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Ronald J. Colombo
Maurice A. Deane School of Law at Hofstra University

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Religious Freedom and the Business Corporation

Ronald J. Colombo

Introduction

The twenty-first century has witnessed, particularly in the United States, the advent of the ‘religiously expressive business corporation.’ By that term, I refer to for-profit companies that embrace an articulated religious identity and strive to conform their operations to such identity.

The religiously expressive business corporation is controversial because, among other things, it conjoins to one controversial subject a second controversial subject. More specifically, this entity brings together (1) the perennially problematic puzzle of balancing the individual’s right to religious freedom within a society ostensibly predicated upon ordered liberty; and (2) the role, nature, rights and responsibilities of the business corporation.

Exacerbating the controversy over the religiously expressive business corporation has been the widening gulf between American citizens who maintain traditional religious beliefs and perspectives, and those who have adopted more secularised views in conformity with much of the modern West.¹ As the former group wanes in number while the latter group waxes, regulation – even regulation of business entities – has commonly taken on a character that increasingly reflects and effectuates progressive, secularised views on ‘social

1 Studies within the past decade have demonstrated that non-affiliation to an organized religion is more prevalent among younger Americans, particularly second generation American youth; those who do identify with an organized religion tend to consider themselves to be “orthodox” or more conservative than their non-religiously affiliated peers. The share of U.S. adults who say they believe in God, while still remarkably high by comparison with other advanced industrial countries, has declined modestly, from approximately 92% to 89%, since Pew Research Center conducted its first Landscape Study in 2007. The share of Americans who say they are “absolutely certain” God exists has dropped more sharply, from 71% in 2007 to 63% in 2014. And the percentages who say they pray every day, attend religious services regularly and consider religion to be very important in their lives also have ticked down by small but statistically significant margins. See Ammerman, Nancy T. “The many meanings of non-affiliation.” *Empty churches: Non-affiliation in America (2021)*: 27–55; See also Smith, Gregory A., and Sandra Stensel. “U.S. Public Becoming Less Religious.” Edited by Alan Cooperman. Pew Research Center’s Religion & Public Life Project. Pew Research Center, November 3, 2015.

issues' such as contraception, abortion, and sexual orientation. A conflict of rights invariably ensues when a business corporation asserts its religious liberty interests against acquiescence to entitlements and protections granted by legislation to its customers and employees.

Simultaneously, the concept of 'corporate social responsibility' has never been more widely and vigorously embraced. Coupled with pervasive professions of pluralism being preferred (oftentimes by 'diversity, equity, and inclusion' initiatives), one would expect the religiously expressive corporation to receive a welcomed embrace by society. It generally has not. Paradoxically (and to paraphrase George Orwell), it would seem that although all differences are valued, some differences are more valued than others.

This chapter will examine the issue of corporate religious liberty in four parts. Part 1 will provide a brief overview of the history of the business corporation in the United States, with a focus on conceptualisations of its nature. Part 2 will discuss religious liberty jurisprudence in the United States in general, and Part 3 will discuss corporate assertions of religious liberty in particular. Part 4 will point out the cognitive dissonance of a society that simultaneously embraces a robust understanding of corporate social responsibility yet an enervated appreciation of corporate religious liberty rights.

Part 1: A Primer on the Business Corporation

Evidence of business undertakings pursuant to structured, organised forms can be found in some of the earliest annals of recorded history.² Blackstone has "attributed the invention of private corporations to ... Numa Pompilius," the second king of Rome.³ I suggest that this lineage, coupled with the corporation's persistence in one form or another throughout the millennia, bears upon the fundamental nature of the entity (a point with repercussions to which we will return later).⁴

2 Skeel, David A. "Christianity and the Large Scale Corporation." *Public Law Research Paper* 314–15 (2007).

3 See Arner, Douglas. "Development of the American Law of Corporations to 1832." *SMUL Rev.* 55 (2002): 23; see also Colombo, Ronald J. "The Naked Private Square." *Hous. L. Rev.* 51 (2013): 1. ('Numa Pompilius was the second king of Rome (following Romulus, Rome's first king and founder), reigning from 715 to 673 B.C.') (citing "Numa Pompilius. (1994). In *Encyclopedia Britannica* (13th ed., Vol. 8, p. 825). "Other scholars have posited that the corporation first came into existence in ancient Greece." (Colombo, 2013, 48).

4 See Berle, Adolf Augustus, and Gardiner Coit Means. "Modern corporation and private property." (1932); Hager, Mark M. "Bodies politic: The progressive history of organizational real

With regard to the American experience, the European colonialisation of North America was famously accomplished, in part, by the efforts of joint stock companies (close forerunners to the modern corporation)⁵ such as the Virginia Company of London⁶ and the Dutch West India Company.⁷ Great Britain's success in the Seven Years' War (1755–1763) cemented British dominance in North America, with one of the results being that the United States inherited not only much of its culture from Great Britain, but its law and jurisprudence as well.⁸

Thus, at the dawn of the American Republic in the 1780s, the law and understanding of corporations in the United States was that of Great Britain.⁹ Theoretically, the corporation was conceptualised as a mere “concession of the state” at this time.¹⁰ This understanding comported well with the legal regime in which the corporation operated; corporate charters were granted on a case-by-case basis, subject to the sovereign's approval (which, in America, meant the state legislatures).¹¹ In its assessment of a corporate charter application, the sovereign would look for evidence that the proposed entity would “benefit the public good,” and consequently “mainly awarded charters for enterprises [such as] building public works like bridges and supplying public transport like operating a ferry.”¹²

Over time, however, society's conceptualisation of the corporation changed. Whether this was a result of the changing landscape of corporate law, or whether the changing landscape of corporate law prompted the reconceptualization, is

entity theory.” *U. Pitt. L. Rev.* 50 (1988): 575–80; Ripken, Susanna K. “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.” *Fordham J. Corp. & Fin. L.* 15 (2009): 97; Tsuk, Dalia. “Corporations without labor: The politics of progressive corporate law.” *University of Pennsylvania Law Review* 151, no. 6 (2003): 1861–73.

5 The primary difference between a joint stock company and a modern corporation is that the former “derives its existence from a contract of individuals” whereas the latter “derives its existence from the sovereign power of the state.” Nature and status of joint-stock companies; as distinguished from corporation (*American Jurisprudence*, 2021). Indeed, “in some jurisdictions, joint-stock companies have the powers and characteristics of corporations to such an extent that the differences between the two forms of organization are matters of degree, rather than of kind. Accordingly, joint-stock companies may be found which are corporations in the strictest sense of the word.” *Ibid.*

6 See Morison, Samuel Eliot. “The Oxford history of the American people.” (1965).

7 See *ibid.*, 56–57 see also Davies, Kenneth G. “Joint-stock investment in the later seventeenth century.” *The Economic History Review* 4, no. 3 (1952): 296–97.

8 See *ibid.*, 163–169.

9 Colombo, Ronald J. *The first amendment and the business corporation*. Oxford University Press, 2015.

10 *Ibid.*, 38.

11 Pollman, Elizabeth. “Reconceiving corporate personhood.” *Utah L. Rev.* (2011): 1629.

12 *Ibid.*, 1634.

an interesting question, but it need not detain us.¹³ What is fairly clear, however, is that these changes occurred concurrently and, I submit, were mutually reinforcing.

By the mid-19th century, the case-by-case approach to chartering corporations “gave way to general incorporation statutes.”¹⁴ Pursuant to these general incorporation statutes, the act of incorporation “was merely a formality of filing” the requisite paperwork with state authorities,¹⁵ somewhat analogous to the process by which most individuals today obtain licenses and other such approvals from governmental bureaucracies.¹⁶ This new approach was revolutionary, and made it untenable to maintain a conceptualisation of the corporation as a mere concession of the state.¹⁷

Replacing the concessionary perspective came the ‘aggregation theory,’ of the corporation, under which the corporation is conceived of in terms similar to that of a partnership: largely an aggregation of individuals, joining together to run a business enterprise for profit.¹⁸ But as corporations grew in size and complexity, the role of their governing bodies—their boards of directors—became the object of increasing attention.¹⁹ For the existence of a board of directors, with robust powers and responsibilities, helps distinguish the corporation from a partnership or other aggregate undertakings. The board of directors’ unique role serves to underscore the distinctive ‘separation of ownership and control’ that characterises the corporation.²⁰

Thus, with this attention on boards of directors came an abandonment of the aggregation theory and an embrace of the ‘real entity theory’ of the corporation – a concept with medieval roots.²¹ Real entity theory posits that

13 Padfield, Stefan J. “Rehabilitating concession theory.” *Okla. L. Rev.* 66 (2013): 327.

14 Ripken, Susanna K. “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.” *Fordham J. Corp. & Fin. L.* 15 (2009): 97.

15 Ibid.

16 Weidner, Donald J. “A Perspective to Reconsider Partnership Law.” *Fla. St. UL Rev.* 16 (1988): 1. (“Creating a corporation is similar to what the process for obtaining a driver’s license would be if competency testing were stripped away.”).

17 See Ripken, “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.”

18 See Joo, Thomas W. “The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence.” *Wash. ULQ* 79 (2001): 1.

19 See generally Berle, Adolf Augustus, and Gardiner Coit Means. “Modern corporation and private property.” (1932).

20 The shareholders own the company, but the board of directors controls the company. Tsuk, Dalia. “Corporations without labor: The politics of progressive corporate law.” *University of Pennsylvania Law Review* 151, no. 6 (2003): 1861–73.

21 See *ibid.*; see also Hager, Mark M. “Bodies politic: The progressive history of organizational real entity theory.” *U. Pitt. L. Rev.* 50 (1988): 575–80.

the corporation is a *sui generis* phenomenon, with a whole greater than (and distinct from) the sum of its parts.²² As Susanna Kim Ripken eloquently explained:

Under the real entity view, a corporation can have its own will and pursue its own goals in a way that cannot be equated with the will and goals of each individual member. The corporation has a “collective consciousness” or “collective will” that results from discussion and compromise among the individual members, and may not reflect the particular preferences of any one person. Actions of the corporation are qualitatively different from those of its individual constituents, who each may have contributed some part to the act, but no one person can be said to be responsible for the unified corporate action.²³

Contrary to concessionary theory, real entity theory resonates well with the human experience, as alluded to at the beginning of this part: real entity theory reflects the “‘natural’ tendency of human beings to organize themselves into productive groups.”²⁴ The corporation does not appear to truly owe its existence to the sovereign’s acquiescence, but rather to natural human initiative. Indeed, the state’s approval of a corporate charter might be compared, roughly, to its issuance of a birth certificate: this action more properly can be said to constitute government’s recognition of a creature – not the government’s creation thereof. As Morton Horwitz explained, real entity theory conceptualises the corporation as an “entity whose existence is prior to and separate from the state.”²⁵

Alas, the tsunami of the ‘law and economics’ movement in the latter half of the Twentieth Century washed away – at least for most of the legal academy – the real entity understanding of the corporation, replacing it with the ‘nexus of contracts’ model.²⁶ Pursuant to this ‘contractarian’ approach, the corporation is little more than a legal fiction employed to represent the myriad of

22 See Ripken, “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.”

23 *Ibid.*, 114.

24 Blair, Margaret M. “Corporate personhood and the corporate persona.” *U. Ill. L. Rev.* (2013): 805.

25 Horwitz, Morton J. “Santa Clara revisited: The development of corporate theory.” *W. Va. L. rev.* 88 (1985): 173.

26 Phillips, Michael J. “Reappraising the real entity theory of the corporation.” *Fla. St. UL Rev.* 21 (1993): 1061.

contracts (both explicit and implicit) that, taken collectively, give rise to the corporation.²⁷

John Dewey famously decried the indeterminacy of corporate theory.²⁸ He posited that practically any theory could be used to support any particular opinion on corporate law.²⁹ Although there may be some truth in that, it nevertheless seems fair to recognise that certain uses of corporate theory to support or undermine a given proposition can be labeled ‘more reasonable’ or ‘less reasonable.’ Some theoretical conceptualisations of the corporation genuinely lend themselves to support particular approaches to the corporation and corporate law better than others. Thus, cognizant of Dewey’s protestations, it would benefit us to consider the implications of corporate theory to the question of corporate religious liberty. We should also consider the implications of corporate theory to the question of ‘shareholder primacy’ – the widely embraced norm that the primary objective of a corporation’s board of directors should be to maximise corporate profits for the benefit of corporate shareholders.³⁰ For the degree to which shareholder primacy can be abandoned, assertions of corporate social responsibility can more plausibly be pressed.³¹ This is significant because this same rationale, used to justify displacement of shareholder primacy to make room for corporate social responsibility, also justifies a corporation’s embrace of religious values and principles,³² and for reasons which we become clear later, this is relevant to our inquiry.³³

Concessionary theory, which posits that the corporation exists only because the state deems it an expedient means of serving the common good,³⁴ does not furnish much support at all for shareholder primacy. For similar reasons, it fails to provide a basis upon which the corporation may persuasively assert constitutional rights and privileges.³⁵ It is no surprise, therefore, that modern-day

27 Ibid.

28 See *ibid.*, 1079–81.

29 See *ibid.*

30 See Smith, D. Gordon. “The shareholder primacy norm.” *J. Corp. L.* 23 (1998): 277.

31 See Wells, C. A. “Cycles of corporate social responsibility: An historical retrospective for the twenty-first century.” *U. Kan. L. Rev.* 51 (2002): 77.

32 See Bodie, Matthew T. “The Next Iteration of Progressive Corporate Law.” *Wash. & Lee L. Rev.* 74 (2017): 739.

33 See *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975–77 (7th Cir. 2021); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring)

34 See Colombo, Ronald J. *The first amendment and the business corporation*. Oxford University Press, 2015; Pollman, Elizabeth. “Reconceiving corporate personhood.” *Utah L. Rev.* (2011): 1629.

35 See Padfield, Stefan J. “Rehabilitating Concession Theory.” *Okla. L. Rev.* 66 (2014): 327.

proponents of concessionary theory are typically those who seek to de-emphasise the primacy of shareholders in order to emphasise the importance of corporate social responsibility,³⁶ as well as seek to rein in corporate assertions of constitutional rights.³⁷ For reasons discussed previously,³⁸ concessionary theory no longer holds much sway over corporate theorists – such that this theory can be deemed a “marginaliz[ed]” one.³⁹

Although the implications of real entity theory are not as clear as those flowing from concessionary theory, some certainly can be discerned. Given its natural law heritage and trappings, real entity theory well supports the notion that the corporation itself is entitled to certain rights and privileges on account of its very nature.⁴⁰ For “if the corporation is viewed as a real and natural entity, much like an individual person, the corporation should be entitled to the same rights and privileges that are afforded to natural persons.”⁴¹ With regard to the question of shareholder primacy, it bears noting that the modern manifestation of real entity theory arose as a reaction to the untrammelled individualism of Nineteenth Century America.⁴² Indeed, the real entity theory posits “the existence of a sharp distinction between the corporate entity and the shareholders.”⁴³ Of course, the complete abandonment of shareholder primacy does not ineluctably follow from this, but it does suggest a devaluation of the corporation’s shareholders: the shareholders are considered part of the corporation, not synonymous with the corporation. The corporation has values and a will of its own – separate and apart from those of the shareholders.⁴⁴

Conversely, to paraphrase King Louis XVI’s famous quip “*L’état, c’est moi*,”⁴⁵ under aggregation theory the shareholders are the corporation.⁴⁶ As such,

36 See, e.g., Padfield, Stefan J. “Corporate Social Responsibility & Concession Theory.” *Wm. & Mary Bus. L. Rev.* 6 (2015): 1.

37 See Padfield, Stefan J. “Rehabilitating Concession Theory.” *Okla. L. Rev.* 66 (2014): 327.

38 See Padfield, Rehabilitating Concession Theory.”

39 Padfield, Stefan. “Rehabilitating Concession Theory.” *Oklahoma Law Review* 66, no. 2 (2014): 327.

40 Horwitz, Morton J. “Santa Clara Revisited: The Development of Corporate Theory.” *West Virginia Law Review* 88, no. 2 (1986): 5.

41 Ripken, Susanna K. “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.” *Fordham J. Corp. & Fin. L.* 15 (2009): 97.

42 See Horwitz, Morton J. “Santa Clara Revisited: The Development of Corporate Theory.” *West Virginia Law Review* 88, no. 2 (1986): 5.

43 *Ibid.*, 214.

44 See Ripken, “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.”

45 *Ye v. Zemin*, 838 F.3d 620 (7th Cir. 2004).

46 See “Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle.”

aggregate theory would seem best to support the concept of shareholder primacy, given its understanding of the corporation as something quite similar to a partnership.⁴⁷ Similarly, it would seem to support a robust understanding of corporate constitutional rights, because people do not ordinarily lose their rights when they band together and act as a group.⁴⁸ Although not as discredited as concessionary theory, aggregation theory has generally given way to real entity theory for reasons previously discussed.⁴⁹

We finally return to the contractarian model, and if ever there was a theory that Dewey's criticism applied to, it would be contractarianism. For of all the conceptualizations of the corporation discussed, the contractarian model is the most indeterminate when it comes to justifying shareholder primacy, and the least helpful in assessing claims to corporate constitutional rights.⁵⁰ This is because the content of the various 'implicit' contracts constituting the corporation appear largely to be in the eyes of the beholder. For example, the shareholder primacy norm has been both defended and attacked by scholars on contractarian grounds.⁵¹ Similarly, the legitimacy of a corporation's assertion of constitutional rights – such as those protected by the Free Exercise Clause – has been both asserted on contractarian grounds⁵² and challenged on those same grounds.⁵³ Perhaps on account of these and other difficulties,

47 See Morton, "Santa Clara Revisited: The Development of Corporate Theory."

48 See Magpantay, Glenn D. "Associational Rights and Standing: Does Citizens United Require Constitutional Symmetry between the First Amendment and Article III." *NYUJ Legis. & Pub. Pol'y* 15 (2012): 667.

49 See Berle, Adolf Augustus, and Gardiner Coit Means. "Modern corporation and private property." (1932); Joo, Thomas W. "The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence." *Wash. ULQ* 79 (2001): 1; Tsuk, Dalia. "Corporations without labor: The politics of progressive corporate law." *University of Pennsylvania Law Review* 151, no. 6 (2003): 1861–73.

50 See Sugin, Linda. "Theories of the Corporation and the Tax Treatment of Corporate Philanthropy." *NYL Sch. L. Rev.* 41 (1997): 835.

51 See Eisenberg, Melvin A. "The conception that the corporation is a Nexus of contracts, and the dual nature of the firm." *Journal of Corporation Law* 24, no. 4 (1999): 819.

52 Hutchison, Harry G. "Hobby Lobby, Corporate Law, and Unsustainable Liberalism: A Reply to Chief Justice Strine." *Harv. JL & Pub. Pol'y* 39 (2016): 703. ("within the nexus-of-contract framework, the structure of governance is contingent and contractual, enabling shareholders to unify ownership and control and thus exercise the same prerogatives as owners of non-corporate businesses, all while maintaining limited liability and without adhering strictly to separation of ownership and control. As a result of this custom-tailored process, shareholders regularly impose their religion on corporations.").

53 Mohapatra, Seema. "Time to lift the veil of inequality in health-care coverage: Using corporate law to defend the Affordable Care Act." *Wake Forest L. Rev.* 50 (2015): 137. ("Under the nexus of contracts theory, the government's argument concerning the contractual

the real entity theory continues to hold sway – especially outside of the legal academy.⁵⁴

Part 2: Religious Liberty in the United States

The United States Constitution recognises the right to the “free exercise” of religion.⁵⁵ Although framed in the First Amendment as a restriction on Congress’s power (and therefore only upon the federal government), the Fourteenth Amendment has been interpreted as subjecting the actions of state and local governments to the strictures of the Constitution’s religious liberty protections as well.⁵⁶

The protection of religious liberty rights was added to the United States for a variety of reasons, some theological and some practical.⁵⁷ Of particular relevance for our purposes is James Madison’s famous defence of religious liberty on explicitly pluralistic grounds: “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 degree of obligation, to the claims of Civil Society.”⁵⁸ In other words, religious liberty must be protected because “every man” owes a duty to God that supersedes his duties to the State. This profound assertion captures well the incredible importance of America’s “first freedom”⁵⁹ in the minds of its drafters.

The operative constitutional text is remarkably terse: “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise

obligations of an employer to an employee is more compelling than the corporation’s argument that its religious beliefs ... are offended”).

54 Vischer, Robert K. “Do For-Profit Business Have Free Exercise Rights.” *J. Contemp. Legal Issues* 21 (2013): 369. Silvestri, Elizabeth M. “Free Speech, Free Press, Free Religion: The Clash between the Affordable Care Act and the For-Profit, Secular Corporation.” *Suffolk UL Rev.* 48 (2015): 266–7.

55 U.S. Const. amend. 1.

56 *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

57 See McConnell, Michael W. “Why is Religious Liberty the First Freedom.” *Cardozo L. Rev.* 21 (2000): 1243.

58 *Ibid.*, 1246 (quoting Madison, James., “Memorial and Remonstrance Against Religious Assessments” (1785) (citing *Everson v. Board of Educ.*, 330 U.S. 1 (1946) (Rutledge, J., dissenting)). It bears in mind to recall that James Madison has been given the title “Father of the Constitution.” E.g. Hart, James. “James Madison; Father of the Constitution, 1787–1800. By Irving Brant (New York: The Bobbs-Merrill Company, Inc. 1950. Pp. 520. \$6.00.)” *American Political Science Review* 44, no. 3 (1950): 755–756.

59 McConnell, “Why is Religious Liberty the First Freedom.”

thereof..."⁶⁰ The first half of this text is known as the "Establishment Clause," and its primary purpose has been to police the relationship between Church and State.⁶¹ Of relevance to our inquiry is the second half of this text, known as the "Free Exercise Clause."

Any momentary reflection upon the Free Exercise Clause immediately brings to mind important questions, such as: What is the definition of 'religion?' What constitutes 'free exercise?' What qualifies as a 'prohibition?' The Supreme Court has struggled mightily over these and related concerns over the past two centuries.⁶²

As to the first of these questions, it appears as though the Supreme Court has adopted a modestly broad definition of what constitutes religion. In what has been called a 'functional' approach, the Court suggests that in assessing whether a particular belief is "religious" in nature, one must examine the "role [it] plays in the individual's or group's life," and compare it to the role that traditional religious beliefs play in the lives of traditional religious believers.⁶³ The Supreme Court has added that for a belief to qualify as religious, it may not be "[p]urely secular."⁶⁴

Equally vexing had been the question of what constitutes an impermissible 'prohibition' upon the 'free exercise' of one's religion. Clarity had been achieved with regard to two matters related to this: (1) that the government may in no way attempt to coerce a person with regard to his or her religious beliefs *per se*,⁶⁵ and (2) that the government may in no way target the conduct of a particular sect, or of religious believers in general, for special circumscription – in other words, the government may not engage in "intentional discrimination" against religion generally or a particular religion.⁶⁶

What remained incredibly confusing was the degree to which a person could challenge a law or regulation that infringed upon his religiously motivated conduct – especially if said law or regulation were not targeting religious

60 U.S. Const. amend I.

61 See Tribe, L. H. (1988). §14–3. In *American Constitutional Law* (2nd ed.). essay.

62 See *ibid.*, §14–8, §14–13.

63 *Ibid.*, §14–6.

64 *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829 (1989) (quoted in Colombo, Ronald J. "Corporate Entanglement with Religion and the Suppression of Expression." *Seattle University Law Review* 45 (2022).

65 *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

66 *Erickson v. Bd. of Governors of State Colleges & Universities for Ne. Illinois Univ.*, 207 F.3d 945 (7th Cir. 2000).

conduct *per se*.⁶⁷ Put differently: the degree to which a religious adherent could seek an exemption from a law of general applicability. The U.S. Supreme Court attempted to resolve the issue in *Employment Division v. Smith*,⁶⁸ holding that ordinarily, no such exemption is constitutionally required in such cases.⁶⁹ Thus, for example, a law prohibiting the use of peyote (a controlled substance) is as applicable to Native Americans who wish to use peyote in religious observances as it is to anyone else.⁷⁰

The Court in *Smith* hastened to add that although the Free Exercise Clause does not require *judicial* recognition of an exemption to a law of generally applicability, the First Amendment permits the promulgation of *legislative* accommodations to laws of general applicability for the benefit of religious believers.⁷¹ Congress swiftly acted upon this acknowledgment, passing the Religious Freedom Restoration Act (“RFRA”) which grants religious believers the right to challenge any government action that infringes upon the exercise of their religion, even if the action in question is a neutral law of general applicability.⁷² More specifically, pursuant to RFRA, if a person’s exercise of religion is “substantially burdened” by the government (“even if the burden results from a rule of general applicability”) the government must prescind from enforcement of the law or continuation of the action in question unless it is able to demonstrate that its burden-producing activity (1) “is in furtherance of a compelling governmental interest,” and (2) “is the least restrictive means of furthering that compelling government interest.”⁷³ This is known as ‘strict scrutiny,’ and affords claimants a powerful means by which to challenge governmental activity that infringes upon the practice of religion.⁷⁴

Due to the federalist nature of American legal system, including the limited power of the U.S. Congress to enact legislation binding upon state governments, the Religious Freedom Restoration Act was held unconstitutional as applied to the states.⁷⁵ This sparked the promulgation of ‘state RFRA’s’ –

67 See Tribe, “American Constitutional Law.”

68 *Employment Div. v. Smith*, 494 U.S. 872 (1990).

69 See *ibid.*, 878–79.

70 See *ibid.*, 874–76.

71 See *ibid.*, 890.

72 Religious Freedom Restoration Act (2006).

73 *Ibid.*

74 Rhodes, John. “Up in Smoke: The Religious Freedom Restoration Act and Federal Marijuana Prosecutions.” *Okla. City UL Rev.* 38 (2013): 319.

75 See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

state-by-state legislative enactments typically mirroring the federal Religious Freedom Restoration Act.⁷⁶

Thus, where things stand with regard to religious liberty in the United States in the third decade of the Twenty-First Century is as follows:

1. The Free Exercise Clause of the First Amendment to the U.S. Constitution prohibits the government (state or federal) from undertaking any action that would target religious belief or practice *per se*; its prohibitions do not extend to neutral laws or actions of general applicability that only encroach upon religious belief or practice happenstantially.
2. The Religious Freedom Restoration Act provides a means by which neutral laws of general applicability that encroach upon religious beliefs or practices can be challenged; such challenges are resolved via the 'strict scrutiny' test. If the law in question has been promulgated by a state or local government, the challenger would need to invoke his or her state-RFRA for protection.

Part 3: Corporate Free Exercise

Before turning to the religious liberty rights of business corporations, let us first examine the religious liberty rights of 'corporate' entities generally: that is, groups and organisations, whether for-profit or nonprofit.

As Alexis de Tocqueville so eloquently observed almost two centuries ago, associations serve an indispensable role in any nation that purports to be free.⁷⁷ They occupy a critical middle ground between citizen and state, providing a means by which individuals can join together to fulfill important needs and pursue valuable objectives.⁷⁸ De Tocqueville stated that "the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society."⁷⁹

When an association is religious in nature, I submit that its significance is magnified, as it serves to simultaneously further a citizen's right to exercise

⁷⁶ As of this writing, 21 states have adopted a Religious Freedom Restoration Act. See Baumgardner, Paul, and Brian K. Miller. "Moving from the Statehouses to the State Courts: The Post-RFRA Future of State Religious Freedom Protections." *Alb. L. Rev.* 82 (2018): 1385.

⁷⁷ See Colombo, Ronald J. "The Corporation as a Tocquevillian Association." *Temp. L. Rev.* 85 (2012): 1. (citing Alexis de Tocqueville, *Democracy in America* 224 (Henry Reeve trans., Bantam Books 2000) (1835)).

⁷⁸ See *ibid.*

⁷⁹ *Ibid.* (quoting Alexis de Tocqueville, *Democracy in America* (Bantam Books, 2000) 224.

his religion.⁸⁰ This suggests that religious associations be afforded the highest level of protection that a society can muster in recognition of the inalienable rights they serve to effectuate.

Therefore, it should come as no surprise to learn that nonprofit religious organisations, such as schools, hospitals, societies, and other entities, have long enjoyed the protections of the Free Exercise Clause.⁸¹ Indeed, churches themselves are typically organised as nonprofit corporations,⁸² and churches naturally receive extremely strong protection under the First Amendment.⁸³ Were this not the case, it is difficult to envision how religious liberty could be genuinely protected, given that so much of what constitutes religion is communal in nature.⁸⁴

But what about for-profit corporations that are predicated upon particular religious values and attempt to operate in accordance with them? As I have detailed elsewhere, the rise of such corporations has been an undeniable and noteworthy development in the American business landscape.⁸⁵ Is their categorisation as ‘for-profit’ instead of ‘nonprofit’ constitutionally relevant for purposes of the Free Exercise Clause? Regarding other constitutional provisions, the Supreme Court has clearly ruled that business corporations

80 The main parts of religious liberty are, in their elemental form, twofold: 1) the autonomy of the individual in his or her choice of religion and the freedom to put a chosen faith into practice; and 2) protection against interference or prohibition of the exercise of any faith. The Supreme Court has routinely demonstrated that non-interference and non-preferential treatment for one religion over another are paramount considerations of the First Amendment and have incorporated these rules against the states through placing their imprimatur on various government and private actions. See McConnell, Michael W. “Accommodation of religion.” *The Supreme Court Review* 1985 (1985): 1–59; see, e.g., *Torcaso v. Watkins* 367 U.S. 488 (1961) (finding that the First Amendment was violated by a Maryland requirement that a candidate for public office declare a belief in God to be eligible for the position by giving preference to candidates who believed in God and were willing to state their beliefs); *Sherbert v. Verner* 374 U.S. 398 (1963) (finding that the state of South Carolina violated the Free Exercise Clause of the First Amendment in denying unemployment benefits to a person for turning down a job, because it required him or her to work on the Sabbath).

81 See Bassett, William W. “Private religious hospitals: Limitations upon autonomous moral choices in reproductive medicine.” *J. Contemp. Health L. & Pol’y* 17 (2001): 455. see also Cordish, Melissa Fishman. “A Proposal for the Reconciliation of Free Exercise Rights and Anti-Disrimination Law.” *UCLA L. Rev.* 43 (1996): 2113.

82 See Jackson, Bruce B. “Secularization by Incorporation: Religious Organizations and Corporate Identity.” *First Amend. L. Rev.* 11 (2012): 90.

83 See *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021).

84 See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (Brennan, J., concurring).

85 See Colombo, “The first amendment and the business corporation.”

enjoy the same standing and rights as nonprofit corporations and individuals, stating in 1978, for example, that, “[i]t has been settled for almost a century that [business] corporations are persons within the meaning of the Fourteenth Amendment.”⁸⁶ The Court has not, however, specifically addressed the applicability of the Free Exercise Clause to business corporations, and lower courts have split on this question.⁸⁷ Nevertheless, the Supreme Court’s decision in *Burwell v. Hobby Stores, Inc.*⁸⁸ provides a rather strong indication of how the Court would rule.

Burwell concerned objections raised by three closely held, for-profit business corporations against the U.S. Department of Health and Human Services’ (HHS) demand that they provide health insurance coverage “for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners.”⁸⁹ The corporate claimants asserted their objections under both the Free Exercise Clause of the First Amendment and RFRA. As is its custom, the Supreme Court declined to address the constitutional (First Amendment) issue, deeming that the case could be decided upon statutory (RFRA) grounds.⁹⁰

By its terms, RFRA applies to “a person’s” exercise of religion.⁹¹ The Act’s definitional section does not address the term “person,”⁹² which requires the reader to consult the Dictionary Act “unless the context indicates otherwise.”⁹³ The Court noted that there is “nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition” of “person.”⁹⁴ Consequently, for the scope of RFRA’s protections, it turned to the Dictionary Act.

As per the Dictionary Act, a “person” is defined to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁹⁵ This readily dispensed with the issue: the corporate plaintiffs were entitled to bring claims against the government pursuant to RFRA.⁹⁶ Nevertheless the government (HHS) persisted in arguing that the corporate plaintiffs lacked standing to bring suit under RFRA. As the Supreme

86 First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765 n.15 (1978).

87 See Lyle, John. “Contraception and Corporate Personhood: Does the Free Exercise Clause of the First Amendment Protect for-Profit Corporations that Oppose the Employer Mandate.” *U. Dayton L. Rev.* 39 (2013): 137.

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

89 *Ibid.*, 688.

90 See *ibid.*, 736.

91 Religious Freedom Restoration Act (2006).

92 See *ibid.*

93 *Burwell*, 573 U.S. at 707 (2014).

94 *Ibid.*, 708.

95 Dictionary Act (2012).

96 *Burwell*, 573 U.S. at 707–709.

Court adroitly observed, “the principal argument advanced by HHS ... focuses not on the statutory term ‘person’ but on the phrase ‘exercise of religion.’”⁹⁷ In response, the Court proceeded to consider the question of whether a business corporation could exercise religion, dismantling one-by-one the arguments asserted to the contrary.⁹⁸

First, the Court observed that the mere fact that the plaintiffs were organised as corporations could not be dispositive, as it was conceded that non-profit corporations enjoy standing under RFRA.⁹⁹

Second, the Court stated that a profit-making objective could not disqualify plaintiffs from RFRA’s protections, as Supreme Court precedent had long recognised the ability of for-profit enterprises to assert Free Exercise Claims (such as those brought by sole proprietors).¹⁰⁰

Third, the Court rejected the notion that business corporations are invariably organised to maximise shareholder profits “at the expense of everything else.”¹⁰¹ Echoing some of what we discussed in Part 1 of this Chapter and will address further in Part 4, the Court observed that:

For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

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 corporations because of

97 Ibid., 709.

98 See *ibid.*, 709–717.

99 See *ibid.*, 709.

100 See *ibid.*, 709–10.

101 *Burwell*, 573 U.S. at 711–12.

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.¹⁰²

Fourth, the Court showed little patience for the argument that RFRA's reach was beholden to that of Free Exercise Clause jurisprudence prior to its enactment (during which time no business corporation had yet asserted a Free Exercise claim).¹⁰³ As the Court appropriately stated, this argument was particularly "absurd" and marked by a certain degree of obvious "weakness."¹⁰⁴

Finally, the Court rejected the contention that "it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation."¹⁰⁵ The Court noted that "HHS has ... provided no evidence" that there exists a "purported problem of determining the sincerity of an asserted religious belief" on the part of a business corporation.¹⁰⁶

Not surprisingly, the Court concluded that the corporate plaintiffs had standing to bring suit under RFRA.¹⁰⁷

I suggest that the decision in *Burwell* foreshadows any decision the Court may ultimately render on the question of corporate standing under the First Amendment. Recall that the text of the First Amendment does not mention "person," but rather is framed entirely as a prohibition on the powers of Congress: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."¹⁰⁸ In other words, the First Amendment is written in a way keyed to the protection of *conduct*, not persons, individuals, or other potential claimants. Since the conduct that cannot be prohibited is the "free exercise" of religion, and since the *Burwell* decision quite clearly held that for profit corporations (or at least closely held for profit corporations) can indeed engage in the exercise of religion, it naturally follows that business corporations can avail themselves of the protections of the Free Exercise Clause.

102 *Ibid.*, 712–13.

103 *Ibid.*, 713–15.

104 *Ibid.*, 715–16.

105 *Ibid.*, 717.

106 *Burwell*, 573 U.S. at 718.

107 See *ibid.*, 719. The Court also proceeded to rule in favor of the corporate claimants on the merits, holding that application of the strict scrutiny test requires the government to exempt plaintiffs from the offending provisions of the HHS regulations. See *ibid.*, 719–36.

108 U.S. Const. amend 1.

Part 4: Corporate Social Responsibility and the Religiously Expressive Corporation

It can be argued that the widespread embrace of ‘corporate social responsibility’ across businesses in America has never been more pronounced.¹⁰⁹ Pursuant to this embrace, it is understood and expected that corporations will undertake “activities for reasons other than simply enhancing profits.”¹¹⁰ It would seem as though the religiously expressive corporation – the corporation that is guided by religious principles and values conjoined to an eye toward profit – should fit comfortably into this new era of American business. And with the exception of abandoned corporate conceptualizations (concessionary theory of the firm),¹¹¹ the advent of the religiously expressive corporation is readily justifiable on theoretical grounds as well.

Yet, curiously, the religiously expressive corporation has not been warmly embraced by modern society.¹¹² Despite the long history of religion as being at the forefront of positive social change in America,¹¹³ and despite the fact that few corporations exemplify the concept of putting principle (if not people) over profits more concretely than the religiously expressive corporation.¹¹⁴

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- 109 See Driebusch, C. (2021, September 8). *For Allbirds, Warby Parker, Other Fall IPOs, Greed is Out. Do-Gooding is In*. The Wall Street Journal. Retrieved from <https://www.wsj.com/articles/for-chobani-allbirds-other-coming-ipos-greed-is-out-do-gooding-is-in-11631093400>; Herren Lee, A. (2021, June 28). *You Cannot Direct the Wind, But You Can Adjust Your Sails*. SEC.gov. Retrieved from <https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors>; Kraik, Alexander T. “Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm.” *Vt. L. Rev.* 44 (2020): 493.
- 110 Berger-Walliser, Gerlinde, and Inara Scott. “Redefining corporate social responsibility in an era of globalization and regulatory hardening.” *American Business Law Journal* 55, no. 1 (2018): 167–218.
- 111 See Part 1.
- 112 E.g., Strine Jr, Leo E. “A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications.” *J. Corp. L.* 41 (2015): 71.
- 113 See McConnell, Michael W. “Five reasons to reject the claim that religious arguments should be excluded from democratic deliberation.” *Utah L. Rev.* (1999): 639. (“Indeed, virtually every important movement for social and political reform that was to appear in America would be led by people with religious motivations making religious arguments,” including the “abolition of slavery,” “labor reform,” “social welfare legislation,” and “civil rights.”). But see Lipkin, Robert Justin. “Reconstructing the Public Square.” *Cardozo L. Rev.* 24 (2003): 2025. (“Abolitionism and the civil rights movements, for instance, fought against slavery and segregation, both of which were vigorously defended on religious grounds. Similarly, the movement for women’s suffrage and equal rights came about in reaction to a religiously grounded patriarchy.”).
- 114 See Primrose, Nicholas A. “Has Society Become Tolerant of Further Infringement on First Amendment Rights.” *Barry L. Rev.* 19 (2014): 324–30.

Why might this be so? Perhaps an examination of the plight of Trinity Western University (TWU) can help provide an explanation. Although this case does not involve a for-profit business corporation, I suggest it illustrates well what is giving rise to the cognitive dissonance referred to above.

In 2013, TWU undertook the creation of “the first faith-based law school in Canada.”¹¹⁵ Consistent with TWU’s undergraduate standards, the proposed law school would have included as a condition of admission a matriculant’s pledge to TWU’s “community covenant.” This required an agreement to (among other things) “voluntarily abstain from ... sexual intimacy that violates the sacredness of marriage between a man and a woman.”¹¹⁶ The community covenant was deemed a discriminatory affront to Canada’s LGBTQ population, and on account of this TWU’s proposed law school was denied accreditation by some of the relevant Canadian authorities.¹¹⁷ TWU brought suit, ultimately losing its case before the Supreme Court of Canada.¹¹⁸

Of particular interest is one of the rationales relied upon by the Canadian Supreme Court in its decision against TWU. The Court noted that denying accreditation to TWU’s proposed law school furthered the accreditation organisations’ interest in “supporting diversity” within the legal profession.¹¹⁹ In other words, as per the Court’s logic, denying accreditation to what would have been Canada’s first and only faith-based law school, specifically on account of its faith-based admission standards, would justifiably “support[] diversity.” This underscores profoundly divergent views on how to define diversity and the related concept of pluralism.

One view of pluralism and diversity is broad, embracing differences of opinion and belief that are deep and fundamental in nature. This view can fairly be characterised as the “liberal” view of pluralism and diversity (understanding

115 Smith, G. A., & Stensel, S. (2015, November 3). *U.S. Public Becoming Less Religious*. Pew Research Center’s Religion & Public Life Project. Retrieved from <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>.

116 *Community covenant agreement – TWU*. (n.d.). Retrieved from https://www.twu.ca/sites/default/files/community_covenant_june_25_2019.pdf. In 2018, TWU made signature of the Community Covenant optional. See Ferguson, D. (2018, August 14). *B.C. School’s pledge to ban sex outside of heterosexual marriage now optional for students*. TheProgress.com. Retrieved from <https://www.theprogress.com/news/breaking-trinity-western-university-changes-controversial-covenant/>.

117 See Boersma, John. “The Accreditation of Religious Law Schools in Canada and the United States.” *BYU L. Rev.* (2016): 1081.

118 See Marzano, Vito John. “Canadian Supreme Court Rejects Religious Exceptionalism to Discriminate Against Lgbtq Law Students.” *LGBT L. Notes.* (2018): 372.

119 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (Can. 2018).

“liberal” in its classical American sense).¹²⁰ Pursuant to the liberal worldview, “toleration, mutual respect, observing the rights of others” are deemed civic virtues.¹²¹ Consequently, a liberal understanding of pluralism and diversity would compel toleration (and, most likely, defence) of the right of corporations to embrace and advance whatever particular agenda or worldview they elected to, whether secular or religious in nature.

A second view of pluralism is more qualified.¹²² This view can fairly be characterised as the ‘progressive’ view of pluralism and diversity (understanding ‘progressive’ in its modern American sense).¹²³ The progressive does not necessarily deem virtuous the same qualities as does the liberal – questioning, for example, even that most quintessential of liberal values, freedom of speech. Other values, such as “equity, inclusion, redistribution, and social justice” are prioritised.¹²⁴ Consequently, a dethroned toleration need not extend to ideas or beliefs that are deemed inimical to progressive aims and values – and especially not to those found to be intrinsically intolerant or illiberal.¹²⁵

120 See Movsesian, Mark L. “Markets and morals: The limits of *Doux Commerce*.” *Wm. & Mary Bus. L. Rev.* 9 (2018): 449. (“[C]lassical liberalism and pluralism are related. In fact, they mutually reinforce one another: classical liberalism promotes pluralism, and pluralism, in turn, promotes classical liberalism.”) (internal citations omitted). Or, as per John Inazu, a “confident pluralism.” Inazu, John D. “A confident pluralism.” *S. Cal. L. Rev.* 88 (2014): 587.

121 Sandel, Michael J. “The constitution of the procedural republic: Liberal rights and civic virtues.” *Fordham L. Rev.* 66 (1997): 1.

122 See Hinkle, A. B., Binion, B., Boehm, E., Sullum, J., Doherty, B., & Harrigan, F. (2017, October 11). *Diversity is Not Enough. We Need Pluralism*. Reason.com. Retrieved from <https://reason.com/2017/10/11/diversity-is-not-enough-we-need-pluralis/>.

123 Inazu, John D. “A confident pluralism.” *S. Cal. L. Rev.* 88 (2014): 587.; Weiner, G. (2018, April 14). *When Liberals Become Progressives, Much is Lost*. The New York Times. Retrieved from <https://www.nytimes.com/2018/04/13/opinion/moynihan-liberals-progressives-lost.html>.

124 See Davidson, Nestor M. “The dilemma of localism in an era of polarization.” *Yale LJ* 128 (2019): 954.

125 Inazu, John D. “A confident pluralism.” *S. Cal. L. Rev.* 88 (2015): 587. (“Progressives in California and Tennessee are able to rid their campuses of conservative religious groups with traditional beliefs about sexuality. We can readily multiply the list of examples: the suspension of the star of Duck Dynasty, the threats by local officials to deny Chick-fil-A permits, the forced resignation of Mozilla’s CEO, and the legislative efforts in Arizona have also made headlines in recent months.”) (internal citations omitted); Smith, G. A., & Stensel, S. (2015, November 3). *U.S. Public Becoming Less Religious*. Pew Research Center’s Religion & Public Life Project. Retrieved from <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> (“Because progress is an unadulterated good, it supersedes the rights of its opponents. This is evident in progressive indifference to the rights of those who oppose progressive policies in areas like sexual liberation.”); Thro, William E. “No Angels in Academe: Ending the Constitutional Deference to Public Higher Education.”

To date, religiously expressive corporations have been characterised by traditional understandings of religion that do not conform to modern progressive values.¹²⁶ As such, their existence, their active participation in society, and especially their assertion of religious liberty rights against those who would otherwise enjoy some of the benefits afforded by progressive legislative measures, are unwholesome and viewed with suspicion (if not disdain) by American commentators in the media and the academy (which are predominantly progressive).¹²⁷ In turn, the progressive capture of what it means to promote diversity and pluralism has largely contributed to the narrative that the religiously expressive corporation undermines, rather than contributes to, these societal values. Consequently, it appears that opposition to the religiously expressive corporation is not justifiable on neutral principles of corporate law or theory (which are readily invoked to defend other manifestations of the mission-driven, socially responsible corporation),¹²⁸ but, rather more likely, the product of ideological animus.

Belmont L. Rev. 5 (2018): 27. ("On many public university campuses, the aspirations of social justice progressives conflict with the fundamental principles of classical liberalism. Wishing to satisfy the often vocal social justice progressives, university officials ignore or diminish the principles of classical liberalism. Such an approach is constitutionally problematic and, ultimately, leads to totalitarianism."); Cf. Morgan, Gay. "Searching for Common Ground." *J. Contemp. Legal Issues* 12 (2002): 757, 769–70. ("Therefore, liberalism's failure to promote and to protect the existence of those social groups adhering to normative traditions to which liberal individualism is inimical results in the liberal paradox. Individuals comprising those illiberal groups are denied their fundamental liberal right to construct their individual identity within their group's normative context by their group's illiberal (but not necessarily evil) normative social ordering's inevitable inability to flourish in a liberal environment, hence the paradox."); Blackman, Josh. "Collective Liberty." *Hastings LJ* 67 (2016): 623. ("[F]or the left, a robust freedom of speech and religion – no longer serving progressive causes of social justice – can now more easily be subordinated to the "generalized conception of the public good.").

- 126 See Crane, Daniel A. "Faith, Reason, and Bare Animosity." *Campbell L. Rev.* 21 (1999): 125.
- 127 See Ryn, Claes G. "Unleashing the Will to Power: Neo-Jacobin Exceptionalism as a Justification for American Global Supremacy." *U. St. Thomas LJ* 3 (2005): 211; *Media Bias: Pretty Much All of Journalism Now Leans Left, Study Shows*. Investor's Business Daily. (2018, November 16). Retrieved from <https://www.investors.com/politics/editorials/media-bias-left-study/>; Gross, N. (2016, May 20). *Op-Ed: Professors are overwhelmingly liberal. Do universities need to change hiring practices?*. Los Angeles Times. Retrieved from <https://www.latimes.com/opinion/op-ed/la-oe-gross-academia-conservatives-hiring-20160520-snap-story.html> (college campuses are "bastions of progressivism").
- 128 See Bodie, Matthew T. "The Next Iteration of Progressive Corporate Law." *Wash. & Lee L. Rev.* 74 (2017): 739; Wells, C. A. "Cycles of corporate social responsibility: An historical retrospective for the twenty-first century." *U. Kan. L. rev.* 51 (2002): 77.

Conclusion

Few monuments mark the American experiment in ordered liberty more than the First Amendment to the U.S. Constitution, and few phenomena characterise American society as much as the proliferation of associations. It was perhaps inevitable, therefore, that the rights protected by the First Amendment would eventually come to be claimed by business associations, including for-profit corporations. Among these rights has been that to religious liberty.¹²⁹ Although some commentators have decried this development, it is justifiable under the most plausible theoretical conceptualisations of the business corporation. Moreover, this development is in keeping with America's commitment to religious freedom and pluralism.

Separate and apart from the question of constitutional and liberty interests, commentators, including scholars and media pundits across the political spectrum, have long recognised the benefits of affording people the ability to work for, invest in, and patronise businesses that share their values—such as the opportunity of those who identify as environmentalists to gravitate towards “green” companies in their dealings. Society's commitment to pluralism and diversity should be sincere enough to recognise and respect these same benefits when derived from religious values.

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129 As has been previously discussed, the right to religious liberty, when asserted against a law of general applicability, is more commonly protected by statute rather than the First Amendment *per se*. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); Rhodes, John. “Up in Smoke: The Religious Freedom Restoration Act and Federal Marijuana Prosecutions.” *Okla. City UL Rev.* 38 (2013): 319.

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