FREE EXERCISE, INC.: A NEW FRAMEWORK FOR ADJUDICATING CORPORATE RELIGIOUS LIBERTY CLAIMS

THAD EAGLES*

Do corporations deserve religious liberty protection? This question came to the forefront in the series of contraception mandate cases, leading to a circuit split and the controversial Supreme Court decision in Burwell v. Hobby Lobby Stores, Inc. *This Note looks past that debate to the potential effects of business regulation on individuals and develops a framework for considering corporate religious liberty claims that accounts for those individual burdens. Part I provides relevant background information to understand the contraception mandate issue that led to* Hobby Lobby. *Part II demonstrates that regulatory burdens that fall on secular, for-profit corporations can nonetheless burden their individual owners by putting them to the choice of either disobeying the dictates of their religion or facing adverse financial consequences. Part II continues by showing that nothing in corporate law requires ignoring this burden and points to ambiguities in the* Hobby Lobby *majority opinion that may prevent courts from properly recognizing and focusing on this important burden. Part III answers the questions left open by the* Hobby Lobby *majority and suggests a framework for considering which corporations should be able to bring religious liberty claims. This framework is aimed at protecting individuals from the burden of being unable to enjoy the benefits of the corporate form without having to violate their religious beliefs.*

 J.D. Candidate, 2015, New York University School of Law; B.A., 2010, Haverford College. I would like to thank everyone who helped me develop this Note, especially Professors Adam Samaha and Barry Friedman; the members of the Furman Academic Scholars Program and Furman Fellows, especially Joy Milligan; and the members of the *New York University Law Review*, especially Shayon Ghosh, Laura Pacifici, and Cristopher Santos.

Introduction

Among its many contested provisions, the Patient Protection and Affordable Care Act (ACA)—popularly referred to, with varying degrees of affection, as "Obamacare"—directed the Department of Health and Human Services (HHS) to create a list of "preventive care and screenings" for which employers would have to provide complete coverage for their female employees.[1] In February of 2012, HHS promulgated a rule that included in that list all Food and Drug Administration (FDA) approved contraception and sterilization procedures, providing an exception only for churches with religious objections.[2] This requirement caused a sizeable public outcry. The

[1] 42 U.S.C. § 300gg-13(a)(4) (2012).

[2] *See* 45 C.F.R. § 147.130(a)(1)(iv) (2012) (leaving it to the Health Resources and Services Administration to craft guidelines regarding which preventative services must be covered); *Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., http://

Senate narrowly rejected legislation that would have allowed employers to refuse to cover items to which they have religious or moral objections,[3] Rush Limbaugh called a law student who spoke in favor of the regulation a "prostitute,"[4] and religious employers filed dozens of lawsuits. In response to this controversy, HHS created a new accommodation, allowing religious nonprofits to inform their insurers of their religious objections, and requiring the insurer rather than the nonprofit to fully cover the contraception for female employees.[5] HHS created no similar exception for for-profit employers, who were responsible for over thirty challenges to the contraceptive coverage requirement.[6] These cases wound their way through the courts, with circuits splitting on the corporate plaintiffs' ability to bring religious liberty claims.[7] Ultimately, in June of 2014, the Supreme Court decided to permit these claims, at least from closely held corporations.[8]

These suits gave rise to a number of complex and controversial issues.[9] With its decision in *Burwell v. Hobby Lobby Stores, Inc.*,[10] the

www.hrsa.gov/womensguidelines/ (last visited Jan. 28, 2015) (outlining what is covered under the regulations).

[3] *See* Robert Pear, *Senate Rejects Step Targeting Contraception*, N.Y. TIMES, Mar. 2, 2012, at A1 (reporting on the failed legislation).

[4] *See* Jonathan Weisman, *Obama Backs Student in Furor with Limbaugh on Birth Control*, N.Y. TIMES (Mar. 2, 2012, 12:55 PM), http://thecaucus.blogs.nytimes.com/2012/03/02/boehner-condemns-limbaughs-comments/?ref=contraception (reporting on the scandal and its repercussions).

[5] *See* 45 C.F.R. § 147.130(a) (2014) (listing the coverage requirements for insurers of religious nonprofits).

[6] Many of the challenges from religious nonprofits are moving forward despite the new regulations under the theory that even notifying their insurer of their objections amounts to signing a "permission slip" for actions that are against these nonprofits' religion or the religion of their principal stakeholders. *E.g.*, S. Nazarene Univ. v. Sebelius, No. CIV-13-1015-F, 2013 WL 6804265, at *8 (W.D. Okla. Dec. 23, 2013) ("The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access . . . to the products to which the institution objects.").

[7] *See infra* notes 49–58 and accompanying text (describing the history of contraception mandate challenges in the lower courts).

[8] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

[9] How compelling is the government's interest in ensuring contraceptive coverage? *Compare* Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2188 (2012) (arguing that there is no compelling interest), *with* Caroline Mala Corbin, *Two Easy Cases: Nonprofit and For-Profit Corporate Challenges to the Contraception Mandate*, 161 U. PA. L. REV. ONLINE 268, 272 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (arguing that there is). Is there a more narrowly tailored way to achieve that goal? *Compare* Whelan, *supra*, at 2185–86 (suggesting that the government could provide free contraception directly), *with* Kathryn S. Benedict, *When Might Does Not Create Religious Rights: For-Profit Corporations' Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 119 (2013) (arguing that the mandate is narrowly tailored because "[t]he cost and difficulties of putting in another, government-sponsored system

Supreme Court has paved the way for future corporate religious liberty claims by explicitly permitting closely held corporations to bring such claims.[11] This Note does not address the merits or detriments of the contraception mandate. Instead, its focus is on the more fundamental, threshold question on which the circuits actually split: Should corporations be allowed to bring religious liberty claims? And if so, what fundamental principles should guide future courts deciding whether corporations that are not closely held should be able to bring religious liberty claims?

This question has nothing to do with what one believes about contraception. As several courts have noted, a health code regulation requiring non-kosher butchering practices would pose an analogous problem for incorporated kosher butchers.[12] Other commenters have hypothesized that financial regulations could require "Muslim-owned financial brokerage[s] that will not lend money for interest" to violate their beliefs.[13] Or, more dramatically, consider a Quaker and conscientious objector whose corporation is required to manufacture weapons during wartime. In each case, the regulatory burden technically falls on the corporation, but each corporate owner clearly has sincere religious objections to the regulatory requirement. This Note addresses these owners' ability to even have a court hear their religious liberty claims. It does not deal with the substance or merit of

only for contraceptive coverage may be prohibitive"). How substantially burdensome is it to simply provide an insurance plan from which employees can get free contraception, much as they could buy it with their salary? *See* Corbin, *supra*, at 271 ("[I]f an institution considers it 'cooperation with evil' to allow its employees to use their salary to purchase contraception, buy alcohol, or see a movie celebrating same-sex marriage, then [must] we . . . permit it to impose conditions on its employees' salaries unless laws that prohibit such conditions pass strict scrutiny[?]"). Similarly, does it matter that accommodations for employers may burden employees, or may unconstitutionally sanction discrimination against women? *See id.* ("Deciding whether to grant a religious exemption involves a balancing act, and the calibration is off when employees' purchasing decisions can be considered a substantial burden on an employer's religious conscience.").

[10] 134 S. Ct. 2751 (2014).

[11] *See id.* at 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

[12] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) (asking if an incorporated kosher butcher would "really have no claim to challenge a regulation mandating non-kosher butchering practices?"); Korte v. Sebelius, 735 F.3d 654, 681 (7th Cir. 2013) ("On the government's understanding of religious liberty, a Jewish restaurant . . . could be denied the right to observe Kosher dietary restrictions."); *cf.* Sidsel Overgaard, *Banning Traditional Animal Slaughter, Denmark Stokes Religious Ire*, NAT'L PUB. RADIO (Apr. 9, 2014, 4:49 PM), http://www.npr.org/blogs/thesalt/2014/04/09/291887381/banning-traditional-animal-slaughter-denmark-stokes-religious-ire (describing Denmark's regulation of animal slaughter and the religious backlash).

[13] Brief for States of Michigan, Ohio, and 18 Other States as Amici Curiae in Support of Conestoga, Hobby Lobby, Mardel at 3, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 and 13-356).

those claims, including of the contraception mandate, which are potentially infinite and varied.

Much of the commentary on the topic of who can bring religious liberty claims has focused on the peripheral question of whether a corporation can exercise a religion, ignoring the potential effects of business regulations on the exercise of individuals' religions.[14] A parallel error that many courts have made is tailoring their analysis to only one potential burden—that government regulation prevents the exercise of individual religion through the corporate form—and ignoring another—that members of a certain religion may be put to the choice of either violating their religious beliefs or facing adverse legal consequences if they do not comply. The majority opinion in *Hobby Lobby* recognized this latter type of burden.[15] Nonetheless, largely in response to the arguments of the dissent, it blurred the line between the two burdens, leaving its reasoning unclear and lower courts with poor guidance for how to determine whether corporations can bring future religious liberty claims.[16]

This Note addresses this critical issue, arguing that regulatory burdens on corporations *can* substantially burden the free exercise of individuals' religions, and that courts should not ignore that potential burden simply because the directly regulated party is a corporation. The Note then provides a framework for evaluating when an individual can credibly claim that a regulatory burden on a corporation substantially burdens his or her individual exercise of religion, and

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[14] *See, e.g.*, Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 64–68 (2013) (conflating the corporation and its owners, as if corporations themselves could believe anything); Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 620–30 (2014) (arguing that the right of religious exercise extends to corporations themselves and not just individuals); Elissa Graves, *The Corporate Right to Free Exercise of Religion: The Affordable Care Act and the Contraceptive Coverage Mandate*, 18 TEX. REV. L. & POL. 199, 211–15 (2014) (arguing that corporations exercise the religious beliefs of their owners); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 63–64 (2013) (arguing that for-profit corporations can exercise religion). *But see* Gregory P. Magarian, Hobby Lobby *in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 72 (2014), http://www.vanderbiltlawreview.org/content/articles/2014/03/Magarian_Hobby-Lobby-in-Constitutional-Waters.pdf (arguing that corporations cannot "manifest conscience"); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 5 (2014) ("[A] business organization does not have religious beliefs.").

[15] *See Hobby Lobby*, 134 S. Ct. at 2767 ("HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.").

[16] *See infra* Part II.C (exploring these ambiguities in the *Hobby Lobby* opinion).

thereby when a court should allow the corporation to bring a religious liberty claim.

Part I provides the background information necessary to understand the debate, including relevant law regarding the constitutional and statutory protection of religious exercise and the details of the so-called "contraception mandate."[17] Part II posits that the relevant burdens that courts should consider are those that fall, even if indirectly, on the individuals who make up a corporation. It then shows that judges who sided against corporate plaintiffs in the contraception mandate cases largely ignored the potential for government regulation to force corporate owners to decide between enjoying the benefits of incorporation or remaining faithful to the tenets of their religious beliefs, even though nothing in corporate law requires ignoring or discounting this burden. Part II closes by evaluating the open questions left by the *Hobby Lobby* Court. Part III suggests a new framework for evaluating corporate claims of religious liberty. The key question guiding this inquiry is whether the regulatory burden on the corporation can credibly translate to either of the two types of burdens on individual religious exercise discussed in Part II. Part III concludes by addressing concerns with this framework.

I
BACKGROUND

In this Part, I provide the background information required to understand the question that the Supreme Court examined in *Hobby Lobby*. I begin with a brief history of the interpretation of the Free Exercise Clause and its statutory companion, the Religious Freedom Restoration Act (RFRA), and then provide the details of the regulatory regime that HHS created and the claims to which it gave rise. This section closes by surveying Supreme Court precedent regarding corporate religious liberty rights and the litigation that the contraception mandate spurred.

A. Religious Liberty Protection: The Free Exercise Clause and RFRA

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[18] The historical test for violations of the Free Exercise Clause, most notably spelled out in

[17] I employ this phrase throughout purely for convenience's sake, with no value judgment attached.

[18] U.S. CONST. amend. I.

Sherbert v. Verner[19] in 1963 and *Wisconsin v. Yoder*[20] in 1972, requires that laws that substantially burden religious exercise be justified by a "compelling state interest"[21] or "interests of the highest order."[22] However, the Court changed direction in 1990 with *Employment Division v. Smith*.[23] Rather than subjecting all government regulation to this level of scrutiny, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[24] In other words, laws whose purpose is not to restrict religious behavior and that affect more than just religious behavior are by and large *not* subject to heightened scrutiny, regardless of whether they burden the free exercise of an individual's religion in practice.[25]

Many saw *Smith* as a drastic limitation on the scope of the Free Exercise Clause, and in 1993 Congress responded by passing RFRA.[26] RFRA requires that the government "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless that burden "is in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that . . . interest."[27] RFRA's explicit purpose was to "restore the compelling interest test as set forth in [*Sherbert* and *Yoder*]," but it made the claims statutory rather than constitutional.[28]

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19 374 U.S. 398 (1963). *Sherbert* was brought by a Seventh-Day Adventist who was denied unemployment benefits after she lost her job due to her unwillingness to work on Saturdays. *Id.* at 399–401.

20 406 U.S. 205 (1972). *Yoder* was brought by an Amish parent who claimed that a law requiring him to send his children to school until age sixteen or pay a five-dollar fine violated his free exercise rights. *Id.* at 207–09.

21 *Sherbert*, 374 U.S. at 406.

22 *Yoder*, 406 U.S. at 215.

23 494 U.S. 872 (1990).

24 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

25 *See id.* at 881–83 (describing the limited circumstances when the Free Exercise Clause applied).

26 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012); *see* Editorial, *Congress Defends Religious Freedom*, N.Y. TIMES, Oct. 25, 1993, at A18, *available at* http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html (describing and supporting RFRA's passage as a response to the Supreme Court's "radically changing the ground rules for deciding claims of religious liberty" by "water[ing] down the religious liberty of all Americans").

27 42 U.S.C. § 2000bb-1 (2012).

28 *Id.* RFRA applied to state and local laws as well, but the Supreme Court held that that application exceeded Congress's enforcement power under the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 532–33 (1997). Congress responded by passing RLUIPA, which relates to land use and incarcerated persons. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–2000cc-5 (2012).

B. The Regulatory Framework and Religious Liberty Claims

The regulatory regime that plaintiffs in the contraception mandate cases claimed violates RFRA—and, in some cases, the Free Exercise Clause even after *Smith*—begins with the ACA's requirement that most businesses[29] provide a minimum level of health care coverage to their employees, including no-cost coverage for preventive care and screening for women.[30] Employers that provide health insurance but do not comply with this requirement must pay a "tax" of $100 per employee per day,[31] while those who provide no health insurance at all must pay $2000 per year for each employee over thirty full-time employees.[32]

In July of 2013, HHS promulgated its final rules pursuant to Congress's direction to create a list of covered preventive care and screenings. Like the interim rule before it, the final rule included in the list all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[33] Among these contraceptive methods are two hormonal emergency contraceptives[34] that help prevent pregnancy in a variety of ways, including by potentially blocking the attachment of a fertilized egg to the wall of the uterus.[35] For those who believe that a

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[29] Employers of fewer than fifty people are entirely excluded, 26 U.S.C. § 4980H (2012), and employers whose insurance plans have not changed since March 23, 2010 are excused from meeting several requirements, including minimum coverage of preventative services, 42 U.S.C. § 18011(a)(2) (2012).

[30] *See* 42 U.S.C. § 300gg-13(a)(4) (2012) (outlining required no-cost coverage).

[31] 26 U.S.C. § 4980D.

[32] *Id.* § 4980H. This is a much less substantial burden. *See* Marty Lederman, Hobby Lobby *Part III: There Is No "Employer Mandate*," BALKINIZATION (Dec. 16, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html (arguing that this provision gives employers a choice between paying a non–substantially burdensome tax or providing health insurance). Some corporate plaintiffs have claimed that their faith requires them to provide health insurance, *e.g.*, Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402, 441 (W.D. Pa. 2013), or that failing to have health insurance would cause them to lose valuable employees, *e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1140–41 (10th Cir. 2013).

[33] *See Women's Preventive Services Guidelines*, *supra* note 2 (outlining what is covered under the regulations).

[34] *See Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Jan. 8, 2015) (listing Levonorgestrel (Plan B) and ulipristal acetate (Ella) as approved contraceptive methods).

[35] *See id.* (listing possible ways in which these pills function). The current scientific evidence runs counter to this assertion, but the FDA has not changed its labeling. *See* Tiffany Stanley, *Why Can't the FDA Fix Outdated Birth Control Labels?*, DAILY BEAST (Mar. 22, 2014), http://www.thedailybeast.com/articles/2014/03/22/why-can-t-the-fda-fix-outdated-birth-control-labels.html (describing the near-consensus among the scientific community that Plan B and Ella do not prevent egg implantation).

new life is created at the moment of fertilization, this amounts to risking murder.[36]

The final rules required nothing of churches and created a new accommodation for nonprofits that certify that they (1) hold themselves out as religious and (2) have religious objections to providing contraceptive coverage.[37] These organizations need only inform their insurers of their objection, and the insurer must then notify employees and provide contraceptive coverage itself.[38] Notably, these new regulations do not accommodate for-profit employers with religious objections, who then brought over thirty challenges to the mandate, including those that led to *Hobby Lobby*.[39]

C. *Supreme Court Precedent and Contraception Mandate Litigation*

Before *Hobby Lobby*, the Supreme Court had offered very few hints about whether for-profit corporations qualified as "persons" under RFRA or whether they had free exercise rights under the First Amendment. The Court had granted several constitutional rights to corporations,[40] held on multiple occasions that government action violated the free exercise and RFRA rights of incorporated churches,[41]

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[36] *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 853 (2014) ("If I hand you a gun and say that it might be loaded, but not to worry, it probably is not—or even if I say it almost certainly is not—not one of my readers would take the chance and fire that gun at another human being.").

[37] 45 C.F.R. § 147.131(a)–(c) (2014).

[38] *See id.* § 147.131(c) (outlining the procedures that eligible nonprofits must follow to avail themselves of the coverage exception).

[39] Many religious nonprofits did not drop their suits, arguing that informing their insurer was irreconcilable with their religious beliefs. *E.g.*, Class Action Complaint ¶ 5, Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13–cv–2611–WJM).

[40] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 575–76 (1977) (protecting against double jeopardy); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (recognizing Fourth Amendment rights against unreasonable searches and seizures); Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923) (stating that corporations can be "persons" within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment). They do not, however, have a Fifth Amendment right against self-incrimination, United States v. Kordel, 397 U.S. 1, 7–8 (1970), and are not "citizens" for purposes of the Privileges and Immunities Clause of Article IV, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178 (1868). The Court recently recognized some free speech rights under the First Amendment for for-profit corporations in *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010).

[41] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 423–25 (2006) (holding that the Controlled Substances Act ban on hoasca, an Amazonian hallucinogenic tea, violated RFRA as applied to a church with roots in Brazil whose members drank the tea as part of a religious ceremony); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 526, 545–46 (1993) (striking down an ordinance forbidding animal sacrifice passed immediately after the church, whose congregants' religion required animal sacrifice, announced plans to build a house of worship, cultural

and heard challenges from incorporated churches that failed for other reasons.[42] The corporate form *alone*, therefore, could not prohibit religious liberty protection.[43] There had also been at least one unsuccessful free exercise lawsuit brought by an incorporated nonprofit that was not a church,[44] and one brought by an incorporated for-profit corporation,[45] but their corporate status appeared to play no role in the decisions. The Court had also heard several unsuccessful individual

center, and museum); Jones v. Wolf, 443 U.S. 595, 603–04 (1979) (clarifying that the ultimate award of property must rely on a firm, religiously neutral principle); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–50 (1969) (striking down a Georgia law allowing juries to resolve church-property disputes by determining which group abandoned the original faith); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 97–98, 115–16 (1952) (striking down a New York statute that transferred control of a Russian Orthodox Church from the governing body in Moscow to an American governing body). More recently, the Supreme Court approved of a "ministerial exception" to Title VII discrimination claims, noting that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

[42] *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990) (holding that requiring that the Ministries pay sales taxes did not violate their free exercise rights); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 304–05 (1985) (holding that requiring compliance with the Fair Labor Standards Act did not violate the foundation's free exercise rights); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 642–43, 654 (1981) (upholding a Minnesota rule prohibiting distribution of any unapproved materials against a challenge brought by an incorporated church).

[43] Some commentators have argued that, because every successful corporate free exercise claim has been brought by a church, churches should be the only corporations that enjoy these religious protections. *E.g.*, CAROLINE MALA CORBIN, AM. CONSTITUTION SOC'Y, CORPORATE RELIGIOUS LIBERTY: WHY CORPORATIONS ARE NOT ENTITLED TO RELIGIOUS EXEMPTIONS 4–7 (2014), *available at* https://www.acslaw.org/sites/default/files/Corbin_-_Corporate_Religious_Liberty.pdf ("[T]he reasons we protect churches do not ultimately apply to corporations.").

[44] Bob Jones University had its tax-exempt status revoked because of its racially discriminatory admissions policy and sued to recover it, claiming that the revocation violated their free exercise rights. Bob Jones Univ. v. United States, 461 U.S. 574, 580–82 (1983). The Court held that the compelling government interest in combating racism justified "whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604. The question of the plaintiff's right to bring these claims was neither challenged nor addressed. *Cf.* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 423 & n.122 (1987) (arguing that the "short shrift" given the claim in *Bob Jones* likely meant that the Supreme Court at the time did not believe that organizations could bring religious claims).

[45] A supermarket operated by Orthodox Jews claimed that a Sunday-closure law violated its free exercise rights, as its religion dictated that it also stay closed on Saturday. Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617, 630–31 (1961). The Court had rejected a substantially similar claim in *Braunfeld v. Brown*, 366 U.S. 599 (1961), brought by individual plaintiffs, so the Court simply pointed to that decision, *Gallagher*, 366 U.S. at 631. However, the dissenters did implicitly find standing. *See Gallagher*, 366 U.S. at 642 (Brennan, J., dissenting) (arguing that the state law prohibited the appellees' free exercise of religion).

free exercise claims involving for-profit businesses. In *United States v. Lee*, an Amish employer claimed that the imposition of social security taxes for his employees burdened the free exercise of his religion.[46] The Court held that "an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees," and that Congress had made a sufficient accommodation in excluding the self-employed with religious objections.[47] In *Braunfeld v. Brown*, the Court found that an exception to a Sunday-closure law for Orthodox Jewish shop owners, who had to remain closed for the entire weekend due to their observance of the Sabbath on Saturday, would undermine the statute's purpose and be too difficult to enforce.[48]

Perhaps unsurprisingly, given this lack of direction, district courts trying the contraception mandate cases largely avoided deciding whether or which for-profit corporations enjoy religious protection.[49] Instead, these courts variously held that some could assert the religious rights of their owners,[50] which had been the law in the Ninth Circuit since 1988;[51] that the individual owners' standing was easier to establish;[52] or that the contraception mandate clearly survived, making the difficult corporate question avoidable.[53] The circuits then

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[46] United States v. Lee, 455 U.S. 252, 254–56 (1982).

[47] *Id.* at 261.

[48] 366 U.S. at 608.

[49] *But see* MK Chambers Co. v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435, at *5–6 (E.D. Mich. Sept. 13, 2013) (denying the corporate plaintiffs before them religious protection); Mersino Mgmt. Co. v. Sebelius, No. 13–cv–11296, 2013 WL 3546702, at *10 (E.D. Mich. July 11, 2013) (same); Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1116 (D. Colo. 2013) (same).

[50] *E.g.*, Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402, 430 (W.D. Pa. 2013); Monaghan v. Sebelius, 931 F. Supp. 2d 794, 801 (E.D. Mich. 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 115–17 (D.D.C. 2012); Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).

[51] *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988) (holding that corporations that are "merely the instrument through and by which [their owners] express their religious beliefs" can assert the religious rights of their owners); *see also* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009) (holding that, because it was "a fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family," the corporation in question did "not present any free exercise rights of its own different from or greater than its owners' rights" and could assert the rights of its owners).

[52] *See* Korte v. Sebelius, 528 F. App'x 583, 586–87 (7th Cir. 2012) (noting that the company in question is mostly owned by the two individual plaintiffs); Monaghan v. Sebelius, 916 F. Supp. 2d 802, 808 (E.D. Mich. 2012) (noting that the plaintiff is the sole owner of the company in question).

[53] Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *4 (W.D. Mich. Dec. 24, 2012); O'Brien v. U.S. Dep't of Health and Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012).

split, with the Tenth[54] and Seventh Circuits[55] allowing the corporate plaintiffs before them to bring religious liberty claims, and the Third,[56] Sixth,[57] and District of Columbia Circuits[58] denying them. This circuit split led to the Supreme Court's decision in *Hobby Lobby*, where the conservative majority held that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."[59] Justice Ginsburg, joined by Justice Sotomayor, argued in dissent that no for-profit corporations should be able to bring religious liberty claims.[60] Justices Breyer and Kagan refused to answer that question, joining Justice Ginsburg's opinion only insofar as it argued that the plaintiffs' claims failed on the merits.[61]

II
Corporate Regulations' Potential to Cause Individual Burdens

In this Part, I argue that courts should consider the burdens that fall, even if indirectly, on the individuals who must act in response to business regulations, and I outline the contours of those burdens. I then show that, contrary to arguments by courts that have sided with HHS in the contraception mandate cases, incorporation as a for-profit—even a for-profit with a directly secular purpose—has no effect on whether a regulation puts individuals to the choice of either violating their religious beliefs or no longer enjoying the benefits of incorporation, paying a fine, or facing some other adverse consequence. This Part closes by pointing to open questions and ambiguities in the *Hobby Lobby* majority opinion that are likely to prevent lower courts from focusing on this individual burden in future corporate religious liberty cases.

A. The Potential Burdens on Individual Exercise of Religion

RFRA prohibits the government's imposition of "substantial[ ] burden[s] [on] a *person's* exercise of religion" without sufficient justi-

54 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013).

55 Korte v. Sebelius, 735 F.3d 654, 666 (7th Cir. 2013).

56 Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013).

57 Autocam Corp. v. Sebelius, 730 F.3d 618, 625–26 (6th Cir. 2013).

58 Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1214 (D.C. Cir. 2013).

59 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

60 *See id.* at 2794 (Ginsburg, J., dissenting) (stating that no support exists in the pre-*Smith* case law for the notion that for-profit corporations have free exercise rights).

61 *Id.* at 2806 (Breyer & Kagan, JJ., dissenting).

fication.[62] The first question, therefore, should be whether the government regulation at issue actually burdens a person's exercise of religion. Because corporations technically brought these lawsuits, some analysts have instead focused on whether corporations can exercise religion.[63] Of course they cannot.[64] Admittedly, there are important differences between the exercise of religion alone and the exercise of religion as part of a community or association,[65] but recognizing those differences does not mean that organizations can themselves exercise religion, nor does it create an independent duty to protect the religious liberty rights of the organizations themselves. As an illustration, while the Supreme Court has recognized that churches with active members can bring religious exercise claims,[66] would "a defunct church that no longer has any members but still owns property and other assets be able to claim free exercise rights in its own right?"[67] The answer must be no.

Admittedly, in the most technical sense, it is the corporation and not its individual owners that must comply with a regulation, pay a fine, or cease to operate.[68] But it is overly formalistic to pretend that it is not the owner of the corporation who makes that choice, just as she would if her business were unincorporated. Churches and religious

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[62] 42 U.S.C. § 2000bb-1 (2012) (emphasis added).

[63] *See* CORBIN, *supra* note 43, at 2 ("[W]hat the Free Exercise Clause unquestionably protects are uniquely human attributes . . . ."); Christopher McMahon, *The Ontological and Moral Status of Organizations*, 5 BUS. ETHICS Q. 541, 547 (1995) (arguing from a philosophical perspective that "organizations and other social entities—viewed as distinct from their members—are not appropriately accorded moral consideration in their own right").

[64] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) ("[T]he exercise of religion is characteristic of natural persons, not artificial legal entities."); Korte v. Sebelius, 735 F.3d 654, 701 (7th Cir. 2013) (Rovner, J., dissenting) (quoting Justice Stevens's dissent in *Citizens United*, pointing out that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires"); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) (same); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part) (same).

[65] *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 21–23 (2000) (arguing that the role of churches as inculcators of values that the government cannot promote requires "special provisions for religious associations").

[66] *See supra* note 41 and accompanying text (citing cases).

[67] *Korte*, 735 F.3d at 696 (Rovner, J., dissenting).

[68] *See, e.g.*, Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1239 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) ("The Mandate does not regulate the Gilardis; it regulates their companies."); Autocam Corp. v. Sebelius, 730 F.3d 618, 624 (6th Cir. 2013) ("The decision to comply with the mandate falls on Autocam, not the Kennedys."); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) ("Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*.").

nonprofits are no more capable of exercising religion than other corporations, and yet churches and religious nonprofits can bring religious liberty cases regarding regulatory burdens that technically fall only on them rather than on their congregants or stakeholders. The relevant inquiry cannot be whether the regulations burden the corporation's religious exercise—whatever that means—but whether they burden individuals.[69]

When government regulates corporations, there are two potential burdens on the religious exercise of individuals associated with those organizations. The first is that the regulations actually prevent individuals from exercising their religion or make the exercise more difficult. For example, allowing churches themselves to own property and enter into contracts greatly facilitates their existence and therefore the communal exercise of religion they allow.[70] A regulation that essentially prevented a church from incorporating would deprive its congregants of that unique communal exercise, or at least make it more difficult. Similarly, a group of nuns who feel religiously compelled to care for the elderly by operating a nursing home may find it impossible to do so without limited liability. A regulation preventing their incorporation or making it more difficult would directly hamper the active exercise of their religion. This burden can only exist where the corporation is designed to directly further individual religious practice.

The second potential burden on the individual owners' exercise of religion occurs when the government, rather than preventing the owners from exercising their religion, forces corporate owners to choose between taking action that is against their religion through their control of their corporation or facing some sort of adverse consequences. Depending on the extent of those consequences, government regulations could, in effect, deny persons of certain religions the ability to take advantage of the benefits of the corporate form, a benefit that those of different religions enjoy. This burden is familiar from pre-*Smith* jurisprudence, where even by 1963 it had become "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[71]

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[69] *See* Colombo, *supra* note 14, at 87–88 ("[F]ailure to recognize the religious liberty rights of the business corporation means failure to recognize fully the religious liberty rights of flesh-and-blood human beings.").

[70] *See* Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 Nw. U. L. REV. 239, 255–56 (2003) (discussing why incorporation is useful for religious organizations).

[71] Sherbert v. Verner, 374 U.S. 398, 404 (1963); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) (recognizing the burden imposed on Amish employers' exercise of religion by forcing them to pay social security taxes); Petition for Writ of Certiorari at 12, Navajo

B. Incorporation Does Not Lessen or Require Ignoring These Potential Burdens on Individuals

Courts that denied the corporate plaintiffs before them the ability to make religious liberty claims erroneously ignored this second potential burden, unlike the majority in *Hobby Lobby* and most lower courts that sided with the plaintiffs.[72] Many of these judges pointed out first that the regulatory burden falls on the corporation, not the individual, and then argued that the corporate form either eliminates *any* potential burden on individuals, or requires courts to ignore them. Several cited the Supreme Court's articulation of the purpose of incorporation as being "to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[73] Recognizing individual burdens, they argue, would therefore be a "subver[sion of] the corporate form" and an "enormous shift in corporate law."[74] The obvious counterargument is that incorporated churches and religious nonprofits are also independent entities from

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Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2009) (No. 06-15371), 2009 WL 46999, *cert. denied*, 556 U.S. 1281 (2009) (evaluating the circuit split regarding the definition of a substantial burden, and noting that even the narrowest definition would cover individuals seeking to achieve a secular goal without violating their religious beliefs who are "forced to choose between following the tenets of their religion and receiving a government benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanction" (internal quotation marks omitted)).

72 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014) (noting the possibility that the government could force religious business owners to "either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations"); *Gilardi*, 733 F.3d at 1210 ("[T]he Gilardis were faced with two choices: . . . provide the mandated contraceptive services in contravention of their religious beliefs, or pay a penalty amounting to over $14 million per year. Finding themselves on the horns of an impossible dilemma, the Gilardis and their companies filed suit . . . ."); *Conestoga*, 724 F.3d at 390 (Jordan, J., dissenting) (noting that one need look no further than "the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the Hahns bury their religious scruples or watch while their business gets buried").

73 Cedric Kushner Promotions, Ltd. v. King, 553 U.S. 158, 163 (2001); *see also* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 387 (3d Cir. 2013) (quoting *Kushner*); Autocam Corp. v. Sebelius, 730 F.3d 618, 623 (6th Cir. 2013) (same); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1171 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part) (same); Grote v. Sebelius, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting) (same); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion.").

74 Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 318 (2014); *see also* Brief for Corporate and Criminal Law Professors as Amici Curiae in Support of Petitioners at 13–16, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 and 13-356), 2014 WL 333889, at *13–16

their congregants and stakeholders, yet all agree that they can bring religious liberty claims.

Other courts responded that secular corporations do not deserve religious protection because they do not facilitate the individual exercise of religion, whereas churches and religious nonprofits are tools of religious exercise.[75] As Justice Ginsburg put it, "religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill."[76] Notably, Justice Ginsburg stands nearly alone in arguing that a corporation's for-profit status necessarily prevents it from existing to serve a community of believers,[77] as lower courts almost universally limited their holdings to prevent for-profit *and secular* corporations from bringing religious liberty claims.[78]

("This Court should not allow Hobby Lobby and Conestoga to selectively disregard the corporate veil that separates them from their shareholders.").

[75] *See infra* note 78 and accompanying text (collecting these cases).

[76] *Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting).

[77] Justice Ginsburg's position appears to be based on the fact that for-profit corporations employ and do business with people who are not co-religionists. *See id.* at 2795 ("Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community."). However, this is obviously both underinclusive, as churches regularly employ people who are not members of their religion as, for example, custodial staff, and overinclusive, as for-profit corporations may only employ co-religionists. This consideration is therefore better suited to the second part of the analysis. That is, perhaps the government has a compelling interest in preventing an employer from forcing his employees to make sacrifices based on the employer's religion. *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) (finding that "an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees").

[78] *See Grote*, 708 F.3d at 857 (Rovner, J., dissenting) ("[T]he mission of [the plaintiff], like that of any other for-profit, secular business, is to make money in the commercial sphere."); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("We do not see how a for-profit [corporation] *that was created to make money* could exercise [religion]." (emphasis added)); *Hobby Lobby*, 723 F.3d at 1165 (Briscoe, C.J., concurring in part and dissenting in part) (arguing that the plaintiffs were "for-profit businesses focused on selling merchandise to consumers"); Gilardi v. Sebelius, 926 F. Supp. 2d 273, 280 (D.D.C. 2013) (finding "that the Freshway Corporations are engaged in *purely commercial conduct* and do not exercise religion under the RFRA" (emphasis added)). Several of these courts contrasted the case before them with *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), which involved a for-profit corporation that published Christian books and was 95% owned by a foundation that distributed its share of the profits to Christian charities. *See Grote*, 708 F.3d at 856 (Rovner, J., dissenting) (citing *Tyndale* as an example of a corporation that might require different analysis because it was "organized expressly to pursue religious ends"); *Gilardi*, 926 F. Supp. 2d at 280 (differentiating the plaintiff before the court from Tyndale, "which was formed to publish religious books and Bibles and was owned in large part by a non-profit religious entity"); Mersino Mgmt. Co. v. Sebelius, No. 13-cv-11296, 2013 WL 3546702, at *11 (E.D. Mich. July 11, 2013) (pointing out that the "core business product" of the plaintiff in *Mersino* did not "reflect in any way a religious purpose" and citing *Tyndale* with the mysterious "cf.").

Regardless of where the line is drawn, the corporation's role in facilitating the exercise of religion is only relevant when courts are evaluating whether a corporation actually functions as a tool of religious exercise. In other words, it matters only when courts are deciding whether a regulation prevents individuals from exercising their religion in a way that the corporate form permits or facilitates. It is simply irrelevant when courts are deciding whether regulations force corporate owners of one religion to choose between acting inconsistently with their religious beliefs or suffering adverse consequences.[79]

The only argument that courts have proffered against the clear potential for government regulation to cause substantial burdens on individuals is that business owners traded away or waived their religious liberty rights when they incorporated for-profit businesses without a directly religious purpose.[80] As Justice Ginsburg put it, "[b]y incorporating a business, . . . an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation."[81]

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[79] The appropriate relevance of the corporate veil may depend on whether incorporation is a right, *cf.* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (holding that free school bus transportation for all children, including those who attend religious schools, is comparable to "state-paid policemen" and does not violate the Establishment Clause), or a discretionary subsidy, *cf.* Locke v. Davey, 540 U.S. 712, 720–22 (2004) (refuting Justice Scalia's argument that "generally available benefits are part of the baseline against which burdens on religion are measured" while upholding against a Free Exercise challenge a scholarship program unavailable to students studying to become priests). The debate about the contours of these categories lies outside of the scope of this Note. I will assume that incorporation is part of the baseline to which all are entitled. *See generally* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989) (discussing government action toward religion using the language of taxes and subsidies, but admitting the difficulty in establishing a baseline).

[80] *See, e.g.*, Autocam Corp. v. Sebelius, 730 F.3d 618, 624 (6th Cir. 2013) ("We are without authority to ignore the choice the Kennedys made to create a separate legal entity to operate their business."); *Grote*, 708 F.3d at 858 (Rovner, J., dissenting) ("[Corporate owners] have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so."); *Conestoga*, 724 F.3d at 388 (arguing that, in return for the benefits of the corporate form, "the shareholder must give up some prerogatives, including that of direct legal action to redress an injury to him as primary stockholder in the business," and noting that "[t]he Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form" (internal quotation marks omitted)).

[81] *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting); *see also Hobby Lobby*, 723 F.3d at 1173 ("[I]t is simply unreasonable to allow the individual plaintiffs in this case to benefit, in terms of tax and personal liability, from the corporate/individual distinction, but to ignore that distinction when it comes to asserting claims under RFRA."); *id.* at 1179 (Matheson, J., concurring in part and dissenting in part) ("The structural barriers of corporate law give me pause about whether the plaintiffs can have their corporate veil and pierce it too."); *Gilardi*, 926 F. Supp. 2d at 278 ("The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited

Implicit in this argument is the belief that the reasonable owner of a secular, for-profit corporation—unlike the reasonable owners of unincorporated businesses or for-profit corporations with directly religious purposes, or the stakeholders in a religious nonprofit—should have no expectation of religious accommodations. The basis for this belief is unclear. No provision of state corporate law, nor any Supreme Court precedent, requires trading away one's religious liberty rights in exchange for the benefits of incorporation, or suggests that there is a good reason to ignore burdens on religious owners of secular, for-profit corporations. Indeed, the only relevant federal appellate court decisions before the contraception mandate *allowed* at least some corporations to bring religious liberty lawsuits on behalf of their owners.[82]

Nor does broader corporate theory suggest such a strict division. Historically, there have been three answers to the question, "What is a corporation?"[83] The "artificial entity" theory focuses on the fact that corporations are creations of the government.[84] The "real entity" or "natural entity" theory posits that corporations are naturally occurring and have independent lives of their own.[85] The "aggregate" theory sees corporations as merely collections of individuals who have banded together to achieve some goal.[86] A strict adherent of the first two philosophies would ignore the individual burden, while a believer in the aggregate theory would look past the "metaphorical hocus-pocus" to the individuals themselves.[87]

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liability. They cannot simply disregard that same corporate status when it is advantageous to do so.").

[82] *See supra* note 51 and accompanying text (describing the Ninth Circuit's decisions in *EEOC v. Townley Eng'g & Manuf. Co.*, 859 F.2d 610 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009)).

[83] *See* Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999 (2010) (describing the long history of these three views, dating back to the eighteenth century).

[84] *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (describing corporations as "the mere creature of law" and therefore "possess[ing] only those properties which the charter of its creation confers upon it"); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 810–15 (1989) (describing the "artificial entity" theory in more detail).

[85] *See* Coates, *supra* note 84, at 818–25 (describing the development of the "natural entity" theory).

[86] *See, e.g.*, Cnty. of San Mateo v. S. Pac. R.R., 13 F. 722, 748 (C.C.D. Cal. 1882) ("[T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name."); Coates, *supra* note 84, at 815–18 (describing the "aggregate theory" in more detail).

[87] Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 931 (2011).

However, focusing on these classifications misses the trees for an imaginary forest.[88] In different circumstances, corporations fall into each of these different categories.[89] Corporations take on liability for business debts, own property, and sign contracts, consistent with the real entity theory. On the other hand, eight circuits agree that some corporations can bring racial discrimination claims,[90] refusing to "deny standing to the corporation because it has no racial identity" and to also "deny standing to the stockholders on the . . . ground that the injury was suffered by the corporation and not by them."[91] Furthermore, contrary to Justice Ginsburg's assertion, courts often ignore the corporate veil to the detriment of the corporate ownership. When corporations are charged with crimes that require mental states, courts "determine if relevant employees had the requisite bad intent, and then attribute it to the corporation as a whole."[92] And, of course, ignoring limited liability and piercing the corporate veil to hold shareholders directly liable is a familiar process.[93] Legal theorists and jurists

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[88] *See* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1569–75 (2013) (arguing persuasively that these theories do not supply normative premises to evaluate particular claims, especially in the context of what he terms "corporate conscience").

[89] The Court has recognized this flexibility, and has applied different visions in different contexts. *See* Miller, *supra* note 87, at 916–31 (providing examples of when the Court has applied each of these three views of the corporate form). Recognition of this phenomenon dates back to an influential 1926 article in which John Dewey argued that "[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends." John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926).

[90] *See* Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth., 745 F.3d 703, 715 (4th Cir. 2014) (Title VI); Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (Section 1981); Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 882 (8th Cir. 2003) (Fair Housing Act); Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc., 295 F.3d 1065, 1072 (10th Cir. 2002) (Sections 1981 and 1982); Gersman v. Grp. Health Ass'n, 931 F.2d 1565, 1568 (D.C. Cir. 1991) (Section 1981), *vacated on other grounds*, 502 U.S. 1068 (1992); Triad Assocs. v. Chi. Hous. Auth., 892 F.2d 583, 591 (7th Cir. 1989) (Section 1985(3)); Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 706 (2d Cir. 1982) (Title VI); Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 13–14 (1st Cir. 1979) (Section 1981).

[91] *Hudson Valley*, 671 F.2d at 706 (internal quotation marks omitted).

[92] Eric Posner, *Stop Fussing Over Personhood*, SLATE (Dec. 11, 2013, 10:09 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html.

[93] *See generally* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL (2014) (introducing broadly the theory and practice of piercing the corporate veil in litigation). For a theory of veil piercing in the contraception mandate context, see Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013).

should strive for consistency, but it is not meaningfully inconsistent to recognize that different contexts call for different analyses.[94]

There is little reason to think that individual owners of incorporated businesses do not or should not feel burdened by having to choose between either complying with regulations to which they have religious objections or facing adverse consequences, such as ceasing to enjoy the benefits of incorporation altogether. Unlike the principles of limited liability and entity ownership, ignoring the potential existence of these burdens would not make corporations more productive. In fact, given the potential for actual burdens on individuals, it could easily "extend the principle of incorporation beyond its legitimate purposes and . . . produce injustices or inequitable consequences."[95]

C. The Hobby Lobby *Majority Opinion: Unanswered Questions*

The *Hobby Lobby* majority opinion, authored by Justice Alito, appears to recognize this second potential burden, but it leaves open the important question of how the holding translates to non–closely held corporations. The opinion is careful to limit its actual holding to allow only closely held corporations to bring religious liberty claims,[96] although, as Justice Ginsburg points out, much of "its logic extends to corporations of any size, public or private."[97] The majority opinion provides no explicit guiding principle for that consideration, suggesting only that courts look to the corporate governing structure.[98] What hints the rest of the opinion provides about how to implement this decision in the context of non–closely held corporations misleadingly imply that the corporation's function as a tool of religious exercise is always a relevant consideration.

The *Hobby Lobby* majority opinion begins its analysis by recognizing that "protecting the free-exercise rights of corporations like [the plaintiffs] protects the religious liberty of the humans who own and control those companies"[99] and that "[c]orporations, separate and apart from the human beings who own, run, and are employed by

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[94] As John Dewey recognized in 1926, attempts to define corporate personhood by "reflecting a definite metaphysical conception regarding the nature of [corporations]" miss the mark, and we should instead engage in "another mode of definition which proceeds in terms of consequences." Dewey, *supra* note 89, at 660.

[95] Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973) (internal quotation marks omitted) (justifying piercing the corporate veil).

[96] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) ("For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

[97] *Id.* at 2797 (Ginsburg, J., dissenting).

[98] *Id.* at 2774–75 (majority opinion).

[99] *Id.* at 2768.

them" cannot "pray, worship, observe sacraments or take other religiously-motivated actions," or indeed "do anything at all."[100] Nonetheless, the opinion's subsequent logic suggests several other inconsistent limiting principles that fail to fully embrace this important intuition and therefore fail to provide proper guidance to lower courts.

Justice Alito begins, as many courts did, with the Dictionary Act, which includes corporations within its definition of "person," unless the context of the statute indicates otherwise.[101] Noting that the government conceded that some nonprofits were "persons," Justice Alito argues that "[n]o known understanding of the term 'person' includes some but not all corporations."[102] The clear implication of this is that *all* corporations are "persons" under RFRA. The limiting principle, then, was the statute's use of the phrase "exercise of religion."[103] Pointing out that neither the corporate form itself nor seeking a profit makes religious exercise impossible—as churches and owners of unincorporated businesses are protected under RFRA—he argues that the two in combination should be no different.[104] He also argues that assuming for-profit corporations exist only to make money "flies in the face of modern corporate law," noting that for-profit corporations can pursue all sorts of ends, including religious ones, pointing to corporate charitable donations and benefit corporations as examples.[105] Only a few paragraphs after pointing out that corporations can do

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[100] *Id.* (internal quotation marks omitted).

[101] *Id.* (citing 1 U.S.C. § 1 (2012)).

[102] *Id.* at 2769.

[103] *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012) (forbidding government from substantially burdening a person's exercise of religion unless there is a compelling governmental interest to be served, and the burden is the least restrictive means of serving that interest).

[104] *See Hobby Lobby*, 134 S. Ct. at 2769–70 (arguing that the same religious autonomy that furthers individual freedom in nonprofits equally furthers that religious freedom in for-profit corporations); *see also* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 406 (3d Cir. 2013) (Jordan, J., dissenting) ("[T]he corporate form itself [does not] justify discriminating against Conestoga, and [neither does] the pursuit of profits . . . . Yet somehow, by the miracle-math employed by HHS and its lawyers, those two negatives add up to a positive right in the government to discriminate against a for-profit corporation.").

[105] *Hobby Lobby*, 134 S. Ct. at 2770–72; *see also Conestoga*, 724 F.3d at 403 n.18 (Jordan, J., dissenting) (arguing that there was "absolutely no evidence that Conestoga exists solely to make money" and that it was "operated, rather, to accomplish the specific vision of its deeply religious owners"); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 625 (9th Cir. 1988) (Noonan, J., dissenting) (noting that the "fundamental purpose of their company is 'to stand as a testimony to God's blessing to all persons who will operate their business according to Christian principles'" and quoting the individual plaintiffs' "covenant with God" as described in their brief).

nothing without individual people, Justice Alito effectively argues that for-profit corporations can exercise religion!

Unfortunately, this line of reasoning applies only to some types of corporate free exercise claims. Justice Alito's argument suggests that, when a court must inevitably decide whether a non–closely held corporation can bring a religious liberty claim, it should examine the corporation's religiosity. However, a corporation's religiosity is pertinent only if the alleged burden is that the regulations prevent or make it more difficult for individuals to exercise their religion in a way that the corporate form permits or facilitates. It is irrelevant to the question of whether regulations force a religious corporate owner to choose between either taking action counter to her beliefs or facing adverse consequences. The differences between these two burdens, and the necessary corporate qualities for establishing these burdens, escape even the majority in *Hobby Lobby*, leaving lower courts without this key insight to guide future decisions.

III
A New Test

In this Part, I provide a framework to guide courts in deciding when to allow a corporation to bring a religious liberty claim. To determine whether a corporation can bring religious liberty claims, courts should ask whether it is credible that a regulatory burden on the corporation will actually translate to a burden on the free exercise of an individual's religion, which will depend on the relevant incentives and the corporate structure.[106] This framework is shaped by the recognition of the two potential burdens that government regulation of corporations can impose on individual free exercise. This Part then addresses potential counterarguments and refocuses the debate on the meaningful question of individual religious exercise, rather than on the epiphenomenal question of corporate religious exercise.

A. Proposed Framework for Evaluating Corporate Religious Liberty Claims

This subsection first addresses incentives for faking religious beliefs, which are a constant in this calculus. It then evaluates how to conduct this inquiry when the potentially burdened parties within corporations are easily identifiable, in which case the court should simply look to their sincerity. It goes on to the more interesting question of

[106] This inquiry is akin to the sincerity test used in the individual religious liberty context, where the courts' job is to determine "whether [the claimant's belief] is 'truly held.'" United States v. Seeger, 380 U.S. 163, 185 (1965).

corporations in which potentially burdened individuals are not easily identifiable. Relevant indicia in that context, apart from incentives for faking, include the publicly religious aspects of the corporation itself that may serve as evidence of the religiosity and sincerity of individual owners, and what efforts the corporation made to ensure the religiosity of its individual members.

1. Incentives for Faking Religious Beliefs

The first consideration is the presence of incentives or disincentives for faking.[107] Strong incentives for faking should require proportional evidence of sincerity, but where the advantages of complying with the regulation clearly outweigh the disadvantages, courts should require little or no further evidence. Admittedly, the strength of religious belief may not change depending on these incentives, and yet that unrelated variable may sometimes be determinative. However, the alternative is to abandon sincerity testing entirely, which, given the incentives for faking or convenient conversion, cannot be allowed.

The intuition that for-profit corporations are less likely to exercise religion can be expressed in this phase. For-profit corporations are—perhaps inter alia—tools for making money, and if obtaining an exemption to a regulation would allow a corporation, and thus the associated potentially burdened individuals, to make more money, it is appropriate to inquire into their sincerity.[108]

2. When Potentially Burdened Individuals Are Readily Identifiable

The corporate structure is the principal indicator of when potentially burdened individual corporate constituencies are readily identi-

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[107] Though sincerity is almost never challenged, *see* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 326 n.110 (1986) (listing the cases in which sincerity was at issue), it has been relevant when there are extraordinarily high incentives for faking, most notably during the draft, *see Seeger*, 380 U.S. at 185 (noting that the draft boards' tasks included deciding "whether the beliefs professed by a registrant are sincerely held"); *see also* Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 23–25 (1983) (arguing that the Court's decisions in *United States v. Lee*, 455 U.S. 252 (1982), and *Braunfeld v. Brown*, 366 U.S. 599 (1961), relied in part on recognition of the incentives for strategic behavior because of their for-profit status).

[108] This is related to a separate question: Would an accommodation violate the Establishment Clause by advantaging some religions in the profit-making world, as the Court and Justice Brennan were concerned about in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338, 340, 343–44 (1987). This question would have to be addressed on a case-by-case basis and claims of exemptions for taxation, for example, should fail, *see* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 378 (1990) (holding that it did not violate the ministries' free exercise rights to require that they pay sales taxes), while accommodations that do not fiscally benefit the corporation should not.

fiable.[109] Lower courts in the contraception mandate cases that have examined the sincerity and religiosity of individual owners have properly focused on the fact that single persons or families owned the corporate plaintiffs before them entirely.[110] Courts must only ensure that those individuals sincerely hold the relevant religious beliefs and sincerely believe that the government action burdens the religious exercise that grows from those beliefs.[111]

Another way that the potentially burdened individuals may be readily identifiable is if there are easily discovered religious commonalities among all owners and stakeholders. For example, Little Sisters of the Poor Home for the Aged, a nonprofit plaintiff in the contraception mandate litigation, is "controlled by and associated with the Little Sisters of the Poor, an international Congregation of Catholic Sisters who serve needy elderly people."[112] Though there are numerous affiliated individuals, they are all nuns,[113] and official Catholic ideology is very clear on the morality of contraception.[114] Their claims of burdened religious exercise are likely sincere.

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[109] This concept raises the obvious question: To which individuals do we look? *See* John B. Stanton, *Keeping the Faith: How Courts Should Determine "Sincerely-Held Religious Belief" in Free Exercise of Religion Claims by For-Profit Companies*, 59 LOY. L. REV. 723, 783–84 (2013) ("One practical problem in trying to extract a corporate identity from a view of the corporation that sees little more than a mass of individuals: which individuals matter?"). In the case of for-profit corporations, we should look only to those who would actually decide whether to continue as an incorporated enterprise at all, pay the fine or face whatever other consequences might accompany failure to comply, or just comply with the regulation. This inquiry ignores other corporate constituencies who are not burdened by this difficult choice, but says nothing about other potential considerations of employees, such as whether an accommodation subjecting them to the religious beliefs of their owners is a violation of the Establishment Clause.

[110] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) (noting that the plaintiffs were "closely held family businesses with an explicit Christian mission as defined in their governing principles" upon which the owners were "unanimous"); Conestoga Wood Specialties Corp. v. Sec'y of the Dep't of Health & Human Servs., 724 F.3d 377, 403 (3d Cir. 2013) (Jordan, J., dissenting) ("Conestoga . . . is nothing more than the common vision of five individuals from one family who are of one heart and mind about their religious belief.").

[111] While the Supreme Court has not given much guidance regarding *how* to determine sincerity, relevant factors from previous cases include incentives for faking; consistency, both temporally and within different contexts of the claimant's life; testimony from others, especially religious leaders; parallels between claimed beliefs and traditional religious beliefs; the statement of the claimant; and membership in a recognized religious body. *See* Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 342–51 (1990) (listing factors that courts have taken into account).

[112] Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 1232 (D. Colo. 2013).

[113] *Id.*

[114] *See, e.g.*, 1983 CODE c.1398 ("A person who procures a completed abortion incurs a latae sententiae excommunication.").

3. *When Potentially Burdened Individuals Are Not Easily Identifiable*

While courts should ideally test the sincerity of each individual owner of the corporation, that will sometimes be impossible, given the number of potentially burdened people or, in the case of nonprofits, the fact that there are no actual owners. In those instances, the court should look to corporate religiosity, which can serve as evidence of the religious beliefs of the owners or stakeholders. The more religious a corporation, the more credible its claim that a regulatory burden on the corporation will translate to a burden on the free exercise of the stakeholders' religion.

a. Corporations with Directly Religious Goals

The first such characteristic is whether the corporation serves an explicitly and directly religious purpose. In this instance, the relevant burden is likely to be that the regulations actively prevent individuals from exercising their religion in a way that incorporation facilitates. Some corporations, like churches, are inarguably instruments of individual religious exercise. Regulations that require them to take steps contrary to that religious purpose or to the traditional tenets of the religion from which the corporate purpose springs are likely to burden the religious practice of the individuals who use that corporation to facilitate the exercise of their religion. Regulations that simply make it more difficult or expensive for the corporation to function would similarly burden the individual religious exercise.

Evidence of a corporation's religious purpose can include business practices and products, the stated purpose in corporate documents, and the state laws under which the corporation is incorporated. Thus a church is differentiated from a furniture manufacturer, a publisher of Christian books whose goal is to "[m]inister to the spiritual needs of people"[115] from a food processing company, and a Catholic retirement home maintained as an officially religious nonprofit from a chain craft store.

b. Corporations with Many Potentially Burdened Individuals and Directly Secular Goals

It is conceivable that numerous individuals who came together to achieve a secular goal through incorporation wish to do so in a

[115] *The Tyndale Purpose*, TYNDALE HOUSE PUBLISHERS, http://www.tyndale.com/50_Company/tyndale_purpose.php (last visited Jan. 31, 2015).

manner that is consistent with a shared set of religious beliefs.[116] There is no principled reason why a person who finds fifty or fifty thousand like-minded people with whom to cooperate deserves less protection than a person who acts alone. In those instances, courts should look to public demonstrations of corporate religiosity and actions that directly affect the controlling ownership. The more overtly religious the corporation is, the more likely it is that the owners' beliefs are manifested in it and that a regulation asking the corporation to act against those beliefs burdens the free exercise of the individuals' religion.

The first piece of evidence regarding the overt religiosity of a corporation may simply be the fact that it has sued. It is certainly true that, when the direct corporate purpose is secular and there are no clearly religious ties among the ownership, it is less likely that the owners will share a religious belief with which the regulation at issue conflicts. However, this argument suggests that such organizations will simply never bring a religious liberty claim more than that such a claim, if brought, is spurious. If the corporate leadership decided to sue as a result of a referendum, or if that issue was a critical plank in the platform of a particular slate of victorious director candidates, then that decision should carry some weight in the eyes of the court.[117] If the owners actively agree to something so controversial, it suggests sincere religious commitment.

If, however, the incentives for faking are extremely powerful, or the process by which the corporation brought the lawsuit did not involve the owners, courts should look to other religious aspects of the corporation. Examples include the corporation's name, marketing strategy, and business practices, such as publicly donating profits to explicitly religious organizations rather than reinvesting or distributing them. Statements in the charter and bylaws may also be relevant, but are less convincing than more noticeable displays of religiosity. If a corporation meets the high standard of being so

[116] A claim by a secular nonprofit should automatically fail. Making nonprofits officially religious is fairly straightforward, and nonprofits have no individual owners whose religious beliefs, though unexpressed in the corporation, would be burdened.

[117] Greater weight is justified where owners are more actively involved in corporate decisions, as opposed to the unpublicized decision of a board. The collective action problems inherent in diverse ownership are well established. It is perfectly plausible that a majority of the owners do not feel burdened but do not take action or sell their shares. They may not be aware of the decision, since following those kinds of details is not worth their time given their small stake in the corporation, or they may not believe that their small voice will make a difference.

"imbued with religious attributes"[118] that those attributes can credibly serve as evidence of the individual owners' religious beliefs, despite the corporation's secular purpose, dispersed ownership, and the incentives for faking that may be present, then a large number of owners should not stop a court from scrutinizing the challenged regulation.

c. Publicly Traded Corporations

In the unlikely event that a publicly traded corporation files a religious liberty lawsuit,[119] there should be a fairly strong presumption against the corporate burden translating to individual ones. Anyone who believes that the value of the shares will increase has incentive to purchase them, regardless of their religious beliefs. By choosing the publicly traded form, the corporate constituents have probably sacrificed a stable religious corporate ethos.

A publicly traded corporation would therefore have to show that it has ample and sufficiently religious aspects to support a claim that the majority would only become owners if they shared relevant religious beliefs. Again, if the corporation brought the lawsuit without any effort to determine the sentiments of the shareholders, collective action problems suggest that the lawsuit itself is poor evidence, but a lawsuit brought as a result of shareholder action should be relevant.[120] If a corporation can show that it is so overwhelmingly sectarian and religious that no one would become an owner if they did not have this particular set of religious beliefs, then courts should let them bring the claim.

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[118] Mersino Mgmt. Co. v. Sebelius, No. 13-cv-11296, 2013 WL 3546702, at *14 (E.D. Mich. July 11, 2013).

[119] A good scouring of the Internet turned up only three explicitly Christian publicly traded corporations: Zion Oil and Gas, whose "Biblically inspired" goal is to find oil and natural gas in Israel, *The Vision of Zion Oil and Gas*, ZION OIL & GAS, http://www.zionoil.com/vision (last visited Jan. 31, 2015); Light Media, which appears to mostly deal with Christian hip hop, *Digital Advertising Platforms (24/7-WorldWide)*, LIGHT MEDIA NETWORK, http://www.lightmedianetwork.com (last visited Mar. 11, 2015); *Light Media (LGMH) Launches Light Media Network (Phase 1)*, NASDAQ GLOBENEWSWIRE, (Jan. 15, 2015, 1:30 P.M.), http://globenewswire.com/news-release/2015/01/15/697792/10115730/en/Light-Media-LGMH-Launches-Light-Media-Network-Phase-1.html; and Salem Communications, a media company "targeting audiences interested in Christian and family-themed content and conservative values," *Our Audience and Reach*, SALEM MEDIA GRP., http://salemmedia.com (last visited Mar. 6, 2015).

[120] Another concern is that the board may decide to file the lawsuit, and dissenters, who could be in the majority, simply sell their shares. Whether this is positive or negative depends on one's views of homogenization versus self-selection and sorting. It is also conceivable that those who want a corporate toehold to combat the efforts of the lawsuit may purchase in, which magnifies concerns about chaos and loss of production.

B. Concerns with This Framework

This framework sets up a system for evaluating corporate religious claims for those who want to protect the religious liberty of individuals, whether they choose to take advantage of the benefits of the corporate form or not. However, there are some potential problems associated with expanding the pool of those who can bring claims for religious exemptions. This subsection addresses these concerns, finding that they are less troublesome than they may seem at first glance, and that Congress, through RFRA, instructed courts to wrangle with what difficulties they do raise.

1. Possible Negative Consequences of Permitting These Claims

One potentially negative result of allowing corporate religious liberty claims is the financial cost. Agencies may have to create an infrastructure to field and rule on requests for corporate accommodations. Furthermore, many of these inquiries are not simple, reasonable courts and agencies could easily disagree, and developing answers may entail serious litigation and uncertainty costs. The fact that the set of potentially burdened individuals may change exacerbates the cost concern, as new corporate owners or stakeholders may require new determinations of religiosity.[121]

A second issue is that this system may motivate corporations to become more overtly religious, which may concern those who find it undesirable for the government to promote religious behavior.[122] The system may also invite strife by encouraging business owners to emphasize their religious affiliation, both internally and as the public reacts.[123] On the other hand, openness could allow consumers to make

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[121] For a more detailed discussion of the problems that a rotating cast of individual corporate stakeholders creates for judicial review of individual rights, see Stanton, *supra* note 109, at 784 ("The individual-based approach fails to account for the corporate entity, the idea of a cohesive whole, one of the benefits of which resides in its permanency, including a corporate identity that can stand independent of being linked to any certain individual within its sphere of operation.").

[122] *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (describing his theory of "substantive neutrality" toward religion, which places an emphasis on "minimiz[ing] the extent to which [government] either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"). Substantive neutrality suffers from a baseline problem: From what line do you measure encouragement or discouragement? It seems that the purest form of government neutrality is to simply take no action at all. *See* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) ("'Neutrality,' like 'equality,' is a principle of relationship, not of content. A statement such as 'the state should be neutral' is completely vacuous; it says nothing about that with respect to which the state is supposed to be neutral.").

[123] *See infra* note 141 (describing the Chick-fil-A controversy).

better-informed decisions about where they spend their money, employees about where they work, and owners about with whom they collaborate or in which companies they invest.[124]

A third potential problem is the flood of litigation challenging business regulation. As Justice Ginsburg argued, "[there is l]ittle doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood . . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."[125] Most dramatically, one lower court judge argued:

> [Allowing such claims] would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief. Such a rule would paralyze the normal process of governing, and threaten to replace a generally uniform pattern of economic and social regulation with a patchwork array of theocratic fiefdoms.[126]

However, "it makes no sense under RFRA to refuse to grant a merited exemption just because others may also seek it. How ironic if a burden on religious objectors can be justified because 'too many' objectors find a law repugnant."[127] If Congress discovers that it is burdening too many people's religions for RFRA to be sustainable, it is Congress's job to remove the access to the courts that it provided

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[124] This concern echoes the debate between emphasizing a nationally homogenous set of baseline beliefs or sorting religious believers into smaller communities where they can thrive. *Cf.* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 318–20 (1974) (advocating a libertarian framework for a decentralized, heterogeneous society and distinguishing such a framework from various forms of utopianism).

[125] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting); *see also* Grote v. Sebelius, 708 F.3d 850, 866 (7th Cir. 2013) (Rovner, J., dissenting) (arguing that, if a "controlling shareholder" can exclude contraceptive coverage because of his religious beliefs, then there is "no reason why coverage for any number of medical services could not also be excluded"); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part) (arguing that the majority "opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs (e.g., Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act)"); Aram A. Schvey, *Much Ado About Nothing? Religious Freedom and the Contraceptive-Coverage Benefit*, 39 A.B.A. HUM. RTS. (2013), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/much_ado_about_nothing_religious_freedom_andthecontraceptivecoveragebenefit.html (arguing that allowing corporate religious liberty claims "would certainly open the floodgates to substantial mischief, potentially allowing corporations to flout discrimination laws and other worker protections, zoning policies, and safety regulations by claiming a religious posture").

[126] Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012).

[127] *Hobby Lobby*, 723 F.3d at 1150.

through RFRA, not the judiciary's job to circumvent congressional intent.

Furthermore, several of these concerns assume that there will be many new claims requesting accommodations, but that will likely not be the case. There are strong political incentives not to pass overly burdensome regulations,[128] and there are strong commercial incentives not to bring such lawsuits.[129] Indeed, nothing has prevented corporations from bringing these lawsuits before now. The Ninth Circuit has expressly permitted them since 1988, and yet there have been few.[130] Similarly, there have been almost no religious liberty claims brought by proprietors, partners, or other unincorporated, secular employers regarding business regulations.

In addition, assuming courts continue to grant religious accommodations as rarely as they have historically, very few corporations will bring these claims, because they will probably lose. While commentators often consider strict scrutiny in the equal protection context to be "fatal in fact,"[131] its application in the context of Free Exercise and RFRA has been notably less deadly. In the pre-*Smith* days that Congress purportedly meant RFRA to restore, the Supreme Court denied a whole host of plausible Free Exercise challenges.[132] From 1980 to 1990, federal appellate courts denied 87% of free exercise

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128 One judge hypothesized that there is so little precedent regarding the religious liberty rights of corporations because "there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the Mandate, so there has been little reason to address the issue." Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 399 (3d Cir. 2013) (Jordan, J., dissenting).

129 *See* Daniel Diermeier, *When Do Company Boycotts Work?*, HARV. BUS. REV. (Aug. 6, 2012), http://blogs.hbr.org/2012/08/when-do-company-boycotts-work/ ("Being in a political dog-fight is rarely good for a company's reputation. The public debate is likely to create intense media coverage. And it may lead to severe internal tensions among employees who may ask themselves whether the company is still a welcoming place to work.").

130 *See* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 117 n.11 (D.D.C. 2012) ("*Townley* has been the law of the Ninth Circuit since 1988, yet nothing has been presented to show that courts in that Circuit have been flooded with free exercise and RFRA claims by for-profit corporations.").

131 *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (coining the phrase "strict in theory and fatal in fact" (internal quotation marks omitted)).

132 *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 695, 712 (1986) (rejecting the claims of Native American parents seeking to prevent the government from identifying their child with a social security number); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (rejecting the claims of an Orthodox Jew seeking to wear a yarmulke while in his Air Force uniform); *see also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 880–82 (1990) (describing the limited number of times and contexts when the Court upheld free exercise challenges).

claims,[133] and between 1990 and 2003, 72% of laws challenged under RFRA and Religious Land Use and Institutionalized Persons Act were upheld.[134] If the government interest is compelling, as it is or should be with many business regulations, especially those seeking to eradicate discrimination,[135] then whether the corporation can credibly claim that the regulation burdens their individual owners or stakeholders would not matter because the issue would be settled for everyone.

The combination of the sincerity test as outlined above and strict scrutiny as it has been applied in this context would help ensure that actual burdens on individuals' exercise of religion that truly serve no compelling interest would be struck down. But this should be rare. If corporate religious liberty claims continue to be relatively rare and unsuccessful, then there should be few costs associated with expanding the pool of potential claimants.

2. Judicial Competence to Decide These Questions

Another concern is whether judges can or should be answering these difficult questions. If the framework this Note sets up would require inquiries that should be outside of the province of the courts, then drawing a hard line may be preferable.

a. Incentives for Faking

Accurately determining the incentives for faking is not a simple task.[136] Even the direct economic effects of complying with the con-

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[133] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 859 (2006).

[134] *Id.* at 809–10, 860. These statistics also counter a concern expressed by Justice Scalia in *Smith* that "watering [the compelling interest test] down here would subvert its rigor in the other fields where it is applied," 494 U.S. at 888, as no such subversion of rigor has yet occurred.

[135] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (holding that Minnesota's interest in "eradicating discrimination against its female citizens" justified the application of a Minnesota nondiscrimination statute to an all-male nonprofit membership organization, despite whatever effect it "may have on the male members' associational freedoms"); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that the compelling government interest in combating racism, as achieved through denying the plaintiffs nonprofit status because they barred interracial dating, justified "whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs"). The justifications present for Title VII exceptions in the context of churches would not be present in other businesses. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("Requiring a church to accept or retain an unwanted minister . . . intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.").

[136] This inquiry may be rendered irrelevant in the future. *See* Kerri Smith, *Reading Minds*, 502 NATURE 428, 430 (2013), *available at* http://www.nature.com/polopoly_fs/

traception mandate are complex. The Obama administration claimed that supplying contraception might result in savings from "improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies."[137] For the employer, this means lower premiums or less money spent on deliveries and babies. Additionally, unintended pregnancies can result in costs from maternal leaves or quitting.[138] If contraception coverage is ultimately cost-saving,[139] then it is credible that there is an individual burden, as the plaintiffs in these cases are asking to pay good money to keep a clear conscience.

However, prescient corporate owners foresaw that the alternative was unlikely to be that women would bear the cost of their own contraception. Instead, the government was likely to implement a system similar to that already in place for religious nonprofits, where insurers must bear the costs of contraception. Indeed, in the wake of *Hobby Lobby*, HHS has proposed a new rule doing just that.[140] Should this

1.13989!/menu/main/topColumns/topLeftColumn/pdf/502428a.pdf (describing efforts to develop brain scans that can detect lies).

137 Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,877 (2013) (codified at 29 C.F.R. Pts. 2510 and 2590).

138 The employer or insurer who pays for the contraception that prevents a woman from getting pregnant today stops reaping the benefits when that woman leaves for another job. While it is possible that all employers should be roughly equally benefitted and burdened from this phenomenon, collective action problems could lead to underinvestment.

139 Surprisingly, given that twenty-eight states require health insurers to cover contraceptives, *see* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,873, there is very little empirical data on this topic. HHS relies on the fact that premiums did not increase when contraception was added to the Federal Employees Health Benefits Program, *id.* at 39,872, and cites a study of four group health plans in Hawaii, finding that its contraception mandate did not lead to increased costs, *see id.* at 39,877 (citing JOHN BERTKO ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE COST OF COVERING CONTRACEPTIVES THROUGH HEALTH INSURANCE (2012), *available at* http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml#_ftnref12). While not every study is so convinced, *see, e.g.*, SUSAN K. ALBEE ET AL., TEX. DEP'T OF INS., COST IMPACT STUDY OF MANDATED BENEFITS IN TEXAS REPORT # 2, at 35 (2000), *available at* http://www.tdi.texas.gov/reports/documents/benefits2_00.pdf (predicting that the majority of health plans would still cover oral contraceptives due to market demand, resulting in negligible overall savings), there is widespread agreement that the more women who use contraception, the more money that is saved, and that cheaper contraception results in more widespread and consistent use, *see, e.g.*, GUTTMACHER INST., A REAL-TIME LOOK AT THE IMPACT OF THE RECESSION ON WOMEN'S FAMILY PLANNING AND PREGNANCY DECISIONS 3, 5 (2009), *available at* http://www.guttmacher.org/pubs/RecessionFP.pdf (finding that 8% of women in couples who are not sterile sometimes do not use birth control in order to save money, and that 18% of women using the pill are inconsistent as a means of saving money, although 29% of women surveyed said that they were more careful with birth control because of the recession).

140 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (proposed Aug. 27, 2014) (summarizing the alternative coverage options for exempt organizations).

rule be approved, employers would enjoy all of the benefits of free contraception for their employees but none of the burdens.

Furthermore, the direct financial effects of the regulation are not the only relevant incentives. Taking a public, impassioned stand on a controversial issue is likely to alienate some potential customers or employees and attract others.[141] If a corporation serves a relatively homogeneous demographic, the business it attracts may outweigh the costs of litigation, while the potential for lost business given a diverse or uniformly opposed customer base suggests sincerity.[142] Predicting the effects of potential consumer backlash should involve more than just an intuition, and might be outside of what we can reasonably expect courts to do.[143]

Additionally, there may be other nonreligious incentives that are not immediately economic. Republicans are loudly claiming, and many business owners believe, that Obamacare will make it signifi-

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141 *See, e.g.*, Mark Oppenheimer, *Few Resist the Temptation to Opine on Chick-fil-A*, N.Y. TIMES, Aug. 3, 2012, at A15, *available at* http://www.nytimes.com/2012/08/04/us/taking-sides-on-chick-fil-a-is-a-temptation-few-can-resist.html (describing steps taken by various mayors in response to Chick-fil-A's owner's public opposition to same-sex marriage to prevent or discourage Chick-fil-A from opening franchises in their cities, as well as efforts by Mike Huckabee and Rick Santorum to encourage patronizing Chick-fil-A). For what it's worth, Chick-fil-A's sales increased 12% in 2012. Joe Satran, *Chick-Fil-A Sales Soar in 2012 Despite Bad PR*, HUFFINGTON POST (Jan. 31, 2013, 12:24 PM), http://www.huffingtonpost.com/2013/01/31/chick-fil-a-sales-2012_n_2590612.html.

142 When Stormans, Inc. began refusing to carry Plan B, it faced a boycott in which even the state government participated. *See* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 963 (W.D. Wash. 2012) (noting that "pro-choice groups organized a boycott and staged regular and ongoing protests against both of the Stormans' grocery stores" and that even the Governor's office joined in). Though litigation continues, the boycott has subsided. *See* Brad Shannon, *State's Appeal of Stormans Plan B Case Continues*, OLYMPIAN (Jan. 4, 2014), http://www.theolympian.com/2014/01/04/2914319/states-appeal-of-stormans-plan.html (describing the ongoing legal battle but noting that the boycott has ended).

143 *See, e.g.*, *Papa John's Obamacare Stance Costs Company Its Reputation: Study*, HUFFINGTON POST (Dec. 3, 2012, 5:26 PM), http://www.huffingtonpost.com/2012/12/03/papa-johns-obamacare_n_2233525.html (citing a study that found that the brand was seen as dramatically less favorable after its CEO publicly made disparaging comments about Obamacare, but also posting a response from Papa John's citing another study that showed significant improvement); *see also* Basic, Inc. v. Levinson, 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part) (arguing against adoption of the fraud-on-the-market theory because "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts"); Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1208 n.4 (2013) (Thomas, J., dissenting) (citing Justice White's concern in *Basic, Inc.* as still "valid today"). For what it's worth, the Facebook page "Hobby Lobby Boycott" had 18,781 "Likes" as of January 14, 2015, *Hobby Lobby Boycott*, FACEBOOK, https://www.facebook.com/HobbyLobbyBoycott (last visited Jan. 14, 2015), and the Change.org petition to boycott Hobby Lobby closed with seventeen supporters, Steven Smith, *Boycott Hobby Lobby*, CHANGE.ORG, http://www.change.org/petitions/hobby-lobby-boycott-hobby-lobby (last visited Jan. 16, 2014).

cantly harder for business owners to run their businesses.[144] Furthermore, to many, Obamacare stands as a symbol of the foolishness of the Democratic Party, and to discredit Obamacare is to discredit President Obama and his political vision. There have been a number of other legal challenges to the ACA's provisions,[145] and repealing Obamacare remains a goal of the Republican Party.[146] The challenges to the contraception mandate could be a result of a desire to delegitimize progressive policies rather than to defend burdened religious beliefs.[147] However, direct evidence of these motivations is likely to be hard to come by.

b. How Religious Is Religious Enough?

Even if courts are competent to determine exactly how strong the incentives are for or against faking, it remains difficult to determine how religious a corporation must be to overcome those incentives. In fact, courts may be better off not answering these questions at all, either because of their complexity or because of their theological nature.

For example, determining how many decisionmakers' free exercise rights must be burdened may pose difficulties. The floor is clear: at least enough to make binding decisions for the corporation, as the government will always have a compelling interest in preventing the anarchy of one of the one hundred equal owners of a corporation dictating the corporate direction over the dissent of the other ninety-

144 *See, e.g.*, Press Release, U.S. Chamber of Commerce, U.S. Chamber Releases Q2 Small Business Survey (July 15, 2013, 8:00 PM), https://www.uschamber.com/press-release/us-chamber-releases-q2-small-business-survey (finding that 71% of small business owners said Obamacare makes it harder to hire); *see also* REPUBLICAN NAT'L COMM., RESOLUTION TO DEFUND OBAMACARE 1 (2013), *available at* https://cdn.gop.com/docs/Resolution_to_Defund_Obamacare_LH.pdf ("Whereas, employers (especially those employing over 50 employees) are finding it impractical to employ more full-time employees due to these onerous costs, because it is impractical, expensive and harms the businesses . . . .").

145 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (challenging the constitutionality of the individual mandate and Medicaid expansion); King v. Burwell, 759 F.3d 358, 363 (4th Cir. 2014) (challenging the IRS's rule implementing Obamacare's premium tax credit provision), *cert. granted*, 135 S. Ct. 475 (Nov. 7, 2014) (No. 14-114).

146 *See, e.g.*, Indep. Women's Voice & Am. Majority Action, *We Signed the Repeal Pledge!*, REPEAL PLEDGE, http://www.therepealpledge.com/status/full-list-of-signers/ (last visited Dec. 30, 2014) (listing Republican politicians who have pledged to repeal Obamacare).

147 *Cf.* Korte v. Sebelius, 735 F.3d 654, 663 (7th Cir. 2013) (noting that it was only "when the contraception mandate was finalized [that] the Kortes discovered that their then-existing health plan covered sterilization and contraception").

nine.[148] Even if the majority of the owners are neutral, corporations should not be able to simply add a single religious owner in order to circumvent a regulatory burden. Whether a supermajority or even unanimity should be required is a more interesting question, given the potential for chaos and loss of productivity that might ensue if religious proxy wars pitted corporate owners against each other. On the other hand, a single holdout should not prevent burdened owners from accessing the courts.[149]

Furthermore, our Free Exercise and RFRA jurisprudence requires answering sensitive questions; allowing corporate religious claims may expand both the number of questions that can be asked and the number of times those questions are asked. Courts will have to determine what corporate aspects are actually religious[150] and how likely a religious aspect is to actually signal the existence of individual burdens. This inquiry smacks of determining the "centrality" of religious beliefs, which has been rejected both by the Supreme Court[151] and Congress.[152] Because of the deeply personal and intractable

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[148] Some courts and commentators view this phenomenon as an insubstantial burden. The argument goes that *you* cannot be burdened by what *someone else* does. *See, e.g.*, Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1237 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) ("No Free Exercise decision issued by the Supreme Court has recognized a substantial burden on a plaintiff's religious exercise where the plaintiff is not himself required to take or forgo action that violates his religious beliefs . . . ."). This unnecessarily answers the difficult question of when a burden is substantial, given the compelling government interest in not letting one person with strong religious beliefs dictate rules of conduct to the whole country. But the result is the same.

[149] Justice Alito suggested a way to avoid this thorny issue: leaving it to state corporate law. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) ("State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure.").

[150] The Supreme Court has avoided defining religion, instead proceeding analogically. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965) ("A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."). But this may be inescapable in the corporate context. For example, a corporation completely dedicated to advocating a raw diet as a way to spiritual and physical health may struggle to convince the court that its purpose is religious. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1027 (3d Cir. 1981) (describing these aspects of the claimant's alleged religion).

[151] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

[152] *See* 42 U.S.C. § 2000cc-5 (2012) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."). Another possible reason that courts should not answer these questions is that the monitoring required to ensure continued sincerity may lead to unconstitutional "entangling" of the government with religious activity. *See, e.g.*, Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 82, 92 (2002) (presuming that a sincere "inquiry into institutional commitments is

nature of many religious beliefs, we should perhaps avoid putting—or appearing to put—a governmental imprimatur on some beliefs ahead of others.[153]

On the other hand, courts answer hard questions of dramatic import every day. In determining where to draw the line for purposes of religious liberty claims, a court would necessarily have to answer these questions. Allowing only religious nonprofits to bring these claims denigrates the beliefs of those who find profit compatible with spirituality. Furthermore, and perhaps more importantly, Congress has affirmatively put courts to the task of answering these questions, despite their difficulty and the demonstrated judicial preference for avoiding them.[154] As Justice Roberts once noted:

> We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. . . . But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.[155]

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presumptively forbidden by the prohibition on excessive entanglements between the state and religious entities"). While the merits and continued relevance of the "entanglement" test are beyond the scope of this Note, the general theory is that religion and government each do best when they operate in their own separate spheres, and too much involvement by one in the other is unconstitutional. *See* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (striking down state financial aid to parochial schools because "comprehensive, discriminating, and continuing state surveillance will inevitably be required" to ensure that the funds were not used for religious purposes). For more on this issue, see Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the* Lemon *Entanglements Prong*, 7 FIRST AMEND. L. REV. 253, 259 (2009) (discussing the weakening of the entanglement prong).

153 *See* Freed & Polsby, *supra* note 107, at 26 (arguing that situations where "[t]he government is . . . put to the uncomfortable choice of either allowing itself to be lied to or of setting up a process to assay the sincerity of religious claims" would impermissibly put the government in "'the business of evaluating the relative merits of differing religious claims'" (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))).

154 *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1219 (D.C. Cir. 2013) ("[I]t was Congress, and not the courts, that allowed for an individual's religious conscience to prevail over substantially burdensome federal regulation.").

155 Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006). For those who genuinely believe that Congress had no intention of allowing corporations to have these protections, this argument may not be convincing. Admittedly, this Note does not focus on congressional intent or the intent of the framers or ratifiers, if such a thing exists (were "the ratifiers" any more capable of belief than a corporation is of the exercise of religion?). But certainly Congress meant to protect the free exercise of individuals, on which the framework I propose focuses.

Conclusion

All courts have recognized that government regulations that technically fall on corporations—such as incorporated churches and religious nonprofits—can burden individuals. It is only when corporations have for-profit status or directly secular purposes that some courts believe that the potential for these burdens disappears. However, the religiosity of the corporation is only relevant when the burden at issue is that the regulations prevent individuals from exercising their religion in a manner that the corporate form facilitates or allows. It is irrelevant to the burden of being forced to choose between fidelity to one's religious beliefs or facing adverse financial consequences that those of other religions do not face. When a claim that a regulatory burden on a corporation can credibly translate to a burden—of either of these types—on the free exercise of an individual's religion, that corporation should be permitted to bring a religious liberty claim. This test is admittedly complicated, and these inquiries may take us beyond the scope of ideal government involvement or judicial competence. But it is those concerns—not misleading claims about the nature of corporations or inconsistent and unprincipled piercing of the corporate veil—that should guide the creation of a bright-line rule, if such a rule is necessary.