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*HOBBY LOBBY, CORPORATE LAW, AND THE THEORY OF  
THE FIRM: WHY FOR-PROFIT CORPORATIONS ARE  
RFRA PERSONS*

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INTRODUCTION

*Sebelius v. Hobby Lobby Stores, Inc.*<sup>1</sup> is shaping up to be the blockbuster case of the Supreme Court's October 2013 Term. The 2010 Patient Protection and Affordable Care Act ("ACA") requires most companies with fifty or more employees to provide such workers health insurance, including women's "preventive care and screenings."<sup>2</sup> In August 2011, the Health Resources and Services Administration determined that such care includes "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures,"<sup>3</sup> including medications that some consider abortifacients. Over 300 plaintiffs who object to artificial contraception, abortion, or both have filed dozens of lawsuits challenging the contraception mandate under the Religious Freedom Restoration Act ("RFRA").<sup>4</sup> Hobby Lobby Stores, Inc., is one such plaintiff.

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."<sup>5</sup> This protection is not absolute. Instead, RFRA allows the government to burden a person's religious exercise when doing so is the least restrictive means of furthering a "compelling

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<sup>1</sup> 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

<sup>2</sup> Patient Protection and Affordable Care Act, Pub. L. No. 11-148, § 2713(a)(4), 124 Stat. 119, 131 (2010). It should be noted that some entities with more than fifty employees are nonetheless exempt from this mandate. *See* 42 U.S.C. § 18011(a)(2) (2006 & Supp. V 2011).

<sup>3</sup> *Women's Preventive Services Guidelines*, HEALTH RES. AND SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Apr. 25, 2014), *archived at* <http://perma.cc/U8R4-VKSW>.

<sup>4</sup> *See HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Apr. 25, 2014), *archived at* <http://perma.cc/KAW4-RWQR> (summarizing various cases challenging the ACA's contraception mandate).

<sup>5</sup> 42 U.S.C. § 2000bb-1(a) (2006).

governmental interest.”<sup>6</sup> Hobby Lobby, a business co-owned by five family members, contends that the mandate to provide contraceptive care contravenes its owners’ understanding of Christianity and thus substantially burdens religious exercise.

The case raises many issues. Does the mandate substantially burden Hobby Lobby’s religious exercise? If so, is the requirement the least restrictive means of furthering a compelling interest? Questions like these are beyond the scope of this essay, which addresses a single issue: Do corporate law principles preclude a for-profit corporation like Hobby Lobby from qualifying as a RFRA “person”? The Obama Administration contends that, for various reasons, Hobby Lobby is not a RFRA person.<sup>7</sup> For instance, the Administration asserts that treating for-profit corporations as RFRA persons contravenes “[f]undamental [t]enets of American [co]rporation [l]aw.”<sup>8</sup> One set of amici — forty-four corporate and criminal law scholars — elaborated on this latter argument.<sup>9</sup> These scholars contend that treating corporations as RFRA persons that exercise their shareholders’ religion contradicts basic principles of corporate law and would undermine that law’s goals. In particular, they claim that corporations are distinct legal entities, protected from intrusion by shareholders who enjoy limited liability behind the corporate veil. These essential attributes of corporateness, they say, preclude shareholders from exercising their religion under the aegis of the corporate form.

This essay argues that these scholars are mistaken.<sup>10</sup> In the real world, shareholders impose religiously motivated policies on corporations all the time. This is no surprise, given a theory of the firm that emphasizes the contractual nature of corporate law. That law, in turn, empowers shareholders to unify corporate ownership and control and thus exercise the ordinary prerogatives of business ownership themselves. There is simply no essence of corporateness that precludes shareholders with such prerogatives from employing for-profit corporations to exercise their religion.

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<sup>6</sup> *Id.* § 2000bb-1(b).

<sup>7</sup> Brief for the Petitioners at 15–22, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

<sup>8</sup> *Id.* at 23; *see also id.* 23–26.

<sup>9</sup> *See* Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, *Hobby Lobby*, No. 13-354 (U.S. Jan. 28, 2014) [hereinafter “Law Professors’ Brief”].

<sup>10</sup> We are not the only corporate scholars to take issue with the Law Professors’ Brief. *See, e.g.*, Stephen M. Bainbridge, Essay, *A Critique of the Corporate Law Professors’ Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1 (2014). Professor Bainbridge critiques the brief’s application of the doctrine of reverse veil piercing. We do not address reverse veil piercing and, for reasons made clear below, we do not think that the viability of a for-profit corporation’s claim under RFRA turns on this doctrine.

We make three basic claims. First, corporate law does not discourage for-profit corporations from advancing religion. Second, such businesses do not undermine the goals of corporate law, nor would it undermine such goals to grant these firms religious exemptions from otherwise neutral laws in appropriate cases. Third, given the plausible reasons for protecting religious exercise by for-profit corporations, there is no reason to reject the most natural reading of RFRA's text, namely that "person" includes private corporations of all kinds. This does not mean, of course, that every RFRA claim by a for-profit corporation should be successful. In some cases there will be no substantial burden on religious practices, and in other cases the government may have a compelling reason for regulating corporations. RFRA, however, does not assign the task of weeding out such undesirable religious exemptions to the definition of "person." Rather, other statutory provisions do that work.<sup>11</sup>

Part I of this essay provides background on RFRA and the debate over for-profit corporations. Part II considers religious for-profit corporations and examines the claim that such corporations violate corporate law or undermine its goals. Part III explains why society should protect religious exercise by for-profit corporations.

#### I. RFRA PERSONHOOD, FOR-PROFIT CORPORATIONS, AND THE SCHOLARS' CLAIMS

As noted in the introduction, RFRA prevents unjustified interference with religious exercise by "persons." The most natural reading of the term "person" in RFRA includes for-profit corporations. Congress passed RFRA in response to *Employment Division v. Smith*,<sup>12</sup> which abandoned application of strict scrutiny to neutral laws burdening religious exercise.<sup>13</sup> Because RFRA implements a previous constitutional rule, one could seek the meaning of "person" in constitutional precedent. As Justice Brennan explained, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."<sup>14</sup> Thus, the Supreme Court has repeatedly held that for-profit corporations are constitutional "persons."<sup>15</sup> Furthermore, the so-called "Dictionary Act,"

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<sup>11</sup> See 42 U.S.C. § 2000bb-1(a)-(b) (requiring a substantial burden on religious exercise and allowing regulations creating such a burden in the case of a compelling government interest).

<sup>12</sup> 494 U.S. 872 (1990).

<sup>13</sup> *Id.* at 889; see also 42 U.S.C. § 2000bb(b)(1) (2006) (articulating Congressional purpose to restore strict scrutiny of neutral laws that substantially burden religious exercise); *id.* § 2000bb(a)(4) (finding that *Smith* nearly eliminated strict scrutiny of such laws).

<sup>14</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978).

<sup>15</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (unanimous treatment of corporation as a person); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (same);

which defines terms appearing in the U.S. Code, provides that, “unless the context indicates otherwise,” the term “person” includes corporations, partnerships, and other entities, “as well as individuals,” without regard to whether such firms or individuals are engaged in profit-seeking activities.<sup>16</sup>

The Dictionary Act’s language allowing a different meaning when “the context indicates otherwise” does not authorize judges to fashion optimal definitions of “person” on a statute-by-statute basis. The Act’s presumption is stronger than that. Instead, the Supreme Court has characterized the “context” caveat as a sort of escape hatch that courts may employ if, and only if, the Act’s definition of person “seems not to fit” with the statute in question.<sup>17</sup> In such cases, the Court has said, the context caveat and resulting departure from the Dictionary Act’s definition of person can save the courts from “forcing a square peg into a round hole.”<sup>18</sup>

Nonetheless, the Obama Administration and amici claim that “person” does not include for-profit corporations.<sup>19</sup> The scholars properly assume that Hobby Lobby’s shareholders are the true source of religious exercise by the corporation.<sup>20</sup> However, they contend that basic principles of corporate law distinguish corporations from other business enterprises and forestall shareholders from this use of the corporate form. The scholars emphasize that corporations are entities legally separate from their shareholders.<sup>21</sup> This separate existence, they say, creates limited liability, an “impermeab[le]” barrier protecting shareholders’ personal assets from corporate creditors.<sup>22</sup>

Taken together, the scholars say, these fundamental attributes categorically preclude shareholders from using corporations for religious exercise.<sup>23</sup> In fact, the scholars contend that Hobby Lobby’s shareholders are trying to “have it both ways.”<sup>24</sup> By choosing to invest in a for-profit corporate enterprise, shareholders obtain benefits of the cor-

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*Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (same); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (holding that a corporation is a “citizen” within the meaning of Article III of the Constitution).

<sup>16</sup> See 1 U.S.C. § 1 (2012) (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .”).

<sup>17</sup> *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 200 (1993).

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* notes 7–9 and accompanying text (recounting position by the Administration and amici that for-profit corporations are not RFRA persons).

<sup>20</sup> See Law Professors’ Brief, *supra* note 9, at 2–3.

<sup>21</sup> *Id.* at 3–10.

<sup>22</sup> *Id.* at 7 (invoking the “impermeability of the corporate veil”).

<sup>23</sup> *Id.* at 13–16.

<sup>24</sup> *Id.* at 14.

porate form, including limited liability.<sup>25</sup> However, these same shareholders seek to ignore the separateness of the corporation to use it as a conduit for their religious beliefs.<sup>26</sup> Allowing shareholders' religion to "pass through" to the corporation, the scholars say, would create "an unprecedented and idiosyncratic tear in the corporate veil."<sup>27</sup> The Court should not, they contend, read RFRA to empower controlling shareholders to "impose their personal religious beliefs" on corporations.<sup>28</sup>

The scholars do not address the Dictionary Act's definition of "person" or other federal laws granting for-profit corporations conscience rights.<sup>29</sup> Rather, they suggest that RFRA coverage of for-profit corporations would burden commerce by encouraging intracorporation struggles over religious identity, struggles that would sometimes result in litigation, and thereby discourage investment.<sup>30</sup>

## II. RELIGIOUS BUSINESSES AND CORPORATE LAW

The scholars claim that the legal attributes of corporations disable them from exercising the religion of their owners, who cannot "reverse veil pierc[e]"<sup>31</sup> to impose their views on the firm. We take a different view. For-profit corporations embodying shareholders' religions are common, passing without corporate law objections. This is unsurprising given religious diversity in the United States and corporate law's enormous flexibility. The structure of corporate governance is contingent and contractual, enabling shareholders of closely held corporations to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships. While such closely held firms retain limited liability and entity status, neither attribute justifies denying shareholders of such entities the right to advance religion while earning a profit. Treating such entities as RFRA persons "fit[s]" just fine within RFRA and does not "forc[e]" a square peg into a round hole.<sup>32</sup>

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<sup>25</sup> *Id.* at 6, 14.

<sup>26</sup> *Id.* at 13–14.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 22.

<sup>29</sup> See 42 U.S.C. § 300a-7(b)(2)(A) (2006) (protecting the rights of individuals and entities receiving public health funds to decline to perform abortions on "the basis of religious beliefs or moral convictions"); 42 U.S.C. §§ 1395w-22(j)(3)(B)(i), 1396u-2(b)(3)(B)(i) (2006 & Supp. V) (managed care or Medicare+Choice organization may decline abortion coverage if it objects "on moral or religious grounds").

<sup>30</sup> See Law Professors' Brief, *supra* note 9, at 19–22.

<sup>31</sup> *Id.* at 17.

<sup>32</sup> Cf. *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993) (discussing definition of a "person" under the Dictionary Act).

A. *The Ubiquity of Shareholder Imposition of Religion*

Some lower courts have asserted that “for-profit, secular corporations cannot engage in religious exercise.”<sup>33</sup> As an empirical matter, this claim is false. Shareholder-induced pursuit of religion is common. Religion infuses much of American commerce, “includ[ing] a \$4.6 billion Christian products industry, a \$12.5 billion kosher food market, and a growing share of an \$800 billion global sharia-compliant finance market.”<sup>34</sup> Moreover, numerous mutual funds confine investments to firms whose activities reflect investors’ religious precepts.<sup>35</sup>

Of course, not all religiously infused commerce reflects shareholders’ imposition of religious beliefs. Some of that commerce, however, certainly does. Consider the following nonscientific sample. A kosher supermarket owned by Orthodox Jews challenged Massachusetts’ Sunday closing laws in 1960.<sup>36</sup> For seventy years, the Ukrops Supermarket chain in Virginia closed on Sundays, declined to sell alcohol, and encouraged employees to worship weekly.<sup>37</sup> A small grocery store in Minneapolis with a Muslim owner prepares halal meat and avoids taking out loans that require payment of interest prohibited by Islamic law.<sup>38</sup> Chick-fil-A, whose mission statement promises to “glorify God,” is closed on Sundays.<sup>39</sup> A deli that complied with the kosher standards of its Conservative Jewish owners challenged the Orthodox definition of kosher found in New York’s kosher fraud law,<sup>40</sup> echoing a previous challenge by a different corporation of a similar New Jersey law.<sup>41</sup> Tyson Foods employs more than 120 chaplains as part of its ef-

<sup>33</sup> *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 678 (2013).

<sup>34</sup> Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. (forthcoming Feb. 2015) (footnotes omitted).

<sup>35</sup> See, e.g., Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 22–23 (2013) (describing such funds).

<sup>36</sup> See *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 618 (1960) (“Appellees are Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith . . .”).

<sup>37</sup> See James Leasure, *Ukrop’s Christian Values Out the Door with Sale to Ahold*, RICHMOND EVANGELICAL EXAMINER (Jan. 22, 2010), <http://www.examiner.com/article/ukrop-s-christian-values-out-the-door-with-sale-to-ahold>, archived at <http://perma.cc/EM5J-FREY>; David Wilkinson, *Ukrop’s CEO Walks the Ethics Talk*, ETHICS DAILY (Aug. 23, 2002, 12:00 AM), <http://www.ethicsdaily.com/ukrops-ceo-walks-the-ethics-talk-cms-1446>, archived at <http://perma.cc/F2XM-U9RZ>.

<sup>38</sup> See Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 75–76 (2013) (describing this business).

<sup>39</sup> *Frequently Asked Questions: Corporate Information*, CHICK-FIL-A, <http://www.chick-fil-a.com/FAQ#?category=2> (last visited Apr. 27, 2014), archived at <http://perma.cc/372U-59V4> (describing firm’s mission “[t]o glorify God” and explaining why Chick-fil-A restaurants close on Sundays).

<sup>40</sup> See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 419–20 (2d Cir. 2002).

<sup>41</sup> See *Ran-Dav’s County Kosher, Inc. v. New Jersey*, 608 A.2d 1353, 1355–56 (N.J. 1992).

fort to maintain a “faith-friendly” culture.”<sup>42</sup> New York City is home to many Kosher supermarkets that close two hours before sundown on Friday and do not reopen until Sunday.<sup>43</sup> A fast-food chain prints citations of biblical verses on its packaging and cups.<sup>44</sup> A Jewish entrepreneur in Brooklyn runs a gas station and coffee shop that serves only Kosher food.<sup>45</sup> Hobby Lobby closes on Sundays and plays Christian music in its stores. The company provides employees with free access to chaplains, spiritual counseling, and religiously themed financial advice. Moreover, the company does not sell shot glasses, refuses to allow its trucks to “backhaul” beer, and lost \$3.3 million after declining to lease an empty building to a liquor store.<sup>46</sup>

Nearly all of these corporations are owned by one or just a few shareholders, and their shares do not trade in public markets, with the result that they are considered “closely held.”<sup>47</sup> These shareholders nonetheless enjoy limited liability and each firm is a separate legal person. In each case (and presumably many others), shareholders have imposed their religious beliefs on the corporation. Tellingly, the scholars’ brief does not cite a single case challenging such actions on corporate law grounds.

The role of religion in these and other corporations is not surprising. Americans are the most religious people in the developed world.<sup>48</sup> Many religions emphasize “living one’s faith,” even in a business setting. With the rise of general incorporation statutes after the Civil War, any entrepreneur may use the corporate form. Corporations

<sup>42</sup> *Faith In the Workplace*, TYSON FOODS, <http://www.tysonfoods.com/Ways-We-Care/Faith-In-The-Workplace.aspx> (last visited Apr. 27, 2014), *archived at* <http://perma.cc/5X57-93FA>.

<sup>43</sup> *See, e.g., Our Mission Statement*, ARON’S KISSENA FARMS, <http://www.kissenafarms.com/mission-statement.html> (last visited Apr. 27, 2014), *archived at* <http://perma.cc/CJS8-TLTS>; *see also Contact*, EMPIRE KOSHER, <http://www.empirekosher.com/contact> (last visited Apr. 27, 2014), *archived at* <http://perma.cc/4DAS-KMXD>; THE KOSHER MARKETPLACE, <http://www.thekoshermarketplace.com/Home.html> (last visited Apr. 27, 2014), *archived at* <http://perma.cc/SN6D-82C7>.

<sup>44</sup> *See* Lynn Arave, *In-N-Out Serves Burger With a Side of Scripture*, DESERET NEWS (Dec. 26, 2009, 12:15 AM), <http://www.deseretnews.com/article/705379755/In-N-Out-serves-burgers-with-a-side-of-scripture.html>, *archived at* <http://perma.cc/GS24-HJPC>.

<sup>45</sup> *See* Rienzi, *supra* note 38, at 74–75.

<sup>46</sup> *Id.* at 77–78; *see also* Hobby Lobby Stores, Inc., v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (describing ways that owners “allow their faith to guide business decisions”).

<sup>47</sup> *See* ROBERT C. CLARK, CORPORATE LAW 24–25 (1986) (defining closely held corporations). One exception is Tyson Foods, which is publicly traded. *See Investor FAQs*, TYSON FOODS, <http://ir.tyson.com/investor-relations/investor-overview/investor-faqs/default.aspx> (last visited April 27, 2014), *archived at* <http://perma.cc/WC6Z-83HA>.

<sup>48</sup> Matthew Hay Brown, *U.S. is Most Religious in Industrialized World*, BALTIMORE SUN (Dec. 16, 2009, 4:28 PM), [http://weblogs.baltimoresun.com/news/faith/2009/12/united\\_states\\_is\\_most\\_religiou.html](http://weblogs.baltimoresun.com/news/faith/2009/12/united_states_is_most_religiou.html), *archived at* <http://perma.cc/L77G-J6KG>.

whose owners “impose their personal religious beliefs” on the firm are common.

*B. Religious For-Profit Businesses Do Not Violate Corporate Law*

The examples above are inconsistent with the claim that an impermeable barrier prevents shareholders from mixing commercial and religious objectives. The largely contractual nature of corporate law explains the existence of such businesses. Investors may alter default rules in various ways that contradict the essentialist version of the for-profit corporation invoked by the scholars’ brief.

Classical economics assumes that firms unite ownership and control, concentrating decision-making authority and economic consequences in the same hands.<sup>49</sup> The scholars’ vision of the corporation rejects such unification, at least when it comes to religious exercise, by driving a wedge between owners and the corporation. Corporate owners, they say, simply lack the power to impose their religious views on the firm.<sup>50</sup> This vision parallels the “standard” corporation, characterized by passive shareholders and management centralized in a board of directors.<sup>51</sup> As others have explained, the success of such enterprises depends on a clear boundary between owners and managers.<sup>52</sup> Such separation of ownership from control results in benefits from specialization that would be forgone if each shareholder of ExxonMobil, for instance, could seek to impose its individual preferences on the firm.

However, this variant of the corporation is just that: a variant. All corporations are not ExxonMobil. Indeed, the vast majority of corporations are closely held.<sup>53</sup> Corporate law is not a set of immutable government commands issued on a take-it-or-leave-it basis to those who wish to incorporate. The most prevalent theory of the firm teach-

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<sup>49</sup> Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 781–83 (1972).

<sup>50</sup> See *supra* notes 9 and 19–28 and accompanying text.

<sup>51</sup> See CLARK, *supra* note 47, at 2; *id.* at 762 (referring to this “standard model” of the corporation).

<sup>52</sup> *Id.* at 2 (explaining how these attributes facilitate “the efficient aggregation of very large amounts of capital from numerous investors and the efficient operation of a very large business”).

<sup>53</sup> According to the United States Census Bureau, more than 5.8 million corporations filed federal tax returns in 2008. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, tbl. 745 (2012), archived at <http://perma.cc/6NR6-QWHZ>. Only a tiny fraction of these firms are publicly traded. See Dan Strumpf, *U.S. Public Companies Rise Again*, WALL ST. J. (Feb. 5, 2014, 3:43 PM), <http://online.wsj.com/news/articles/SB10001424052702304851104579363272107177430> (last visited May 4, 2014), archived at <http://perma.cc/M99A-XCBI> (reporting that the number of publicly traded American corporations peaked at 8884 in 1997); see also JAMES D. COX & THOMAS LEE HAZEN, I. CORPORATIONS § 1.20 (2d ed. 2003) (“Most of the incorporated enterprises in this country, perhaps 90 percent or more, are close corporations . . .”).

es that firms are nexuses of contracts among suppliers of labor, capital, and other inputs.<sup>54</sup> Corporate law reflects this contractual vision. Thus, the law that facilitates the formation of large public corporations consists of default rules that parties can change in various ways.<sup>55</sup> The same corporate law that facilitates the creation of ExxonMobil also facilitates formation and operation of the local bed and breakfast with a single shareholder.

Hobby Lobby's five shareholders manage the corporation "in a manner consistent with Biblical principles" they unanimously share.<sup>56</sup> Courts and commentators have often characterized such a closely held corporation as a "chartered partnership," "incorporated partnership," or "a corporation *de jure* and a partnership *de facto*."<sup>57</sup> Indeed, some courts once resisted treating such enterprises as corporations at all, precisely because the shareholders ignored the separation of ownership from control and other attributes of corporate personality, instead behaving like co-partners.<sup>58</sup> This resistance has collapsed, however, and corporate law now provides methods for contracting around the potential separation of ownership from control that characterizes large publicly held corporations. Far from excluding shareholders from control of an artificial entity, these tools grant shareholders the same prerogatives as owners of noncorporate enterprises like partnerships.

The most obvious vehicle for imposing shareholder views on the corporation is the corporate charter. Many charters empower the corporation to pursue any lawful business or purpose, and state laws pro-

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<sup>54</sup> See generally R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937); Scott E. Masten, *A Legal Basis for the Firm*, 4 *J.L. ECON & ORG.* 181 (1988) (explaining how parties could replicate the various attributes of firms by contract).

<sup>55</sup> See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW*, 1-39 (1991).

<sup>56</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) (internal quotation mark omitted).

<sup>57</sup> F. HODGE O'NEAL & ROBERT THOMPSON, 1 *CLOSE CORPORATIONS AND LLCs* § 1.2 (rev. 3d ed. 2004) (quoting Juan L. Luna, Jr., *Protection of Minority Interests Through Stockholders' Agreements: A Commentary on Section 9 of the New York Stock Corporation Law*, 28 *PHILIPPINE L.J.* 506, 535 (1953)); CLARK, *supra* note 47, at 25 ("[L]awyers sometimes refer to [closely held corporations] as incorporated partnerships."); *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 512 (Mass. 1975) ("[T]he close corporation bears striking resemblance to a partnership. Commentators and courts have noted that the close corporation is often little more than an 'incorporated' or 'chartered' partnership.").

<sup>58</sup> See O'NEAL & THOMPSON, *supra* note 57, § 4:4; see also *Jackson v. Hooper*, 75 A. 568, 571 (N.J. 1910) ("The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus-like, become at will a copartnership or a corporation . . . They cannot be partners inter sese and a corporation as to the rest of the world."); RODMAN WARD, JR. ET AL., *FOLK ON THE DELAWARE GENERAL CORPORATION LAW XIV-42* (4th ed. 2006) (reporting that shareholders in closely held firms often ignore requirement to elect a board of directors).

vide this default option.<sup>59</sup> However, those who set up the corporation may adopt a charter reflecting shareholder views about what business the firm conducts and how to conduct it.<sup>60</sup> Under Delaware Law, for instance, the charter may include “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders.”<sup>61</sup> The only exception is for provisions that are “contrary to the laws of this State.”<sup>62</sup>

Thus, charters may presumably include provisions limiting what products the firm may sell (for example, only Halal or Kosher food, no tobacco, no alcohol, no armaments, only fair-trade products), where it may sell, and on what days it may operate (for example, the firm may not operate on the Sabbath).<sup>63</sup> The charter could also include provisions requiring the firm to charge “reasonable prices” (as legislation creating corporations once did) or pay “fair wages.”<sup>64</sup> Moreover, the charter may contain aspirational provisions, such as a requirement that the firm conduct business in a manner respectful of the environment or consistent with God’s plan. Each would “impose the views” of the founding shareholders on the corporation. Some might even reduce profits.<sup>65</sup> None of these provisions would contravene the laws of Delaware, which allow corporations to pursue any “lawful purpose.”<sup>66</sup>

The same may be said of charter provisions imposed midstream. Granted, directors must propose such changes before a shareholder vote.<sup>67</sup> However, in closely held firms, directors and shareholders are

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<sup>59</sup> See DEL. CODE ANN. tit. 8, § 102(a)(3) (2014) (empowering corporations to adopt such provisions). We look to Delaware to inform our discussion because of the state’s leading role in generating American corporate law. We also note that the law of Oklahoma, where Hobby Lobby is incorporated, sometimes replicates Delaware Law verbatim. See, e.g., OKLA. STAT. ANN. tit. 18, § 1006.A.3 (2013) (authority of the board of directors).

<sup>60</sup> See DEL. CODE ANN. tit. 8, § 102(a)(3).

<sup>61</sup> *Id.* § 102(b)(1); see also *id.* § 102(a)(3) (charter may impose “express limitations” on “lawful acts and activities”).

<sup>62</sup> *Id.* § 102(b)(1). Presumably the laws of Delaware include federal law, such as RFRA and the ACA. See *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876).

<sup>63</sup> See O’NEAL & THOMPSON, *supra* note 53, § 3.13 (suggesting that participants in “closely held enterprises” may consider “narrowly restricting the purpose of the corporation” and “inserting . . . ‘self-denying’ clauses to exclude the corporation from specified lines of activity or limit some of [its] powers”).

<sup>64</sup> *Cf.* *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 59–60 (1873) (describing statute incorporating the Crescent City Live-Stock Landing and Slaughter-House Company and establishing maximum charges for each animal slaughtered).

<sup>65</sup> See Aaron Blake, *Obama Praises CVS’s Decision to Stop Selling Cigarettes*, WASH. POST (Feb. 5, 2014, 7:26 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/05/obama-praises-cvss-decision-to-stop-selling-cigarettes/>, archived at <http://perma.cc/Z6K9-UGRB>.

<sup>66</sup> DEL. CODE ANN. tit. 8 § 101(b) (2014).

<sup>67</sup> See *id.* § 242(b).

often one and the same.<sup>68</sup> Moreover, shareholders may simply elect directors who promise to propose such amendments. Here again, a straightforward application of garden-variety corporate law empowers shareholders to employ the corporation as a tool for furthering their religious beliefs.

Shareholders may accomplish the same objective by amending the bylaws on their own initiative. Such amendments may include “any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”<sup>69</sup>

Indeed, shareholders in closely held corporations need not amend the charter or bylaws to implement their religious views. They may also enter shareholder agreements constraining the firm. Delaware, for instance, provides that such agreements are enforceable, even if they “restrict or interfere with the discretion or powers of the board of directors.”<sup>70</sup> Courts have enforced shareholder agreements that required unanimous shareholder consent for hiring employees,<sup>71</sup> conducting “all corporate operations,”<sup>72</sup> or entering particular types of agreements.<sup>73</sup> An agreement that a restaurant will not open Sunday or not violate Kosher restrictions without unanimous consent would impose the shareholders’ religious beliefs.<sup>74</sup>

Shareholders may also eliminate directors altogether and vest themselves with operational control over the corporation. Delaware’s close corporation statute, in a section entitled “Management by stockholders,” expressly authorizes charter amendments providing “that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors.”<sup>75</sup> This provision allows firms to replicate the management and ownership structure of a

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<sup>68</sup> See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013) (identifying shareholders serving on firm’s board).

<sup>69</sup> DEL. CODE ANN. tit. 8, § 109(b) (2014); see also Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN’S L. REV. 476, 477 (1984) (contending that shareholders may prefer bylaw changes to “limit corporate activities”).

<sup>70</sup> E.g., DEL. CODE ANN. tit. 8, § 350 (2014); see also REVISED MODEL BUSINESS CORPORATION ACT § 7.32 (enforcing unanimous shareholder agreements).

<sup>71</sup> See *Klausman v. Rosenberg*, 143 S.E.2d 164 (Ga. 1965).

<sup>72</sup> *Adler v. Svingos*, 436 N.Y.S.2d 719, 720 (N.Y. App. Div. 1981).

<sup>73</sup> See *Zion v. Kurtz*, 405 N.E.2d 681 (N.Y. 1980) (applying Delaware law).

<sup>74</sup> Shareholders who enter such agreements accept whatever liability directors would incur for actions or omissions mandated by such agreements. See DEL. CODE ANN. tit. 8, § 350 (2014). We think it unlikely that unanimous agreements imposing religiously motivated policies would give rise to successful claims. See *supra* notes 71–73 and accompanying text. The sole exception may be for agreements that exacerbate a firm’s losses in or near insolvency, imposing financial costs on creditors.

<sup>75</sup> DEL. CODE ANN. tit. 8, § 351 (2014).

partnership.<sup>76</sup> Such manager-shareholders would still owe fiduciary duties, nominally to the corporation.<sup>77</sup> However, we know of no authority (and the scholars cite none) holding that such a fiduciary's reliance on religious or other ethical considerations ipso facto breaches these duties. Indeed, religiously motivated decisions may sometimes increase profits, though some such decisions may reduce them.<sup>78</sup> While some case law suggests that fiduciaries must unalterably maximize shareholder profits,<sup>79</sup> we believe that shareholders can waive any such rule, like other default rules.<sup>80</sup> No decision of which we are aware holds that managers must maximize profit over the unanimous objection of the shareholders, who can amend the charter to validate any such choice.<sup>81</sup> Indeed, corporate law even empowers shareholders,

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<sup>76</sup> See WARD, *supra* note 58, at XIV-42-43 (explaining operation of this provision and opining that it will be most attractive for family owned corporations); *infra* note 80 and accompanying text (discussing Delaware statute confirming that a corporate charter may properly confer on shareholders the management prerogatives of partners).

<sup>77</sup> See DEL. CODE ANN. tit. 8, § 351.

<sup>78</sup> See Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 77 (2013) (explaining that adherence to religion may increase a firm's costs).

<sup>79</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). *But compare* 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2) (1994) (corporations may implement "ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" despite impact on profits).

<sup>80</sup> See generally Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

<sup>81</sup> Some readers of a previous draft suggested that the business judgment rule can bolster shareholders' ability to impose religiously motivated policies, by sheltering from judicial review any practice with a minimally plausible prospect of increasing profits. See *Shlensky v. Wrigley*, 237 N.E. 2d 776, 778-80 (Ill. App. Ct. 1968). We agree that directors who decide that a corporation will not provide particular health insurance benefits could readily avoid duty of care liability by claiming that such a decision reduces the cost of employee benefits. *Cf. id.* at 780 (rejecting duty of care challenge based upon judicial speculation about financial consequences of challenged practice). In the same way, a decision not to operate on Sunday could reduce costs and enhance the firm's ability to recruit employees. Indeed, some religiously motivated practices that unquestionably *increase* costs could nonetheless survive business judgment scrutiny because they could plausibly differentiate the firm's product and increase market demand for it. See Tushnet, *supra* note 78, at 78 (suggesting that adherence to religious norms may help a firm claim a market niche).

Nonetheless, we believe the business judgment rule is beside the point in this context. Neither shareholders nor directors need invoke pretextual commercial rationales to justify practices that are in fact motivated by religious beliefs. For, as explained in the text, modern corporate law empowers shareholders to induce corporations to pursue religious objectives overtly and regardless of whether the resulting policies maximize profits. Moreover, shareholders that induce corporations to adopt religiously motivated policies would presumably lack standing to challenge directors' adoption of such policies, thereby rendering the business judgment rule superfluous. Indeed, invocation of the business judgment rule "proves too much" from our standpoint, as the rule could in some cases protect directors who adopt policies contrary to the religious beliefs of shareholders, so long as such policies have some plausible connection to profit making. Finally, we note that a firm's reliance on the business judgment rule and concomitant invocation of profit-oriented rationales for such practices could needlessly undermine subsequent assertions that such practices

by unanimous vote, to ratify alleged corporate waste.<sup>82</sup>

In sum, modern corporate law provides shareholders of closely held corporations with numerous tools for structuring the firm to mirror the allocation of responsibilities in other forms of business enterprises, including partnerships. Indeed, Delaware expressly empowers shareholders to employ these devices to “treat the corporation as if it were a partnership or to arrange relations among the stockholders or between the stockholders and the corporation in a manner that would be appropriate only among partners.”<sup>83</sup> Such devices obliterate any boundary between ownership and control. No fiduciary duties or other manifestations of corporate separateness constrain such shareholders from exercising the very same ownership prerogatives as members of a partnership. Instead, there is simply no distinction relevant to the exercise of religion between the nexus of contracts known as the partnership and that known as the closely held corporation.

To be sure, shareholders of such “incorporated partnerships” would still retain limited liability, unlike partners, and the firms themselves would continue to enjoy entity status for transactional or other purposes, unlike the partnerships they otherwise mimic. However, any claim that these attributes preclude use of the corporate form to further shareholders’ religion does not withstand analysis, for two reasons. First, the argument proves too much. Many synagogues, churches, and mosques are also incorporated.<sup>84</sup> Like for-profit corporations, they are “artificial legal entities.”<sup>85</sup> Many also have members who, like shareholders, enjoy limited liability.<sup>86</sup> Some even engage in commercial activity.<sup>87</sup> Such entities possess First Amendment rights, and even the Obama Administration admits that non-profit “religious corporation[s]” could be RFRA persons.<sup>88</sup> The scholars’ brief does not

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are in fact forms of sincere religious exercise protected by RFRA.

<sup>82</sup> ROBERT S. WELCH ET AL., *FOLK ON DELAWARE GENERAL CORPORATION LAW* 152–53 (2014).

<sup>83</sup> DEL. CODE ANN. tit. 8, § 354 (2014).

<sup>84</sup> See WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 1:19 (2013); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) (referring to Hosanna-Tabor as “an ecclesiastical corporation”), *rev’d on other grounds*, 132 S. Ct. 694 (2012).

<sup>85</sup> See, e.g., 1A WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 25 (“The distinctness of the corporate entity applies equally to all kinds of corporations,” and “nonprofit corporations . . . like other corporations, are legal entities separate from their members.”).

<sup>86</sup> MARILYN E. PHELAN, *NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS AND ASSOCIATIONS* § 4.01 (2004) (stating that limited liability for members of non-profit corporations “is a fundamental principle of the general law relating to corporations”).

<sup>87</sup> See COX & HAZEN, *supra* note 53, § 1.18 (“Many non-profit organizations engage in profit-making activities.”).

<sup>88</sup> See Brief for the Petitioners, *supra* note 7, at 17–21; see also, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that local ordinance abridged non-profit

explain this anomaly but instead expressly declines to address the application of its logic to not-for-profits.<sup>89</sup>

Second, and more fundamentally, nothing about limited liability or entity status justifies stripping corporations, whether for-profit or non-profit, of their religious personhood. Take limited liability. Limited liability is a default rule. Corporations can amend their charters to eliminate it or redefine its extent.<sup>90</sup> Moreover, market forces often induce shareholders in closely held firms to guarantee the firm's debts.<sup>91</sup> Indeed, unlimited liability by owners of non-corporate entities is also largely a default rule; partners sometimes pay higher interest rates in return for "non-recourse loans" that shelter personal assets from business creditors.<sup>92</sup>

Shareholders' ability to pursue their religious values via the corporate form should not turn on whether they have forsaken limited liability. As the scholars have explained, states adopt limited liability to encourage economic activity.<sup>93</sup> While this policy may lose its force with respect to "incorporated partnerships," that ship sailed long ago, as states granted limited liability regardless of size or governance structure chosen by shareholders. Nothing in the rationale for limited liability, furthermore, provides a reason for limiting the ability of a firm's owner to use the corporation as a vehicle for religious activity. No one, for instance, claims that sole proprietors who bargained with all creditors for limited liability would thereby create a barrier that prevented them from using their business to further religion. Metaphors aside, whether a particular shareholder's personal assets (if any) are available to satisfy the firm's creditors seems normatively irrelevant to shareholders' ability to infuse corporations with their religious values.

Limited liability is of course an economic benefit to those shareholders who: (1) have significant personal assets; and (2) invest in firms

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corporation's free exercise of religion); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 492 (1979) (construing National Labor Relations Act narrowly so as not to infringe free exercise rights of "the Catholic Bishop of Chicago, a corporation sole . . . [and] the Diocese of Fort Wayne-South Bend, Inc."); *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc) (per curiam) (holding that ban on controlled substances violated rights of religious corporation and its members), *aff'd* 546 U.S. 418 (2006); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006).

<sup>89</sup> See Law Professors' Brief, *supra* note 9, at 1, n.2 ("[T]his brief does not specifically address non-profit corporations, limited liability companies or partnerships.")

<sup>90</sup> See DEL. CODE ANN tit. 8, § 102(b)(6) (2014).

<sup>91</sup> See CLARK, *supra* note 47, at 25.

<sup>92</sup> See Larry Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 112-13 (1991).

<sup>93</sup> See Law Professors' Brief, *supra* note 9, at 5 (limited liability encourages "entrepreneurial activity by founders, investment by passive investors, and risk taking by corporate managers").

whose activities could give rise to involuntary creditors.<sup>94</sup> As such, limited liability is economically indistinguishable from other institutions that limit a debtor's liability. Indeed, most Americans enjoy limited liability from tort victims in the form of homestead and other exemptions that often shield most individuals' assets from creditors.<sup>95</sup> Such individuals do not forfeit their right to exercise religion. Nor should limited liability deprive shareholders and corporations of rights under RFRA.

What about the corporation's status as an artificial entity? As others have explained, entity status is simply a legal fiction that facilitates transacting and the assertion of legal rights by an enterprise that aggregates the capital of multiple investors.<sup>96</sup> Thus, entity status mimics any number of institutional mechanisms that reduce transaction costs and thus facilitate commercial activity. The alternative, a grand bargain negotiated by the firm's entire population of shareholders each time the firm transacted, would entail large and needless transaction costs. However, the state's creation of a useful institutional device does not forestall individuals from employing that device to exercise religion.

In short, the scholars' argument rests on an essentialist characterization of an institution defined by an immutable set of status relationships, relationships that categorically distinguish every corporation from partnerships and other business entities. This essentialist vision flies in the face of corporate law's contractual and enabling nature, as understood through the lens of the nexus-of-contracts theory of the firm. There is no single model of corporate governance and concomitant relationship between shareholder, managers, and creditors. Nor is there any fundamental distinction between closely held corporations ("incorporated partnerships") and the partnerships or sole proprietorships they mimic. Instead, as the Supreme Court unanimously recognized over a century ago: "Under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succes-

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<sup>94</sup> Shareholders in closely held firms internalize the impact of limited liability for voluntary corporate debts, as firms pay higher interest rates that reduce corporate earnings. To this extent, the "benefit" of limited liability is illusory.

<sup>95</sup> See, e.g., FLA. CONST. art. X, § 4 (exempting the entirety of an individual's home, regardless of value, from the claims of creditors). Federal law similarly limits the ability of tort victims and other creditors to garnish wages, effectively conferring limited liability over exempt wages. See 15 U.S.C. § 1673(a) (2012) (limiting wage garnishment to twenty-five percent of disposable wages or the excess of disposable earnings above thirty times the Federal minimum hourly wage, whichever is less).

<sup>96</sup> See EASTERBROOK & FISCHER, *supra* note 55, at 11–12 (describing how entity status reduces the cost of transacting in the corporate context).

sion of members without dissolution.”<sup>97</sup> Including corporations as RFRA persons is no more an anomaly than including partnerships, sole proprietorships, or other business enterprises.<sup>98</sup> Absent some claim — which the scholars do not make — that (attempted) profit-making simpliciter deprives entities of RFRA personhood, for-profit corporations are, like non-profit corporations, RFRA persons.

By focusing on closely held corporations such as Hobby Lobby, we do not mean to suggest that publicly held firms cannot be RFRA persons. The Dictionary Act, after all, does not distinguish between closely held corporations, publicly held corporations, and those that may lie somewhere in between. Instead, the statute designates (all) “corporations” as persons, suggesting a unitary result. Given that the vast majority of corporations are, like Hobby Lobby, closely held firms, the most logical result is RFRA personhood for all.<sup>99</sup>

Indeed, shareholders of firms that are publicly held and characterized by a nominal separation of ownership from control can nonetheless employ some of the mechanisms described above to ensure that firm policies reflect their religious beliefs. For instance, shareholders could approve amendments to the firm's charter or alter the firm's by-laws so as to mandate religiously motivated policies such as closing on Sunday. In the real world, of course, reliance on such mechanisms may be relatively rare. Shareholders of publicly held firms are likely quite diverse in their religious views (or lack thereof), and market pressure may deter large firms with diverse consumers and employees from adopting a particular religious stance. Still, while rare, we do not believe that such assertions are impossible.

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<sup>97</sup> *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

<sup>98</sup> To be sure, the absence of any meaningful difference between corporations and partnerships does not ipso facto establish that corporations are RFRA persons, absent some demonstration that partnerships are themselves RFRA persons. However, the Dictionary Act expressly defines partnerships as “persons,” thus raising a presumption of RFRA personhood. *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958) (relying upon Dictionary Act's definition of “whoever” to impose criminal liability upon a partnership). Moreover, neither the scholars nor the Obama Administration identifies any attribute of partnerships qua partnerships that renders conferral of RFRA personhood on such entities “awkward” or analogous to “forcing a square peg into a round hole.” *Cf. Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993). All that remains is the argument, adumbrated by the Administration, but not made by the scholars, that attempting to make a profit deprives even sole proprietors of RFRA personhood. *See* Brief for the Petitioners, *supra* note 7, at 19–22. Pre-*Smith* law points in the other direction, however. *See United States v. Lee*, 455 U.S. 252 (1982) (entertaining free exercise claim by sole proprietor); *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1960) (entertaining free exercise claim by for-profit corporation); *infra* note 112 (detailing various opinions in *Crown Kosher*). Assuming that for-profit entities can be RFRA persons, exclusion of for-profit corporations such as Hobby Lobby would be awkward and illogical.

<sup>99</sup> *See supra* note 53 (explaining that the vast majority of corporations are closely held).

To be sure, publicly held firms that do invoke RFRA in an effort to avoid regulation may face more obstacles than closely held corporations. It may, for instance, be more difficult for such firms to demonstrate that the asserted religious belief is sincere or that the challenged imposition is a substantial burden on the exercise of that belief.<sup>100</sup> Moreover, regulation of large, public firms may more readily satisfy RFRA's compelling interest test.<sup>101</sup> Put another way, RFRA gives courts various tools for addressing any unique challenges posed by public corporations. There is thus no apparent rationale for categorically depriving such firms of RFRA personhood.

It would be strange to deal with any such unique challenges by adjusting RFRA's definition of "person" instead of invoking other doctrinal tools. When it comes to religious activity by natural persons, RFRA does not differentiate meritorious from non-meritorious claims by manipulating the statutory definition of person to exclude individuals with insincere claims or identify instances in which regulation advances a compelling government interest. Rather, courts treat individuals invoking RFRA as "persons" for purposes of the statute and use other doctrinal tools to filter out baseless claims.<sup>102</sup> In the same way, courts should resist any urge to exclude public corporations from RFRA personhood and rely upon other doctrinal tools to handle any special challenges arising from such firms' invocation of RFRA.

*C. Religious For-Profit Businesses Do Not Undermine Corporate Law Policies*

One might still argue that religious for-profit corporations undermine the goals of corporate law. The scholars claim that religion "could make the raising of capital more challenging, recruitment of employees more difficult, and entrepreneurial energy less likely to flourish."<sup>103</sup> Elsewhere they suggest that injecting religion "would invite contentious shareholder meetings, disruptive proxy contests, and expensive litigation regarding whether the corporations should adopt a religion and, if so, which one."<sup>104</sup> Likewise they claim that allowing such corporations to claim religious exemptions would create incen-

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<sup>100</sup> See 42 U.S.C. § 2000bb-1(a) (2006) (articulating RFRA's "substantial burden" standard); *infra* notes 129–135 and accompanying text (describing decisions under both RFRA and the Free Exercise Clause determining whether a claimant's religious belief was sincere).

<sup>101</sup> See *id.* § 2000bb-1(b) (articulating RFRA's compelling interest test).

<sup>102</sup> See *infra* note 144 and accompanying text (explaining that courts should employ such tools to identify meritless claims).

<sup>103</sup> Law Professors' Brief, *supra* note 9, at 8.

<sup>104</sup> *Id.* at 9.

tives to manufacture religious beliefs to avoid regulations.<sup>105</sup> We find these arguments unconvincing.

As explained earlier, for-profit corporations have been asserting religious identities in the marketplace for decades.<sup>106</sup> Likewise we need not leave entirely to speculation the probable results that will follow if corporations are found to be RFRA persons and thus not barred from seeking an exemption from generally applicable laws.

Federal law and the laws of some states already authorize some for-profit corporations to decline to perform or pay for certain medical procedures because of religious or moral objections.<sup>107</sup> We also have experience with the application of strict scrutiny to religious for-profit corporations. In 1963, the Court held in *Sherbert v. Verner*<sup>108</sup> that strict scrutiny applied to neutral laws burdening religious exercise.<sup>109</sup> Until the Court's 1990 *Smith* decision, courts applied this standard as a matter of constitutional law.<sup>110</sup> Corporations have long held rights under the First Amendment,<sup>111</sup> including the Free Exercise Clause.<sup>112</sup> For-profit corporations have sued on Free Exercise grounds both before and since *Smith*.<sup>113</sup> The experience with state law is also instruc-

<sup>105</sup> *Id.* at 25–28.

<sup>106</sup> See Part II.A, *supra*.

<sup>107</sup> See note 29, *supra*; see also, e.g., 18 PA. CONS. STAT. § 3213(d) (2014) (“Except for a facility devoted exclusively to the performance of abortions, no medical personnel or medical facility . . . shall be required against his or its conscience to aid, abet or facilitate performance of an abortion or dispensing of an abortifacient . . .”).

<sup>108</sup> 374 U.S. 398 (1963).

<sup>109</sup> See *id.* at 403.

<sup>110</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 899–900 (1990) (O’Connor, J. concurring in the judgment) (collecting numerous Supreme Court decisions applying strict scrutiny to facially neutral burdens on religion).

<sup>111</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (unanimously protecting free speech rights of for-profit corporation).

<sup>112</sup> See e.g. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (recognizing Free Exercise Clause as applying to a religious corporation); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (same).

<sup>113</sup> See *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (declining to decide whether for-profit corporation could assert free exercise rights and rejecting free exercise arguments made by the corporation and its owners); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) (holding that defendant corporation was an “instrument” through which its shareholders could exercise religion and assert free exercise claims). Indeed, in *Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1960), all nine Justices addressed the merits of the plaintiff corporation’s free exercise challenge to the state’s Sunday closing law, in four different opinions. See *id.* at 618 (Warren, C.J., joined by Black, Clark, and Whittaker, JJ.); *id.* at 642 (Brennan and Stewart, JJ., dissenting) (concluding that the law abridged plaintiffs’ free exercise rights); *McGowan v. Maryland*, 366 U.S. 420, 459 (1960) (separate opinion of Frankfurter, J., joined by Harlan, J.); *id.* at n.† (noting that the opinion also applied to *Crown Kasher Super Market, Inc.*); *McGowan*, 366 U.S. at 561 (Douglas, J. dissenting) (concluding that law abridged plaintiffs’ free exercise rights); *id.* at n.\*. No Justice suggested that the plaintiff’s status as a for-profit corporation deprived the firm of free exercise rights. See, e.g., *Crown Kasher Super Mkt., Inc.*, 366 U.S. at 630–631 & 631 n.7 (declining to consider procedural objections to plaintiff’s chal-

tive. In the wake of the Supreme Court's decision in *City of Boerne v. Flores*<sup>114</sup> striking down RFRA as applied to state law, fifteen states passed their own state versions of RFRA.<sup>115</sup> All of these statutes protect "persons." Only two states — Louisiana and Pennsylvania — explicitly limit persons to non-profit corporations,<sup>116</sup> while South Carolina explicitly defines persons to include "an individual, corporation, [or] firm."<sup>117</sup> Courts in at least one state have entertained state RFRA claims by for-profit corporations.<sup>118</sup> For over half a century, then, there has been no per se bar to free exercise claims by for-profit corporations, and the parade of horrors envisioned by the scholars has simply not materialized.<sup>119</sup> For-profit corporations have been asserting religious identities in commercial and legal arenas for decades. Others have declined the opportunity to do so. There has been no flood of shareholder derivative suits challenging a firm's adoption of a religious identity or failure to adopt such an identity. In fact, the scholars do not cite a single example of a corporate governance dispute connected to such decisions. In closely held corporations with a single shareholder, the structure for many religious businesses, the fear of such litigation is especially fanciful. Even if such decisions did lead to occasional litigation, the mere possibility of corporate conflict would provide no reason for prohibiting corporate religious exercise. On matters ranging from business plans to corporate social responsibility (or its absence), corporations often engage in controversial actions. These matters have

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lenge). Some intermediate state appellate courts have held, however, that for-profit corporations cannot assert rights under the Free Exercise Clause. *See, e.g.,* *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. Ct. App. 1985); *Atlantic Dep't Store, Inc. v. State's Att'y for Prince George's Cnty.*, 323 A.2d 617 (Md. Ct. Spec. App. 1974). Neither decision, it should be noted, mentions or discusses *Crown Kosher Super Market, Inc.*

<sup>114</sup> 521 U.S. 507 (1997).

<sup>115</sup> *See* W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2013) (collecting statutory references).

<sup>116</sup> *See* 71 PA. STAT. ANN. § 2403 (2014) ("Person." An individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under [federal law]."); LA. REV. STAT. § 5234(1) (2013) ("A person" includes an individual and also includes a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under [federal law].").

<sup>117</sup> *See* S.C. CODE ANN. § 1-32-20(3) (2014) ("Person" includes, but is not limited to, an individual, corporation, firm, partnership, association, or organization.).

<sup>118</sup> *See* *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008) (reversing a lower court dismissal of a for-profit corporation's suit asserting claims under state RFRA, state conscience laws, and the Free Exercise Clause); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2012) (considering a challenge to a state law brought by a for-profit corporation on, inter alia, state RFRA grounds).

<sup>119</sup> David Skeel, *Corporations and Religious Freedom*, WALL ST. J., Dec. 2, 2012, archived at <http://perma.cc/EB6F-FYBM> (expressing doubt that a Supreme Court ruling in favor of Hobby Lobby will lead to "a massive wave of corporate religious freedom claims").

resulted in reported cases.<sup>120</sup> We do not prohibit, however, corporations from planning their business or from implementing corporate social responsibility programs. Rather, we provide firms with discretion and let people vote with their pocketbooks.

There remains the claim that religious firms might suffer difficulty raising capital, finding employees, or otherwise achieving entrepreneurial success. The first response to this claim is to ask, “So what?” The survival of such firms in the market shows they are able to attract capital and labor. Hobby Lobby is apparently a thriving enterprise. Furthermore, corporate law does not punish behavior simply because it might increase costs.<sup>121</sup> As one commercially sophisticated judge has observed, “The courtroom . . . is not a boardroom. The judge is not a business consultant.”<sup>122</sup> Firms engage in costly behavior such as closing on Sunday or alienating employees by refusing to provide contraception coverage,<sup>123</sup> just as corporations may also choose to sell expensive “fair trade” goods or donate substantial sums to philanthropy.<sup>124</sup>

Furthermore, religion may sometimes solve economic problems. Religion can lower agency costs, a common problem in the corporate context.<sup>125</sup> For example, commercial networks of coreligionists are common. Religious homogeneity generates the trust on which these networks depend. First, coreligionists monitor and informally sanction

<sup>120</sup> See, e.g., *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953) (upholding corporate charitable donation to a university); *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) (rejecting challenge to board’s refusal to schedule night games). *Shlensky*, of course, declined to interfere with the “honest business judgment” of the directors. See *id.* at 778. As explained in note 81, *supra*, we disclaim any reliance upon the business judgment rule to support this essay’s arguments.

<sup>121</sup> See CLARK, *supra* note 47, at 136–40 (noting the discretion of managers under the deferential business judgment rule).

<sup>122</sup> *In re Colonial Ford*, 24 B.R. 1014, 1016 (Bankr. D. Utah 1982) (quoting *In re Curley Valley Associates*, 14 B.R. 506, 511 (Bankr. D. Utah 1981)) (internal quotation marks omitted).

<sup>123</sup> See, e.g., *Why We’re Closed on Sundays*, CHICK-FIL-A, <http://www.chick-fil-a.com/Company/Highlights-Sunday> (last visited Apr. 25, 2014), archived at <http://perma.cc/NAZ9-GY42>; Igor Volsky, *Many Catholic Universities, Hospitals Already Cover Contraception in Their Health Insurance Plans*, THINKPROGRESS.ORG (Feb. 7, 2012, 9:04 AM), <http://thinkprogress.org/health/2012/02/07/420114/many-catholic-universities-hospitals-already-offer-contraception-as-part-of-their-health-insurance-plans/>, archived at <http://perma.cc/RQ9-JYAQ> (noting Boston College “chose to meet the needs of the overwhelming majority of Catholic women and offer these much needed services”); see also Tushnet, *supra* note 78, at 77–78 (concluding that adherence to cost-increasing religious norms may generate offsetting psychic income).

<sup>124</sup> See, e.g., *Fair Trade FAQ*, ALLEGRO COFFEE, <http://www.allegrocoffee.com/about/more-info/our-story#faq> (last visited Apr. 25, 2014), archived at <http://perma.cc/U6G5-Q8WQ> (“Allegro offers Fair Trade certified coffee . . .”); Jacquelyn Smith, *America’s Most Generous Companies*, FORBES, July 16, 2013, <http://www.forbes.com/sites/jacquelynsmith/2013/07/16/americas-most-generous-companies/>, archived at <http://perma.cc/TA2U-7DWT> (noting that in 2012 Wells Fargo donated \$315,845,766 in cash while Walmart, Inc. donated \$311,607,280 in cash and \$755,868,381 in products to about 50,000 different charities).

<sup>125</sup> See, e.g., *EASTERBROOK & FISCHER*, *supra* note 55, at 11–12 (discussing the problem of agency costs in corporations).

one another. For example, the diamond business depends on high-cost, low-margin transactions in goods that are extremely easy to steal. It requires enormous trust to function profitably. Orthodox Jews dominate the wholesale industry in America and depend heavily on religious sanctions to insure trustworthy behavior.<sup>126</sup> Second, costly religious devotion often signals commitment to community norms.<sup>127</sup> Counter-parties may rely on religious observance as a low-cost signal of trustworthiness. To be sure, the frequency of religious affinity fraud suggests that religion also can be used opportunistically, but in many situations it is sufficiently accurate to be a rational response to more expensive systems of sorting and monitoring. This does not mean that religious businesses are insincere. Rather, the role of religion in generating trust suggests that religious businesses may survive precisely because religion solves economic problems.

Finally, the scholars' brief raises the specter of corporations manufacturing fictitious religious identities to obtain regulatory exemptions. They write, "Companies suffering a competitive disadvantage will simply claim a 'Road to Damascus' conversion. A company will adopt a board resolution asserting a religious belief inconsistent with whatever regulation they find obnoxious . . . ."<sup>128</sup>

This concern has nothing to do with the corporate form. Natural persons can also make insincere religious claims.<sup>129</sup> Sole proprietorships and partnerships may also desire regulatory exemptions. Some version of strict scrutiny has been applied to free exercise claims for over half a century, and courts considered the sincerity of religious beliefs even before that.<sup>130</sup> The scholars suggest that it would be unprecedented for courts to inquire into whether challengers are engaging in religious practices in "good faith," citing the Supreme Court's decision in *Thomas v. Review Board*<sup>131</sup> for the proposition that federal courts

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<sup>126</sup> See Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L. & SOC. INQUIRY 383 (2006) (discussing the role of religion in generating intra-industry trust in the diamond trade); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing extralegal enforcement in part through religious sanctions in contracting in the American diamond industry).

<sup>127</sup> See Laurence R. Iannaccone, *Why Strict Churches are Strong*, 99 AM. J. SOCIOLOGY 1180 (1994) (arguing that strict religious behavior acts as a signal of commitment and prevents opportunism in religious communities).

<sup>128</sup> Law Professors' Brief, *supra* note 9, at 27–28. We presume that the Scholars are not implying that Saint Paul's conversion to Christianity was insincere. See *Acts* 9:1–6. Certainly the Romans who executed him believed that his conversion to Christianity had been sincere.

<sup>129</sup> See *infra* note 134 (collecting cases).

<sup>130</sup> See *United States v. Ballard*, 322 U.S. 78 (1944) (holding that a court could not judge the truth of theological beliefs but it could judge whether or not a person held those beliefs in good faith).

<sup>131</sup> 450 U.S. 707 (1981).

lack expertise in making such judgments.<sup>132</sup> This, however, is a misstatement of the law. The courts have consistently held that they lack the competence to evaluate the truth of theological claims or the accuracy of a particular litigant's interpretation of their faith.<sup>133</sup> This task is entirely separate, however, from the question of whether a litigant's asserted religious beliefs are sincerely held. Courts applying RFRA have not infrequently evaluated such sincerity.<sup>134</sup> Insincerity is a good reason for denying a RFRA claim in particular cases. But the possibility of such insincerity does not justify categorically excluding for-profit corporations from RFRA's reach.<sup>135</sup>

### III. RELIGIOUS FREEDOM AND CORPORATIONS

One might object that it just makes no sense to apply RFRA to for-profit corporations, with the result that courts should not treat such entities as RFRA persons. Corporations aren't natural persons and religious freedom, properly understood, applies only to natural persons.<sup>136</sup> There are two responses to this claim. The first is that corporations are instrumentalities by which people act in the world. When individuals act religiously using corporations they are engaged in reli-

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<sup>132</sup> See Law Professors' Brief, *supra* note 9, at 27 n.12.

<sup>133</sup> See *Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."); *Watson v. Jones*, 80 U.S. 679, 733 (1871) (stating that civil courts lack jurisdiction to resolve theological questions).

<sup>134</sup> See *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) ("The sincerity of a plaintiff's belief in a particular religious practice is an essential part of the plaintiff's prima facie case under . . . RFRA."); *United States v. Quaintance*, 608 F.3d 717 (9th Cir. 2010) (rejecting as insincere an individual's claim to believe that marijuana was a deity entitling him to a RFRA exemption from criminal drug laws); *United States v. Manneh*, 645 F. Supp. 2d 98 (E.D.N.Y. 2008) (rejecting defendant's RFRA challenge to ban on importation of parts of endangered primates after finding that defendant's claimed religious need to eat "bushmeat" was insincere).

<sup>135</sup> The scholars also claim that divining sincerity in the corporate context is particularly difficult, pointing to Hobby Lobby as an example. See Law Professors' Brief, *supra* note 9, at 28 ("The evidence [of religious belief] typically will be no more, and no less, than what is present in this case: the views of shareholders that the regulation burdens their personal beliefs and a board resolution adopting those beliefs as the corporation's own.") The facts in the case, however, belie this claim. See *supra* note 46 and accompanying text (summarizing Hobby Lobby's extensive religious activities).

<sup>136</sup> See, e.g., 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) ("[I]t is claimed that the religious beliefs of the organization itself are violated by the Mandate. This argument fails because a business organization does not have religious beliefs. Rather, as it has been famously put, 'a corporation has no soul.'"); David Clay Johnston, *Do Corporations Have Religious Beliefs*, AL-JAZERA AMERICA (Mar. 28, 2014, 7:00 AM), <http://america.aljazeera.com/opinions/2014/3/hobby-lobby-firstamendmentreligiousrightsobamacare.html>, archived at <http://perma.cc/ASQ5-BU3G> (arguing that "a corporation cannot exercise religion or have any beliefs because it is merely an inanimate vessel, a box, as it were, to contain liability for debts, for misconduct and even for criminality, thus shielding its owners").

gious exercise. When we regulate corporations we in fact burden the individuals who use the corporate form to pursue their goals. We often have very good reasons for doing so, but we should not be seduced by the fiction of corporate personality into imagining that when we regulate corporations we are not regulating individuals. The second response is that religious freedom is broader than an individualist concern with personal rights. Rather, it is about limiting the ability of the state to regulate a particular kind of conduct — religious exercise — even when corporate bodies engage in that conduct. Just as free speech is about restraining the government from regulating speech, even of for-profit corporate entities like *The New York Times*, so too religious freedom is about restraining the government from regulating religious conduct, including that by corporate entities.

Like the rules of contract law or the rules governing the alienability of property, corporate law's main purpose is facilitative. As Delaware puts it, a corporation can be formed for "any lawful business or purposes."<sup>137</sup> Corporations are a tool. They are a means for pursuing the ends chosen by their creators. Like any other legal tool, such as contract or property, corporations can be regulated by the state. These regulations burden the activity of those that choose to use corporations. For the sake of convenience or to pursue some discrete policy we often treat corporations as separate persons. This is a pragmatic decision, however. It is not because corporations belong to some category of things whose interests are divorced from the interests of natural persons.<sup>138</sup> There is no reason Congress cannot selectively treat corporations as tools used by individuals rather than separate persons. Congress employs just such selective treatment in taxing S-corporations, ignoring the legal personality of corporations for tax purposes.<sup>139</sup> Likewise, when it passed RFRA Congress did not limit the term "person," and it is perfectly reasonable to suppose that its failure to do so reflected a recognition that for-profit corporations are a way that people in our society do in fact pursue religious objectives.<sup>140</sup>

<sup>137</sup> See DEL. CODE ANN. tit. 8 § 101(b) (2014).

<sup>138</sup> See generally John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926) (arguing that legal personality ought to be understood primarily as a pragmatic device rather than a metaphysical essence).

<sup>139</sup> See 26 U.S.C. § 1363 (2012).

<sup>140</sup> Several lower courts have suggested that standing doctrine precludes RFRA challenges to the regulation of corporations. See *Autocam Corp. v. Sebelius*, 730 F.3d 618, 621 (6th Cir. 2013) ("As to the Kennedys, we agree with the government that they lack standing as individuals to bring RFRA claims arising from an obligation on their closely-held corporation."); *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), cert. granted, 134 S.Ct. 678 (2013) (holding that a corporation cannot assert the Free Exercise rights of its owners under the First Amendment). Some courts have concluded (erroneously) that for-profit corporations are not RFRA persons. However, even these courts concede that when a for-profit corporation claims that it has been regulated in violation of federal

One might object that by definition people create for-profit corporations to make a profit and thus such corporations cannot be instrumentalities for religious exercise. As noted above, as an empirical matter this claim is false. A moment's reflection also reveals its impoverished psychology. People's motives are mixed. Entrepreneurs wish to earn a profit, but they often have more grandiose ambitions to change the world. It's unsurprising that some people pursue a religious mission as part of their business. One might object that if profits are involved, the exercise cannot "really" be religious. After all, didn't Jesus declare, "You cannot serve God and mammon"?<sup>141</sup> As Professor Michael Helfand has observed, however:

This opposition of profit and religion — the claim, essentially, that religion ends where business begins — is deeply misguided. It may trace to a particular brand of Christian theology — a dogmatic view of what it means to "render unto Caesar what is Caesar's" — that relegates religion to the narrow confines of the church and the inner life of the mind. Religion, on this account, simply does not apply in the marketplace or the boardroom.

Such a worldview is completely foreign to other faith traditions, notably the Jewish legal tradition. From the perspective of Jewish law, Judaism's requirements apply equally in all spheres of human endeavor — from the synagogue to the workplace and everywhere in between.<sup>142</sup>

This worldview is also completely foreign to many non-Jewish traditions, including to many Christians.<sup>143</sup>

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law, the corporation alleges an injury that would grant it standing under Article III, even if the court ultimately disagrees with the corporation's interpretation of federal law. *See, e.g., Autocam*, 730 F.3d at 621 ("[W]e agree with the parties . . . that Autocam has Article III standing to assert RFRA claims."). Some commentators have suggested that corporations may also have prudential third-party standing to assert the First Amendment or RFRA claims of their owners. *See, e.g.,* Matthew I. Hall & Benjamin Means, Essay, *The Prudential Third-Party Standing of Family-Owned Corporations*, 162 U. PA. L. REV. ONLINE 151 (2014). We do not believe, however, that *Hobby Lobby* presents any need for such involved standing analysis. RFRA rights are a creature of statute and thus conferred by an act of Congress. Congress conferred these rights on for-profit corporations by adopting the capacious definition of "person" contained in the Dictionary Act and expressly authorizing such "persons" to seek judicial relief. *See* 1 U.S.C. § 1 (2012); 42 U.S.C. § 2000bb-1(c) (2006). Article III presents no standing barrier when a corporation invokes such a statutory right to mount such challenges. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . .").

<sup>141</sup> *Matthew* 6:24 (King James).

<sup>142</sup> Michael A. Helfand, *Obamacare and Religious Rights in a For-Profit World*, L.A. TIMES (Mar. 18, 2014), <http://articles.latimes.com/2014/mar/18/opinion/la-oe-helfand-hobby-lobby-supreme-court-religious-20140319>, archived at <http://perma.cc/J2ZD-DYCV>.

<sup>143</sup> *See, e.g.,* PONTIFICAL COUNCIL FOR JUSTICE & PEACE, VOCATION OF THE BUSINESS LEADER: A REFLECTION ¶ 10 (2012) ("Dividing the demands of one's faith from one's work in business is a fundamental error . . ."); LEONARD J. ARRINGTON, FERAMORZ Y. FOX & DEAN L. MAY, BUILDING THE CITY OF GOD 2 (2d ed. 1992) (describing Mormon teachings and prac-

Some might object that religion is less central to a believer's activities in the for-profit context, thus weakening the case for free exercise claims of businesses. This is likely true for many businesses. However, this is equally true of for-profit corporations and natural persons, who may engage in religious activity while trying to make a living. RFRA deals with such concerns by requiring that the burden on religion be "substantial," not through the definition of "person." Likewise, one might argue that corporations, because they can allow individuals to amass wealth and power, present situations in which the need for regulation is particularly acute. This is also surely true. However, RFRA deals with such concerns through the "compelling interest" test, not the definition of "person." We have no doubt that regulations sometimes place only a minimal burden on religious exercise and that regulations sometimes advance compelling interests. Dealing with such cases, however, by expanding or contracting the definition of "person" under the statute makes no sense. For example, it is true that sometimes natural persons will challenge laws that do not place a substantial burden on religious exercise or that serve a compelling government interest. In such cases it would make little sense to avoid the problem of granting religious exemptions by claiming that the plaintiffs are not "persons" for purposes of RFRA. Rather, such concerns are dealt with elsewhere in the statute.<sup>144</sup>

When thinking about religious freedom it is easy to slip into the assumption that only individual rights matter. Religious freedom, however, need not end with such rights. There are numerous instances in our law where protecting religious freedom involves limiting government control over corporate entities.<sup>145</sup> Most recently, for example, the Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*<sup>146</sup> that the First Amendment prohibited the state from regulating the relationship between a religious corporation and its "ministerial" employees.<sup>147</sup> Likewise, numerous statutory provisions exempt religious corporations from generally applicable laws.<sup>148</sup> Given

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tics aimed at "reorganizing . . . economic patterns of life" in order to "build unity among a people fragmented by their individualistic search for economic well-being").

<sup>144</sup> See 42 U.S.C. § 2000bb-1(a)-(b) (2006) (requiring a substantial burden on religious exercise and allowing regulations creating such a burden in the case of a compelling government interest).

<sup>145</sup> See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding the validity of the religious-institution exemption from Title VII as applied to a religious organization's secular activities); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (recognizing Free Exercise Clause as applying to a corporation); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952) (same).

<sup>146</sup> 132 S. Ct. 694 (2012).

<sup>147</sup> *Id.* at 702-07.

<sup>148</sup> See, e.g., 42 U.S.C. § 2000-e1 (2006 & Supp. V) (exempting any "religious corporation, association, educational institution, or society" from certain applications of Title VII); 11 U.S.C. § 548(a)(2) (2012) (exempting certain charitable donations to religious organizations from the

that religion is often an expression not only of individual conscience but also of religious communities, this is unsurprising. It points, however, toward an understanding of religious freedom that need not depend on individual rights.

Consider the analogy of freedom of speech.<sup>149</sup> *The New York Times* is a for-profit corporation that enjoys legal protections under the Free Speech Clause of the First Amendment, even when publishing paid advertisements.<sup>150</sup> We might strain to understand this entirely in terms of individual rights. Perhaps we limit the government's ability to regulate what the *Times* publishes to vindicate the expressive rights of various individuals. On this view, we are only concerned about government regulation of the corporation's speech because it might incidentally burden individuals. However, we can also think of speech as a valuable social activity. We are better off, as Holmes suggested, with a robust "marketplace of ideas"<sup>151</sup> where matters of public concern are debated. Discussion is an inherently social activity. Its presence or absence doesn't hinge on the legal identity of the speakers. *The New York Times* is not valuable because its pages involve the individual exercise of expressive rights. Rather, it is valuable because it contributes to public discussion. On this view, public discussion is not a byproduct of individual rights. Rather, individual rights are one among several mechanisms — including free speech rights for corporations — by which we foster public discussion.<sup>152</sup>

Likewise, we can think of religious freedom as limiting government control over religious activity rather than as protecting only individual rights.<sup>153</sup> On this view, what is important about religious activities by

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bankruptcy code's fraudulent conveyances statute); 42 U.S.C. §§ 2000cc et seq. (2006 & Supp. V) (The Religious Land Use and Institutionalized Persons Act of 2000); 26 U.S.C. § 501(c)(3) (2006 & Supp. V) (stating that "corporations . . . operated exclusively for religious . . . purposes" are exempt from income taxation).

<sup>149</sup> For an argument that institutions play a key role in advancing free speech values, see Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); see also Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1749–50 (2007) (arguing that institutions should play a larger role in constitutional thinking).

<sup>150</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964).

<sup>151</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the search for truth is best served by "the competition of the market" between ideas).

<sup>152</sup> Professor Jack Balkin, for example, has argued that "[f]reedom of expression . . . is part of something much larger: Let's call it knowledge and information policy. The word 'policy' may be a misnomer, because people often oppose policy to rights and rights discourse. We don't have to do that, though." Jack M. Balkin, Address at the Second Access to Knowledge Conference at Yale University, *Two Ideas for Access to Knowledge: The Infrastructure of Free Expression and Margins of Appreciation* (April 27, 2007) (transcript available at <http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html>).

<sup>153</sup> Several scholars have also argued that institutions should play a larger role in free exercise jurisprudence. See generally Paul Horwitz, *Churches as First Amendment Institutions: Of Sover-*

corporations is that they are religious. There are a number of reasons to limit the government's control over religious activity. We proclaim "no official, high or petty, can prescribe what shall be orthodox in . . . religion."<sup>154</sup> It does not follow that our society should treat religion as irrelevant.<sup>155</sup> Religion is a virtually universal human experience, even in secular milieus that define themselves in terms of the negation of religious claims.<sup>156</sup> In a pluralistic society, people and communities need space in which to test differing modes of religious experience — including the religious experience of agnosticism and atheism. This experience becomes a collective social resource in trying to understand and structure our spiritual worlds. The piling up of such experience, however, is only possible if the government gives the religious marketplace the kind of breathing room that it gives to the free-speech marketplace of ideas.

It is also a brute social fact that people practice religion collectively. To protect religion only within the confines of personal conscience or individual action would do great violence to lived religion. It is not possible for a Catholic to be a Catholic wholly independent of the structures of the Catholic Church and its sacraments.<sup>157</sup> Likewise, for an Orthodox Jew certain prayers can only be said in the context of a *minyan* consisting of ten adult Jewish men.<sup>158</sup> The government cannot refuse to protect collective religious actions while protecting individual actions without favoring some religious traditions over others. Finally, to the extent that religious freedom is grounded purely in a pragmatic judgment that social peace is more likely to be maintained if the government avoids regulating religion, it cannot avoid the reality of corporate religious activity.

One might accept the importance of protecting religious activity but deny that for-profit corporations should receive such protections. We disagree. Many for-profit corporations are infused with religious values and religious missions.<sup>159</sup> Some for-profit corporations are sole-

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*eignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008).

<sup>154</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>155</sup> See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1994) (criticizing the view that religion should be treated as an irrelevant or unimportant concern).

<sup>156</sup> See, e.g., CHARLES TAYLOR, *A SECULAR AGE* (2007) (arguing that secularity represents a continuation and adaptation of ultimately religious ideas).

<sup>157</sup> See CATECHISM OF THE CATHOLIC CHURCH § 2030 (1994) ("It is in the Church, in communion with all the baptized, that the Christian fulfills his vocation. From the Church he receives the Word of God containing the teachings of 'the law of Christ.' From the Church he receives the grace of the sacraments that sustains him on the 'way.'" (footnote omitted)).

<sup>158</sup> See LAWRENCE A. HOFFMAN, *THE WAY INTO JEWISH PRAYER* 46 (2009) ("The Talmud rules that without a *minyan* of ten, those prayers that deal explicitly with the theme of sanctity must be omitted.").

<sup>159</sup> See *supra* Part II.A (discussing religiously infused businesses).

ly owned by churches. The owners of these corporations can feel called on to infuse their business activities with religious values.<sup>160</sup> In other cases, businesses exist to fulfill explicit religious missions. Religious publishing houses devoted to propagating religious messages provide a good example.<sup>161</sup> Finally, many believers deny that religion is sharply limited to the non-commercial realm. Islam, for example, prohibits *riba*, the taking of interest, and a multi-billion dollar industry exists to provide Muslim investors with sharia-compliant investment instruments.<sup>162</sup> Likewise, the New Testament speaks about the treatment of debtors,<sup>163</sup> the relationship between employers and employees,<sup>164</sup> and the proper religious attitude toward money.<sup>165</sup> Religion speaks to the totality of what constitutes a good and faithful life. In a liberal polity, we rightly wish the government to refrain from making spiritually ambitious claims, thus maintaining a space where others can work out such concerns without the heavy hand of the state.

### CONCLUSION

For-profit corporations infused with their owners' religion are common. These businesses do no violence to corporate law, which is primarily contractual and facilitative, allowing firms, including those that are closely held, to adopt provisions best suited to their needs. There is no evidence that these businesses generate greater corporate dysfunction than their secular counterparts. It is true that society treats corporations as legally distinct persons for some purposes, but this is a pragmatic choice rather than a normative judgment that human concerns do not apply to such firms. Corporations are just means by which groups of people pursue common purposes, and acknowledging the exercise of religion by for-profit corporations is by no means a category mistake. Nor, given that corporations can be formed for "any lawful purpose," do shareholders violate some social compact by ac-

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<sup>160</sup> See, e.g., *Mission Statement*, DESERET MGMT. CORP., <http://deseretmanagement.com/mission-statement>, archived at <http://perma.cc/388N-KV3Z> (stating that the for-profit corporations owned by the Church of Jesus Christ of Latter-day Saints seek to "honor principles espoused by our owner in the products and services . . . provide[d]").

<sup>161</sup> See, e.g., *The Tyndale Purpose*, TYNDALE HOUSE PUBLISHERS, [http://www.tyndale.com/50\\_Company/tyndale\\_purpose.php](http://www.tyndale.com/50_Company/tyndale_purpose.php), archived at <http://perma.cc/5ZF5-UJDQ> (noting that the company serves to "spread the Good News of Christ around the world").

<sup>162</sup> See generally FRANK E. VOGEL & SAMUEL L. HAYES, *ISLAMIC LAW AND FINANCE* (1998).

<sup>163</sup> See *Matthew* 6:12 (New International) ("Forgive us our debts as we have forgiven our debtors.").

<sup>164</sup> See *1 Timothy* 5:18 (King James) ("The laborer is worthy of his hire.").

<sup>165</sup> See *1 Timothy* 6:10 (King James) ("For the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows.").

cepting the benefits of the corporate form while pursuing both profits and religious values. Of course, granting religious exemptions from otherwise applicable laws raises the risk of opportunism and can undermine important governmental policies. These risks are present with natural persons as well, however. RFRA deals with these concerns not by narrowing the definition of “person,” but instead by scrutinizing only those burdens on religious exercise that are substantial and allowing compelling interests to justify such burdens in appropriate cases. Simply put, corporate law provides no reason for excluding for-profit corporations from RFRA.