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### Corporate Entanglement with Religion and the Suppression of Expression

Ronald J. Colombo

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# Corporate Entanglement with Religion and the Suppression of Expression

*Ronald J. Colombo\**

## ABSTRACT

The power and ability of corporations to assert their First Amendment rights to the detriment of others remains both a controversial and unresolved issue. Adverting to relevant strands of existing jurisprudence and certain constitutionally relevant factors, this Article suggests a solution. The path turns upon the recognition that whereas some corporations are appropriately categorized as rights-bearing entities (akin to associations), others are more appropriately categorized as “entities against which the rights of individuals can be asserted.” Legislation, in the form of the draft “CENSOR” Act, is provided as a means by which to implement this categorization. What hopefully emerges is a regime that best effectuates the ideals of the First Amendment by maximizing the meaningful exercise of First Amendment rights by those individuals and entities most entitled to those rights.

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\* Professor of Law, Maurice A. School of Law at Hofstra University. I am indebted to the organizers and participants of the Adolf A. Berle Symposium on Corporation, Law and Society at the Seattle University School of Law for an extremely engaging discussion of a prior draft of this article and for the invaluable feedback received therefrom.

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## INTRODUCTION

A broad array of commentators share a common concern over the degree to which many modern business corporations have involved themselves in religious matters. Unfortunately, dialogue among these commentators has been impeded by a failure to recognize a root commonality of their concerns. As such, discussion regarding such concerns has generally proceeded piecemeal, rather than holistically; or, worse yet, as two ships passing in the night, without truly joining issue.

One camp of commentators has decried the advent of the religiously expressive business corporation: commercial enterprises that have explicitly embraced religious-based principles to help guide their operations.<sup>1</sup> Examples of these entities include Chick-Fil-A and Hobby Lobby; the former becoming a flashpoint in America's culture wars because of its Sunday closing policy and its founder's religious views on marriage,<sup>2</sup> the latter receiving widespread publicity in its successful fight

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1. E.g., Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 76 (2015).

2. See Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313, 324–30 (2014).

against the Affordable Care Act's "contraceptive mandate," predicated upon religious liberty grounds.<sup>3</sup>

Another camp of commentators has voiced concern over the degree certain corporations have suppressed the religious speech or expression of their workers,<sup>4</sup> restricted the articulation of unpopular beliefs on their social media platforms (whether religiously inspired or simply unpopular),<sup>5</sup> or forbade the sale of products deemed "offensive" (again, whether religiously inspired or merely politically incorrect for other reasons) on their marketplaces.<sup>6</sup> Once more adverting to the culture wars, included in these concerns would be, perhaps, corporate America's "War on Christmas," pursuant to which the time around December 25th is scrupulously referred to as everything but "Christmas" by many companies.<sup>7</sup>

3. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

4. See Kevin D. Williamson, *Kings of the Castle*, NAT. REV. (July 12, 2020), <https://www.nationalreview.com/2020/07/cancel-culture-suppresses-free-speech/> [https://perma.cc/4YNF-LX7M].

5. See *infra* notes 39–41 and accompanying text.

6. Apple's App Store has, for example, banned "an app from the Manhattan Declaration for sharing a Christian manifesto about 'the sanctity of human life and the dignity of marriage as a union of husband and wife.'" Jess Bolluyt, *15 Controversial Apps That Were Banned From Apple's App Store*, SHOWBIZ CHEATSHEET (Dec. 12, 2017), <https://www.cheatsheet.com/gear-style/kinds-of-apps-that-apple-has-banned-from-the-app-store.html> [https://perma.cc/D3JC-US53]; See also Craig Parshall, *Sheriff Needed for Silicon Valley's Wild West Censorship?*, NRB (July 11, 2019) (commenting on Amazon's decision to ban a book by the head of a Christian ministry because of its "intolerance" toward "sexual orientation" issues") <https://nrb.org/articles/sheriff-needed-for-silicon-valleys-wild-west-censorship/> [https://perma.cc/CF7F-XJM2]; CRAIG L. PARSHALL, THE JOHN MILTON PROJECT FOR RELIGIOUS FREE SPEECH, TRUE LIBERTY IN A NEW MEDIA AGE: AN EXAMINATION OF THE THREAT OF ANTI-CHRISTIAN CENSORSHIP AND OTHER VIEWPOINT DISCRIMINATION ON NEW MEDIA PLATFORMS (2011), <https://nrb.org/wp-content/uploads/2021/02/True-liberty-in-a-New-Media-Age9-15-11.pdf> [https://perma.cc/5436-CHDP] [hereinafter TRUE LIBERTY]; NRB *Project for Digital Free Speech*, NRB, <https://digitalfreespeech.org/timeline/> [https://perma.cc/9HJL-WFXK]. A related practice might be that of some banks which have refused to transact business with gun manufacturers. See Kevin McCoy & Adam Shell, *Gun Clients and Banks: JPMorgan Limits Firearms Clients, Wells Fargo Keeps Them*, USA TODAY (Apr. 13, 2018), <https://www.usatoday.com/story/money/2018/04/13/jpmorgan-chase-limits-business-gunmakers-while-wells-fargo-continues/515430002/> [https://perma.cc/U4RC-SMLU].

7. See Travis Weber, *Christmas, No Time for Public Profession of Faith?*, FAM. RSCH. COUNCIL (Dec. 18, 2014), <https://www.frc.org/op-eds/christmas-no-time-for-public-expression-of-faith> [https://perma.cc/23QA-UVXL]; Paul Jankowski, *Is Saying 'Merry Christmas' Politically Correct? Who Cares?*, FORBES (Dec. 19, 2014), <https://www.forbes.com/sites/pauljankowski/2014/12/19/is-saying-merry-christmas-politically-correct-who-cares/?sh=6cda263f1fdb> [https://perma.cc/9LZQ-QQ5E]. An interesting twist on this would be the popular children's film *The Polar Express*. Reminiscent of Thomas Jefferson's re-write of the Bible (colloquially known as the *Jefferson Bible*, originally entitled *The Philosophy of Jesus*), which sets forth a version of the New Testament devoid of miracles and other elements of the supernatural. See *Jefferson Bible*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Jefferson-Bible> [https://perma.cc/8D3M-9EKM]. The *Polar Express* sets forth a version of Christmas stripped of all religious elements or references, right down to the its very soundtrack (which eschews any songs or carols that veer beyond the confines of a strictly

Infrequently do these two camps find common ground, despite the mutual core of their concerns. For example, proponents of religious liberty rights of corporations generally criticize businesses that adopt a posture of hostility toward religious expression.<sup>8</sup> Thus, those who typically cheer a company for embracing the “Merry Christmas!” salutation each December invariably tend to criticize those companies that make a concerted effort to avoid such references. Conversely, those who laud business enterprises that adopt rigorously secular approaches to their operations tend to condemn those corporations that opt to embrace a religious persona.<sup>9</sup>

A certain internal logic makes each of these vignettes internally consistent in at least one important respect: each epitomizes a particular approach toward the role of religion in society. The former example epitomizes an approach which deems religion and religious expression to be a positive good, something to be promoted and permitted in the public sphere. The latter epitomizes a less sanguine approach toward religion, and often accompanies the view that religious beliefs are best kept private (if kept at all).

But from another vantage point, both perspectives suffer from the same internal contradiction. By examining the issue with a focus on the nature of the business corporation per se, and not with an eye towards the role and place of religion in general, a central paradox can be found within each perspective.

If the corporation is a rights-bearing entity, with rights that extend to the interrelated liberties of religion, expression, association, and speech, then the power of inclusion ought to be conjoined with the power of exclusion. On the other hand, if the corporation fails to bear such rights, then it ought to be restricted from preventing others from doing so. Put differently, either the corporation has some real identity, some form of genuine personhood, entitling it to act upon its own set of values, be they favorable or unfavorable toward those of others, or it does not.<sup>10</sup>

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secularized version of the holiday), see *THE POLAR EXPRESS* (2004), and *The Polar Express*, Original Motion Picture Soundtrack (2004).

8. Cf. Weber, *supra* note 7.

9. See *Celebrate Christmas – Or Not. It’s Up to You*, AMS. UNITED FOR SEPARATION OF CHURCH & STATE (Dec. 22, 2020), <https://www.au.org/blogs/no-christmas-bullies> [<https://perma.cc/NH4S-QEPS>]; Press Release, AMS. UNITED FOR SEPARATION OF CHURCH & STATE, Americans United Announces Support for Legislation Designed to Blunt Effects of Hobby Lobby Ruling (July 9, 2014), <https://www.au.org/media/press-releases/americans-united-announces-support-for-legislation-designed-to-blunt-effects-of> [<https://perma.cc/H8WR-V723>].

10. See Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law*, 44 RUTGERS L.J. 1, 38 (2013), for another article highlighting the inherent inconsistencies among those who champion, or decry, corporate personhood, but within the context of international human rights law.

As things currently stand, it is clear that at least some business corporations genuinely embrace a religious persona and are guided by certain religious values.<sup>11</sup> Those who challenge this observation persist, asserting the absurdity of a religiously expressive business corporation; but the rich history and proliferation of such entities belie this assertion.<sup>12</sup> However, this does not resolve the controversy. For more is at work than simply the embrace of religious (or, conversely, stridently secular) values on the part of a business corporation. Even if one concedes (as I suggest, one must) that several businesses have indeed chosen this path, it does not follow that such a path is appropriate. It does not follow that the business corporation's articulation and observance of a particular set of values are entitled to the same protection as that of an individual, or to any protection at all.

As one drills deeper into this second layer of the issue over corporate religious liberty, one quickly discovers that both proponents and opponents justify the need to recognize (or disallow) such freedom via recourse to the flesh-and-blood human beings who constitute, or otherwise interact with, the business corporation.<sup>13</sup> Whereas proponents of corporate religious liberty claim that its recognition serves to help effectuate the free exercise of religion on the part of individuals,<sup>14</sup> opponents contend the exact opposite: that corporate religious liberty frequently undermines and violates the individual's freedom to exercise religion.<sup>15</sup>

The resolution of these issues carries significant consequences, as both sides of its debate seem to recognize. For society and culture, including the operations of the private sector and the marketplace, bear upon the rights, *de facto* if not *de jure*, of both believers and nonbelievers. America's constitutional protection of religious freedom, along with its commitment to non-establishment, each ring somewhat hollow if, in the daily lives of countless individuals, freedom of, and freedom from,

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11. See RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 6468 (2015).

12. See Joseph P. Slaughter, *The Virginia Company to Chick-Fil-A: Christian Business in America, 1600–2000*, 44 SEATTLE U. L. REV. 421 (2021). This calls to mind Inigo Montoya's response to Vizzini's repeated exclamations of "Inconceivable!" following the transpiring of one event after another: "You keep using that word. I do not think it means what you think it means." *THE PRINCESS BRIDE* (1987).

13. See Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 41–42 (2012). But see Jonathan Chaplin, *Toward A Social Pluralist Theory of Institutional Rights*, 3 AVE MARIA L. REV. 147, 147 (2005) ("One of the principal deficiencies of the dominant liberal individualist understanding of rights is its inability to do justice to the rights of *institutions*."). (emphasis added).

14. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 24 (2013).

15. Cf. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 658 ("Too frequently the extension of corporate constitutional rights is a zero-sum game that diminishes the rights of real individuals.").

religion simply cannot be realized as a practical matter. And, as Justice Cardozo famously remarked: “the free exercise of religion [is] implicit in the concept of ordered liberty, . . . [and without this freedom,] neither liberty nor justice would exist[.]”<sup>16</sup>

Perhaps for this reason, opponents of corporate religious liberty frequently frame the issue in terms essentially equivalent to those used in discussions of the Establishment Clause of the First Amendment to the United States Constitution.<sup>17</sup> They argue that excessive corporate entanglement with religion gives rise to a situation analogous to that of sixteenth century Europe, where the creed of the people must follow the creed of their prince.<sup>18</sup> Or, perhaps, something resembling a theocracy.<sup>19</sup>

From the opponents’ perspective, proponents of corporate religious liberty generally identify a corporation with *the people*, while opponents of corporate religious liberty generally identify a corporation with *the state*. Consequently, proponents argue that the corporate exercise of religion constitutes a right that must be protected; the latter argue that the corporate exercise of religion constitutes an infringement of rights against which protection is necessary.

To best resolve the controversy over corporate religious liberty, it behooves us to examine the degree to which modern business corporations should be conceived of as an arm of the state, a state actor, or somehow, in a constitutionally relevant way, analogous to the state. In other words,

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16. Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 U. SAINT THOMAS L.J. 650, 657 (2018) (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

17. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

18. Summarized by the expression “*cuius regio, eius religio*,” upon which the Peace of Augsburg of 1555 was predicated. H. DANIEL-ROPS, *THE PROTESTANT REFORMATION* 506–07 (Audrey Butler trans., J. M. Dent & Sons Ltd., 1961) (1958); *Cuius regio, eius religio*, ENCYC. OF EARLY MOD. HIST. ONLINE, [https://referenceworks.brillonline.com/entries/encyclopedia-of-early-modern-history-online/cuius-regio-eius-religio-SIM\\_018148](https://referenceworks.brillonline.com/entries/encyclopedia-of-early-modern-history-online/cuius-regio-eius-religio-SIM_018148) [<https://perma.cc/5PEN-CTMS>].

19. See, e.g., Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL’Y REV. 63, 88 (2015). This characterization, although perhaps rhetorically powerful, is particularly absurd given that the definition of a theocracy is “Government of a state by the immediate direction of God,” *Theocracy*, BLACK’S LAW DICTIONARY (6th ed. 1990), in which “[t]he laws of the commonwealth are the commandments of God, and they are promulgated and expounded by the accredited representatives of the invisible Deity, real or supposed—generally a priesthood.” *Theocracy*, CATHOLIC ONLINE, <https://www.catholic.org/encyclopedia/view.php?id=11438> [<https://perma.cc/AU9E-4MXC>]. Although some corporations have adopted policies drawn from religiously inspired moral principles, I am aware of no religiously expressive business corporation that employs a governing priesthood or comes close to making theocratic claims.

should the corporation be deemed a “public”<sup>20</sup> enterprise or a “private” one? Such is the focus of this Article.

As per my prior scholarship on corporations,<sup>21</sup> I am wary of arguments suggesting a “one size fits all” approach. Perhaps one of the most incontrovertible assertions that can be made about the modern business corporation is that one instantiation of the enterprise can differ dramatically from the other. Indeed, the corporate landscape is incredibly diverse.<sup>22</sup> Thus, the critical question ought not to be “the degree to which the modern business corporation should be conceived of as an arm of the state,” as set forth above, but rather “the degree to which *certain* corporations should be conceived of as an arm of the state.”

For example, it is unlikely that a New York City hot-dog cart that is incorporated, owned, and operated by one individual, approximates a government or an arm of the state. However, other enterprises, such as a privately administered prison, might more fairly be subject to such conceptualization.<sup>23</sup> This Article will articulate how such divergent characterizations can be made and consider the repercussions that flow therefrom.

This Article builds upon my previous scholarship in corporate free exercise. Specifically, in *An Antitrust Approach to Corporate Free Exercise Claims*,<sup>24</sup> I propounded the thesis that the religious liberty rights of business corporations ought to stand or fall based upon the firm’s market power, especially when these rights conflict with other’s rights.<sup>25</sup>

This Article approaches the same general controversy but from a different and complementary angle, asking under what circumstances should the values and principles undergirding the First Amendment’s Establishment Clause apply to a business corporation? Although the Establishment Clause inquiry may appear to be merely the opposite side of the same coin as the prior inquiry into corporate free exercise rights, it is not. The repercussions of applying the Establishment Clause to business corporations has far-reaching effects. Such application does more than

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20. As per the word’s derivation from the Latin adjective “publicus,” meaning “belonging to the people,” from which the word “republic” is itself derived. See CASSELL’S LATIN DICTIONARY 486, 814 (Wiley 1968).

21. See COLOMBO, *supra* note 11, at 189–212.

22. Consider the wide divergences among corporations concerning revenue, profit margin, product markets, geographic markets, capital structure, corporate governance, market capitalization, number of employees, “benefit corporation” status, “B-corporation” status, and close versus public corporation status.

23. See Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 992 (2007).

24. Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 92 SAINT JOHN’S L. REV. 29 (2018).

25. See *id.*



simply preclude corporations from asserting their own religious liberty rights; it works to restrict corporations from engaging in certain undertakings that promote or undermine religion, and from adopting certain policies that encourage or punish religiously motivated belief or conduct. Perhaps most profoundly, it would subject corporations to potential free exercise claims brought against it by customers, employees, and others.

Additionally, the same rationale that would impose the restrictions of the Establishment Clause upon a corporation serves to justify, essentially, imposition of *all* the First Amendment's restrictions upon a corporation. In other words, if our assessment of a particular corporation, operating within a particular context, leads us to conclude that it is akin to a government actor for purposes of the Establishment Clause, that same assessment would lead us to conclude that the corporation is akin to a government actor for purposes of the other freedoms identified by the First Amendment. Thus, although the corporation's entanglement with religion remains the motivating force and focus of this Article, expanding our inquiry into corporate activity affecting other freedoms protected by the First Amendment is unavoidable.

This Article will proceed as follows. Part II will set forth the factual predicate to this inquiry. It will expand upon and supplement the examples previously referenced concerning the challenges posed by a corporation's entanglement with religion.

Part III will critically review the degree that the First Amendment applies to the business corporation under existing law and precedent. It will address the rights and restrictions of a business corporation with respect to questions of religion.

Part IV will open with an examination into the nature of the business corporation, covering traditional and modern theories of the firm. This examination will discuss to what degree corporate theory helps ascertain whether a corporation should be characterized as "private" (and thus predominantly an entity which *bears rights*) or "public" (and thus predominantly an entity *against which rights are borne*). Part IV will then address the diversity of corporate enterprises and its implications upon our theoretical understanding of the corporation. Part IV will then turn to legal theories that have been used to treat as public enterprises which would otherwise be considered as private: the state action doctrine, the law of common carriers, and the law of public accommodations.

Part V will utilize the principles identified in Parts III and IV to proffer a solution moving forward, in the form of the "CENSOR Act"—a draft piece of federal legislation offering a means by which corporate entanglement with religion could be navigated.

Ultimately, for the most part, conceptualizing the business corporation as a quasi-state is a mistake. Hence, subjecting corporations to restrictions like those that the Constitution places on the United States government is also a mistake. Rather, one ought to conceptualize most corporations as private phenomena, associations for which the Bill of Rights is properly construed as recognizing protections *for*, not protections *from*. Consequently, most corporations ought to enjoy the same protections from government-afforded private individuals under the Free Exercise Clause, and no restrictions imposed by the Establishment Clause. This would enable most corporations to embrace a distinctive religious persona, and qualify the corporation to seek exemptions, in some situations, from laws of general inapplicability. Thus, a religiously expressive corporation might be able to make hiring decisions that would otherwise be impermissible to nonreligious corporations. This impermissibility would extend to corporations that embrace a distinctively hostile approach toward religion: the First Amendment would not enable them to violate laws of general applicability passed to protect religious employees and customers.

However, a small number of corporations do share critical, constitutionally relevant characteristics with the state. These characteristics are intrinsic to the structure of such corporations (including its professed values as a neutral, public institution in the service of the common good), and the role that the corporation plays in society (exercising control, for example, of critical conduits of expression). Regarding such corporations, appreciation of constitutional values suggests a different path. For such corporations, the religious liberties that ought to be prioritized are those of employees and customers vis-a-vis the corporation. Thus, legal protections for the benefit of employees and customers against religious (and other forms of) discrimination should be enforced vigorously against such corporations. Coupled with this would be Establishment Clause concerns, which would discourage, if not, curtail the degree to which any such corporation could adopt a religiously expressive persona. This would best effectuate the ideals upon which the United States was founded.

The world that ultimately emerges is one in which religious liberty and individual freedom are maximized.<sup>26</sup> Religiously expressive

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26. To the extent that “the American people generally believe that religious freedom is the most important right enshrined in the Constitution,” this would seem to be an appropriate result. See Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 126 (2007) (citing Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153 n.12 (1991) (citing Mary Ann Glendon, Professor of Law, Emerita, Harvard University, Law, Communities, and the

corporations, and corporations that can plausibly be deemed associations, would enjoy the rights to exercise religion and to engage in other forms of expression; employees and customers of other companies would enjoy the rights to religious exercise and freedom of expression safe from corporate encroachment.

### I. THE PROBLEM: A CONFLICT OF RIGHTS

Individuals have rights. Associations, including corporations, have rights as well. Unfortunately, at times, these rights come into conflict. This part will briefly highlight some representative examples of this problem, thereby setting the stage to discuss how the law currently addresses these issues (Part III), and how the law might address these issues in a better way (Part V). Because of this part's nature, a thorough discussion of the applicable law will be sidestepped—merely a rudimentary sketch thereof will be provided to contextualize the facts provided.

**Corporate free exercise of religion.** In *Burwell v. Hobby Lobby*,<sup>27</sup> the U.S. Supreme Court acknowledged the free exercise rights of business corporations (namely, three closely held corporate enterprises), cognizable as claims under the Religious Freedom Restoration Act (RFRA).<sup>28</sup> Pursuant to these rights, the Court held that the business corporations were entitled to an exemption from the “contraceptive mandate” promulgated by the Department of Health and Human Services in its administration of the Affordable Care Act.<sup>29</sup> The contraceptive mandate required businesses of a certain size to include in their employee health insurance plans no-cost coverage of “approved contraceptive methods,”<sup>30</sup> creating a statutory right for employees of qualifying businesses. Consequently, *Burwell* presents a paradigmatic case of rights in conflict: the religious liberty rights of the employer on the one hand, and the right to an employee's right to no-cost contraceptives on the other.<sup>31</sup>

**Employee free exercise of religion.** Freedom of religion, along with the other cherished freedoms set forth in the First Amendment to the U.S. Constitution, protects against infringement of liberty on the part of the

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Religious Freedom Provisions of the Constitution, Address to the Bicentennial Conference on the Religion Clauses (May 30, 1991)).

27. 573 U.S. 682 (2014); *see also infra* Part III.A.

28. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4.

29. The Affordable Care Act “requires an employer’s group health plan or group-health-insurance coverage to furnish ‘preventive care and screenings’ for women without ‘any cost sharing requirements.’” 42 U.S.C. §§ 300gg–13(a)(4).” *Burwell*, 573 U.S. at 697. Pursuant to this legislation, the Department of Health and Human Services issued regulations requiring coverage of “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling.” *Id.* (citing 77 Fed. Reg. 8725) (alteration in original).

30. *Burwell*, 573 U.S. at 697 (citing 77 Fed. Reg. 8725).

31. *See infra* Section III.A for a more detailed discussion of *Burwell*.

state.<sup>32</sup> Protections against religious (and other forms of) discrimination against private actors are set forth in the Civil Rights Act of 1964.<sup>33</sup> Title VII of the Civil Rights Act gives employees the right to a workplace free of religious discrimination.<sup>34</sup>

Although not enshrined in any constitution or statute, in the colloquial sense, business establishments can be understood as having the “right” to establish dress codes for their employees as part of their branding. Indeed, one might be able to articulate such a right as derivative of the constitutional right to “freedom of expression.”<sup>35</sup> Abercrombie & Fitch (A&F) famously had such a dress code, referred to as its “Look Policy.”<sup>36</sup> In 2011, an A&F store refused employment to Samantha Elauf, an otherwise qualified applicant, because she would not agree to abide by its Look Policy.<sup>37</sup> The company reasoned that her religious obligation, as a Muslim woman, to wear a hijab violated the Look Policy’s ban on all “caps.”<sup>38</sup> Once again, we encounter a confrontation between an employer’s right to operate its business as it sees fit, and an employee’s right to a statutory benefit (in this case, the benefit of a workplace free of religious discrimination).

**Viewpoint Censorship.** An area of increasing concern is that of viewpoint censorship, especially as undertaken by large media companies. In 2020, Twitter infamously censored the New York Post,<sup>39</sup> capping years of politically biased censorship (at least according to its critics).<sup>40</sup> Facebook, another social media platform, has been severely criticized for banning from its platform commentators it deemed “dangerous.”<sup>41</sup> Zoom, the seemingly ubiquitous videoconferencing service used throughout the

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32. See John Balitis & Michael Bohan, *Protest: A Path to Unemployment?*, 54 ARIZ. ATT’Y, no. 4, Dec. 2017, at 35.

33. See *id.* at 36–37.

34. See Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About Abercrombie & Fitch: Straightening Out the Judicial Confusion in the Lower Courts*, 46 PEPP. L. REV. 471, 478 (2019).

35. Cf. Suneal Bedi, *Fully and Barely Clothed: Case Studies in Gender and Religious Employment Discrimination in the Wake of Citizens United and Hobby Lobby*, 12 HASTINGS BUS. L.J. 133, 180 (2016) (recognizing, but disagreeing with, the argument that businesses’ dress codes might be constitutionally protected speech).

36. See generally *EEOC v. Abercrombie & Fitch Stores, Inc.*, 578 U.S. 768, 770 (2015).

37. *Id.*

38. *Id.*

39. See Jack Dorsey *Is Finally Starting to Admit Twitter’s Censorship Problem*, N.Y. POST (Nov. 17, 2020), <https://nypost.com/2020/11/17/jack-dorsey-is-finally-starting-to-admit-twitters-censorship-problem/> [https://perma.cc/QBC8-TXWF].

40. Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan. 12, 2018), <https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/?sh=4d43c3a465f5> [https://perma.cc/C6HW-KFTV].

41. Oliver Darcy, *Louis Farrakhan, Alex Jones, and Other ‘Dangerous’ Voices Banned by Facebook and Instagram, and Others From Its Platforms As ‘Dangerous.’*, CNN BUSINESS (May 3, 2019), [www.cnn.com/2019/tech/facebook-bans-louis-farrakhan](http://www.cnn.com/2019/tech/facebook-bans-louis-farrakhan) [https://perma.cc/99FN-MEML].

COVID-19 pandemic, shut down at least two webinars featuring terrorist hijacker Leila Khaled.<sup>42</sup> The retail giant Target, stopped selling a book critical of “transgenderism” due to political pressure,<sup>43</sup> and Amazon has done the same.<sup>44</sup> Similarly, other merchandise deemed unduly offensive, such as Confederate flag merchandise, has been banned from the platforms of Amazon, Walmart, and eBay.<sup>45</sup> These social media practices reached a crescendo in January 2021, when Twitter, Apple, Google, YouTube and other platforms acted in concert<sup>46</sup> to silence then-President Donald Trump and many of his supporters, sparking an international outcry of condemnation by figures ranging from Russian dissident Alexei Navalny to German Chancellor Angela Merkel.<sup>47</sup>

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42. Haley Worth, *Zoom Cancels Second University Event Featuring Terrorist Hijacker*, CAMPUS REFORM (Nov. 16, 2020), [www.campusreform.org/article?id=16180](http://www.campusreform.org/article?id=16180) [<https://perma.cc/GQ4M-XHEK>].

43. Abigail Shrier, *Does the ACLU Want to Ban My Book?*, WALL ST. J. (Nov. 15, 2020), <https://www.wsj.com/articles/does-the-aclu-want-to-ban-my-book-11605475898> [<https://perma.cc/V7CG-ED42>]. See Adam Kirsch, *Land of Free (And Fettered) Speech*, WALL ST. J. (Sept. 4, 2020), <https://www.wsj.com/articles/land-of-free-and-fettered-speech-11599231635> [<https://perma.cc/KQ94-PWKR>] for an article on the related subject of “cancel culture.”

44. Haley Victory Smith, *Amazon Reviews Bestselling Conservative Book About Transgender Issues Without Explanation*, WASH. EXAMINER (Feb. 23, 2021), <https://www.washingtonexaminer.com/news/amazon-best-selling-transgender-issues-explanation> [<https://perma.cc/6ZPS-JWAQ>].

45. Alex Fitzpatrick, *Amazon Is Pulling Down Confederate Flag Merchandise*, TIME (June 23, 2015), <https://time.com/3932645/amazon-confederate-flags/> [<https://perma.cc/G3A5-2EKK>].

46. By “in concert,” I do not mean to suggest in accordance with an agreement among them, but rather simply consistently and toward the same end, whether doing so through individual, independent decision making or not.

47. See, e.g., Robert Hart, *‘Problematic’ And ‘Perplexing’: European Leaders Side With Trump Over Twitter Ban*, FORBES (Jan. 11, 2021), <https://www.forbes.com/sites/roberthart/2021/01/11/problematic-and-perplexing-european-leaders-side-with-trump-over-twitter-ban/?sh=40d1f2ab13b5> [<https://perma.cc/DCQ4-F7KE>]; Jason Lemon, *Angela Merkel Calls Trump Twitter Ban Problematic as Freedom of Opinion Is Fundamental Right*, NEWSWEEK (Jan. 11, 2021), <https://www.msn.com/en-us/news/world/angela-merkel-calls-trump-twitter-ban-problematic-as-freedom-of-opinion-is-fundamental-right/ar-BB1cEQZa?ocid=uxbndlbing> [<https://perma.cc/4599-VNMY>]; John Levine, *Russian Dissident Alexei Navalny Blasts Twitter for Trump Ban*, N.Y. POST (Jan. 9, 2021), <https://nypost.com/2021/01/09/russian-dissident-alexei-navalny-blasts-twitter-for-trump-ban/> [<https://perma.cc/V3TZ-YDYU>]. First, Twitter permanently banned President Trump from tweeting. *The Progressive Purge Begins*, WALL ST. J. (Jan. 10, 2021), <https://www.wsj.com/articles/the-progressive-purge-begins-11610319376> [<https://perma.cc/7NLG-8Q6H>]. Facebook quickly followed suit, banning the President from its platform as well, with “no plans” on ever reversing it. AFP News, *Facebook Exec Says “No Plans” to End Trump Ban*, INT’L BUS. TIMES (Jan. 11, 2021), <https://www.ibtimes.com/facebook-exec-says-no-plans-end-trump-ban-3119261> [<https://perma.cc/KAC6-FWD3>]. Facebook also banned hashtag “Stop The Steal” (popular with Trump supporters) and related content. Brakkton Booker, *Facebook Removes ‘Stop The Steal’ Content; Twitter Suspends QAnon Accounts*, NPR (Jan. 12, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/12/956003580/facebook-removes-stop-the-steal-content-twitter-suspends-qanon-accounts> [<https://perma.cc/U27J-LQJH>]. YouTube got into the act as well, and “temporarily” banned President Trump from uploading new videos. April

Although the most prominent examples of censorship—such as those set forth above—do not concern themselves with religion per se, similar examples abound with respect to the expression of religious beliefs as well. In a 2011 report entitled “True Liberty in a New Media Age,” the John Milton Project for Religious Free Speech catalogues a host of such examples and identifies policies suggesting that they will proliferate on the part of Apple, Google, Facebook, and others.<sup>48</sup> As per the aptly entitled headline of a 2021 Wall Street Journal op-ed, “Big Tech Censors Religion, Too.”<sup>49</sup>

Social media companies and videoconferencing platforms are private enterprises. As with other private, corporate actors, one would recognize the generalized right of these companies to set standards and policies in keeping with their corporate identity. But given the critical role that social media giants and large retailers play in society, the risk that their standards and policies may be operating in a politically biased or discriminatory way is deeply troubling. For such would seriously undermine the ability of individuals to express themselves and participate fully in the marketplace of ideas.

## II. THE FIRST AMENDMENT AND THE BUSINESS CORPORATION

The First Amendment to the United States Constitution recognizes some of the most foundational rights that human beings are endowed with—and certainly rights deemed indispensable in a modern, democratic republic: the rights to freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government for a redress of grievances.<sup>50</sup> Adding to (and, as correctly viewed,

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Siese, *YouTube Temporarily Bans New Videos from Trump Account*, CBS NEWS (Jan. 13, 2021), <https://www.cbsnews.com/news/youtube-suspends-trump-account-new-videos/> [https://perma.cc/6L76-U3EK]. When, in the midst of this, many Trump supporters migrated from the above-referenced social media platforms to a marginal one, “Parler,” Amazon Web Services, which hosted Parler, suspended Parler’s account, thereby shutting the platform down. See Bill Chappell, *Parler Sues Amazon, Seeking to Restore Web Service*, NPR (Jan. 11, 2021), <https://www.npr.org/2021/01/11/955664150/parler-files-lawsuit-against-amazon-seeking-to-restore-web-service> [https://perma.cc/N7SL-TETV]. All these actions were predicated upon a need to combat political violence in the wake of riots in Washington, D.C. on January 6, 2021. See Ryan Tracy & John D. McKinnon, *Congress Gets Fuel to Rein in Big Tech Firms*, WALL ST. J. (Jan. 12, 2021), <https://www.wsj.com/articles/capitol-riot-puts-more-scrutiny-on-big-tech-11610372968> [https://perma.cc/X7RK-EE2H].

48. TRUE LIBERTY, *supra* note 6, at 3–4. For example, “Apple has twice removed applications that contained Christian content from its iTunes App Store. Apple admitted that these apps were denied access because it considered the orthodox Christian viewpoints expressed in these applications to be ‘offensive.’” *Id.* at 3.

49. Josh Holdenried, *Big Tech Censors Religion, Too*, WALL ST. J. (Mar. 29, 2021), <https://www.wsj.com/articles/big-tech-censors-religion-too-11616959164> [https://perma.cc/7JUT-E4BW].

50. U.S. CONST. amend. I.

reinforcing<sup>51</sup>) these rights is the prohibition upon Congress's power to make any law "respecting an establishment of religion,"<sup>52</sup> and the jurisprudential gloss concerning freedom of association.<sup>53</sup> Despite the plain text of the First Amendment, these prohibitions upon government action extend to the entire federal government (not just the legislative branch),<sup>54</sup> and, following adoption of the Fourteenth Amendment, to the state governments as well.<sup>55</sup>

The core inquiry is whether the business corporation ought to be characterized as a subject of the rights set forth in the First Amendment rights, versus, instead, a target of the restrictions upon government set forth in the First Amendment to best secure these same rights. Before embarking upon the inquiry into what the law *ought* to be, this section will explore what the law currently *is*.

#### A. Definition of "Religion"

As a predicate matter, we must first define the concept of "religion" itself. Unfortunately, this is a subject upon which the Supreme Court has not exactly been pellucid.<sup>56</sup>

The Court's inability to define religion is troublesome as the existence of a clear definition could serve as a means by which to resolve, at least in part, the questions under review here. For if religion is understood in a narrow, traditional sense (as, for example, tethered to belief in a divinity), then conflating freedom *of* religion with freedom *from* religion, although quite commonplace (as was done in this Article's introduction), would be deeply mistaken. This suggests that we not treat religiously solicitous business corporations similar to religiously *hostile* business corporations for purposes of constitutional (and perhaps statutory) analysis.

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51. Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 893–94 (2001).

52. *Id.*

53. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

54. See Michael S. Anderson, *Free Exercise, Establishment and Statutory Provisions at Guantánamo*, 49 COLUM. J. TRANSNAT'L L. 755, 774 (2011) (while "[t]he Supreme Court has never explicitly held that the free exercise clause applies to executive action, . . . [the Court] has assumed on countless occasions that it does") (quoting *Shrum v. City of Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006)); but see Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

55. See Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2067 (2019).

56. See Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 HOUS. L. REV. 909, 910 (2016).

Conversely, consider the repercussions of defining religion broadly. To define religion as encompassing any deeply held beliefs, including those derived from philosophical principles devoid of any reference to God, gods, or the supernatural, would suggest treating corporations embracing either a positive or a negative approach to religious expression and practices similarly under the Constitution.

A fair question exists regarding how the framers understood religion: what, did they intend “religion” to encompass? The most compelling evidence suggests that they probably would have defined religion as limited to monotheistic faiths.<sup>57</sup> Polytheistic belief systems would likely have been categorized as mythologies,<sup>58</sup> not “civilized” enough to be deemed legitimate religions.<sup>59</sup> Similarly, the framers most likely would not have defined religion to have included “non-theistic views of the world.”<sup>60</sup>

Not surprisingly, American courts initially interpreted the term “religion” narrowly—comporting with the most likely intent of the framers: “in terms of theistic notions respecting divinity, morality, and worship.”<sup>61</sup> But as the American experience with religion broadened, so did the courts’ interpretation of the term.<sup>62</sup> The courts recognized the need to define religion “broadly enough to recognize the increasing number and diversity of faiths,” and, moreover, to adopt a definition “from the believer’s perspective.”<sup>63</sup> As to this latter point, the Supreme Court has moved away from an objective understanding of religion to one of a subjective sincerity, holding that beliefs can qualify as religious even if they are not “acceptable, logical, consistent, or comprehensible.”<sup>64</sup>

Unfortunately, “a generalized, unitary theory of what constitutes religion or religious belief remains elusive.”<sup>65</sup> Nevertheless, the concept of religion under American constitutional jurisprudence remains distinct from that of “philosophical beliefs.”<sup>66</sup> Indeed, the Supreme Court has

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57. See Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181, 182 (2002); W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 1:3 (Dec. 2020).

58. See Strang, *supra* note 57, at 213–14 (2002); but see Usman, *supra* note 26, at 162 (Thomas Jefferson, whose conceptualization of religion was “inconsistent,” at one time understood religious freedom to protect “the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and the infidel of every denomination”).

59. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1179 (2d ed. 1988).

60. See Lee J. Strang, *supra* note 57, at 182 (2002); but see Usman, *supra* note 58, at 163 (Thomas Jefferson and James Madison viewed religious freedom as extending to atheists).

61. TRIBE, *supra* note 59, at 1179.

62. See *id.* at 1179–80.

63. *Id.* at 1181.

64. *Id.* (quoting *Thomas v. Review Board*, 450 U.S. 707, 715 (1981)).

65. See DURHAM & SMITH, *supra* note 57, at § 1:3.

66. See TRIBE, *supra* note 59, at 1183. Although some have asserted that the Supreme Court has “expanded religion to explicitly include religious and nonreligious moral, philosophical, and other



“rebuffed attempts to turn the Free Exercise Clause into an all-purpose conscience clause.”<sup>67</sup> In *Wisconsin v. Yoder*, the Court declared for conduct to be entitled to protection under the First Amendment, the beliefs undergirding said conduct cannot be “purely secular,” but rather must be “rooted in religious belief.”<sup>68</sup> Alas, as secular means “not pertaining to or connected with religion,”<sup>69</sup> this means little more than to be “religious” a belief must not be purely “non-religious”—not very enlightening.

After surveying various commentary on the subject, it appears the courts most likely will apply the “functional” approach when defining religion, but with an important modification.<sup>70</sup> The functional approach looks to the “role a belief plays in the individual’s or group’s life,” and compares it to that generally and traditionally played by religion in the lives of believers.<sup>71</sup> The courts would modify this definition to include an element of the supernatural.<sup>72</sup> This appears to be the only way to properly account for the Supreme Court’s insistence that a belief, to qualify as religious, may not be “purely secular.”<sup>73</sup> Further, this definition comports not only with the framers’ original understanding of the term “religion,”<sup>74</sup> but with the mainstream, modern understanding of the term as well.<sup>75</sup>

Arriving at this definition has profound consequences for our present purposes. Such a definition permits us to avoid what one commentator described as the “surface plausibility” of conflating *pro*-religiously motivated beliefs and conduct with *anti*- or *non*-religiously motivated

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strongly held beliefs,” a close examination of the precedent in question permits us to distinguish the cases upon which such assertions are made. Strang, *supra* note 57, at 203–04. For the leading cases *U.S. v. Seeger*, 380 U.S. 163 (1965), *Welsh v. U.S.*, 398 U.S. 333 (1970), each concern the interpretation of a particular statute (the Universal Military Training and Service Act, U.S.C. App. § 456(j)), and a third “defines” religion in dicta relegated to a footnote, see *Torcaso v. Watkins*, 367 U.S. 488, 1684 n.11 (1961). Indeed, the Court in *Wisconsin v. Yoder*, emphatically proclaimed that the protections of the Free Exercise Clause cannot be invoked “on purely secular considerations” but rather must be predicated upon “religious belief.” 406 U.S. 205, 215 (1972).

67. Esbeck, *supra* note 51, at 895.

68. 406 U.S. 205, 215.

69. *Secular*, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1289 (1989).

70. TRIBE, *supra* note 59, at 1182.

71. *Id.*

72. See Ethan Blevis, *A Fixed Meaning of “Religion” in the First Amendment*, 53 WILLAMETTE L. REV. 1, 26 (2016).

73. See text accompanying *supra* note 66.

74. See *supra* notes 57–62.

75. *Religion*, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1212 (1989) (“concern over what exists beyond the visible world, differentiated from philosophy in that it operates through faith or intuition rather than reason, and generally including the idea of the existence of a single being, a group of beings, an eternal principle, or a transcendent spiritual entity . . .”); *Religion*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“Man’s relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings.”).

beliefs and conduct.<sup>76</sup> It reminds us that the First Amendment “was tasked to . . . limit the government, not to restrain churches, a particular religion, the majority religion, or religion in general.”<sup>77</sup> Moreover, “the role of the First Amendment is not to protect the nonreligious from the religious.”<sup>78</sup> This will help guide our path out of the conundra posed in the introduction, as we attempt to evaluate permissible conduct on the part of corporations regarding matters of religion.<sup>79</sup>

More specifically, this suggests that corporations wishing to embrace a religiously expressive character would (in many if not most cases) be entitled to exemptions from laws of general applicability, the same could not be said of corporations wishing to embrace a religiously hostile character. Although the other protections of the First Amendment should certainly apply equally to enterprises that embrace religious hostility, those protections particular to the Free Exercise Clause (or statutorily via RFRA) should not.

### B. The Free Exercise Clause

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”<sup>80</sup> Thus begins the First Amendment (and, indeed, the entire Bill of Rights) to the U.S. Constitution. The second half of this declaration has come to be known as the “Free Exercise Clause.”<sup>81</sup> It serves to constitutionalize John Madison’s recognition that:

It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.<sup>82</sup>

Broad consensus exists concerning some aspects of the Free Exercise Clause. First, it applies to government, not private, actors.<sup>83</sup> Second, the Clause absolutely prohibits the government from intentionally

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76. Esbeck, *supra* note 51, at 886.

77. *Id.*

78. *Id.* The role of the First Amendment is to protect everyone from the government: protection against the imposition of religion by the government and/or the imposition of restrictions upon religion by the government. *See id.*

79. *See* text accompanying *infra* notes 299–313.

80. U.S. CONST. amend. I.

81. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

82. William Haun, *Religious Liberty and the Common Good*, 43 NAT’L AFFS., Spring 2020, at 132, 135.

83. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 742 n.209 (1992). Due to incorporation via the Fourteenth Amendment, the Free Exercise Clause applies to both federal and state government actors. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

discriminating against religion or religious believers per se.<sup>84</sup> As the Supreme Court explained, “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>85</sup> Third, the government may not engage in any “regulation of religious beliefs as such.”<sup>86</sup>

Jurists and commentators had commonly thought that the Free Exercise Clause protected individuals against laws of general applicability as well.<sup>87</sup> This “protection” was provided via the imposition of the “compelling government interest test” to regulations and other laws that “substantially burden” an individual’s practice of religion.<sup>88</sup> The Supreme Court upended that understanding in its 1990 case *Employment Division v. Smith*.<sup>89</sup> In *Smith*, the Court held that the Free Exercise Clause’s protections did not extend to neutral laws of general applicability—it did not extend to laws that only, by happenstance, infringed upon an adherent’s religious liberty.<sup>90</sup> The opinion’s author, Justice Scalia, explained that absent the presentation of a “hybrid” situation (in which a free exercise claim was asserted “in conjunction with other constitutional protections,”<sup>91</sup>) a claimant whose religious conduct was substantially burdened by a law of general applicability did not have recourse to the compelling government interest test.<sup>92</sup> Although the *Smith* decision enjoyed a 6-3 majority, that section of the opinion that jettisoned the compelling government interest test for neutral laws of general applicability only received the support of five justices.<sup>93</sup>

The ensuing uproar generated by the *Smith* decision led to Congress’s passage of the Religious Freedom Restoration Act (RFRA).<sup>94</sup> RFRA effectively reverses the *Smith* decision by declaring that any legislation that substantially burdens a person’s exercise of religion must represent “the least restrictive means of serving a ‘compelling government

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84. See David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 246 (1995).

85. *Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

86. *Employment Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

87. See *id.* at 892 (O’Connor, J., concurring).

88. *Id.* at 894 (O’Connor, J., concurring).

89. *Id.* at 872.

90. See *id.* at 878–79.

91. *Id.* at 881.

92. See *id.*

93. See 494 U.S. at 874–90.

94. 42 U.S.C. §§ 2000bb–2000bb-4. See also *Burwell v. Hobby Lobby*, 573 U.S. 682, 694–95 (2014) (discussing RFRA’s legislative history).

interest.”<sup>95</sup> Should the government be unable to meet that standard, the claimant would be granted an exemption from the law in question.<sup>96</sup>

In 1997, the Supreme Court ruled that RFRA was unconstitutional as applied to state law—but constitutional with respect to federal law.<sup>97</sup> In response, several state legislatures enacted state-level Religious Freedom Restoration Acts, essentially replicating RFRA regarding state legislation that burdened religious exercise.<sup>98</sup>

The most critical, controversial issue regarding Free Exercise Clause jurisprudence for our purposes concerns the question of what constitutes “the exercise of religion.” This same issue persists under RFRA as that legislation defines the term “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>99</sup> Answering this question will help distinguish the rights of a religiously expressive corporation from those of a religiously intolerant or religiously hostile corporation.

As mentioned, free exercise certainly entails the freedom to believe in the religious doctrines of one’s choice—there is no genuine dispute regarding that.<sup>100</sup> There is also universal agreement that free exercise extends to “freedom of worship”—the right to pay homage to God as one sees necessary or fit.<sup>101</sup> But this is, of course, a rather narrow concept of religious liberty—the pilgrims who famously helped settle America did not do so merely for the freedom to praise God every Sunday, but rather to live lives consistent with their religiously informed consciences each and every day.<sup>102</sup> I suggest that Justice Goldberg best captured the intent and meaning of the First Amendment’s religion clauses when he wrote that their “single end” is “to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which

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95. 42 U.S.C. § 2000bb-1.

96. *See id.*

97. *See City of Boerne v. Flores*, 521 U.S. 507, 532–33 (1997).

98. *See* Mark Strasser, *Old Wine, Old Bottles, and Not Very New Corks: On State RFRAs and Free Exercise Jurisprudence*, 34 SAINT LOUIS U. PUB. L. REV. 335, 335 (2015). As of this writing, twenty-one states have enacted a Religious Freedom Restoration Act. *See State Religious Freedom Restoration Acts*, NAT’L CONF. OF STATE LEGISLATURES (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/S522-R36J>].

99. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (citing Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc-5(7)(A)).

100. *See* text accompanying *supra* note 86.

101. *See* Eugene R. Milhizer, *The Morality and Legality of the HHS Mandate and the “Accommodations”*, 11 AVE MARIA L. REV. 211, 213 (2013).

102. *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562 (1989).

secure the best hope of attainment of that end.”<sup>103</sup> This logically should extend well beyond Sabbath observances and religious rituals, and ought to encompass all conduct dictated, compelled, or otherwise recommended by an individual’s (or an association’s) religious principles.

Consequently, to effectuate the purpose of the First Amendment, state and federal governments are challenged to minimize their encroachments upon religious belief, conscience, and practice. When such encroachments do occur—either via oversight or on account of some unavoidable conflict—the government (or, if unwilling to do so, the courts) must work hard and creatively at finding solutions that eliminate the encroachment to the greatest extent possible. For a case arising under RFRA, or a state analogue, this will mean application of the “compelling government interest test,” discussed above.<sup>104</sup> For those cases not subject to RFRA, protection for religious liberty is limited to three situations: (1) where religion or religious practice is targeted for circumscription, (2) where religious belief is subject to regulation or coercion, and (3) where a “hybrid” situation exists, in which the government infringes upon religious liberty and another constitutional right.<sup>105</sup>

### *C. The Business Corporation and the Free Exercise Clause*

Business corporations in the United States have enjoyed a long and steady march toward the realization of their constitutional rights.<sup>106</sup> To summarize, the first step was taken in 1819 by the Supreme Court in *Trustees of Dartmouth College v. Woodward*.<sup>107</sup> In that case, the Contracts Clause of the U.S. Constitution<sup>108</sup> was deemed applicable to the business corporation, thereby protecting Dartmouth College (an incorporated entity) from New Hampshire’s attempted impairment of the college’s charter.<sup>109</sup>

More significant to this realization was the decision in the 1886 case *Santa Clara Co. v. S. Pac. R.R.*<sup>110</sup> There, the Supreme Court announced that the protections of the recently enacted Fourteenth Amendment,

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103. *Id.* at 1598 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

104. See text accompanying *supra* note 88.

105. See text accompanying *supra* notes 84–86, 91. A potential fourth situation (or perhaps best considered part of the first enumerated) is that where an exception to a facially neutral law is promulgated but fails to cover similarly situated religious actors. See Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 869 (2001).

106. See COLOMBO, *supra* note 11, at 87–91.

107. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

108. U.S. CONST. art. I, § 10.

109. *Trustees of Dartmouth Coll.*, 17 U.S. at 654.

110. *Santa Clara Co. v. S. Pac. R.R.*, 118 U.S. 394 (1886).

prohibiting each state from denying “any person within its jurisdiction the equal protection of the laws,”<sup>111</sup> extended to the business corporation.<sup>112</sup> The Court did not set forth a rationale for its holding; rather, Chief Justice Waite simply informed counsel during oral argument that “all” of the justices were of the opinion that the equal protection clause inured to the benefit of the corporate claimants before them.<sup>113</sup>

Moving to the present day, a pair of early twenty-first century Supreme Court cases indicate that the rights contained in the First Amendment protect business corporations as well as natural persons. The first of these cases, *Citizens United v. FEC*, (in)famously struck down key provisions of the McCain-Feingold Campaign Finance Reform Act of 2002 as unconstitutional.<sup>114</sup> The Court in *Citizens United* held that the Act’s suppression of corporate political speech violated the First Amendment.<sup>115</sup> Writing for the Court’s majority, Justice Kennedy explained that the First Amendment prohibits “Congress” from making any law “abridging the freedom speech,” thereby focusing on the government actor, not the nature of the speaker nor the source of the speech.<sup>116</sup> Indeed, the First Amendment was premised, in large part, upon “mistrust of governmental power,” and against governmental “attempts to disfavor certain subjects or viewpoints.”<sup>117</sup> This must extend to “interrelated” attempts to restrict speech on the basis of the speaker—typically “simply a means to control content.”<sup>118</sup>

The logic of *Citizens United* would appear to extend to every other right identified in and protected by the First Amendment, as all are framed as a restriction on the power of the government.<sup>119</sup> An exception might exist regarding the freedom of assembly, as this is articulated in the First Amendment as “the right of the people peaceably to assemble.”<sup>120</sup>

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111. U.S. CONST. amend. XIV.

112. *Santa Clara Co.*, 118 U.S. at 396.

113. *Id.*

114. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

115. *Id.* at 336, 340.

116. *Id.*

117. *Id.* at 340.

118. *Id.*

119. The Supreme Court had previously recognized that the First Amendment’s “redress of grievances” provision applied to corporations. *See* *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524 (2002). Similarly, “freedom of the press” has long been understood to protect the work and communications of media corporations. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 244–45 (1936).

120. U.S. CONST. amend. I. *See also* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939). This would largely comport with how corporations are treated in Europe as well, where the European Court of Human Rights has held that “corporations are protected by the right to due process, free expression, property rights, and freedom of assembly” under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Beth Stephens, *Are Corporations People?*

Merely four years after *Citizens United*, the Supreme Court handed down its decision in *Burwell v. Hobby Lobby*.<sup>121</sup> *Burwell* concerned the religious liberty rights of business corporations; more specifically, whether a closely held business corporation was entitled to an exemption from the Affordable Care Act's "contraceptive mandate,"<sup>122</sup> either under the RFRA<sup>123</sup> or under the Free Exercise Clause of the First Amendment.<sup>124</sup> Given the Court's ability to resolve the case on statutory grounds (via application of RFRA), it was able to eschew consideration of the Free Exercise claims raised.<sup>125</sup> However, the reasoning employed by the Court strongly suggests that a business corporation would have standing to assert Free Exercise religious liberty rights.

A threshold and fiercely contested question in *Burwell* was whether the religious liberty claimants "forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships."<sup>126</sup> The Department of Health and Human Services contended that business corporations simply lacked standing to bring religious liberty claims by virtue of their for-profit status.<sup>127</sup> Writing for the Court, and applying logic that would apply to both claims brought under RFRA and those brought under the First Amendment's Free Exercise Clause, Justice Alito rejected this argument.<sup>128</sup> His explanation is worth quoting at some length:

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel [the corporate claimants in *Burwell*] focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not

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*Corporate Personhood Under the Constitution and International Law: An Essay in Honor of Professor Roger S. Clark*, 44 RUTGERS L.J. 1, 31 (2013).

121. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

122. The Affordable Care Act "requires an employer's group health plan or group-health-insurance coverage to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'" *Id.* at 697 (citing 42 U.S.C. §§ 300gg-13(a)(4)). Pursuant to this legislation, the Department of Health and Human Services issued regulations requiring coverage of "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." *Id.* (citing 77 C.F.R. § 8725 (2021)) (alteration in original).

123. 42 U.S.C. §§ 2000bb-2000bb-4.

124. U.S. CONST. amend. I.

125. *Burwell*, 573 U.S. at 736. Reticence to address constitutional issues when recourse can be had to statutory grounds for the resolution of a matter is customary for the court. *E.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.") (cited in Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 n.1 (1994)).

126. *Burwell*, 573 U.S. at 691.

127. *Id.* at 705.

128. *Id.* at 719.

protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.<sup>129</sup>

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy. . . often furthers individual religious freedom as well.” But this principle applies equally to for-profit corporations: Furthering their religious freedom also “furthers individual religious freedom.” In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns [the corporations’ owners].<sup>130</sup>

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, the court entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. There, the Court never alluded that this objective precluded their claims. As the Court explained in a later case, the “exercise of religion” involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.” Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that “operates so as to make the practice of . . . religious beliefs more expensive” in the context of business activities imposes a burden on the exercise of religion.<sup>131</sup>

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t Hobby Lobby, Conestoga, and Mardel do the same?<sup>132</sup>

. . . .

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit

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129. *Id.* at 709.

130. *Id.* (citations omitted). An entirely other rationale for the recognition of corporate First Amendment rights such as speech and religious liberty can be grounded upon the concept of institutional pluralism (a subject beyond the scope of this article). See Chaplin, *supra* note 13, at 157-58.

131. *Burwell*, 573 U.S. at 709–10 (citations omitted).

132. *Id.* at 710.



corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.<sup>133</sup>

Admittedly, Congress passed RFRA to expand upon what it had deemed to be an improperly narrow reading of the Free Exercise Clause by the Supreme Court in its 1990 decision *Employment Division v. Smith*.<sup>134</sup> Thus, it might seem fair to argue that *Burwell*, a decision based upon RFRA and not the Free Exercise Clause, cannot logically be extended to Free Exercise claims (the language quoted above notwithstanding). The defect in this argument lies in the fact that RFRA only explicitly broadened the *Smith* approach to religious liberty with respect to the *test* to be applied to religious liberty cases, and not with respect to the question of *who* was capable of bringing religious liberty claims.<sup>135</sup> Indeed, that latter question was not the focus of congressional concern in its reaction to *Smith* and its passage of RFRA.<sup>136</sup> Although Justice Alito in *Burwell* acknowledged that RFRA’s definition of “free exercise” is not necessarily tied to the Supreme Court’s interpretation of the Free Exercise Clause pre-*Smith*,<sup>137</sup> he hastened to point out that “the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests . . . that for-profit corporations possess such rights.”<sup>138</sup>

In sum, business corporations, post-*Citizens United* and *Burwell*, appear to have the same First Amendment speech and religious liberty rights as do private individuals. The question of free speech rights has been made explicitly clear via *Citizens United*; the question of religious liberty

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133. *Id.* at 712–13. For more on benefit corporations, see Ronald J. Colombo, *Taking Stock of the Benefit Corporation*, 7 TEX. A&M L. REV. 73 (2019).

134. See *Emp. Div., Dep’t. of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990); see also *Burwell*, 573 U.S. at 694–95 (discussing RFRA’s legislative history).

135. RFRA sought to restore the “compelling government interest test” to religious liberty claims predicated upon laws of general applicability that infringed upon religious practice. See *Burwell*, 573 U.S. at 694–95.

136. See *id.*

137. See *id.* at 714–16.

138. See *id.* at 715. Alito did proceed to add that the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court’s pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*. *Id.* at 685.

flows naturally from that decision and, moreover, by the logic of the Supreme Court's extension of RFRA's protections to business corporations in *Burwell*.

*D. Prohibitions on Corporate Infringement of Religious Liberty*

Business corporations are subject to significant restrictions regarding the degree to which they can infringe upon the religious liberty of their employees. This possibly extends to the corporations' conduct with respect to customers and counterparties as well. The incongruence of these restrictions, in light of the recognized liberty interests of the corporation itself, will be addressed later.<sup>139</sup> At this juncture, we shall simply set forth said restrictions.

As an initial matter, it bears repeating that the rights and protections set forth in the United States Constitution do not apply to transactions between private parties.<sup>140</sup> Consequently, an employee, customer, or counterparty to a business corporation would not be able to bring a claim against the corporation predicated upon First Amendment grounds.<sup>141</sup> Nor would such an actor be permitted to avail himself or herself of RFRA, as this too is limited to religiously encroaching conduct on the part of government entities.<sup>142</sup> Instead, recourse for an individual claiming that his or her religious liberty had been infringed upon by a corporation would need to do so via recourse to civil rights legislation, or, perhaps, to contractual provisions entered into by both the claimant and the corporation.

Taking the two in reverse order, one could imagine a contract (such as an employment contract) which specifically included provisions regarding religious liberty therein. For example, had Sandy Koufax's contract with the Los Angeles Dodgers included a provision giving Koufax the right not to pitch on Yom Kippur, the Dodgers would be in breach of contract were they to compel him to do so.<sup>143</sup>

More commonly, individuals are protected against infringements of their religious liberty by state and federal antidiscrimination civil rights legislation. As previously mentioned, at the federal level, these protections are set forth primarily in the Civil Rights Act of 1964.<sup>144</sup>

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139. See *infra* Section V.D.

140. See *supra* note 83 and accompanying text.

141. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1933 (2019).

142. *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015).

143. His contract contained no such provision. See generally John Rosengren, *Myth and Fact Part of Legacy from Sandy Koufax's Yom Kippur Choice*, *SPORTS ILLUSTRATED* (Sept. 23, 2015), <https://www.si.com/mlb/2015/09/23/sandy-koufax-yom-kippur-1965-world-series> [<https://perma.cc/ZW78-V7MK>].

144. See *supra* notes 33–34 and accompanying text.

Title VII of the Civil Rights Act gives employees the statutory right of a workplace devoid of religious discrimination.<sup>145</sup> As per Title VII, it shall be unlawful for an employer:<sup>146</sup>

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>147</sup>

Title VII was amended in 1972 to require employers to reasonably accommodate employees whose religious obligations impede their work, to the extent such accommodation does not impose an "undue hardship" upon the employer.<sup>148</sup>

There are three important, substantive exemptions to Title VII. First, distinctions rendered on the basis of religion are not unlawful if such distinctions constitute "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business enterprise[.]"<sup>149</sup> Related to this, educational institutions "managed by a particular religion or by a particular religious corporation, association, or society," or if "directed toward the propagation of a particular religion" may make employment decisions on the basis of religion.<sup>150</sup> Courts have not generally extended this exception to for-profit business corporations, and the instances in which such businesses have sought the exception appear to be exceedingly rare.<sup>151</sup>

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145. *See id.*

146. "Employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees[.]" 42 U.S.C. § 2000e(b).

147. 42 U.S.C. § 2000e-2.

148. Andrew M. Campbell, Annotation, *What Constitutes Employer's Reasonable Accommodation of Employee's Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. Fed. 1, 1 (1996).

149. 42 U.S.C. § 2000e-2(e)

150. *Id.*

151. *See* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 91 (2013). The only case in which a for-profit business entity successfully availed itself of the Title VII bona fide occupational qualification to discriminate on the basis of religion that I was able to locate was *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). As per the synopsis of that case:

requirement that pilot convert to Moslem religion was bona fide occupational qualification which warranted employer's religious discrimination, inasmuch as requirement was not merely response to

Second, Title VII does not apply to, among others, “a religious corporation.”<sup>152</sup> The statute does not define “religious corporation,” and courts have “broadly interpreted the phrase to include places of worship, religious educational institutions, and not-for-profit organizations with clear religious affiliations.”<sup>153</sup> Courts have not extended the definition of this phrase to cover religiously expressive for-profit business corporations.<sup>154</sup>

Lastly, there is the “ministerial exemption.”<sup>155</sup> “Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.”<sup>156</sup> As with the prior exemptions, for-profit enterprises have not been extended this exemption, and not even the commercial activities of church organizations.<sup>157</sup>

Title II of the 1964 Civil Rights Act prohibits discrimination on the basis of religion (and other characteristics) with respect to “goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation[.]”<sup>158</sup> Title II does not provide a definition of “public accommodation” per se, but has been interpreted narrowly to cover “five categories of establishments: ‘lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment;’ and establishments located within covered establishments and open to the public.”<sup>159</sup> Thus, although certainly some corporations would constitute “public accommodations” under federal law, many would not.

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preference of contractor performing work in Saudi Arabia, but reflected fact that non-Moslem employees caught flying into Mecca would, under Saudi Arabian law, be beheaded.  
*Id.* at 1196.

152. 42 U.S.C. § 2000e-1(a).

153. Julie Dabrowski, *The Exception That Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees*, 63 AM. U. L. REV. 1957, 1964 (2014).

154. *Id.* Cf. COLOMBO, *supra* note 11, at 64–68 (discussing the “religiously expressive corporation”).

155. See Allan G. Osborne, Jr. & Charles J. Russo, *When Are Teachers in Faith-Based Schools “Ministers” for Purposes of the Ministerial Exception?*, 364 ED. LAW REP. 731, 737 (2019).

156. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

157. See Michael A. Helfand, *What Is a “Church”? Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 419 (2013).

158. 42 U.S.C. § 2000a(a).

159. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 639–40 (2016) (quoting 42 U.S.C. § 2000a(b)); see also Tara E. Thompson, *Locating Discrimination: Interactive Web Sites as Public Accommodations under Title II of the Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 412 (2002).

In addition to preceding, every state has its own regime of antidiscrimination legislation and regulation,<sup>160</sup> an examination of which is beyond the scope of this Article. That said, I hasten to add that in contrast to Title II of the Civil Rights Act, many, if not most state antidiscrimination laws define the term “public accommodation” in a way that is more consistent with the broad, common law understanding of the term, and do so in a way that encompasses more entities than does the Civil Rights Act.<sup>161</sup>

### III. THE NATURE OF THE BUSINESS CORPORATION

To help evaluate the normative question of the most appropriate relationship between religious liberty and the business requires, I suggest some theoretical considerations regarding the nature of the firm. Our conceptualization of the firm helps inform a proper understanding of its rights and responsibilities.<sup>162</sup> If conceived of as an association of individuals, one would expect the corporation to have rather strong claims to the same rights as individuals—claims perhaps as strong as those of any other association in society.<sup>163</sup> On the other hand, if the firm is conceived of as a mere artificial entity, owing its existence to the acquiescence of the state, then claims to the same rights of individuals are more likely to ring hollow.<sup>164</sup> Moreover, if conceived of as an arm of the state, or some close analogue thereto, our concerns turn from one of delineating the firm’s rights toward articulating restrictions on the firm’s powers in order to safeguard the rights of others.

More specifically, to the extent that the corporation is best classified as a “private” enterprise, extension of First Amendments *protections* to the corporation would be justifiable. To the extent that the corporation is best classified as a “public” institution, imposition of First Amendment *restrictions* upon the corporation would be more justifiable.<sup>165</sup> This understanding of public hearkens us back to the Latin adjective “publicus” from which the word is derived, meaning “belonging to the people” (and from which the word “republic” is also derived).<sup>166</sup>

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160. See, e.g., John J. Coleman, III, DISABILITY DISCRIMINATION IN EMPLOYMENT § 8:1 (Aug. 2020).

161. See *id.* at 640–41; see *infra* Section IV.D.2.

162. Colombo, *supra* note 13, at 26–29.

163. See *id.* at 29–35.

164. See *id.* at 27–28.

165. By “private” I refer to enterprises and phenomena of individual initiative, typically standing in juxtaposition to the state; by “public” I refer to an organ or extension of the state. See Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 841 (2013).

166. *Publicus*, CASSELL’S NEW LATIN DICTIONARY 814 (1968).

Distinct in theory, but less so in practice, is the nature of what the corporation *is* versus the nature of what the firm *does*. A firm that bears all the hallmarks of a genuinely private undertaking might nonetheless be appropriately categorized as a public institution because of its undertakings—because of the role it plays in society. Thus, in our inquiry into the nature of the firm, we should bear in mind these dual aspects of the firm’s nature, one constitutive and one operational.<sup>167</sup>

### *A. Conceptualizations of the Corporation*

#### 1. Nexus of Contracts

In our own time, among legal theorists, the corporation is predominantly viewed as a “nexus of contracts”—an interlocking hub of “reciprocal arrangements”<sup>168</sup> among investors, directors, managers, employees, suppliers, customers, and others.<sup>169</sup> In other words, the very term “corporation” is merely a short-handed way of referring to this aggregation of contractual (in substance, and typically in form as well) relationships.<sup>170</sup> This perspective reflects well the thinking of our era, an era marked by a historically extreme level of individualism (versus communitarianism)<sup>171</sup> and the ascendancy of the economic approach toward legal analysis.<sup>172</sup>

The contractarian conceptualization of the corporation is, however, a malleable one, and can be used to justify a rather wide range of normative perspectives regarding the corporation’s rights and responsibilities.<sup>173</sup> It can be used to support the traditional shareholder primacy model of the corporation (pursuant to which the board of directors is duty-bound to maximize shareholder profits),<sup>174</sup> along with multi-fiduciary approaches

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167. As Professor William Bratton was kind enough to point out to me, this ties into the debate over the “publicness” of the corporation. See, e.g., Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 406 (2020).

168. Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 822 (1999).

169. Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 320 (1993).

170. See *id.*

171. See Gene V. Glass, A. G. Rud & Christopher Higgins, *The Struggle Between Individualism and Communitarianism: The Pressure of Population, Prejudice, and the Purse*, 36 REV. RSCH. EDUC., 95–112 (2012).

172. See Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533 (2006).

173. See Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1452 (1989).

174. Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1428 (1993).

to corporate governance.<sup>175</sup> This is because the contents of the corporate “contract” can rather readily be hypothesized as including this or that particular provision.

Nevertheless, I would not consider the nexus of contracts model agnostic with respect to the question of corporate classification. Its predominant use has been to justify traditional understandings of the corporation as a phenomenon of private ordering.<sup>176</sup> This flows readily from the very nature of the contractarian model, as contract law is the paradigm of private ordering.<sup>177</sup> Thus, despite efforts to broaden the responsibilities of corporate boards to nonshareholder “stakeholders” by progressive contractarian theorists,<sup>178</sup> the nexus of contract model remains fundamentally supportive of an understanding of the corporation that is private in orientation.

## 2. Real Entity Theory

Under the “real entity” (or “natural entity”) theory, the corporation is viewed as a naturally occurring phenomenon—a whole greater than the sum of its parts.<sup>179</sup> This theory, with its medieval origins<sup>180</sup> and occasional metaphysical glosses,<sup>181</sup> does not resonate well with our modern civilization reared on a strictly post-“Enlightenment” diet of philosophical fads and biases.<sup>182</sup> Despite its genuine explanatory power,<sup>183</sup> the real entity theory has not seen a resurgence and “has few, if any, advocates within the scholarly legal community.”<sup>184</sup>

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175. See Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1203–07, 1252–53 (1991) (cited in Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 777 n.24 (2002)).

176. E.g., Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from A Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1281 (1999); Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 337 (2011).

177. See Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 85 (2012).

178. See, e.g., Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 753 (2017).

179. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 580 (1989).

180. *Id.*

181. See Eric W. Orts, *Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559, 596 n.38 (2016).

182. Cf. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 49–59 (1981).

183. See Hager, *supra* note 179; SUSANNA KIM RIPKEN, *CORPORATE PERSONHOOD* 34–39 (2019); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1662 (2011) (“The real entity view perhaps meshes best with common conceptions about corporations.”).

184. Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1062 (1994).

Assessing how a real entity theorist would classify the business corporation is challenging. Even if one visualizes the corporation as a naturally occurring entity, the same can be said of a broad variety of other institutions both public and private, such as “[f]amilies, clans, nations, guilds, [and] unions.”<sup>185</sup> In other words, the “realness” or “naturalness” of the firm does not readily yield to a particular classification of the corporation as either public or private.

### 3. Concession Theory

Pursuant to the “concession theory,” the corporation owes its existence to the sovereign’s grace.<sup>186</sup> Concessionary understandings of the corporation reigned supreme in the age of kings and queens, and seems to be a particularly inappropriate fit to an entity that can today be created via the filing of some routine paperwork with a state bureaucracy.<sup>187</sup>

Yet, unlike the real entity theory, concessionary theories of the corporation abound.<sup>188</sup> This can probably be explained by the fact that, as one commentator frankly acknowledged, “concession theory is the only one that legitimizes presumptive deference to state regulation.”<sup>189</sup> Thus, modern efforts to subject the corporation to enhanced regulation and oversight frequently lean upon concessionary theories of the corporation.<sup>190</sup>

As has been already mentioned, the process of corporate chartering has been radically transformed over the centuries, seriously undercutting a return to a concessionary view of the firm.<sup>191</sup> What had previously been a case-by-case undertaking, subject to the sovereign’s grace,<sup>192</sup> is now essentially a matter of course if not “a right generally available to all on equal terms.”<sup>193</sup> This revolution was brought about by the promulgation of statutes of general incorporation, which had “become common in the 1870s and 1880s.”<sup>194</sup> These statutes removed corporate chartering from

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185. Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 567 (1987).

186. *Id.* at 565.

187. See Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561, 584 (1917).

188. E.g., Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 329 (2014).

189. *Id.*

190. E.g., *id.*

191. See text accompanying *supra* note 187.

192. Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1742 (2016).

193. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 452 (1982) (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 660 (1981)).

194. William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 152 n.24 (2008).



the state's discretion, making "incorporation available to anyone who filed the appropriate documents with a government official."<sup>195</sup> As one commentator aptly put it, "[i]ncorporation was transformed from a privilege into a right."<sup>196</sup> Or, as Henry Butler and Larry Ribstein explained, "the state concession notion has absolutely no application to modern corporations formed under general incorporation laws, where the state merely provides a standard form and a filing mechanism."<sup>197</sup>

Furthermore, throughout the concessionary era, corporations were understood to be entities created by the government largely to carry out public or quasi-public functions.<sup>198</sup> Indeed, up until modern times, "society always has linked permission to create a corporate, and therefore separate, legal personality to the achievement of its social goals."<sup>199</sup> Thus, corporations were historically chartered for the public purposes of tax collection and colonization,<sup>200</sup> and for the construction of canals, bridges, and roads.<sup>201</sup> Corporations were also chartered for what could be considered quasi-public undertakings, such as the operation of banks, insurance companies, churches, and schools.<sup>202</sup> This too changed concomitant with the movement toward general incorporation, for the late Nineteenth Century witnessed the growing permissibility to charter a corporation for "entirely private purposes."<sup>203</sup> Thus today, a corporation can be formed to pursue "any legal purpose," and may be done so within a matter of hours as a matter of course via the submission of certain required paperwork.<sup>204</sup> Consequently, corporations are rightfully viewed

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195. John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2163 (2016).

196. Harvard Law Review Editorial Board, *Constructive Notice of the Charter of a Corporation*, 26 HARV. L. REV. 540, 541 (1913).

197. Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 783–84 (1989).

198. See Peter Nobel, *Social Responsibility of Corporations*, 84 CORNELL L. REV. 1255, 1257 (1999).

199. *Id.*

200. See *id.*

201. Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L., ETHICS & PUB. POL'Y 199, 209 (2015); Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law Via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 251 (2008).

202. Colombo, *supra* note 201, at 251.

203. *Id.*

204. Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 809 (2013).

and referred to as “private enterprises,”<sup>205</sup> pursuant to which they exist to maximize shareholder profits.<sup>206</sup>

Finally, corporate chartering during the concessionary era was typically accompanied by “state-granted monopoly privileges.”<sup>207</sup> As late as 1800, people in the United States “identified corporations with franchised monopolies.”<sup>208</sup> This is a far cry from today, in which incorporation is rarely if ever accompanied by monopoly privileges.<sup>209</sup>

In short, during the concessionary era, corporations “were essentially [1] [discretionarily] state chartered [2] monopolies for [3] the pursuit of some interest beneficial to the state.”<sup>210</sup> None of these hallmarks of corporate chartering apply today.

From the preceding, it becomes readily apparent that concessionary theories of the corporation support a decidedly public classification of the firm. This flows from both the history of concessionary theory and its emphasis on state involvement or acquiescence in corporate formation.

#### 4. Aggregation and Property Theories

“Aggregation” and “property” theories of the firm describe the corporation in terms similar to that of a partnership.<sup>211</sup> As with other conceptualizations of yesteryear, these theories also seem ill-suited to an entity which, today, is defined largely by the separation of ownership and control.<sup>212</sup>

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205. See Izi Pinho, *The Advent of Benefit Corporations in Florida*, 47 STETSON L. REV. 333, 337 (2018). That said, for at least a century, some commentators have pushed back on this contention, observing that modern business corporations “should be seen as *social* institutions rather than private enterprises” by virtue of the fact that shareholder bore “little resemblance to traditional owners.” Paddy Ireland, *Efficiency or Power? The Rise of the Shareholder-Oriented Joint Stock Corporation*, 25 IND. J. GLOBAL LEGAL STUD. 291, 314 (2018).

206. See Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 517 (2011).

207. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 387 (2010) (Scalia, J., concurring).

208. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 194 (2d ed.1985) (quoted in *Citizens United*, 558 U.S. at 387).

209. See Elizabeth Pollman, *supra* note 183, at 1662.

210. Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 26 (2002) (bracketed numbers added) (quoted in Colombo, *supra* note 13, at 15).

211. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202 (1990); Benedict Sheehy, *Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIAMI BUS. L. REV. 193, 221 (2005).

212. Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL’Y 671, 671 (1995).

Aggregation and property conceptualizations can trace their origins back to Roman times,<sup>213</sup> and run through the Middle Ages,<sup>214</sup> with each period recognizing the ability of individuals to act, own property, and be recognized in a collective form.<sup>215</sup>

Arguably aggregation theory reached its most prominent heights during the first half of the nineteenth century, at a time when corporations featured a relatively small number of shareholders, and when limited shareholder liability was not yet the norm.<sup>216</sup> As such, the firm resembled, to a very large extent, a partnership<sup>217</sup> (traditionally the quintessential aggregation/property paradigm of business organization).<sup>218</sup> In the United States, aggregation theory was also able to draw upon the rich history and preference for associational activity to further bolster its adoption as a means by which to conceptualize the corporation.<sup>219</sup>

But as with concession theory, changes in the corporate landscape provoked changes in corporate theory.<sup>220</sup> The proliferation of shareholders put strain on the partnership and associational analogies.<sup>221</sup> With this came the transformation of shareholders from active owners to passive investors—further weakening the propriety of conceptualizing the corporation as an aggregation of individuals along the lines of a partnership.<sup>222</sup> Adding to this has been the extension of limited liability—a prerogative not enjoyed by the traditional partnership.<sup>223</sup>

As with the contractarian approach to the firm,<sup>224</sup> aggregation and property theories emphasize private ordering and the role of the individual.

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213. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 775 (2005).

214. *Id.* at 777; Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 8 (1926).

215. See Avi-Yonah, *supra* note 213, at 775–79.

216. See *id.* at 789–93.

217. See Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 72 (2005).

218. See Donald J. Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 TOL. L. REV. 825, 831 (1990) (recognizing the traditional aggregation theory of the partnership and discussing the recent trend toward an entity theory).

219. See Krannich, *supra* note 217, at 72–73; see generally Colombo, *supra* note 13, at 26–29 (2012).

220. See *supra* Section IV.A.3.

221. See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 807 (2013).

222. See *id.*

223. Query whether the advent of limited liability partnerships undermines the continued invocation of this particular distinction between the corporation and the partnership. Cf. Robert R. Keatinge, *Universal Business Organization Legislation: Will it Happen? Why and When*, 23 DEL. J. CORP. L. 29, 46 (1998).

224. See *supra* Section IV.A.1.

Thus, as with the contrarian approach, these theories support the classification of the corporation as a private entity—not a public one.

### *B. Corporate Diversity and Evolution*

As discussed, the conceptualization of the business corporation has fluctuated over time, and for good reason: the ways in which firms were created, the legal regimes under which they operated, and the objectives which they pursued evolved, shifting significantly over the centuries.<sup>225</sup> This evolution, in turn, provoked a rethinking of the corporation's nature from era to era.<sup>226</sup>

As with rules of thumb and legal presumptions, these broad generalizations about the nature of the business corporation have served a salutary purpose: they permitted thinkers to draw from the well of common human experience, thereby saving the time and effort needed to assess all situations and phenomena afresh. As the sayings go, such generalizations relieve us of the burdens associated with “starting from scratch” or “reinventing the wheel.”

But in society's wisdom, we recognize exceptions to rules of thumb, and we permit the rebuttal of most legal presumptions. This is because generalizations rarely cover every situation to which they apply with equal accuracy. The same holds true with regard to one's embrace of a particular theory of the corporation: it may aptly describe most corporations most of the time during a given era but is unlikely to cover all corporations all of the time.

Thus, in opposition to modern conceptualization of the corporation as a nexus of contracts stand individual instantiations of the corporation that appear to better fit bygone characterizations. Corporations can vary quite dramatically from one to the other, undermining the convenience of a “one size fits all” approach to their characterization.<sup>227</sup> An incorporated hot-dog stand, owned and operated by a single individual, is a sole proprietorship in function even if not in form; it is hardly a nexus of contracts. Similarly, a small family-owned restaurant, run by the owners themselves, resembles a partnership more than an abstract “interlocking hub of ‘reciprocal relationships’”<sup>228</sup> even were it to be incorporated. Once such things are recognized, it becomes possible (and, I suggest, advisable) to dust off and reconsider conceptualizations of the corporation drawn from yesteryear. And with that comes repercussions for any analysis of said corporation's constitutional rights.

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225. See text accompanying *supra* notes 168-224.

226. See *id.*

227. See COLOMBO, *supra* note 11, at 190-92.

228. See text accompanying *supra* note 168.

Additionally, trends in corporate governance and corporate priorities, particularly the advent of the Public Benefit Corporation<sup>229</sup> and the increasing demand for and visibility of “ESG” (environmental, social, and governance) disclosures,<sup>230</sup> all suggest that the reigning nexus of contracts conceptualization might be due for reconsideration. For these movements harken to a more communitarian vision of the corporation—one that distances itself from those theories of the firm that favor a classification of the corporation that is decidedly private in nature.<sup>231</sup> In other words, the embrace of obligations to society in general (versus simply toward those of the corporation’s private constituencies) suggests an entity that is increasingly public in orientation if not in character.

Most salient for our purposes is the degree to which a business corporation can be best characterized as a concession of the state versus some other theoretical construct. This is because of all the conceptualizations considered; only concessionary theories genuinely support classifying a corporation as a public enterprise. Conjoined to this inquiry is an assessment of other factors and realities that reasonably lead to the categorization of a particular corporation as predominantly public in nature.

Certainly, as discussed, in all cases today, corporations may be created by a matter of right—thereby distinguishing them significantly from those corporations chartered during the concessionary era.<sup>232</sup> Nevertheless, obvious and important similarities exist between such corporations of yesteryear and some that, in our own times, engage in activities traditionally undertaken by states and governments. Moreover, frequently (although not always), engagement in such activities requires governmental acquiescence, such as the need to procure certain licenses, or simply the need to win the award of certain contracts.<sup>233</sup>

Consider, for example, public utilities. These “do in fact have privileges (special powers, barriers to entry, government contracts) similar

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229. See generally Colombo, *supra* note 133.

230. See generally Aisha I. Saad & Diane Strauss, *The New “Reasonable Investor” and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 BERKELEY BUS. L.J. 391, 392 (2020); Era Anagnosti, Colin J. Diamond, Maia Gez, Danielle Herrick, Seth Kerschner, Laura Mulry, Henrik Patel, Victoria Rosamond, Clare Connellan, & Emily Holland, *ESG Disclosure Trends in Sec Filings*, WHITE & CASE (Aug. 13, 2020), <https://www.whitecase.com/publications/alert/esg-disclosure-trends-sec-filings> [<https://perma.cc/P8KV-U38Q>].

231. See Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 78 (2017); Paul N. Cox, *The Public, the Private and the Corporation*, 80 MARQ. L. REV. 391, 401 (1997).

232. See *supra* text accompanying notes 195–206.

233. E.g., Rahul Kapoor, *Limits on Foreign Ownership of Radio Licenses Under 47 U.S.C. § 310: An Analysis of the Existing Restrictions and Proposed Changes in the Telecommunications Act of 1996*, 15 WIS. INT’L L.J. 163, 164 (1996); André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL’Y 407, 415 (2016).

to privileges of Founding-era corporations.”<sup>234</sup> The same can be said for “telecommunications companies, airlines, banks, railroads, defense contractors, and the rest of government-dependent or -protected sectors that comprise roughly a third of the value of all privately owned business.”<sup>235</sup> In short, there exist a large number of corporations that “provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities.”<sup>236</sup> Such entities blur the line between what is private and what is public.

Consequently, I suggest an undeniable private-versus-public continuum of corporate activity exists. One pole of this continuum is occupied by undertakings that are wholly private in nature, and the other pole characterized by undertakings that are wholly public in nature.<sup>237</sup> To the extent that a corporation sits nearer the former pole (wholly private), the less appropriately can it be characterized as a public institution or a state concession; to the extent that a corporation sits nearer the latter pole (wholly public), the more appropriately can it be characterized as a public institution or a state concession.

### C. State Action Doctrine

To a degree, the functional nature of the firm is addressed by the “state action doctrine,” and as such, this concept requires our scrutiny. Put in its simplest form, the state action doctrine maintains that “[w]hen a private party performs a traditionally exclusive public function, its performance of this function is treated as state action.”<sup>238</sup> Consequently, First Amendment (and other) restrictions upon government can be applied to a corporation (or any private actor for that matter) if the “nongovernmental defendant performs the sorts of functions traditionally associated with government” or “the nongovernmental defendant has a sufficiently close nexus with the government—through a relationship such as contract, authorization, or regulation—that the Court can attribute its

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234. John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 232 (2015).

235. *Id.*

236. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

237. This to the extent that anything can be properly characterized as “wholly private” or “wholly public.” Indeed, these poles themselves may serve as placeholders for platonic forms rather than genuine instantiations.

238. Fiona O’Carroll, *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers*, 67 EMORY L.J. 293, 328 (2017).

conduct to the government.”<sup>239</sup> Thus, to the extent that a corporation’s activities fall within the ambit of the state action doctrine, our need to classify the corporation as public versus private is dispensed with; the firm is unquestionable treated like a public institution and as such possibly subject to the restrictions of the Establishment Clause.

Unfortunately, applying the state action doctrine is exceedingly difficult.<sup>240</sup> This is because the factors to be considered have been poorly explained and inconsistently applied.<sup>241</sup> Purportedly, courts assessing this question are to evaluate:

- (1) the degree of entanglement between the State and the private entity;
- (2) the extent to which the state and the private entity have a partnership/symbiotic relationship or are participating in a joint venture; and
- (3) whether the private entity is performing a traditionally exclusive State function.<sup>242</sup>

The third element, “whether the entity is performing a traditionally exclusive State function,” in turn is supposed to be guided by a consideration of the following:

- (1) ensuring that people have access to services essential to meaningful existence,
- (2) honoring people’s expectation that some services will be provided in accordance with constitutional rules, and
- (3) preventing entities with market power . . . from exploiting their positions to consumers’ detriment.<sup>243</sup>

I have qualified the factors set forth above in light of the fact that “there is very little consistency in the Court’s State action decisions.”<sup>244</sup> Although the courts have provided examples of state action (“[e]xamples of traditional governmental institutions and activities include schools, hospitals, fire prevention, police protection, sanitation, public health,

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239. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 128–29 (2004).

240. Eric Sirota, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 841 (2018).

241. *See id.*

242. *Id.* at 794.

243. Christopher R. Edgar, *The “Traditional State Function” Doctrine: A Comparative Institutional Perspective*, 1 NYU J.L. & LIBERTY 857, 861 (2005).

244. Sirota, *supra* note 240, at 795.

parks and recreation, libraries, and museums”),<sup>245</sup> unfortunately, most of what falls within versus without the category of state action remains less than pellucid. Indeed, the Supreme Court “has resolved the state action issue on a case-by-case basis.”<sup>246</sup> As the Court itself has said: “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>247</sup> Consequently, as one commentator aptly explained, “[t]here is little coherence to the Supreme Court’s State action jurisprudence.”<sup>248</sup>

#### *D. Common Carriers and Public Accommodations*

Two other closely related legal doctrines bear upon the degree to which business enterprises, such as corporations, are treated as private versus at least partially public undertakings: jurisprudence concerning “common carriers” and the law of “public accommodations.”<sup>249</sup>

##### 1. Common Carriers

Traditionally, a common carrier was

one who holds him or herself out to the public as engaged in the business of transportation of persons or property from place to place for compensation or hire, offering his or her services to the public generally, without making individualized decisions, in particular cases, whether and on what terms to deal.<sup>250</sup>

Under the common law, courts imposed upon such enterprises a requirement “to serve all comers,” or to “serve without discrimination all who desire to be customers.”<sup>251</sup> The justification for this imposition was that the common carrier was effectively a public utility.<sup>252</sup> Although aspects of the common law approach to common carriers have been codified by both state and federal regulation, largely preempting the field,

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245. “Traditional And Nontraditional Governmental Activities,” FAIR LABOR STANDARDS HANDBOOK FOR STATES, LOCAL GOVERNMENTS AND SCHOOLS § 113 (Susan Prince, ed. 2018). Although this list pertains to the Fair Labor Standards Act, a specialized area of the law, it nevertheless provides a useful, general recitation of activities commonly understood to be responsibilities of the state.

246. *Id.* at 129.

247. *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

248. Sirota, *supra* note 240, at 841.

249. *See Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

250. 13 C.J.S. *Carriers* § 2.

251. Harry L. Reed, *The New Carbon Dioxide Pipelines: Revival of the Common Carrier at Common Law*, 12 OKLA. CITY UNIV. L. REV. 103, 104 (1987); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. UNIV. L. REV. 1283, 1292 (1996).

252. *See Reed, supra* note 251, at 113.



the common law in this area was never actually repealed.<sup>253</sup> Moreover, as one commentator explained, the common law remains “alive and well” with respect to the obligations of common carriers, especially with regard to its usefulness in interpreting state and federal regulation.<sup>254</sup>

Based on the preceding, an argument can be made that those who manage the infrastructure of the Internet are common carriers.<sup>255</sup> A number of scholars have extended this to social media companies themselves, calling them “*de facto* common carriers,”<sup>256</sup> and “analogous to common carriers.”<sup>257</sup> As Justice Thomas has noted, “[i]n many ways, digital platforms that hold themselves out to the public resemble traditional common carriers.”<sup>258</sup> Although it is beyond the scope of this Article to resolve whether a particular businesses corporation is or is not a common carrier, it is important to observe that “[t]here is a fair argument that some digital platforms are sufficiently akin to common carriers . . . to be regulated in this manner.”<sup>259</sup>

## 2. Public Accommodations

Some scholars contend that the common law regarding common carriers represents a narrowing of an even older common law tradition regarding public accommodations.<sup>260</sup> As one such scholar explained, “there is a substantial argument that the duty to serve the public extended to all businesses that held themselves out as open to the public,” and not just those designated as “common carriers.”<sup>261</sup> The advent of state and federal civil rights legislation, and most especially the Civil Rights Act of 1964,<sup>262</sup> largely abrogates these concerns, for modern civil rights laws

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253. *Id.* at 115.

254. *Id.* Scholars dispute the degree to which monopoly power plays a role in the designation of an entity as a common carrier. See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255–56 (2002).

255. Speta, *supra* note 254, at 269. (“In the purely legal dimension, Internet carriers seem presumptively to be common carriers.”).

256. W. Mike Jayne, *Fairness Doctrine 2.0: The Ever-Expanding Definition of Neutrality Under the First Amendment*, 16 FIRST AMEND. L. REV. 466, 499 (2018).

257. Ashley E. Smith, *Socially Awkward? Limiting Social Media Companies’ Discretion in Determining What Content Is Appropriate on Business Pages*, 50 UNIV. PAC. L. REV. 127, 141 (2018).

258. Biden v. Knight First Amendment Institute at Columbia University, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

259. *Id.*

260. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. UNIV. L. REV. 1283, 1294 (1996).

261. *Id.*

262. See text accompanying *supra* notes 158–60.

have largely displaced the common law in protecting against discrimination and more clearly define their scope of applicability.<sup>263</sup>

As with common carrier law, some have suggested that the definition of a “public accommodation,” whether under statutory or common law, may extend to cyberspace.<sup>264</sup> Speculation is already underway as to whether social media and online fora should be subject to laws prohibiting discrimination as public accommodations.<sup>265</sup> Again, it is beyond the scope of this Article to resolve this question. Rather, the question helps to underscore the jurisprudential backdrop relevant to the solution proposed below.

#### IV. THE CENSOR ACT

The law regarding the constitutional rights and responsibilities of corporations occupying extreme positions along the public-versus-private continuum, for our purposes at least, is fairly clear.

Corporations near the wholly private end of the continuum are treated essentially the same as private citizens when assessing the constitutional status of their rights and responsibilities. This was suggested by the Supreme Court in *Burwell v. Hobby Lobby*, as previously discussed.<sup>266</sup> At a minimum, *Burwell* stands for the proposition that a closely held arts-and-crafts store such as Hobby Lobby, professing adherence to religious beliefs, could raise a religious liberty challenge under

RFRA equivalent to that raisable by an individual.<sup>267</sup> Without much extrapolation, and based upon the Supreme Court’s logic in *Burwell*, such corporations should also be able to bring religious liberty claims under the First Amendment as well.<sup>268</sup>

Conversely, corporations occupying the wholly public end of the continuum are treated as governmental actors when assessing the constitutional status of their rights and responsibilities.<sup>269</sup> This is what the state action doctrine requires.<sup>270</sup>

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263. See Ronnie Cohen & Janine S. Hiller, *Towards a Theory of Cyberplace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 2, 30 (2003).

264. *Id.* at 41–42.

265. Susan Nabet, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1554 (2012). See also Sean Pope, *America Off-Line: A Look at the Applicability of the Americans with Disabilities Act on Streaming Digital Media and the Internet*, 34 LOY. L.A. ENT. L. REV. 193, 214 (2014).

266. See *supra* Section III.C.

267. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

268. See text accompanying *supra* notes 134–138.

269. Magarian, *supra* note 239, at 128–29.

270. See *supra* Section IV.C.

But for the vast space between these two extremes, how rights and responsibilities ought to be recognized, both normatively and in practice, remains problematic. Existing constitutional jurisprudence and common law touches upon but fails to safeguard critical fora for expression, speech, and religious exercise (especially in the form of proselytizing, or the purchase and sale of religious literature).

In a prophetic statement made decades ago, Erwin Chemerinsky argued “that the state action doctrine should be revisited and abandoned” because “private censorship can be as harmful as governmental censorship.”<sup>271</sup> In Chemerinsky’s own words:

Freedom of speech is defended both instrumentally—it helps people make better decisions—and intrinsically—individuals benefit from being able to express their views. The consensus is that the activity of expression is vital and must be protected. Any infringement of freedom of speech, be it by public or private entities, sacrifices these values. In other words, the consensus is not just that the government should not punish expression; rather, it is that speech is valuable and, therefore, any unjustified violation is impermissible. If employers can fire employees and landlords can evict tenants because of their speech, then speech will be chilled and expression lost. Instrumentally, the “marketplace of ideas” is constricted while, intrinsically, individuals are denied the ability to express themselves. Therefore, courts should uphold the social consensus by stopping all impermissible infringements of speech, not just those resulting from state action.<sup>272</sup>

Or, as expressed more broadly (and less assertively) by Justice Thomas: “We will soon have to no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”<sup>273</sup>

A judicial solution, as perhaps envisioned by Justice Thomas, is certainly possible. As has been demonstrated, several avenues invite further exploration in this regard. However, each, on its own, may not be up to the challenge. Moreover, to the extent that these solutions are grounded upon the Constitution (which would presumably be the case), they would suffer from all the deficiencies attendant to this particularly

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271. David L. Hudson Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 HUM. RTS., 2018, no. 4, at 2, 3.

272. *Id.* at 3–4 (quoting Erwin Chemerinsky, *Rethinking State Action*, 80 NW. UNIV. L. REV. 503, 533–34 (1985)).

273. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

precarious form of judicial lawmaking.<sup>274</sup> Thus, a legislative solution is to be preferred.

Corporate law is primarily the province of the states,<sup>275</sup> and, consequently, any legislative solution could be state-based. State corporate law could, for example, define as ultra vires misconduct along the lines identified herein.<sup>276</sup> The problem with such an approach is the internal affairs doctrine, pursuant to which the state of a company's incorporation governs the corporate law applicable thereto.<sup>277</sup> This would enable a social media giant, for example, to evade any such legislation by simply reincorporating in a state that neglected to adopt such a provision in its corporate law. Hence, a federal legislative solution is necessary.

### *A. Principles*

Informed by the preceding review of precedent and principles, and guided by an understanding of the fact that a corporation's nature can best be conceptualized by an inquiry into its own particular circumstances, a legislative solution to the problem of corporate control over society's most critical fora for expression is considered herein. A model form of this legislation, entitled the "CENSOR Act" (the "Cancellation of Expression, News, Speech Or Religion" Act) is set forth below. Although our focus remains on corporate promotion and suppression of religion, the model legislation addresses expression, news, and speech as well because of the overlapping issues common to all of these First Amendment rights. This also serves to eliminate the difficulty of needing to ascertain whether a particular right or freedom is more appropriately characterized as one of religion, versus speech, versus expression more generally.

Very roughly put, the CENSOR Act serves to clarify and codify the state action doctrine, at least for purposes of the First Amendment. It sets out the circumstances under which a business corporation ought to be bound by the First Amendment's limitations on government action.

Before proceeding to the text and details of the CENSOR Act, let us first pull together and articulate the values from which it has been drawn.

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274. See Paul D. Carrington, *A Senate of Five: An Essay on Sexuality and Law*, 23 GA. L. REV. 859, 899–906 (1989).

275. See Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 551 (1984).

276. See Joseph K. Leahy, *Intermediate Scrutiny for Corporate Political Contributions*, 44 FLA. ST. UNIV. L. REV. 1119, 1162 n.254 (2017).

277. See Schwartz, *supra* note 275.

### 1. Market power.

A critical thread running through much of the understanding of what makes a corporation public versus private is the role of market power. Market power is understood here in the antitrust sense—classically defined as the ability of a firm to raise prices without material loss of patronage.<sup>278</sup> The concept of market power extends well beyond the power of prices, however. It extends to the ability to decrease the quality of goods and services without the material loss of patronage and to the ability to essentially dictate terms of dealing.<sup>279</sup> Monopolies are the quintessential example of an organization with market power, and the government is, for many purposes, the paradigmatic monopoly. It is, therefore, no surprise to see reference to market power during the concessionary era of the corporation, an era in which the state signed over to certain corporations its monopoly over particular undertakings. It is also no surprise to find market power playing a role in one of the Supreme Court's seminal decisions upholding the regulation of corporations.<sup>280</sup>

As such, an essential threshold inquiry for holding a corporation subject to the restrictions of the First Amendment ought to be whether it possesses market power. If it does not, the inquiry into any such subjection should be foreclosed. If it does, the inquiry should proceed.

### 2. Nature

After determining the existence of market power (or lack thereof), the next examination should be into the nature of the corporation in question. "Nature" here refers to two independent concepts: the nature of the firm's function (what the firm does; the market(s) in which the firm operates), and the nature of the firm's being (its composition and characteristics). Each concept requires separate examination. Either one must be implicated for the CENSOR act to apply to a given corporation—both are not necessary.

#### *a. Nature of the Firm's Function*

With regard to the examination into the firm's function, the focus here is on ascertaining whether the market over which the corporation exerts power is, for lack of a better term, a conduit of expression. This

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278. Johnny Shaw, *Avoiding Market Definition Under Section 1 of the Sherman Act*, 88 *FORDHAM L. REV.* 1133, 1134 (2019).

279. See Queenie Ng, *United States and Canadian Olympic Television Coverage: A Tale of Two Monopolists*, 8 *SW. J.L. & TRADE AMS.* 251, 257 (2002).

280. See *Munn v. Illinois*, 94 U.S. 113, 127–28 (1876). *But see* *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019) ("the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor").

hearkens back to the state action doctrine, but in significantly modified form. The state action doctrine's focus was on whether the corporation undertook activities that were traditionally those undertaken by the state.<sup>281</sup> The focus under the CENSOR act will be squarely upon undertakings that serve the public square—conduits over which individuals, associations, and institutions interact with one another to exercise the freedoms of speech, expression, press, and religion. For deprived of these conduits, individuals cannot engage in the discourse that is vital to a free society, cannot engage in certain forms of religious activity, such as proselytizing, that is hollowed within the American tradition, and cannot engage in the kind of self-expression that is respected as essential to human development and dignity in our society. This calls to mind Justice Kennedy's opinion in *Packingham v. North Carolina*,<sup>282</sup> where he observed:

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. . . . While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—"the vast democratic forums of the Internet"—in general, and social media in particular.<sup>283</sup>

This focus on function also draws support from the concept of common carriers. For as with the common carriers of yesteryear, there is a significant utilitarian dimension to the companies of today that dominate critical swaths of cyberspace.<sup>284</sup> As has been discussed previously, this comparison has not been lost upon commentators.<sup>285</sup> Consequently, corporations with market power that operate in conduits of expression, from booksellers such as Amazon to social media giants such as Facebook, should fall within the reach of the CENSOR act.

### *b. Nature of the Firm's Being*

Separate and apart from the question of what a corporation *does*, is the question of what a corporation *is*. The prevailing understanding is that

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281. *See supra* Section IV.C.

282. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733–38 (2017).

283. *Id.* at 1735 (internal citations omitted). *Cf.* Nicholas Jackson, *United Nations Declares Internet Access a Basic Human Right*, ATLANTIC (June 3, 2011), <https://www.theatlantic.com/technology/archive/2011/06/united-nations-declares-internet-access-a-basic-human-right/239911/> [<https://perma.cc/Q6B5-BW94>].

284. *See supra* Section IV.D.1.

285. *See id.*

the corporation is a nexus of contracts—a privately oriented phenomenon of private ordering. Thus, as a default, unless it exercised power over a conduit of expression, a corporation would not ordinarily fall within the purview of the CENSOR Act. However, for reasons discussed previously, not all corporations are best characterized this way.<sup>286</sup>

A privately held (closed) corporation, if not properly understood as a nexus of contracts, are perhaps best analogized to an association,<sup>287</sup> or perhaps even a partnership. As such, it would arguably be best conceptualized under a property or aggregational model of the firm. Either way—nexus, property, aggregation—the privately held corporation does not resemble anything along the lines of a concession from the state. It remains clearly private in orientation. Thus, unless it exercised market power over a conduit of expression, a privately held corporation, or some analogous entity, would not be subject to the restrictions of the CENSOR Act.

A publicly traded corporation, as per its very name, suggests an entity that is not wholly private. Hence, as discussed, the attraction (by some) to concessionary models of the firm, as these models emphasize the public nature of the corporation.<sup>288</sup> But, given the prevailing contractarian understanding of the firm, more is needed to subject the typical publicly traded corporation to the strictures of the CENSOR Act. Relevant to this would be the degree to which the corporation embraces “ESG”—environmental, social, governance objectives. For the more the corporation looks outward, beyond the confines of its own constituents, and to society at large, the more it transforms from an institution of purely private ordering for private ends to an institution that is public in orientation. The more it transforms itself into the kind of entity that existed when concessionary theories of the firm were a better fit. To help shift between corporate rhetoric and actual corporate composition, it may be helpful to see whether the firm has established itself as a Benefit Corporation,<sup>289</sup> thereby disavowing strict shareholder primacy (and, consequently, its status as an enterprise existing to maximize profits on behalf of investors) or take some other concrete action toward such ends.

On a related note, the degree to which a firm positions itself as a neutral provider of goods and services “to all comers,” it ought to be held accountable for making such representations. This draws from the history of requiring common carriers and places of public accommodation to serve

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286. *See supra* Section IV.A.

287. *See* COLOMBO, *supra* note 11, at 64-68.

288. *See supra* Section IV.A.3.

289. For more on benefit corporations, *see generally* Colombo, *supra* note 133.

the public without discriminating,<sup>290</sup> and provides yet another factor upon which to differentiate how best to apply First Amendment values to different organizations.

### *B. Text*

A draft of suggested text for the CENSOR Act is set forth below. The purpose of supplying a draft is to set forth, in broad strokes, the form that a legislative solution to the problem of corporate entanglement with religion (and the related problem of corporate infringement of speech and expression) might take. This effort can, undoubtedly, be improved upon.

#### **Section 1. Short Title**

This Act may be cited as the “Cancellation of Expression, News, Speech, Or Religion Act,” or CENSOR.

#### **Section 2. Congressional Findings and Declaration of Purposes**

(a) Findings. The Congress finds that the ability to meaningfully exercise the rights guaranteed by the First Amendment to the Constitution has been impeded by the actions of persons who exercise market power, particularly, but not exclusively, over critical conduits of expression.

(b) Purpose. The purpose of this Act is to subject certain persons who possess market power to the First Amendment’s restrictions upon government activity in order to safeguard and effectuate the exercise of First Amendment rights by others.

#### **Section 3. First Amendment Rights Protected**

Any person subject to this Act shall undertake no action respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### **Section 4. Persons subject to this Act**

(a) Subject to this act shall be those persons who possess market power and:

(i) exercise market power over a critical conduit of expression; *or*  
(ii) are a public corporation that has elected to deprioritize profit maximization by incorporating as a Public Benefit Corporation, obtaining B Corporation certification, adopting a charter or by-law provision indicating such deprioritization, or some other means.

(b) Part (a) of this section notwithstanding, the following entities shall not be subject to this act:

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290. See *supra* Section IV.D.



(i) churches, including entities operated by or majority owned by churches,

(ii) corporations, organizations, and associations existing primarily to advance or promote a particular political, ideological, religious, or philosophical point of view, perspective, doctrine, or agenda.

#### **Section 5. Interpretations and definitions**

(a) The terms and phrases contained in Section 1 are to be interpreted in accordance with the interpretations provided by the U.S. Supreme Court and lower courts acting in conformity therewith in construing the First Amendment to the United States Constitution.

(b) The term “market power” shall be interpreted in accordance with the interpretations of that term provided by the U.S. Supreme Court and lower courts acting in conformity therewith.

(c) The term “critical conduit of expression” refers to means by which persons express and access thoughts, opinions, beliefs, and news, to both other persons and/or for purposes of self-expression. It includes but is not limited to

(i) social media;

(ii) news feeds;

(iii) Internet search engines; and

(iv) retailers and publishers of books, magazines, newspapers, and other means of mass communication, whether in print or digital

(d) The term “person” means any natural person and any partnership or corporation organized or incorporated under the laws of the United States or under the laws of any foreign jurisdiction.

(e) The term “church” shall be interpreted in accordance with IRS rulings on what constitutes a church, in conjunction with court decisions regarding the same.

#### *C. Operation*

The operative provision of the CENSOR Act is Section 3. Section 3 applies the strictures of the First Amendment to certain corporations (and other entities). Put differently, it safeguards the First Amendment rights of individuals and other persons against the conduct and actions of certain corporations and organizations as if those corporations and organizations were arms of the government. With respect to questions of religion, the corporation would be prohibited from excessive entanglement with religion as per existing Establishment Clause jurisprudence, and the target of Free Exercise claims to the extent that the corporation acts to restrict the free exercise of religion pursuant to existing Free Exercise Clause jurisprudence. Given the attenuation of constitutional Free Exercise

protections by the *Smith* decision (discussed previously),<sup>291</sup> protections against religious discrimination would most likely be grounded in the applicability of the Establishment Clause to such corporations, along, potentially, with the application of the First Amendment's more general protections of speech and expression. Whatever other statutory protections in place to protect against religious discrimination would also remain applicable to such corporations.<sup>292</sup>

For a corporation (or other entity)<sup>293</sup> to fall within the purview of the CENSOR Act's restrictions, said corporation would need to be in the possession of market power as a threshold matter. "Market power" here borrows directly from, and is defined via reference to, U.S. antitrust jurisprudence.

Market power by itself, however, does not subject a corporation to Section 3 of the CENSOR Act. Rather, it is: (a) the exercise of market power within a "critical conduit of expression" that triggers the Act's applicability, or (b) the possession of market power by a corporation that holds itself out to be, essentially, a public good—an entity eschewing the profit-maximization objectives that drive the characterization of most modern corporations as private entities. The CENSOR Act's objective here is to target those corporations critical to the exercise of First Amendment freedoms, along with those corporations who profess to be acting in the public interest.

The importance of targeting the former group is obvious and does not require further elucidation. The latter group of companies is targeted because they can essentially aid and abet the suppression of First Amendment freedoms (and sometimes have done so).<sup>294</sup> Although the corporations might not directly deprive an individual or group access to critical conduits of expression, they can indirectly deprive access to such conduits by denying funding, goods, and services. Consider, for example, a bank that refuses to lend money to organizations based upon their religious or political affiliation.<sup>295</sup> Or a web-hosting platform that denies its services to groups based upon the similar criteria.<sup>296</sup>

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291. See *supra* Section III.B.

292. See *supra* text accompanying notes 158–60.

293. The CENSOR Act applies to "any person," and not just corporations. See *supra* Section V.B. That said, for the sake of readability, I shall refer simply to "corporations" going forward.

294. See text accompanying *supra* note 7.

295. See Times Editorial Board, Opinion, *Editorial: Big Banks Take a Stand Against the Gun Industry*, L.A. TIMES (Apr. 16, 2018), <https://www.latimes.com/opinion/editorials/la-ed-guns-banks-nra-20180412-story.html> [<https://perma.cc/CER4-6N3L>].

296. See Bill Chappell, *Parler Sues Amazon, Seeking to Restore Web Service*, NPR (Jan. 11, 2021), <https://www.npr.org/2021/01/11/955664150/parler-files-lawsuit-against-amazon-seeking-to-restore-web-service> [<https://perma.cc/7L5V-NEAP>].

Informed by principles and precedent derived from the law of common carriers and public accommodations, the preceding assumes that the freedom-depriving corporations in question hold themselves out as religiously neutral, ideologically neutral, or willing to serve “all comers” without discrimination. It is critical, therefore, to carve out from the CENSOR Act’s reach the corporations who do not fit this mold. Indeed, the First Amendment compels the Act to exempt from its provisions those corporations that exist for the very purpose of promoting a particular religious or political point of view, such as a church or political organization—corporations I have referred to elsewhere as “religiously expressive corporations” when the purpose in question is religious in nature.<sup>297</sup> It is unlikely that any such entities would wield actual market power, or power over a critical conduit of expression. But even if it did, existing First Amendment precedent would, I suggest, recognize its First Amendment rights as paramount, overriding the statutory rights created by the CENSOR Act.

The CENSOR Act only applies to a discrete set of corporations, as explained above. Thus, to the extent that a corporation does not fall within the CENSOR Act’s purview, the only protection for individuals (and other organizations) from discriminatory action by such corporation would need to be found in existing anti-discrimination legislation, such as the Civil Rights Act of 1964.<sup>298</sup>

On the other end of the spectrum, to the extent that the religious liberty rights of a religiously expressive corporation were to conflict with the rights of an individual (typically an employee or customer), the *Hobby Lobby* decision suggests that the corporation ought to be able to assert its religious liberty rights for adjudication.<sup>299</sup> As things currently stand, these religious liberty rights are essentially those enshrined in RFRA,<sup>300</sup> pursuant to which imposition of the statutory rights in question upon the corporation must represent “the least restrictive means of further that compelling government interest.”<sup>301</sup> Should the government fail to meet that standard, the corporation would be granted an exemption from the law in question.<sup>302</sup>

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297. See Colombo, *supra* note 287, at 202–04. I have referred to non-religious but nevertheless associational and expressive corporations as “post-modern” corporations (not in reference to “post-modernism” but rather as a juxtaposition to the “modern corporation” characterized by shareholder wealth maximization and a contractarian theoretical conceptualization). See *id.* at 200–02.

298. See *supra* text accompanying notes 15860.

299. See *supra* Section III.B.

300. See *supra* Section III.B.

301. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (1993).

302. See *id.* At its core such situations present a conflict of rights between an association and an individual who voluntarily elects to transact with it. To the extent possible, the law should not give preference to either, but should leave the parties where it finds them. This is because a “conflict of

Finally, let us consider the question of a corporation that asserts a particular philosophical commitment that entitles it to engage in conduct that would be deemed anti-religious. Admittedly a certain superficial equivalence exists between religion and irreligion; between the promotion versus the demotion of religion; between religiously based values and choices and non- (or anti-) religiously based values and choices.<sup>303</sup> But this overlooks an increasingly unpopular but long and well-established understanding that religion is constitutionally special.<sup>304</sup> Whether the company was seeking an “exemption” from laws prohibiting religious discrimination<sup>305</sup> based upon RFRA, or recourse to the hypothetical Section 4(b) of the CENSOR Act, a mere philosophical commitment would not suffice. Although the definition of religion is not pellucid, it involves more than simply philosophically based belief systems, as has been discussed.<sup>306</sup>

That said, it would seem as though such a commitment could be framed in religious terms. As of this writing, few business corporations have staked out such a position, but it is conceivable.<sup>307</sup> Imagine if, instead of invoking the need to suppress “intolerant” material in violation of its “community standards,”<sup>308</sup> a social media company simply proclaimed

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rights” in such situations will almost invariably concern some statutory right asserted on the part of an individual, set in juxtaposition to the corporation’s rights under RFRA. Were it not for the state’s decision to propound such a statutory right to begin with, leaving the parties where it finds them is exactly the situation they would be in. Moreover, given RFRA’s First Amendment pedigree (arguably correcting the misconstruction of a genuine constitutional right), I would suggest that its provisions ought certainly to apply in such situations, and generally the corporate claimant ought to prevail. For a more nuanced and comprehensive approach to resolving such conflicts of rights between individuals and corporations, see Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 92 ST. JOHN’S L. REV. 29 (2018).

303. This presumption is captured well by the “equal regard” theory of interpreting the First Amendment’s religion clauses. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 UNIV. CHI. L. REV. 1245, 1282–1303 (1994).

304. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1491–1500 (1990).

305. See *supra* text accompanying note 298.

306. See Section III.A.

307. Indeed, there has been some foreshadowing of this already on the part of organizations and individuals. See Daniel Cutler, *Not Today, Satan: Re-Examining Viewpoint Discrimination in the Limited Public Forum*, 26 WM. & MARY BILL RTS. J. 1241, 1245 (2018) (discussing the Church of Satan’s self-identification as a religion despite its non-theological belief system); Jesse O’Neill, *The Satanic Temple joins backlash against Texas abortion law*, N.Y. POST (Sept. 5, 2021), <https://nypost.com/2021/09/05/satanic-temple-joins-backlash-against-texas-abortion-law/> [<https://perma.cc/4L9Y-MX4E>] (chronicling the Church of Satan’s efforts to procure religious exemptions from laws of general applicability).

308. Augusto Zimmermann, *Why Is Facebook Censoring a Conference on Christianity and Religious Freedom?*, SPECTATOR AUSTRALIA (Apr. 9, 2019), <https://www.spectator.com.au/2019/04/why-is-facebook-censoring-a-conference-on-christianity-and-religious-freedom/> [<https://perma.cc/4DAA-W5VE>].

itself bound to a particular set of religious principles, with which certain traditional notions of right and wrong conflicted? Virtually every company in the public view already professes some set of values and beliefs,<sup>309</sup> what would happen if they were credibly characterized as religious in nature?<sup>310</sup> This would pose a considerable challenge. For if everything constitutes religion, then nothing constitutes religion,<sup>311</sup> and makes a mockery of the First Amendment's religion clauses.<sup>312</sup> Hence the courts' efforts to police the definition of religion, however unsatisfactory these efforts may continue to be.<sup>313</sup>

### CONCLUSION

In assessing the rights of business corporations, whether religious liberty or other, our desideratum ought to be a regime that best maximizes the legitimate liberty interests of individuals. Critically, however, "individuals" include not only persons acting alone but also persons acting together, in concert, and in association with one another.

When acting together in corporate form, the liberty interests of individuals are legitimate to the extent that the corporation represents a genuinely private undertaking—an enterprise operating in contradistinction to the state, which is public by definition. When this corporation is closely held, committed to a particular set of religious principles, and concerns itself primarily with the private good of its various constituents, the legitimacy of its liberty interests is at its apex. On the other hand, when the corporation holds itself out as a neutral provider of goods and services, eschewing the interests of its shareholders and embracing instead a commitment to serving the public generally. When

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309. See Daniel J. Herron & Daniel E. Haughey, *Do Corporate Mission Statements Really Matter?*, 20 MIDWEST L.J. 94, 95 (2006).

310. Although secular corporations have not themselves characterized their values in religious terms, some commentators have. See Gerard Baker, *The C-Suite Converts to the New Political Religion*, WALL ST. J. (Apr. 5, 2021); cf. Robert H. Nelson, *Rethinking Church and State: The Case of Environmental Religion*, 29 PACE ENVTL. L. REV. 121 (2011) (characterizing "environmentalism as a religion").

311. Cf. THE INCREDIBLES (2004) ("Helen: Everyone's special, Dash. Dash: Which is another way of saying no-one is.") [<https://perma.cc/GD9T-RBVX>].

312. Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 TULSA L. REV. 1, 18–19 (2015).

313. See W. COLE DURHAM AND ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 1:3 (Dec. 2020); Usman, *supra* note 26, at 150–58 (2007). Consider, for example, a rather broad view of religion—one that would include under its umbrella environmentalism. E.g., Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 51, 51 (2004) ("Environmentalism is a type of modern religion."). Under the Free Exercise Clause, this would potentially protect environmentalists from having to comply with laws and regulations that conflict with the obligations they understand themselves to have vis-a-vis the environment. On the other hand, the Establishment Clause would arguably inhibit government agencies from undertaking actions to protect and foster the protection of the environment, as undue entanglement with religion.

the corporation exerts power over markets and controls for essential to the exercise of basic human freedoms that rivals the might of governments, the legitimacy of its liberty interests is at its zenith. Concomitantly, such corporations pose the greatest risk to the effective exercise of religion and the expression of ideas on the part of others.

The CENSOR Act attempts to set forth a means by which to identify and balance the legitimate liberty interests of corporations versus those of individuals. Its regulation on the expressive rights of corporations is designed to end where genuine corporate rights begin: in situations where the corporation in question can claim such rights as a church or a genuine association.

Thus, operating within the confines of existing jurisprudential parameters, the CENSOR Act endeavors to curtail the ability of corporations to impose their own beliefs and agendas where it is constitutionally permissible to do so to protect and promote the liberty interests of others. What emerges is a society in which infrastructure and means necessary for communication and the promulgation of ideas, including the expression and exercise of religious beliefs, is safeguarded, with sufficient freedom reserved for those corporations that either poses no genuine threat to the same or are necessarily excluded from any restrictions on their expressive rights because of their special status as an organization created for the very purpose of propounding a particular religious or ideological point of view. This serves to maximize the effective exercise of First Amendment freedoms by protecting them from subversion in the marketplace.