rational-unity requirement. As should be apparent to corporate observers, companies strive to act in rational ways. If the goal is for the corporation to maximize profits and it can do so by producing widgets, the company will produce widgets. If the market for widgets declines against expectations and producing widgets can no longer be profitable, the corporation will take this new information into account. Consistent with this change of circumstances, the business will stop producing widgets. This is just one basic example of how corporations fulfill the condition of rational unity. Corporations constantly update their intentional states and develop new beliefs regarding how best to fulfill their goals. This process qualifies as rational unity: first, the corporation starts with a set of beliefs; second, the corporation receives new information from the world around it; finally, the corporation updates its beliefs to reflect the newly acquired information.

A general look at corporate action will show that, in nearly all cases, corporations attempt to maintain consistent preferences and update their beliefs as new information is acquired. Just as an individual who acts irrationally will almost certainly fail to maximize his utility, a corporation that lacks rational unity will quickly be forced into bankruptcy. Indeed, a corporation that fails to uphold rational unity will soon find itself the target of rebuke. As mentioned above, this potential for leveling criticism at the entity itself is a necessary condition of rational unity. Pettit clarifies this concept, writing that systems "must be such that they can be held responsible for failures to unify their intentional states and actions in a rational way."[261]

It is important to note that the corporation's rational unity is not equivalent to the rational unity of any set of its members. Insights into judgment aggregation illustrate why the intentional states of corporations can be discontinuous from the intentional states of their constituent members. In 1986, Lewis Kornhauser and Lawrence Sager first identified a vote-aggregation problem in the judiciary that they called the "doctrinal paradox."[262] Kornhauser and Sager found that, in multijudge panels, the disposition of a case can vary depending on whether the

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259. Pettit, *supra* note 253, at 180.

260. *Id.*

261. *Id.* at 184.

262. *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 115 (1986). For their follow-up work on this paradox, see Lewis A. Kornhauser & Lawrence G. Sager, *The Many as One: Integrity and Group Choice in Paradoxical Cases*, 32 PHIL. & PUB. AFF. 249, 251 (2004); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 1 (1993).

judges vote on the issues or the outcome. The paradigmatic example of the doctrinal paradox involves three decision makers who must form judgments on two premises and a conclusion. The following setup presents this example and involves three judges who must vote on the following three issues:

- The defendant had a contractual obligation to undertake a specific action (the first premise).
- The defendant failed to perform that action (the second premise).
- The defendant is liable for breach of contract (the conclusion).

Table 2. The doctrinal paradox

	Contract?	Breach?	Liability?
Judge A	No	Yes	No
Judge B	Yes	No	No
Judge C	Yes	Yes	Yes
Majority	Yes	Yes	No

Judge A believes the second premise but not the first; this leads him to also reject the conclusion. Believing that the first premise is true but that the second is not, Judge B rejects the conclusion. Finally, Judge C believes both premises and therefore accepts the conclusion. This vote breakdown yields majority support for each premise but not for the conclusion. More specifically, the judges collectively believe the following: (1) the defendant had a contractual obligation to undertake a specific action, (2) the defendant failed to perform that action, and (3) the defendant is not liable for breach of contract. This set of beliefs is inconsistent. If both premises are true, the conclusion must also be true. Under this voting breakdown, the outcome of the case differs whether the court holds a vote on the premises or on the conclusion. If the judges vote on the elements, the defendant will be found liable, but if they vote on the legal outcome, the defendant will be found not liable.

Despite the doctrinal paradox's emphasis on the judiciary, it has implications for corporate decision making. Identifying this application, Christian List and Philip Pettit developed a generalized version of the doctrinal paradox known as the discursive dilemma.[263] Their reformulation supports the existence of corporate intentionality.[264] The following example shows just how the occurrence of the discursive dilemma can cause corporations to adopt religious beliefs independent of the beliefs of their members.

Suppose that a corporation has to decide whether to seek an exemption from the contraception mandate. The corporation tasks three of its members (Executives A, B, and C) with resolving this issue. Amongst themselves, the executives decide that the corporation should only seek an exemption if two conditions are met: (1) the corporation's business practices should adhere to the tenets of Christianity, and (2) abiding by the contraception mandate would violate Christian tenets.

263. *See* LIST & PETTIT, *supra* note 176, at 45–47.
264. *See id.*

For the time being, let us suppose that the personal beliefs and positionally accepted judgments of the three executives are the same. The executives vote in the following manner: Executive A does not believe that the corporation should always adhere to the tenets of Christianity but does think that the contraception mandate is incompatible with Christian principles. Accordingly, she votes against seeking an exemption. Executive B believes that the corporation should always work to uphold the tenets of Christianity but does not think the mandate violates those tenets. He, too, votes against seeking an exemption. Finally, Executive C believes both that the corporation should be run according to Christian principles and that abiding by the mandate is incompatible with following such principles. He votes "yes" to both premises and the conclusion. This vote pattern is reproduced in Table 3.

Table 3. The discursive dilemma

	Follow Christian principles?	Mandate violates principles?	Seek exemption?
Executive A	No	Yes	No
Executive B	Yes	No	No
Executive C	Yes	Yes	Yes
Majority	Yes	Yes	No

As in the judicial example, the majority votes on the premises do not agree with the majority vote on the conclusion. In this scenario, a majority of executives believe that the company should follow Christian principles, and a majority also believes that the contraception mandate is incompatible with such principles. Despite these beliefs, a majority concludes that the corporation should not seek an exemption. However, by adopting a premise-based voting system, the corporation comes to believe that it should seek an exemption. Importantly, the reasons for believing that an exemption should be sought are the corporation's own, and not the reasons of any member of the corporation. The corporation is an intentional agent that speaks with its own voice and represents its own views. It is a single person, constituted by—but separate from—its individual members.

One might object that this representation of corporate decision making is unrealistic. Executives would never sit in a room, vote on premises, find that the premises lead to an undesirable conclusion, and say, "There's nothing we can do. Our hands are bound by the premise-based voting system. We must adopt a terrible conclusion." I fully agree with that assessment and have presented this example primarily to serve as a simple, if somewhat stylized, explanation of the discursive dilemma. Next, I will slightly modify the example. The change adds a bit of complexity but shows how the discursive dilemma realistically occurs every day in corporations that have even a minimal level of decentralized decision making.

Suppose that the same two premises still need to be decided. However, this time there are two groups of decision makers. Committee 1 comprises three people (Members A, B, and C) who must decide whether the corporation should abide by the tenets of Christianity. If they vote "yes" to follow the tenets, Committee 2 (Members D, E, and F) must decide whether following the mandate would conflict with Christian tenets. In short, Committee 1 decides one question; Committee 2 decides another, and together their responses determine whether the corporation

will seek an exemption from the mandate. Let us stipulate that the committee members do not know what conclusions their premises will be used for; therefore, we do not have to worry about them voting insincerely to ensure that their preferred outcome occurs.

Table 4 shows the vote preferences of the members of both committees. The words enclosed in parentheses indicate the individuals' preferences on the issues for which they did not vote. The words that are not enclosed in parentheses indicate the members' preferences on the issues for which they voted (i.e., Members A, B, and C voted on the first premise, and Members D, E, and F voted on the second premise).

Table 4. A two-committee problem

	Follow Christian principles?	Mandate violates principles?	Seek exemption?
Member A	No	(No)	(No)
Member B	Yes	(No)	(No)
Member C	Yes	(No)	(No)
Member D	(No)	Yes	(No)
Member E	(No)	No	(No)
Member F	(No)	Yes	(No)
Majority Decision	No Yes	No Yes	No Yes

The interesting point to observe about this setup is that a clear majority of members prefers the "no" option on each of the premises, and every single member prefers a "no" conclusion. Nonetheless, since a majority of each committee votes "yes" on its committee-specific premise, the conclusion receives a "yes" vote. This means that the corporation will perform an action that not a single one of the decision makers wanted it to do. However, to preserve rationality at the group level, the corporation is committed to acting in this manner.[265] When a corporation undertakes actions of this sort, it evinces an intentionality distinct from any of its members. This is precisely why it is appropriate to say that corporations are intentional subjects.

The discursive dilemma shows how the corporation can adopt positions distinct from the positions of its members when there are multiple premises that entail a specific conclusion. That said, one might argue that the solution is simply to have corporate decision makers vote on the conclusions themselves rather than on the premises. In each of the preceding examples, if the employees had voted on the conclusion, the majority belief would have been adopted, and we would have avoided the unsettling result in which the corporation adopts and acts on beliefs with which every one of its members disagrees. If the problem is that group-level intent fails to track individual-level intent, corporations should just change their voting protocols so that employees decide conclusions rather than premises.

This change, unfortunately, would not eliminate the corporation's claim to being an intentional subject. As Tuomela's account showed, corporate decision makers

265. *See id.* at 199.

do not vote their own personal beliefs; they express their positionally accepted beliefs.[266] Like List and Pettit's discursive dilemma, Tuomela's analysis allows for corporations to be intentional subjects, but his account also permits corporations to take on intentional states that are independent of their members when only one decision must be made.

Consider the following example. Again, three executives must make a decision. This time, they only have to decide the conclusion, namely, whether the corporation should seek an exemption from the mandate. In this scenario, the corporation has included a phrase in its charter noting its "strong Catholic commitments." Further, the Catholic Church has stated that good Catholics will not abide by the contraception mandate. Being atheists themselves, all three executives personally believe that "all things considered, the corporation *should not* seek an exemption from the mandate" (proposition "not *p*"). However, all three also positionally accept that "all things considered, the corporation *should* seek an exemption from the mandate" (proposition "*p*"). This tension leads to the situation summarized in Table 5 in which every decision maker believes not *p* and every decision maker positionally accepts *p*.

Table 5. Seek exemption from mandate?

	Personally believe?	Positionally accept?
Executive A	No	Yes
Executive B	No	Yes
Executive C	No	Yes
Majority	No	Yes

As individuals, the executives believe that the corporation should not violate the mandate, but as group members, the executives believe that the corporation should violate the mandate. Because the corporation will adopt the latter position—one with which no executive actually agrees—it is again reasonable to conceive of the corporation as having an independent intentional state. Each of the examples provides strong support for the claim that corporations are persons. Because corporations hold intentional states and update their intentional states in a rational manner, they have the ability to function as persons in a fundamental way. Indeed, they meet Hobbes's performative conception of personhood.

V. CORPORATE SINCERITY

In free exercises cases, plaintiffs must show that the challenged law "(1) substantially burden[s] (2) a sincere (3) religious exercise."[267] In this Part, I focus on the second prong and argue that this sincerity requirement should assuage the concerns of those who object that corporations will exploit free exercise protections for pecuniary gain.[268] Importantly, I do not deny that corporations may attempt to

266. *See supra* Part III.D.2.

267. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006).

268. *See, e.g.*, Wendy Kaminer, *Why Are Secular Businesses Claiming Religious Rights?*,

take advantage of this constitutional right; however, there is strong reason to doubt they will succeed. The many cases withholding free exercise protections from human claimants who did not have sincere religious beliefs lead me to believe that courts can deftly separate the insincere corporate claimants from the sincere ones.[269]

For instance, on the basis of insincere religious beliefs, people have attempted to assert the Free Exercise Clause to acquire special prison privileges,[270] defame others,[271] have sex with young girls,[272] and circumvent drug laws,[273] among others. In each case, the courts have intervened to prevent the claimants from obtaining cover under the umbrella of the Free Exercise Clause. Judges have routinely grappled with insincere religious claims, and there is no reason why that line of cases cannot serve as a guide for prohibiting disingenuous corporate free exercise claims. In the remainder of this Article, I try to offer up such a guide.

First off, there is ample precedent supporting the constitutionality of a religious sincerity requirement. The seminal case on the matter is *United States v. Ballard*.[274] In this action, the government brought religious fraud charges against three leaders of the "I Am" movement: Guy, Edna, and Douglas Ballard. Guy had presented himself as the divine messenger of St. Germain, claimed to have spoken with Jesus, and told his followers that he had acquired supernatural powers. Edna and Douglas similarly claimed to have supernatural powers that enabled them to cure diseases and illnesses.[275] The government alleged that Guy, Edna, and Douglas made these representations with the intent to defraud.

At trial, the judge instructed the jury to only examine the sincerity of the Ballards' beliefs and to disregard the verity of the actual claims. In other words, if the jurors determined that the Ballards sincerely believed their representations, the jurors had to find them not guilty. The Supreme Court affirmed the trial judge's instruction not to examine the truth or falsity of the claims, writing:

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First

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ATLANTIC (July 30, 2012, 12:21 PM), http://www.theatlantic.com/national/archive/2012/07/why-are-secular-businesses-claiming-religious-rights/260463/ (warning of "an ominous legal trend: [r]eligious freedom . . . morphing into religious power").

269. For examples of cases, see *infra* notes 270–273 and 281–300 and accompanying text.

270. *See* Theriault v. Silber, 453 F. Supp. 254, 261 (W.D. Tex. 1978) ("The professed belief of Mr. Theriault that he is the second Messiah . . . appears to this Court to be insincere and, like the rest of the actions of the petitioner, are 'essentially political, sociological and philosophical.'").

271. *See* Hester v. Barnett, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987) (finding that a pastor cannot hide under the cloak of the Free Exercise Clause to avoid defamation charges).

272. *See* Hansell v. Purnell, 1 F.2d 266, 270–71 (6th Cir. 1924).

273. *See* United States v. Kuch, 288 F. Supp. 439, 444–45 (D.D.C. 1968) (denying Free Exercise Clause exemption to use LSD because "[i]t is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence").

274. 322 U.S. 78 (1944).

275. *Id.* at 80.

> Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.[276]

Interestingly, despite being viewed as the foundation of sincerity testing, the *Ballard* decision did not specifically reach that issue. Instead, the Court simply remanded the question back to the Ninth Circuit. Nonetheless, district courts, courts of appeals, and even the Supreme Court itself have subsequently cited *Ballard* as precedent for the sincerity test[277] and consistently reaffirmed the proposition that insincere beliefs are unworthy of constitutional protection.[278]

An obvious objection at this stage is that, even if sincerity testing is constitutional, it is impossible to determine whether corporations are sincere. The same criticism, however, can be directed at sincerity testing for natural persons. It is impossible for courts to look into the brain of a human and know whether that person's beliefs are sincerely held.[279] Indeed, there is a strong argument that we can better peer into the mind of a corporation than into the mind of a natural person. After all, we can view the decision-making procedures employed by a corporation and the interactions of its managers and board of directors. We can see the corporate intentional states emerge. The same is impossible to do with respect to natural persons. Whereas the corporate mind is potentially observable, the human mind is sealed off from the judiciary.

Because of this inability to pry into the mind of natural persons, judges have used other proxies to determine sincerity, such as whether (1) the claimant has taken actions inconsistent with the professed belief, (2) there are adverse consequences of holding the belief or the belief has an alternative secular motivation, (3) the belief is similar in nature to traditional religious beliefs, or (4) the claimant demonstrates a lack of devotion to his faith.[280] Importantly, every single one of these factors can be used to evaluate corporate sincerity. Let us go through each consideration, in turn, to see how courts have found evidence of insincerity.

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276. *Id.* at 87 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

277. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 693 (1989) ("[U]nder the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious . . . ." (citing *Ballard*, 322 U.S. 78)); United States v. Lemon, 723 F.2d 922, 938 n.49 (D.C. Cir. 1983) ("Sincerity can be the only test, for any inquiry into the truth or falsity of beliefs is barred by the first amendment." (citing *Ballard*, 322 U.S. at 86–87)).

278. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989); United States v. Seeger, 380 U.S. 163, 185 (1965) (Courts must "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."); Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) ("[B]eliefs must be sincerely held and religious in nature to be accorded first amendment protection.").

279. *Patrick*, 745 F.2d at 157 ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Mindful of this profound limitation, our competence properly extends to determining 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.'" (quoting *Seeger*, 360 U.S. at 185)).

280. *See* Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 341–51 (1990) (discussing a similar set of factors courts have used to determine insincerity).

First, courts have long found that taking actions inconsistent with the professed belief is evidence of religious insincerity. For instance, in a case involving religious fraud, the Ninth Circuit admitted evidence showing that the defendant was "an habitual indulger in each and every of the sins and practices he pretended to condemn."[281] Ultimately, the court found the defendant guilty of claiming to possess supernatural powers for the purpose of obtaining money from others.[282] In another case, the Second Circuit wrote that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief."[283] This principle is exemplified in *Dobkins v. District of Columbia*.[284] Here, a member of the Jewish faith objected to continuing his trial past sundown on Friday—the start of the Jewish Sabbath. After learning that the claimant worked at his office on Saturdays, the court concluded that there was no religious basis for moving the trial to a different date.[285]

However, not every inconsistent action should be construed as evidence of insincerity. Because of the importance of upholding legitimate constitutional claims, courts have sometimes erred on the side of caution and held that minor deviations from the belief are not sufficient for a finding of insincerity. For example, in *Lovelace v. Lee*, the Fourth Circuit found that the sincerity of a prisoner's beliefs should not be doubted when the prisoner had violated a religious fast once.[286] Just as they do when evaluating the beliefs of natural persons, courts can compare a corporation's actions with its professed beliefs to find evidence of insincerity. The greater the divergence between belief and action, the more likely the corporation is to be insincere. We could envision a scenario in which an advertising corporation has done work promoting Planned Parenthood but now expresses a religious objection to the contraception mandate. In this case, the inconsistent action would severely undermine the corporation's claim for a religious exemption.

A second way to gauge sincerity involves looking at the consequences that flow from—and the motivations behind—holding the belief in question.[287] Justices Black and Douglas pointed to the Jehovah's Witnesses' "willingness to suffer persecution and punishment, rather than make the pledge [of allegiance]" as evidence of "[t]he devoutness of their belief."[288] Conversely, if the claimant's belief appears to be motivated by a secular purpose, it is less likely to be held

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281. New v. United States, 245 F. 710, 713 (9th Cir. 1917).

282. *Id.* at 713–14, 721–22.

283. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

284. 194 A.2d 657 (D.C. 1963).

285. *Id.* at 659.

286. 472 F.3d 174 (4th Cir. 2006). *But see* Daly v. Davis, No. 08-2046, 2009 WL 773880, at *2–3 (7th Cir. Mar. 25, 2009) (holding that a prisoner who had three lapses could be removed from a kosher diet program); Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994) (holding that an inmate who violated the Ramadan fast could be prevented from participating in future fasts).

287. *Krishna Consciousness, Inc.*, 650 F.2d at 441 (Sincerity should be doubted when "there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." (citing Thomas v. Review Bd., 450 U.S. 707, 712 (1981))).

288. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring). *But see Krishna Consciousness, Inc.*, 650 F.2d at 442 (noting the difficulty in determining whether an act is sincere or is merely "a calculated decision to risk occasional punishment as a cost of engaging in a highly profitable, and fraudulent, conduct").

sincerely.[289] At times, the claimant will specifically admit the existence of a secular motivation, such as monetary gain;[290] however, the evidence will normally be more indirect. For instance, in *United States v. Kuch*, the court found the claimants' lack "of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence" demonstrated "that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence."[291] In the corporate context, internal communications will provide insight into the factors motivating the company's free exercise claim. By reviewing e-mails, a court might find that a corporation wants an exemption from the mandate, not for religious reasons, but because it will reduce health insurance costs.

Next, corporations, like people, should not be able to claim religious exemption for beliefs that are so far removed from traditional notions of religion as to be absurd. Although this is a necessary limitation to prevent abuse, it is important that this examination not consider the verity of the claimant's beliefs.[292] As Chief Justice Burger wrote, "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."[293]

Fortunately, we do not have to spend too much time imagining, as there are actual cases that present patently absurd beliefs. One example is *Brown v. Pena*.[294] In that case, the court determined that a plaintiff who claimed his religion required him to eat cat food could not possibly have been sincere.[295] In another case, the claimants professed to subscribe to a religion whose official songs were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat"; whose motto was "Victory over Horseshit!"; and whose symbol was a three-eyed toad.[296] These cases show that, if corporations dare to advance doctrines clearly nonreligious in nature, the courts will surely decline to grant them protection.

Courts have also looked to the depth of a claimant's devotion to his professed faith. This factor arose in the well-known case of *Wisconsin v. Yoder*.[297] Here, the Supreme Court granted the Amish a religious exemption from a state law that required all children under the age of sixteen to attend school. In doing so, the

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289. *See, e.g.*, Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) (Courts must differentiate between "those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.").

290. *See, e.g.*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 96 (E.D.N.Y. 1987) (Claimant was found insincere after "admitt[ing] that he had joined [a religious] group solely for the purpose of attempting to gain [a tax] exemption . . . and was not even clear as to the temple's name.").

291. 288 F. Supp. 439, 444 (D.D.C. 1968).

292. *See supra* notes 274–76 and accompanying text.

293. Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

294. 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

295. *Id.* at 1385.

296. *Kuch*, 288 F. Supp. at 444 ("Reading the so-called 'Catechism and Handbook' of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term.").

297. 406 U.S. 205 (1972).

Court emphasized the deep religious "conviction" of the Amish.[298] In *Thomas v. Review Board of the Indiana Employment Security Division*, the Court similarly highlighted a Jehovah's Witness's "honest conviction" that working at a weapons plant violated tenets of his religion.[299] In that case, the Court required Indiana to provide the claimant with unemployment benefits because he had terminated his employment in accordance with a sincerely held religious belief.[300] Corporations' religious beliefs can also vary in their intensity, and the courts would do well to ascertain how strong a putative belief really is. They can easily do so by examining the corporation's historical religious commitments. Has the corporation always operated according to the religious belief it seeks to claim protection under? Or is it a newfound belief that was conveniently adopted just as a new law that conflicts with the belief came into effect?

Although all of the preceding cases involve human claimants, there is no reason the same analyses cannot be applied to corporate persons. The fear that corporations will abuse free exercise rights is overblown. As this summary has shown, courts have the tools to prevent corporations from exploiting the Free Exercise Clause. Just as the sincerity test has stopped natural persons from taking advantage of religious protections, so too can it stop corporate persons from doing the same.

CONCLUSION

The Supreme Court has grappled with the issue of corporate personhood for more than two hundred years. Despite addressing the topic in dozens of cases, the Court has never adopted a coherent, consistent account of corporate personhood. I have attempted to provide one possible account. Drawing upon the dominant philosophical theories of mind and group agency, I have developed a metaphysically grounded account of the subject, one that acknowledges corporations as persons in their own right.

In this Article, I have shown that corporations not only have a wide range of intentional states but also possess rational unity—a feature that is at the core of personhood. Using the *Burwell v. Hobby Lobby Stores, Inc.* case as an example,[301] I have shown how this understanding of the corporation offers a third path that differs from both the majority and the dissent. Whereas the dissent endorsed an artificial entity theory of the firm and the majority endorsed an aggregate entity theory of the firm, I have advanced a real entity theory. Corporations have intentional states that differ widely from the intentional states of their members.

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298. *Id.* at 216 ("[W]e see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.").

299. 450 U.S. 707, 716 (1981). One need not strictly adhere to every aspect of his religion to have sincere beliefs. *See, e.g.*, Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("[T]he fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.").

300. *Thomas*, 450 U.S. at 719; *see also* United States v. Seeger, 380 U.S. 163, 176 (1965) (exempting a conscientious objector from the draft on the basis of his "sincere and meaningful belief").

301. 134 S. Ct. 2751 (2014).

This finding removes the strongest argument from supporters of expansive corporate constitutional rights—namely, that corporations simply mirror the intentional states of their individual members.

The stronger form of corporate personhood that I endorse in this Article actually argues in favor of narrower corporate constitutional rights. Because for-profit corporations are persons capable of possessing religious beliefs, I do concede that they should be eligible for protection under the Free Exercise Clause. However, I show that they will be unable to exercise this protection frequently. The inability of most, if not all, for-profit corporations to possess *sincere* religious beliefs imposes a strict limitation on corporate religious rights.

The contraception mandate cases offered the Supreme Court another chance to revisit its corporate personhood doctrine. Unfortunately, the Justices did not seize this opportunity to develop a coherent theory. Although this narrow case has been resolved, the issue of corporate personhood remains wide open.