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RELIGIOUS LIBERTY AND THE BUSINESS CORPORATION

Ronald J. Colombo*

INTRODUCTION

Many in the world of business fail to allow their religious convictions to influence their business decisions. Indeed, some business people appear to actively suppress these deeply held beliefs when it comes to the workplace and their careers. The failure of some business-men and -women to bring their religious principles to bear upon their work is most unfortunate. For as Shiva Taghavi¹ and Susan Case² have explained, teachings from across the religious spectrum generally counsel in favor of conduct and practices that receive near universal acclaim. From improved environmental stewardship, to better treatment of workers, religious traditions proffer an approach to business that, to a large degree, addresses serious concerns raised by a wide range of business's critics over the years.

Moreover, evidence suggests that religiously motivated businesspeople practice what they are preached.³ Susan Case's review of the relevant scholarship on the subject suggests that the religious businessperson demonstrates "lower acceptance of questionably ethical decisions, applying higher standards of right and wrong" than his or her non-religious counterparts.⁴ It would seem imperative, then, to harness the largely untapped power of religion in the workplace. But significant obstacles present themselves.

One obstacle is cultural. As Richard Painter has pointed out, many in the business community simply believe, for a variety of reasons, that religion and work do not mix well.⁵ Another obstacle may be our nation's clergy. As Sarah Duggin has explained, American clergy (at least those of mainline Protestant denominations) have eschewed offering moral and ethical guidance to businesspeople.⁶ Corporate law may also be to blame, insofar as it conditions directors and officers to check their personal moral scruples at the office door, and instead focus solely on the maximization of shareholder profits.

Finally, there is the United States Constitution. The "First Freedom" guaranteed in the Bill of Rights—the freedom of religion—has no applicability to the business corporation. Yet many inaccurately imagine that the Constitution requires a religiously neutral workplace—a private analogue to the separation of Church and State. Taken together, this inhibits the ability of many religiously motivated entrepreneurs, investors, workers, and

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¹ See Shiva Taghavi, *Work is an Act of Worship: The Effect of Religious Thoughts on Work and Behavior* (2014) (unpublished Ph.D dissertation, HEC Paris) (on file with author).

² See Susan S. Case & Edward Chavez, *Guiding Lights for Morally Responsible Sustainability in Organizations: Revisiting Sacred Texts of Judaism, Christianity, and Islam*, 17 J. OF ORGANIZATIONAL PSYCHOL. 35, 35-49 (2017).

³ See Taghavi, *supra* note 1; Case & Chavez, *supra* note 2.

⁴ Case, *supra* note 2, at 37.

⁵ See Richard W. Painter, *The Moral Responsibilities of Investment Bankers*, <https://ssrn.com/abstract=1935415>.

⁶ See Sarah Duggin, *God's Grace and the Marketplace: Why Mainline Protestant Churches Have Difficulty Offering Moral and Ethical Guidance to Business Managers and How They Can Do Better* (forthcoming 2017) (on file with author).

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customers to band together in support of private enterprises that fully reflect and comport with their most cherished values and beliefs. This undermines the ability of religion to have the salutary effect on business practices referenced earlier. It essentially denudes the workplace and the free market of any serious religious influence. Even more significantly, it substantially restricts the concept of religious freedom itself, for it effectively dictates a radical privatization of religion. It contributes to the ongoing replacement of the fundamental right to the “free exercise” of religion (as envisioned by the framers of the First Amendment) with the modern, anemic concept of “freedom of worship.” In the pages that follow, I will demonstrate why it is both essential and constitutionally proper to extend the Constitution’s guarantee of freedom of religion to the business corporation, as the U.S. Supreme Court has done in *Burwell v. Hobby Lobby Stores, Inc.*⁷

I. WHAT IS A “RELIGIOUS BUSINESS CORPORATION”?

There are many ways in which a corporation can be infused with religion. One way would be for a corporation to simply acknowledge the importance of religion in the lives of most people. Approximately 55% of Americans identify religion as “very important” to them,⁸ and thus one would expect business corporations to take this into account when formulating workplace policies, designing products, and offering services. And one can find examples of this—perhaps most vividly in the rising phenomenon of “workplace chaplains” employed by many companies to minister to the spiritual needs of their employees.⁹ Or in the decision of McDonald’s Corporation to serve up only meatless hamburgers in India, given the religious objection to beef in that predominantly Hindu nation.¹⁰

In cases such as these, however, the corporation itself is not necessarily “religious,” but rather simply takes into account religious sensitivities—just as any well-run company would take into account the important concerns of its various constituencies. This is simply good management—and smart marketing.

A more aggressive infusion of religion would be one in which employees, officers, and directors were permitted to consult their religiously based moral and ethical principles in the course of their work. To a degree, this is certainly done in companies across America—but not explicitly. The prevailing belief is that such “personal” values are best left at home, and not brought into the office.¹¹ Corporate decision-making is expected to be, in large part, valueless—and focused narrowly on profits.¹² This expectation grows increasingly heavy as one moves up the corporate chain of command.¹³ Thus, to the extent that an officer or director is compelled to support or oppose a potential course of action on the basis of his or

⁷ 134 S. Ct. 2751 (2014).

⁸ See Frank Newport, *This Christmas, 78% of Americans Identify as Christian*, GALLUP (Oct.15, 2017, 1:15 PM), <http://www.gallup.com/poll/124793/this-christmas-78-americans-identify-christian.aspx>.

⁹ A growth industry which has “grown fastest since 2001” and is expanding from its roots in the Bible Belt to regions across America. Sue Shellenbarger, *Praying with the Office Chaplain*, WALL ST. J., June 23, 2010, at D1.

¹⁰ See Erin Perun, “Where’s the Beef?” CBS News (Feb. 11, 2009), http://www.cbsnews.com/2100-500522_162-2640540.html.

¹¹ See Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3 (2012).

¹² See *id.*

¹³ See *id.*

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her deeply held religious beliefs, he or she is likely to couch his position in terms having to do with the business's bottom-line.

But corporations need not be allergic to authentically religious considerations. Contrary to the population (mis)understanding, corporate law does not require profit-maximization at all costs.¹⁴ Although profits can fairly be deemed the primary objective of most business corporations, and indeed the overall focus of corporate actors pursuant to corporate law, profit-making need not completely displace consideration of other pressing values.¹⁵ Thus, one can readily imagine a corporation that, rather than suppress religiously based perspectives and viewpoints, actively invites and encourages them.

Finally, consider the prospect of an authentically religious business corporation. Since a corporation, as it has famously been remarked, lacks not only a body to kick, but also a "soul to damn,"¹⁶ a "religious business corporation" is difficult for some to imagine. It need not be. In fact, some are already in existence. And close analogues are ubiquitous.

An authentically religious business corporation is a for-profit entity that embraces a particular religious identity. Its pursuit of profits is tempered by an articulated commitment to a set of religiously based principles and teachings.

We are certainly familiar with such entities in the non-profit world. Nomenclature aside, most non-profit organizations actively strive to turn a profit.¹⁷ But to the extent that they embrace a religious persona, they forgo revenue (and, ultimately profits) out of deference to their convictions. Consider the case of abortion. As of 2000, abortion generated approximately \$487 million in revenue (in total) for those clinics that performed them.¹⁸ Several nonprofit hospitals and clinics do not perform abortions on religious grounds—passing up their potential piece of this significant revenue stream.¹⁹ Or consider the case of adoption. In at least two states (Illinois and Massachusetts), Catholic Charities have shut down their adoption agency services, rather than violate their religious principles by placing children with same-sex couples as required by a change in law—turning down millions of dollars of revenue in the process.²⁰

¹⁴ See Lyman Johnson, *Corporate Law Professors As Gatekeepers*, 6 U. ST. THOMAS L.J. 447, 450 (2009) ("[N]o law requires that businesses pursue only the goal of corporate profit or the goal of investor wealth maximization.").

¹⁵ See *id.*

¹⁶ "This observation was made by Edward Thurlow, Lord Chancellor of England, 1778-1792 and quoted by Terence Powderly in an article that appeared in the Southland Times on September 3, 1888." Lyman Johnson, *Law And Legal Theory In The History Of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1141 n.21 (2012).

¹⁷ Usha Rodriguez, *Entity and Identity*, 60 EMORY L.J. 1257, 1320 (2011). What distinguishes a non-profit organization from a for-profit one is the inability of a non-profit to distribute its profits to owners outside of the organization. See *id.*

¹⁸ See Justin D. Heminger, *Big Abortion: What The Antiabortion Movement Can Learn From Big Tobacco*, 54 CATH. U. L. REV. 1273, 1295 (2005).

¹⁹ See Katherine A. White, *Crisis Of Conscience: Reconciling Religious Health Care Providers' Beliefs And Patients' Rights*, 51 STAN. L. REV. 1703, 1705 (1999).

²⁰ See Patricia Wren, *Catholic Charities Stuns State, Ends Adoption*, BOSTON GLOBE (March 11, 2006), http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/; Many A. Brachear, *Catholic Charities of Rockford ends foster care, adoption services*, CHICAGO TRIBUNE (May 26, 2011), http://articles.chicagotribune.com/2011-05-26/news/ct-met-rockford-catholic-charities-st20110526_1_catholic-charities-adoption-services-care-and-adoption.

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But for-profit examples exist as well. Chick-Fil-A, for example, famously closes its restaurants on Sundays in keeping with its commitment to biblically based principles.²¹ Less well known examples exist as well. “Hobby Lobby” is an Oklahoma-based craft store, with over 500 locations nationwide. Its declared statement of purpose commits its Board to:

Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.

Offering our customers an exceptional selection and value.

Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.

Providing a return on the owners’ investment, sharing the Lord’s blessings with our employees, and investing in our community.

We believe that it is by God’s grace and provision that Hobby Lobby has endured. He has been faithful in the past, we trust Him for our future.²²

Another example would be “Hercules Industries.” This 265-person HVAC manufacturer is owned and operated by a family deeply devoted to its Catholic faith, and “is managed with an eye toward the holistic well-being of its employees” (as per Catholic social teaching on the responsibility of business).²³ According to its owner-operators, Catholic principles permeate the operations of the company.²⁴

These businesses do not merely permit the consideration of religious values and beliefs to influence corporate decision making—they require it. Moreover, they do not admit any and all religious perspectives to bear upon their operations, but rather only particular ones—“biblically” based beliefs in the case of Chick-Fil-A and Hobby Lobby, Catholic-based beliefs in the case of Hercules Industries. One can certainly imagine similar companies predicated upon and managed pursuant to the principles and beliefs of other religious traditions as well. Thus, here we have a set of companies that are not simply religiously sensitive, nor simply open to generalized, religiously based concerns in managerial decision making. We have instead companies that are themselves intrinsically religious—companies that are guided by specific religious principles and conduct themselves in accordance with such principles.

II. WHY A RELIGIOUS BUSINESS CORPORATION?

Having identified and defined the religious business corporation, why should such an entity exist? At least two reasons can be given.

²¹ See *Who We Are*, CHICK-FIL-A (2016), <https://www.chick-fil-a.com/About/Who-We-Are>.

²² See *Our Story*, HOBBY LOBBY, <https://www.hobbylobby.com/about-us/our-story> (last visited Dec. 16, 2017).

²³ See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012).

²⁴ See *id.*

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The first is that the religious business corporation could be part of the solution to many of the problems plaguing business. Critics have long bemoaned the tendency of business to put “profits before people,” and to engage in a variety of unethical practices in efforts to bolster their bottom line. As noted previously, there is good reason to believe that religious business executives may behave better.²⁵ These findings are admittedly controversial, but upon reflection, not difficult to accept. A religious person, almost by definition, subscribes to a set of beliefs and values beyond simply those circumscribed by his or her job description. It stands to reason, therefore, that a religious individual would be both equipped and particularly amenable to a critique of the demands of his or her employment, as the religious individual has available to him a set of norms by which his corporate obligations can be independently evaluated. Certainly, the means and ability to apply an independent moral and ethical assessment to one’s work is not unique to those who happen to be religious. Indeed, anyone with deeply held moral or ethical principles is similarly equipped. But in the studies previously mentioned, we are not comparing religious individuals with otherwise ethical, non-religious individuals—we are comparing religious individuals against everyone else. “Everyone else” includes those individuals who are immoral, amoral, or only weakly moral. Not surprisingly, a subset of individuals with serious moral and ethical convictions (namely, religious individuals) outperforms the population at large when it comes to navigating questions of moral and ethical dimension. By encouraging religious business corporations via explicit constitutional protection, we foster the creation and growth of corporations that balance the pursuit of profits with serious attention to the morals and ethics of business.

The second, and perhaps far more important reason to welcome the religious business corporation is that recognition and support of such entities fulfills a natural and genuine human yearning.

Although the combination of faith and work rings odd to many 21st Century ears, such combination was arguably the normal state of affairs for the vast majority of human existence. Traditionally, family, faith, and work largely overlapped, with no clear boundaries separating one from the other.²⁶ Work was largely agricultural, and performed at home. In place of state regulation, such as a government-set minimum wages and laws prescribing maximum working hours, there were (in Europe, at least) religious rules setting aside days of rest, days of fast, and days of feasting.²⁷ Work—just as life in general—was subject to, if not simply part and parcel, of religion.

And this was not strictly a Christian, European phenomenon. Non-European cultures can be found in which a separate word for “work” (in the sense of “employment”) is completely lacking.²⁸ This is because no clear distinction between one’s “work” responsibilities and one’s other obligations is recognized.²⁹

²⁵ See Taghavi, *supra* note 1; Case & Chavez, *supra* note 2.

²⁶ See EILEEN POWER, *MEDIEVAL PEOPLE* 1-24 (1924).

²⁷ See *id.*

²⁸ HERBERT APPLEBAUM, *THE CONCEPT OF WORK* 9 (1992).

²⁹ See *id.*

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Moreover, for many, work itself was infused with religious meaning and import. Hence we have handed down to us St. Benedict's 6th Century motto "*Laborare orare est*" ("to work is to pray").³⁰

The Industrial Revolution of the 18th Century changed all this. For the Revolution brought about mass urbanization, which removed a large number of people from their homes (both in terms of their ancestral homelands and their places of their actual abode).³¹ No longer was work intertwined with faith and family—work had become separated out of the traditional mix. Further, work had become "seculariz[ed]", to the "complete inversion of the everyday sense of religion" that had formerly prevailed.³² As one commentator explained: "In industrialized cultures, the world of work is separated and divorced from the home, family life, religious life, and other diverse activities of citizens."³³ (Emile Durkheim famously explained how this phenomenon has given rise to a state of "anomie" that permeates the modern era—normlessness and estrangement.³⁴)

Thus, the phenomenon of the religious business corporation largely represents a return to an earlier era: an era when individuals were not compelled to compartmentalize the most important aspects of their lives into separate spheres of arguably artificial creation. To an era when people could realize a more integrated existence. For many, the prospect of such an integrated life appeals to them as more honest and fulfilling—especially to many of those with deep-seated religious convictions. Although this is true for many workers, it is especially true for corporate officers and directors, whose very identities are often tied very closely to the companies they serve.³⁵

The yearning of an integrated existence extends beyond simply religiously devout entrepreneurs, management, and workers, however. It extends to investors, who are increasingly looking to invest their money in businesses that share their most deeply held values—including their religious values.³⁶ And it extends to customers, who, similarly, are increasingly looking to patronize those companies that respect—rather than affront—their religious beliefs.³⁷

³⁰ See Alain Supiot, *Orare / Laborare*, 30 COMP. LAB. L. & P. 641, 641-42 (2009).

³¹ Gerben J. N. Bruinsma, *Urbanization and Urban Crime: Dutch Geographical and Environmental Research*, 35 CRIME & JUST. 453, 467 (2007).

³² See Supiot, *supra* note 30, at 644, 646.

³³ See Applebaum *supra* note 28, at 9.

³⁴ See Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 67-70 (2001) (citing EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1893)).

³⁵ See Colombo, *supra* note 11, at 42.

³⁶ See BENJAMIN J. RICHARDSON, *SOCIALLY RESPONSIBLE INVESTMENT LAW* 111-120 (2008); see also GEORGE P. SCHWARTZ, *GOOD RETURNS* 8-18 (2010) (distinguishing between "socially responsible investing" and "morally responsible [faith-based] investing.").

³⁷ E.g. Christine Girardin, *Religion, profit mix downtown*, DAYTONA NEWS-JOURNAL (Mar. 14, 2004), [http://nl.newsbank.com/nl-search/we/Archives?p_product=NJ&p_theme=nj&p_action=search&p_maxdocs=200&p_field_label=0=Author&p_text_label=0=Christine%20Girardin&s_dispstring=source\(Christine%20Girardin\)%20AND%20date\(3/14/2004%20to%203/16/2004\)&p_field_date=0=YMD_date&p_params_date=0=date:B,E&p_text_date=0=3/14/2004%20to%203/16/2004\)&xcal_numdocs=50&p_perpage=25&p_sort=YMD_date:D&xcal_useweigh ts=no](http://nl.newsbank.com/nl-search/we/Archives?p_product=NJ&p_theme=nj&p_action=search&p_maxdocs=200&p_field_label=0=Author&p_text_label=0=Christine%20Girardin&s_dispstring=source(Christine%20Girardin)%20AND%20date(3/14/2004%20to%203/16/2004)&p_field_date=0=YMD_date&p_params_date=0=date:B,E&p_text_date=0=3/14/2004%20to%203/16/2004)&xcal_numdocs=50&p_perpage=25&p_sort=YMD_date:D&xcal_useweigh ts=no).

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Thus, the religious business corporation provides an opportunity to entrepreneurs, directors, officers, employees, investors, customers, and other constituencies to create and coalesce around an institution that shares and serves their most cherished values. It provides all these individuals with an opportunity to build, direct, work for, invest in, and patronize a company that is consistent with their beliefs. It allows them to fully participate in the private sector, and the marketplace, without having to set aside or compromise their religious principles. In short, it relieves them of having to choose between livelihood or faith, commerce or religion.

III. WHY WOULD A RELIGIOUS BUSINESS CORPORATION NEED THE PROTECTIONS OF THE FIRST AMENDMENT PROTECTION?

Among the countless incorporated businesses in the United States, the religious business corporation is certainly a *rara avis*. But, absent the protections of religious liberty enshrined in the Constitution, it would be threatened with complete extinction. For without these protections, little stands in the way of ill-considered rules and regulations that would undermine the corporation's religious character. Moreover, little stands in the way of downright, blatant discrimination against the entity on the part of government officials.

Consider something as basic as Title VII—the federal law that generally outlaws employment discrimination.³⁸ Employment discrimination is, of course, ordinarily a very bad thing—and one that Congress rightfully sought to eliminate with Title VII. That said, it would be ridiculous to prevent a Jewish Temple from hiring a rabbi that was actually Jewish—or for a Catholic school from hiring a religion teacher who was actually Catholic. Recognizing this, Title VII understandably provides a partial exemption for “religious organizations,” permitting them to take religion into account in their hiring decisions.³⁹

The same logic, however, would apply to a religious business corporation. A business that wished to operate in accord with the religious beliefs and principles of a particular religious tradition might reasonably need to take an applicant's religion into account when making hiring decisions. Title VII's exemption for “religious organizations” has not, however, been extended to for-profit enterprises.⁴⁰ This deprives them of the ability to construct the workplace environment and corporate culture that best comports with their religious vision—an ability and right that their non-profit counterparts possess.

Some state anti-discrimination legislation has gone a step further than Title VII. Consider the “Worker Freedom from Employer Intimidation Act” (New Jersey) and “Worker

³⁸ 42 U.S.C. §§ 2000e-2000e-17 (2017).

³⁹ See Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims*, 2 NEV. L.J. 86, 91 (2002) (quoting Pub. L. No. 88-352, §702, 1964 U.S.C.C.A.N. 287, 304 (78 Stat.) 241).

⁴⁰ The definition of what constitutes a “religious organization” for purposes of Title VII is fairly narrow, and ascertained by the courts on a case-by-case basis inquiring into the source of the organization's funding and the character of the organization's activities. See Jon D. Michaels et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 218 (2002). It has not been interpreted to include for-profit entities independent of any particular church or religious institution. See Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption For Religious Organizations*, 11 ENGAGE J. 4, 4 n.4 (2010).

Freedom Act” (Oregon).⁴¹ These Acts make proselytization in the workplace (a broadly defined term that could include simply the posting of a religious image) an intentional tort.⁴² This effectively precludes the creation of a religiously distinct workplace.⁴³ Of course, these acts also carve out an exemption for religious organizations, but this exemption is limited to religious non-profit and charitable organizations.⁴⁴ No similar exemption exists to cover for-profit corporations that embrace a genuine religious identity.

Title VII and the worker freedom acts are but two examples of government action that impede the development of religious business corporations. Many other examples exist as well. The most (in)famous was provided by the “contraceptive mandate” promulgated by the Department of Health and Human Services, pursuant to the Affordable Care Act of 2010 (“ObamaCare”).⁴⁵ Because of this mandate, employers are required to purchase health insurance policies for their employees that cover contraceptives, abortifacients, and sterilization.⁴⁶ As many religious traditions oppose these products and practices, the mandate sparked a lawsuit brought by dozens of religiously affiliated charitable and non-profit employers.⁴⁷ They maintained that the government should not be able to force them (or anyone, for that matter) to purchase a product or service that conflicts with their religion.⁴⁸ Receiving, initially at least, less attention were the companion cases filed by three religiously oriented for-profit business corporations on the very same grounds.⁴⁹ These companion cases highlight the reason why religious business corporations need the religious liberty protections enshrined in the First Amendment.

For in the cases brought by religiously affiliated charities and non-profit organizations, the claimants are able to assert the protections contained in First Amendment’s Free Exercise Clause—along with the protections contained in the Religious Freedom Restoration Act (“RFRA”) (passed by Congress in 1990 to broadly and robustly implement the First Amendment’s protections).⁵⁰ As will be explained below, this does not guarantee that these claimants will prevail.⁵¹ But what it does guarantee is that plaintiffs will have an opportunity to present their religious freedom claims to an Article III judge for a full and thorough vetting. Plaintiffs will, as the saying goes, ultimately have their day in court. The

⁴¹ See Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 115 (2010).

⁴² See *id.*

⁴³ See Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1720-21 (2008).

⁴⁴ *Questions and Answers: Religious Discrimination in the Workplace*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (Jan. 31, 2011), https://www.eeoc.gov/policy/docs/qanda_religion.html.

⁴⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (noting the regulations thereunder, particularly the “contraceptive mandate” promulgated by the Department of Health and Human Services pursuant to the Act); see also 77 Fed. Reg. 8725-30 (Feb. 15, 2012).

⁴⁶ See Patient Protection and Affordable Care Act, *supra* note 45.

⁴⁷ See Mary Ann Glendon, *Why the Bishops Are Suing the U.S. Government*, WALL ST. J., May 22, 2012, at A17.

⁴⁸ See *id.*

⁴⁹ See *Newland*, 881 F. Supp. 2d at 1292; *O’Brien v. United States HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

⁵⁰ 42 U.S.C. §2000bb-1(a) (2006).

⁵¹ See *infra* Part IV.

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judiciary will play its role, and properly adjudicate the issue—determining whether the legislation in question goes beyond the powers granted to the government under the U.S. Constitution by infringing upon religious freedom.

But in the cases brought by the for-profit businesses, a significant threshold question was raised. In those cases, the government (in its defense of the mandate) has asserted that the claimants lacked the ability to invoke the First Amendment (and RFRA) altogether.⁵² The government took the position that the protections contained therein were simply inapplicable to business corporations—that there is no such thing as religious liberty when it comes to a for-profit enterprise, regardless of how sincerely devoted to a particular set of religious values and principles they may be.

The implications of the government's position are far reaching. To appreciate how far reaching, we need to address the understanding of religious freedom in the United States, and the protections adopted to protect it.

IV. RELIGIOUS LIBERTY UNDER THE FIRST AMENDMENT AND THE RELIGIOUS FREEDOM RESTORATION ACT

Well over one hundred years ago, it was remarked that the United States' approach to religious liberty is the "great gift of America to civilization and the world."⁵³ Forged from the fires of religious strife and persecution in the Old World, and championed by religiously zealous pilgrims seeking a promised land in which to practice their faiths in peace and tranquility, the American treatment of church and state was a remarkable development in the history of humankind.⁵⁴ The citizens of the newly formed American republic achieved and experienced a degree of religious freedom unknown to the vast majority of their European contemporaries.⁵⁵

This was accomplished by denying the newly formed American state competence over matters concerning religion and the church.⁵⁶ Religious institutions would not have a formal role in the United States government, but the government would lack authority over religion and religious institutions as well. This was largely the work of the "Establishment Clause" of the First Amendment.⁵⁷

Further still, according to some leading scholars, religious conscience and exercise was deemed so sacrosanct that even laws of general applicability—laws without any focus on

⁵² See *Newland*, 881 F. Supp. 2d at 1292; *O'Brien*, 894 F. Supp. 2d at 1157; *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1403.

⁵³ Christopher Marsh & Daniel P. Payne, *The Globalization Of Human Rights And The Socialization Of Human Rights Norms*, 2007 B.Y.U. L. REV. 665, 683 (2007) (quoting SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 2 (1902)); see also Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 222 (1993) ("Religious liberty is one of America's great contributions to civilization."); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 107 (1993).

⁵⁴ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990) [hereinafter McConnell, *The Origins*].

⁵⁵ See *id.*

⁵⁶ See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 135-37 (1992) [hereinafter McConnell, *Religious Freedom*].

⁵⁷ See Carl H. Esbeck, *The Establishment Clause As A Structural Restraint On Governmental Power*, 84 IOWA L. REV. 1, 97-110 (1998); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

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religion *per se*—would yield to the institution or individual whose religion was infringed thereby.⁵⁸ This was in keeping with America's history as a nation founded, in large part, by pilgrims fleeing persecution—pilgrims who set up their own communities and wanted to be left alone.⁵⁹ This achievement was accomplished via the “Free Exercise Clause” of the First Amendment.⁶⁰

In crafting the Free Exercise Clause, the framers eschewed a formulation that referred to religious “tolerance” or mere freedom of “conscience.”⁶¹ For tolerance, as James Madison and others pointed out, implies a mere “act of legislative grace.”⁶² Religious liberty, as the American Declaration of Independence points out, is not a concession granted by the state, but rather a natural, fundamental right with which each individual is “endowed by their Creator.”⁶³

Additionally, the protecting of conscience alone was deemed too narrow.⁶⁴ The American colonists were well aware that even Elizabethan England, with its legendarily cruel and severe persecution of Catholics and non-Anglican dissenters, arguably permitted freedom of thought and conscience.⁶⁵ And in ancient Rome, too, the faithful “were seldom persecuted in Rome for *believing* in Christianity—they suffered oftenest for *acting* it.”⁶⁶

Thus, in place of language establishing simply religious “tolerance,” or merely the protection of one’s right to “belief” and “conscience,” the framers instead turned to the much broader language of Virginia’s state constitution, which guaranteed “the full and free exercise of religion.”⁶⁷ From this language the Free Exercise Clause was derived.⁶⁸

That said, every constitutional right has its limits. Even the right to religious liberty, as enshrined in the Free Exercise Clause, and structurally protected by the Establishment Clause, cannot be without parameters. Over the years, the U.S. Supreme Court, along with the lower courts, have worked to delineate the boundaries of conduct that receives protection under the First Amendment from conduct that does not. The current jurisprudential landscape is defined by two important Supreme Court cases: *Employment Division v. Smith*⁶⁹ and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁷⁰

In the 2012 case *Hosanna-Tabor*, the Supreme Court resoundingly affirmed the autonomy of religious organizations.⁷¹ A unanimous, 9-0 Court rejected the government’s

⁵⁸ See McConnell, *The Origins*, *supra* note 54, at 1515-16. The only exception would be for religious conduct and practices that disturbed the public peace or safety. See *id.* at 1466.

⁵⁹ See THOMAS A. BAILEY, *THE AMERICAN PAGEANT* 16-18, 23-28 (1966).

⁶⁰ See McConnell, *The Origins*, *supra* note 54, at 1515-16; U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

⁶¹ See McConnell, *The Origins*, *supra* note 54, at 1443; Michael W. McConnell, *Establishment and Disestablishment at the Founding*, 44 WM. & MARY L. REV. 2105, 2160 (2003) [hereinafter McConnell, *Establishment*].

⁶² See McConnell, *The Origins*, *supra* note 54, at 1444.

⁶³ THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

⁶⁴ See McConnell, *Establishment*, *supra* note 61, at 2160.

⁶⁵ See *id.*

⁶⁶ 1 JOHN P. DAVIS, *CORPORATIONS* 36 (1905) (emphasis added).

⁶⁷ See McConnell, *The Origins*, *supra* note 54, at 1443.

⁶⁸ See *id.*

⁶⁹ 494 U.S. 872 (1990).

⁷⁰ 565 U.S. 171 (2012).

⁷¹ See *id.*

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assertion that it could apply its employment laws to a religiously affiliated private school without exception.⁷² In so doing, the Court relied upon the longstanding “ministerial exception” doctrine, pursuant to which the government cannot interfere with the personnel decisions of a “religious organization” when it comes to the hiring or firing of “ministers.”⁷³

The Court in *Hosanna-Tabor* explicitly left open the question of what exactly constitutes a “minister” for the purpose of the exception.⁷⁴ It did stress, however, that the performance of “secular” duties in conjunction with religious duties does not prohibit an individual from being deemed a “minister” for purposes of the exception.⁷⁵ Indeed, in *Hosanna-Tabor*, the individual found to be a minister (a teacher) had “religious duties [that] consumed only 45 minutes of each workday, and ... the rest of her day was devoted to teaching secular subjects.”⁷⁶ Similarly, the Court declined to define the contours of what constitutes a “religious institution” or “religious organization”—it was simply presumed under the facts of the case and merited no discussion.

In *Employment Division v. Smith*, decided more than a decade prior to *Hosanna-Tabor*, a sharply divided 5-4 Court held that a law of general applicability does not ordinarily yield when confronted with an alleged infringement of an individual’s free exercise of religion.⁷⁷ Contrary to the understanding of many scholars in the area, the Court decided that in such situations, the law in question need merely be justified by the lenient “rational basis” test in order to survive judicial scrutiny.⁷⁸ The Free Exercise Clause operates with greater vigor, the Court explained, if the law or regulation in question directly targets religious belief or behavior. Under those circumstances, the law would ordinarily be struck down as repugnant to the Constitution.⁷⁹

The *Smith* decision gave rise to a broad and substantial outcry by those who believed it misconstrued precedent and the framers’ original intent.⁸⁰ For many had assumed, and past case law had suggested, that even a law of general applicability could be successfully challenged on free exercise grounds.⁸¹ Critics maintained that such laws, if they substantially burdened an individual’s free exercise of religion, could not be enforced against such individual unless they passed the “compelling governmental interest” test.⁸² Under this test, the government would be required to demonstrate that the challenged law or regulation served

⁷² See *id.*

⁷³ See *id.* at 180-81.

⁷⁴ See *id.* at 188-89.

⁷⁵ See *id.* at 193.

⁷⁶ *Id.*

⁷⁷ 494 U.S. 872, 879 (1990).

⁷⁸ See *id.*; see also *Grace United Methodist Church v. Cheyenne*, 451 F.3d 643, 649 (2006).

⁷⁹ See *Smith*, 494 U.S. at 878-79. Although silent as to the test to be applied in such situations, in a later case the Court confirmed that it would be the “compelling government interest” test. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Under this test, a claimant would prevail (thereby procuring relief from the law or regulation in question) unless the government could demonstrate a compelling interest in enforcement—coupled with means taken that were the least restrictive available (in terms of their burden on the exercise of religion). See *id.*

⁸⁰ See Thomas D. Dillard, *The RFRA: Two Years Later And Two Questions Threaten Its Legitimacy*, 22 J. CONTEMP. L. 435, 435 (1996).

⁸¹ See *id.*

⁸² See *id.* at 444.

a compelling government interest, and was narrowly drawn so as to encroach upon religious practice in the least restrictive way possible.⁸³

The critics of the *Smith* decision prevailed upon Congress, which overwhelmingly passed the Religious Freedom Restoration Act in 1992.⁸⁴ RFRA “restored” the law to where critics contended it was prior to *Smith*: pursuant to RFRA, even a law of general applicability would yield when challenged as substantially burdening an individual’s (or group’s) religion, unless it passed the compelling government interest test.⁸⁵

This understanding of religious freedom (and how it is protected by law in the United States) helps fully frame the issue of corporate religious-liberty rights. If business corporations are precluded from asserting First Amendment claims against government action, they are effectively stripped of the ability to adopt religious principles and values, and to conform their operations to such principles and values. For any such attempts on their part would be at the mercy of the government. We have already considered the “contraceptive mandate,” which would have required businesses with religious objections to contraception, abortion, and sterilization to nevertheless offer health insurance plans to their employees that subsidized these products and practices.⁸⁶ But several other examples can be imagined—for even a seemingly innocuous regulation could seriously undermine a corporation’s credibility and mission as a religiously serious organization. Consider a potential government regulation requiring that all corporate cafeterias serve pork on a regular basis, due to some purported health benefit for doing so. Such a regulation would do violence to the principles and practices of a business that was being operated according to Orthodox Jewish or Muslim principles. Or consider a regulation requiring a particular type of business to remain open seven days a week as a condition of licensing. Many religions prohibit work on the Sabbath, and such a regulation would force a religiously based corporation subject to such regulation to either compromise its religious principles or shut down. Absent standing to bring a claim under the First Amendment, absolutely no judicial recourse on religious liberty grounds would be available to such businesses.

Worse, depriving a corporation of the First Amendment’s protections would make it subject to even blatant religious discrimination on the part of government officials. Consider, for example, the promulgation of a higher corporate tax rate for any business corporation that adopted the religious values of a particular faith. For example, a 10% surcharge on any business corporation that, in its charter or otherwise, professed adherence to Islamic religious principles. Were the First Amendment considered inapplicable to business corporations, no

⁸³ This view was articulated, among others, by the dissenting justices in *Smith*. See *Emp’t Div. v. Smith*, 494 U.S. 872, 907 (1990). (Blackmun, J. dissenting).

⁸⁴ 42 U.S.C. §2000bb-1(a) (2006).

⁸⁵ See *id.* RFRA was subsequently challenged as unconstitutional. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response to this challenge, the courts have upheld RFRA’s applicability to federal action, but struck down RFRA as unconstitutional when applied to state action. Nadia N. Sawicki, *The Hollow Promise Of Freedom Of Conscience*, 33 CARDOZO L. REV. 1389, 1412 (2012). Complicating matters further is that in the wake of this development, some states, but not all, adopted their own versions of RFRA. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look At State RFRA’s*, 55 S.D. L. REV. 466, 474-77 (2010). As a result, today the compelling government interest test is applied to federal action that substantially burdens religion, but only to state action if the state in question has adopted its own version of RFRA (or if its own constitution contains a free exercise clause that has been interpreted differently than the one contained in the First Amendment). See *id.*

⁸⁶ See *supra* notes 45-50 and accompanying text.

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affected corporation would have standing to challenge this blatantly discriminatory provision as an assault on religious liberty. There may be other avenues to attack such a tax, but none would offer the clarity and robust protections of allowing the corporations themselves to bring suit under the First Amendment.

V. BURWELL V. HOBBY LOBBY

As discussed, there are good reasons why the First Amendment's religious liberty clauses ought to apply to the religiously oriented business corporation. Unfortunately, until quite recently, it was not clear whether the religious protections of the First Amendment did in fact apply to a business corporation. To a large extent, the Supreme Court appears to have resolved the question in its 2014 decision, *Burwell v. Hobby Lobby*.

In *Burwell*, the Supreme Court considered the aforementioned challenge to the "contraceptive mandate" brought by three for-profit businesses.⁸⁷ Each of the plaintiffs argued that adherence of the mandate would cause them to violate important, deeply held religious beliefs.⁸⁸ Consequently, plaintiffs asserted that the contraceptive mandate violated the Free Exercise Clause and/or RFRA.⁸⁹

As might be expected, the Court eschewed a decision on the constitutional question, and instead held in favor of the plaintiffs by reference to RFRA.⁹⁰ The Court also limited its holding to closely held business corporations, as that was the nature of the parties before it.⁹¹ But the Court's reasoning, on a number of levels, supports a finding that the same outcome would have transpired were the case decided strictly under the First Amendment.⁹²

Significantly, the Court's majority had little trouble finding that plaintiffs' opposition to the contraceptive mandate genuinely implicated the "exercise of religion."⁹³ As Justice Alito, writing for the majority, pointed out, this finding could not be reasonably challenged on the basis of plaintiffs' corporate status, for the government readily conceded that nonprofit corporations could be protected by RFRA.⁹⁴ Thus, corporate status alone should not be determinative.

The other grounds for denying plaintiffs the protections of RFRA, the distinction between nonprofit versus for-profit enterprises, was similarly found to be unavailing.⁹⁵ For Supreme Court precedent had long recognized the free exercise rights of for-profit, unincorporated business entities.⁹⁶

Finally, nothing magical happens when these two non-dispositive characteristics (the plaintiffs' corporate status and their for-profit objectives) are combined. Referring to developments in corporate law articulated previously, the Court observed that modern

⁸⁷ See 134 S. Ct. 2751, 2785 (2014).

⁸⁸ *Id.* at 2778.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2785.

⁹¹ *Id.*

⁹² The Court's reasoning also suggests, although less forcefully, that the same result would apply to a business corporation that was not necessarily closely held. See generally *id.*

⁹³ 134 S. Ct. at 2769.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

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corporate law does not require a for-profit, business corporation to maximize profits at all cost;⁹⁷ other considerations, including religious considerations, may lawfully influence its decision making.⁹⁸

VI. INTERNATIONAL PERSPECTIVES

With its experiment in ordered liberty, particularly with regard to the issue of religious freedom, the United States has contributed significantly to modernity's understanding of human rights.⁹⁹ Indeed, "[i]t has been said that religious liberty is the 'great gift of America to civilization and the world.'"¹⁰⁰ Thus, to the extent that the Supreme Court's decision in *Hobby Lobby* might be an outlier internationally—a frontier in the recognition of religious freedom, that would be neither surprising nor unusual given the United States' unique history and role in world affairs. Arguably, however, this is not the case.¹⁰¹ For around the world, as in the United States, the building blocks of corporate religious liberty have already been widely embraced: (1) an appreciation of the associational dimension of religious liberty, and (2) an appreciation that human rights ought not to be limited to natural persons alone, but can extend to "juridical persons" such as corporations. Moreover, developments in a few countries have actually served as harbingers of *Hobby Lobby* on the international stage.

Nearly 70 years ago, the obviously communal and public dimension of religious freedom was recognized in the Universal Declaration of Human Rights, adopted by the United Nations in 1948.¹⁰² As Article 18 of the Declaration proclaims:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, *either alone or in community with others and in public or private*, to manifest his religion or belief in teaching, practice, worship and observance.¹⁰³

Thus, contrary to those who would parsimoniously relegate religious freedom to the narrow confines of one's temple or the privacy of one's home (commonly under the

⁹⁷ *Id.*

⁹⁸ *Id.*; see *supra* text accompanying notes 14-15.

⁹⁹ See John Witte, Jr. & Joel A. Nichols "Come Now Let Us Reason Together": *Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 444 (2016).

¹⁰⁰ Marsh & Payne, *supra* note 53 at 687 (quoting SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 2 (1902)).

¹⁰¹ Much of what follows in this section, including the authorities cited herein, hail from a superb amicus brief filed with the Supreme Court in the *Hobby Lobby* case by the International Center for Law and Religion Studies. See generally Brief for Hobby Lobby Stores, Inc. et al. as Amici Curiae Supporting Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (Nos. 13-354, 13-356). In addition to 27 comparative law and religion scholars, this amicus brief was signed by several prominent foreign and/or international institutions: Asociacion para la Promocio y el Estudio de la Libertad Religiosa (Spain), Centro de Libertad Religiosa (Chile), Consorcio Latinamericano de Libertad Religiosa (South America), European Centre for Law and Justice (France), Oxford Society for Law and Religion (England), Law and Religion Chair (Belgium), Real Academic de Jurisprudencia y Legislacion de Espana (Spain). *Id.*

¹⁰² See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁰³ *Id.* at Art. 18 (emphasis added).

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appellation “freedom of worship”¹⁰⁴), the modern understanding of religious liberty is much broader. The modern understanding (which was, in large part, ushered in by, and comports well with, the original understanding of the Free Exercise Clause as previously discussed¹⁰⁵) recognizes that the freedom of religion must include not merely worship, but also teaching, practice, and observance as per the dictates of one’s conscience. As such, internationally, few (if any) modern, Western nations question the religious liberty rights of groups and organizations—even groups and organizations that are not religious communities *per se*.¹⁰⁶

The courts of many nations have also acknowledged that, in order to effectively safeguard and protect individual liberty, it is essential to recognize that, at least in some circumstances, basic human rights must be afforded to groups of individuals as well—even if these groups take the form of a for-profit business corporation.¹⁰⁷ International organizations, too, such as the UN Human Rights Committee, the American Commission on Human Rights, and the European Court of Human Rights, have recognized the propriety of corporate invocations of human rights.¹⁰⁸

Finally, in a foreshadowing of the *Hobby Lobby* decision, there has been growing support among foreign courts and legislators for tying these two strands together, and recognizing the religious liberty rights of for-profit entities and corporations.

In *Kustannus Oy Vapaa Ajatteliija AB and Others v. Finland*, the European Commission on Human Rights remarked that “the general right to freedom of religion” would “not exclude” claims brought by an LLC publishing company maintained by the Freethinker’s Association.¹⁰⁹ Germany’s Federal Constitutional Court, likewise, held that “there are no doubts” that a religious hospital, organized as an LLC, could assert religious freedom rights.¹¹⁰ Similar examples hail from Switzerland¹¹¹, France¹¹², Spain¹¹³, and Italy¹¹⁴.

Via statute, corporate religious and/or conscience rights have been protected in the United Kingdom¹¹⁵, Italy¹¹⁶, Argentina¹¹⁷, and the Netherlands¹¹⁸. Many of these are within

¹⁰⁴ See Eugene R. Milhizer, *The Morality and Legality of the HHS Mandate and the “Accommodations”*, 11 AVE MARIA L. REV. 211, 212-13 (2013).

¹⁰⁵ See *supra* text accompanying notes 60-68.

¹⁰⁶ See *Rommelfanger v. Germany*, App. No. 12242/86, 86 Eur. Comm’n H.R. Dec. & Rep. 195 (1989).

¹⁰⁷ See Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at para. 57-58 (S.Afr.); Private law section, decision no. 12929 (4 June 2007) (Ct. of Cass.III) (Italy); BVerfGE 38, 281, 303 (1974); Triplex Safety Glass Co., Ltd. v. Lancegay Safety Glass, Ltd. [1939] 395 AC 409; Quebec v. Irwin Toy Ltd., [1989] S.C.R. 927 (Can. Que.); see also TK, 1975-1976, 13872, no. 3, p. 11 (explanatory statement attached to the Dutch Constitution acknowledging “[R]ights and claims also on corporate bodies . . . in so far as to do so can be meaningful with regard to the nature of the relevant basic right.”).

¹⁰⁸ See Marius Emberland, *The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights*, 4 HUM. RTS. L. REV. 261 (2004); EMBERLAND, THE HUMAN RIGHTS OF COMPANIES, 13-14.

¹⁰⁹ *Bundstrom v. Finland*, App. No. 20471/92, §1(b)(iii) Eur. Comm’n H.R. Dec. & Rep. 29, 43 (1996).

¹¹⁰ BVerfG, 2 BvR 208/76 Mar. 25, 1980.

¹¹¹ Bundesgericht [BGE] [Federal Supreme Court] Oct. 6, 1976, 102 Entscheidungen des schweizerischen Bundesgerichts [BGE] I 477 (Switz.).

¹¹² Cour d’appel [CA] [regional court of appeal] Laaouej, civ., Nov. 27, 2013, S13/02981.

¹¹³ S.T.C., June 12, 1996 (T.C., No. 106/1996) (Spain).

¹¹⁴ Racc. uff. corte Cost., 14 dicembre 1972, n. 195, 1972 (It.).

¹¹⁵ National Health Service (General Medical Services Contracts) Regulations 2004, SI 2004/291, Reg. 4, ¶ 7 (Eng.).

the field of healthcare, and as such the rights extended are limited in scope. Nevertheless, these still serve as examples of countries recognizing (albeit within limited parameters), the religious (or conscience) rights of for-profit business organizations.

VII. SOME CONCERNS

Although the argument in favor of extending the rights and protections of the First Amendment's religion clauses to the business corporation is, I suggest, quite compelling, I recognize that such an extension raises certain meritorious concerns.

Some may fear that such recognition would do little more than afford opportunistic, pre-textual, self-serving attempts on the part of business to evade undesirable law. Although this is possible, to date this has not been the case: in those cases where a business entity asserted religious liberty rights against government action, the record has either firmly established the strength and sincerity of corporate claimant's attachment to certain religious beliefs and convictions, or has been silent to this question because the case was decided on other grounds.¹¹⁹ Moreover, a threshold question in every First Amendment free exercise claim is the authenticity of the claimant's religious beliefs.¹²⁰ Thus, any corporation wishing to assert a free exercise claim would need first to demonstrate a very real commitment to the religious beliefs and conduct purportedly being encroached upon. To do so would require a history and record of statements and practices evidencing this commitment—not something that can be quickly fabricated for the purposes of litigation.

Another (and more significant) objection is the fear of employment discrimination. The fear that the ascendancy of religious business corporations would bring with it an escalation of workplace discrimination on the basis of religion.

This fear may be overstated. For genuinely religious business corporations need not necessarily restrict hiring and promotion to co-religionists. The "contraceptive mandate" cases are instructive here.¹²¹ None of the plaintiffs in those cases have sought relief from Title VII's requirement against religious discrimination. Instead, they sought relief from a

¹¹⁶ Legge 22 May 1978, n.194, Art. 8 (It.).

¹¹⁷ La Ley [L.L.] (Federal) No. 25.673 (Arg.).

¹¹⁸ Equal Treatment Law §§ 5(1)(a), 6a(2)(a).

¹¹⁹ See *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012) (crediting sincerity of claimant's religious beliefs); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 611, 614 (9th Cir. 1988); *Commack Self-Serv. Kosher Meats v. Hooker*, 800 F. Supp. 2d 405, 416 (E.D.N.Y. 2011) (finding that the challenged regulation "does not restrict any religious practice."); *Maruani v. AER Servs.*, No. 06-176 (MJD/AJB), 2006 U.S. Dist. LEXIS 66789 (D. Minn. Sep. 18, 2006) (not discussing sincerity of claimant's religious beliefs as compelling government interest was found); *Jasniowski v. Rushing*, 287 Ill. App. 3d 655, 658, 664-65, 678 (Ill. App. Ct. 1997) (crediting sincerity of claimant's religious beliefs); *Minnesota v. Sports and Health Club Inc.*, 370 N.W. 2d 844, 855-57 (Minn. 1985); *but see Womens Servs. P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979) (court rejected free exercise argument of abortion clinic because "plaintiffs have presented no evidence to indicate that a woman's obtaining of an abortion without the regulation imposed by this legislation would constitute [sic] a fundamental tenet of any religion. Therefore, the challenged regulation could not interfere with the practice of a fundamental religious tenet.").

¹²⁰ *Frazee v. Illinois Dep't of Empl. Sec.*, 489 U.S. 829, 834 (1989); see also Andy G. Olree, *The Continuing Threshold Test For Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 107 (2008).

¹²¹ See *Newland*, 881 F. Supp. 2d at 1292; *O'Brien v. United States HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

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law that would have them purchase products and services repugnant to their religious values.¹²² And this is not surprising, for a diverse workforce need not be an impediment to a company's religious beliefs and commitments. Such beliefs and commitments are honored not so much by whom a corporation might hire, but rather by what a corporation might do (in terms of how employees are treated, and what products and services are provided). With proper guidance and training, employees of most any background should be able to capably and reliably serve the vast majority of religiously oriented business corporations.

Nevertheless, it can be expected that some religiously oriented business corporations would insist on the indispensable need to base hiring and promotional decisions on a candidate's religious beliefs. Particular positions within the organization might be so sensitive to its religious mission that, as per the ministerial exception, the company could not practically maintain its distinctive religious identity by filling the position with a person of simply any religious background whatsoever (or none at all). In light of this need, they could be expected to seek an exemption from laws prohibiting such discrimination (such as Title VII).

Although many people today reflexively balk at such a proposition, a more thoughtful approach is advisable. As Rick Garnett has explained, "discrimination" is not, *per se*, problematic.¹²³ What is problematic is "wrongful" discrimination.¹²⁴ Such discrimination is usually predicated upon animus, or a desire to demean.¹²⁵ Very roughly put, wrongful discrimination could be summarized as discrimination "against" a particular group. Conversely, and again put very roughly, non-problematic discrimination could be summarized as discrimination "in favor" of a particular group.¹²⁶ As Garnett puts it:

It is entirely understandable, sensible, and unremarkable for a group that is devoted to a value, idea, or truth to limit its membership to those who are themselves so devoted. It does not usually demean a person, or call into question a person's equal worth, to exclude her from an association if she does not embrace the association's aims or reason for being.¹²⁷

Thus, to the extent that a particular business corporation can articulate a genuine need to engage in religiously based hiring, such a practice ought not to be decried as discrimination. Rather, it should be accepted as a legitimate manifestation of pluralism—especially in a society that so loudly champions diversity and pluralism.¹²⁸

¹²² See *Newland*, 881 F. Supp. 2d at 1292; *O'Brien*, 894 F. Supp. 2d 1149; *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278.

¹²³ See Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE 197, 197 (Austin Sarat, ed. 2012) (forthcoming, Cambridge Univ. Press), <http://www.ssrn.com/abstract=2087599>.

¹²⁴ *Id.*

¹²⁵ See *id.* at 202, 208.

¹²⁶ This "for" or "against" dichotomy reflects my own thinking, and is not purported to reflect the views of Garnett.

¹²⁷ See Garnett, *supra* note 123, at 219.

¹²⁸ See ROBERT VISCHER, CONSCIENCE AND THE COMMON GOOD 4-6 (2010); John Garvey, *Introduction to AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125 (2009).

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Further, even if we grant the legitimacy of religiously based hiring on the part of religious business corporations, we need not permit it under all circumstances. As Robert Vischer has explained, in such situations, a thoughtful balancing of rights and interests on a case-by-case basis is possible.¹²⁹ Recall that even free exercise rights have their limits: they must yield to a government law that is of compelling interest and narrowly tailored.¹³⁰ Whether this standard has been met can be determined factually, rather than theoretically. It can be determined via reference to the context and circumstances of each particular case.¹³¹ As with antitrust law, what is permissible for a given corporation to do may turn upon its relative power and importance within a particular market.¹³² Although this certainly entails a bit more work for our courts, given the rights and principles at stake, and the need to thoughtfully balance them, this appears to be a thoroughly fair and appropriate approach. Thus, the only major employer in a particular town may not have the same discretion in hiring on the basis of religion as an employer who is one out of many.

An analogous concern is that religious for-profit corporations might discriminate against potential customers. There have been widely publicized examples of this involving bakers and photographers who have refused to render their services for same-sex weddings,¹³³ but notably the number of such examples has been quite small. Thus, again, this potential problem may be overstated. Moreover, tellingly, in the cases that have made headlines, the businesses in question had no history of discriminating against individuals on account of protected status *per se*. In other words, the businesses involved had long histories of gladly serving individuals regardless of sexual orientation without complaint. Their religiously based objections arose only when asked to provide goods or services in connection with a same-sex wedding.¹³⁴ This is a distinction that, I suggest, significantly reduces the frequency with which religious exemptions will be sought by businesses to justify conduct that could be characterized as discriminatory. And, for the same reasons set forth above regarding concerns over employment discrimination, I suggest that in the face of a genuinely irreconcilable conflict between civil rights legislation and corporate religious liberty, a thoughtful approach forward be found in which all of the legitimate interests and actual harms of all parties involved be carefully weighed and balanced.¹³⁵

Finally, in considering these drawbacks of extending religious liberty protections to the religiously oriented corporation, we ought to recognize that such entities would undoubtedly remain the exception rather than the rule. Rare indeed would be the corporation that is prepared to alienate potential customers, vendors, and employees by adopting a

¹²⁹ See Vischer, *supra* note 128.

¹³⁰ See *supra* text accompanying notes 83-84.

¹³¹ See *id.*

¹³² See William M. Landes & Richard A. Posner, *Market Power In Antitrust Cases*, 94 HARV. L. REV. 937, 937-38 (1981).

¹³³ See Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 711 (2014).

¹³⁴ Barronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2015), <http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story> [<http://perma.cc/BU5V-ZS42>] (cited in Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas Nejaime and Reva Siegal*, 125 YALE L.J. FORUM 399, 412 n.65 (2016)).

¹³⁵ See, e.g., *An Antitrust Approach to Corporate Free Exercise*, __ St. John's L. Rev. __ (2018) (forthcoming).

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religious persona. Rarer still would be the corporation that could credibly maintain adherence to a code of religious beliefs—the predicate for asserting a free exercise claim. Even rarer still would be for such a corporation to come into being among the nation’s largest, publicly traded businesses. Indeed, only the most dedicated, most seriously devout entrepreneurs and businesspeople would want to pursue such a risky path, and jeopardize a significant amount of business, talent, and investment capital along the way.

VIII. CONCLUSION

The modern business corporation is one of the most important and influential institutions in society today. It provides a large portion of the products and services that individuals rely upon, and employs a large percentage of the population. It serves to generate economic returns that investors and institutions rely upon for a number of critical purposes. It also plays an important role between citizen and state, an intermediary institution that enables people to take on and accomplish privately extraordinary undertakings that are collective in nature but not under the direction of the state. Indeed, in many respects the corporation serves as a considerable counterweight to government power.

For these reasons and others, religious individuals have an interest in creating, joining, patronizing, and/or investing in corporations that share their values. Not unlike today’s environmentalists, who increasingly seek out “green businesses,” many people today seek out companies that share their particular religious principles. Corporations that not merely mouth platitudes, and try not to offend, but that genuinely embrace the beliefs and share the concerns that they do. For some people, who yearn to remain faithful to their religious beliefs in all that they do, the interest in such corporations comes closer to a need than a luxury.

So the question becomes whether there is a place for such people in our society. For, despite this article’s focus on the religious liberty rights of the business corporation, ultimately at stake here are the rights of flesh-and-blood human beings. If our Constitution is read to deny business corporations the right to invoke the First Amendment, then carved out from its protections would be incredibly important spheres of individual human activity. Countless daily choices would be effectively secularized, as individuals would be deprived of the ability to make these choices with, or within, an authentically religious corporation.

Particularly impacted would be work, as that is the activity that occupies most of the time of most people. Individuals wishing to conjoin their professional vocations with their religious values—who wish to combine faith and work, rather than compartmentalize the two—would essentially be relegated to the world of nonprofit organizations. Ironical it would be if such individuals, and others like them, felt compelled to leave America, like the pilgrims of yesteryear, in search of a land where they could live out their faiths freely and faithfully in the course of their daily and most significant activities.

