Feature Article

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Congress, the Supreme Court, and the Religious Rights of Corporations

On November 16, 1993, a relatively obscure law entitled the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb, *et seq.*) (RFRA) went into effect. The findings of Congress, and the declaration of purpose, state that the First Amendment's guaranty of the free exercise of religion had been compromised by a decision of the Supreme Court of the United States three years earlier in a case entitled *Emp't Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

In *Smith*, two members of the Native American Church who, ironically, had been fired by the state from their jobs as drug rehabilitation counselors, ingested peyote, a hallucinogenic substance prohibited by Oregon drug laws. *Id.* at 872. The Supreme Court determined that the state need not demonstrate a compelling governmental interest to justify the imposition and enforcement of an otherwise religion-neutral law that had the effect of burdening or prohibiting a particular religious practice. *Id.* at 888. The *Smith* decision overturned two prior United States Supreme Court cases, *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), both of which held that a compelling state interest must exist for any law that substantially burdens the free exercise of religion to pass the First Amendment's constitutional muster.

The RFRA restored the compelling interest test as a means of "striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Thereafter, any federal legislation that substantially burdened a person's free exercise of religion had to pass a two-prong test to be deemed constitutionally valid: (1) the legislation had to be "in furtherance of a compelling governmental interest;" and (2) the legislation must be "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b)(1-2).

With varying results, the RFRA came into play in cases having diverse fact patterns, such as the use of hallucinogenic tea in worship services (*see Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)); the possession of bald eagle

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feathers (*see United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. 2008)); a prohibition against the wearing of beards by Muslim firefighters (*see Potter v. District of Columbia*, 382 F. Supp. 2d 35 (D.C. Cir. 2005)); and to the wearing of a Sikh ceremonial sword in the workplace by a federal employee (*see Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013)).While these cases all dealt with the religious rights of individuals, as have the vast majority of cases under the RFRA, the most recent application came in the corporate context, raising such questions as whether corporations have "personhood" under the RFRA and, if so, whether corporations can be deemed capable of holding religious beliefs, or can claim entitlement to the free exercise of religion.

The *Hobby Lobby* Decision

The consolidated cases of *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*), decided by the United States Supreme Court on June 30, 2014, illustrates the conflict between the free exercise of religion under the First Amendment, as implemented through the RFRA, and the governmental mandate of employer-provided health insurance coverage for various methods of contraception under the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 300gg-13(a)(4).

The gravamen of the RFRA is found at subsection 1 of the ACA, entitled "Free exercise of religion protected," which provides:

> Government shall not substantially burden *a person's* exercise of religion . . . except . . . if it demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a) and (b) (emphasis added).

The ACA's mandate for contraception coverage requires specified employers' group health plans to provide "preventive care and screenings" for women without any cost sharing on the part of the enrolled employees. 42 U.S.C. § 300gg-13(a)(4). Congress authorized a division of the Department of Health and Human Services (HHS) to determine what type of preventive care employers' group health plans must cover. The Health Resources and Services Administration, a component of HHS, compiled a list of 20 contraceptive methods ranging from birth control pills to sterilization procedures to patient counseling that are to be included within the federal contraception coverage mandate. *Id.* at 2754. Four of the 20 methods have the effect of aborting a pregnancy by preventing a fertilized egg from attaching to the uterus. *Id.* at 2762. Such methods of contraception offended the sincerely-held religious beliefs of the owners of the companies involved in the *Hobby Lobby* case, who petitioned for a faith-based exemption from the federal mandate regarding coverage for such procedures under their companies' group health plans. *Id.* at 2755.

The *Hobby Lobby* case presented the Supreme Court with a number of fundamental issues ranging from corporate "personhood" for purposes of RFRA protection; the extent to which a closely held corporation can be used as a reflection of the religious beliefs of its owners while still observing the corporate form; and what distinctions should be drawn, if any, between for-profit and not-for-profit corporations, or between closely held and publicly traded corporations for purposes of exemptions from ACA mandates based upon faith-based objections. *Id.* at 2759. These questions presented mixed issues of law and philosophy against a background of one of the most contested and controversial items of social legislation of the generation. As discussed below in Section IV, some of the issues presented in *Hobby Lobby* received more of the Court's consideration than others, while some will have to await further development in the federal district and appellate courts.

The majority's holding in *Hobby Lobby* tells us the following: (1) that corporations are entitled to invoke the protection of the RFRA to the same extent as individuals, *i.e.* corporations are "persons" under the statute; (2) that closely held corporations can serve as alter-egos of their owners in seeking faith-based exemptions from religiously objectionable aspects of the ACA, such as the contraception coverage mandate; and (3) that for-profit corporations stand with equal footing to religious not-for-profits in their ability to invoke First Amendment free exercise rights and to challenge the impact of overly intrusive governmental regulations on such free exercise rights where the government action is not the least intrusive means of furthering a compelling governmental interest. In such instances, governmental regulation that substantially impacts the free exercise of religion—which is apparently a right not only of natural persons but artificial ones as well—will be deemed unconstitutional if less intrusive means exist to further the legitimate intent of the government in enacting the subject legislation or enforc-

A vigorous dissent challenged the majority's assumption that "artificial legal entities," such as corporations, are capable of the exercise of religion, as "artificial being[s], invisible, intangible and existing only in contemplation of law" [with] "no consciences, no beliefs, no feelings, no thoughts, no desires."

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Does the Holding in *Hobby Lobby* Extend Beyond Closely Held Corporations?

Some might argue that the penultimate paragraph of the majority's opinion in *Hobby Lobby* signals an intent to limit the application of the Court's holding in the case to closely held corporations. *Id.* at 2785 (stating, "[t]he contraceptive mandate, *as applied to closely held corporations*, violates RFRA") (emphasis added). Such a limitation runs contrary to the rationale employed earlier in the majority opinion to justify its finding of corporate "personhood" under the RFRA. The Court found RFRA personhood on the part of for-profit corporations by means of reference to the Dictionary Act, under which the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint-stock companies, as well as individuals." *Id.* at 2768, quoting 1 U.S.C. § 1. In using the Dictionary Act to dispel any distinction between individuals and the closely held corporations involved in the case, the Court may have also laid the groundwork for eliminating any future limitation of the majority's holding to closely held corporations (as opposed to publicly traded companies) when it stated: "No known understanding of the term 'person' includes *some* but not all corporations." *Id.* at 2769 (emphasis in the original).

The Court's majority deemed it "unlikely" that corporate claims for religious freedom under the RFRA would originate from "corporate giants" such as IBM or General Electric (*see Id.* at 2774). Technically there is no more of a basis to draw a distinction under the RFRA between closely held and publicly traded corporations than there is between non-profit and for-profit corporations, all of whom, according to the majority opinion's application of the Dictionary Act, are included in the ambit of "persons" entitled to RFRA protection. While it is conceptually simpler to envision a closely held corporation as an extension of its owners' religious beliefs, there is nothing legally to prevent the expansion of the *Hobby Lobby* holding to publicly traded corporations, just as the majority opinion applied the RFRA's free exercise mandate to for-profit secular corporations as readily as it was earlier applied to non-profit religious organizations. *Id.* at 2772-2773.

Picking up on the cautionary tale about the possible proliferation of accommodation-seeking lawsuits brought by shareholders, officers, or directors of a publicly traded corporation claiming a religious motivation, a Harvard Law School professor opined that "[r]eligious liberty lawsuits are about to become a major growth industry." Noah Feldman, *Analysis: Religious Liberty Lawsuits are about to Become a Growth Industry*, Crain's Chicago Business (June 30, 2014).

Another law school instructor responded to the comment made by Chief Justice Roberts during oral argument that the Supreme Court will have to "await another case when a large publicly traded corporation comes in and says, 'We

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have religious principles,'" by opining that such cases are "inevitable," and are "sure to vex the courts" regarding the nature and scope of "a corporate right of religious belief and exercise." David Cay Johnston, *Do Corporations Have Religious Beliefs?*, Al Jazeera America (March 28, 2014).

As certain faith-based non-profit organizations joined in the churches' objections to the mandatory coverage of contraception methods for their employees, the exemption was broadened to include religious non-profits that did not qualify for the categorical exemption previously granted to churches.

Non-profits and the Form 700 Debate

Initially, an exception from the mandatory coverage for contraceptives under the ACA extended only to any group health plan established and maintained by a "religious employer" as that term is referenced in the provisions of the United States Tax Code governing churches. *See* 45 C.F.R. § 147.131(a). As certain faith-based non-profit organizations joined in the churches' objections to the mandatory coverage of contraception methods for their employees, the exemption was broadened to include religious non-profits that did not qualify for the categorical exemption previously granted to churches. *See* 45 C.F.R. § 147.131(b).

To claim such an exemption, and to avoid any civil penalties for non-compliance with the ACA's mandate for contraception coverage, non-profit corporations were required to complete a self-certification form, known as EBSA Form 700. EBSA Form 700—Certification, Dep't of Labor, http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc (all Internet materials as visited October 3, 2014). Form 700 identifies the objecting organization and provides the name and title of the individual asserting the objection on behalf of the non-profit organization, as well as the mailing address, e-mail address and telephone number for that individual. *Id.* The person certifying the objection has to attest that: (1) on account of religious objections, the organization claiming the exemption opposes providing coverage for its employees for any and all of the contraceptive services that would otherwise be required to be covered under the ACA; (2) that the organization asserting the objection is organized and operates as a non-profit entity; and (3) that the objecting organization holds itself out as a religious organization. *See* 45 C.F.R. § 147.131(a). The objecting organization is then to provide its group insurer or its third-party administrator for a self-insured group health plan with a copy of the form. *See* 45 C.F.R. § 147.131(c). This, in turn, triggers an obligation on the part of the insurer or third-party administrator to provide contraceptive coverage to the employees of the objecting organization without charging the organization any premiums or other fees for the provision of contraception coverage. *Id.* The insurer or third-party administrator would then be reimbursed for the costs of providing or administering the provision of contraceptive services by means of a plan set forth elsewhere in the regulations promulgated under the ACA. *Id.*

A number of religious non-profit organizations objected to the Form 700 requirements, claiming completion and submission of the form to their insurers or claims administrators makes the objecting organization "complicit" in providing contraceptive coverage in violation of their religious beliefs. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). A significant number of religious organizations sought relief from the requirement relating to the completion and submission of Form 700 on that basis, asking for injunctive relief from the exemption's requirements as well as to preclude the possible imposition of civil penalties for noncompliance with the administrative and regulatory requirements associated with their exemption requests. *See Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *see also Sebelius*, 743 F.3d 547; *Eternal Word Television Network, Inc. v. Secretary, U.S. Dept. of Health and Human Services*, 756 F.3d 1339 (11th Cir. 2014).

As of the date of the *Hobby Lobby* decision, at least three federal appellate circuits (the United States Court of Appeals for the Sixth, Seventh, and Eleventh Circuits) had weighed in on the Form 700 debate, with varying results. *See Michigan Catholic*, 755 F.3d 372; *see also Sebelius*, 743 F.3d 547; *Eternal Word Television Network*, 756 F.3d 1339. Several more circuits are expected to follow in taking up the issue once the

federal trial courts decide hundreds of pending cases seeking injunctive relief from the Form 700 requirement.

Among the first of the Form 700 cases to reach the federal appellate stage was *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) where the university, which had never paid for contraceptives for its employees, nor ever permitted its group insurer to reimburse its students for the cost of contraceptives, moved for a preliminary injunction against the HHS, seeking exemption from the ACA's contraceptive coverage mandate. *See Univ. of Notre Dame*, 743 F.3d at 549. Notre Dame signed the Form 700 on the last day prior to being subject to penalties for violating HHS regulations, and sent copies of the form to its insurer and its claims administrator, but sought injunctive relief for the contraceptive coverage mandate regulations. *See id.* at 551. With the university having complied with the requirements of Form 700, the United States Court of Appeals for the Seventh Circuit confessed confusion about what the university wanted the court to do: "Tell it that it can tear up the form without incurring a penalty for doing so . . . ?" *Id.* at 552. Questions about the nature of the relief sought by Notre Dame, coupled with other procedural irregularities, appear to have prompted the Seventh Circuit to affirm the district court's denial of preliminary injunctive relief. *See id.* at 562. This left the university to seek a reversal before the Supreme Court, based upon a claimed entitlement to preliminary protection against the contraceptive mandate until its exemption case has been fully heard on the merits. *Id.* at 554.

A similar decision affirming a district court's denial of a motion for preliminary injunctive relief from the contraceptive coverage mandate came less than four months later in the United States Court of Appeals for the Sixth Circuit. *Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014). However, the opposite approach was taken by the United States Court of Appeals for the Eleventh Circuit, which affirmed a district court's order granting a request to enjoin the government from enforcing the contraceptive mandate provisions of 42 U.S.C. § 300gg-13(a)(4) or assessing fines or other enforcement actions against the petitioning plaintiff for compliance with HHS regulations. *Eternal Word Television Network, Inc. v. Secretary, U.S. Dept. of Health and Human Services*, 756 F.3d 1339, 1340 (11th Cir. 2014).

The first two Form 700 cases that have reached the Supreme Court: *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), both came to the Court on applications for injunction by the religious not-for-profits seeking exemption from the filing of Form 700, while also asking for protection against the government's enforcement of the challenged provisions of the ACA. In both instances the requested relief was granted, subject to the non-profits informing the Secretary of HHS, in writing, that they are non-profit religious organizations that have religious objections to providing coverage for contraceptive services. *Sebelius*, 134 S. Ct. 1022; *Wheaton College*, 134 S. Ct. 2806. In both instances, the applicants for injunctive relief were specifically excused from filling out Form 700, and likewise excused from sending copies of the form to their insurers or third-party administrators. *Sebelius*, 134 S. Ct. 1022; *Wheaton College*, 134 S. Ct. 2806 In *Wheaton College*, the Court added: "Nothing in this interim order affects the ability of the applicant's employees or students to obtain, without cost, the full range of FDA-approved contraceptives." *Id.*

The Concept of Corporate "Ensoulment:" Is a Corporation Capable of, or Entitled to, the Right of the Free Exercise of Religion?

Justice Alito recognized early in the majority opinion in *Hobby Lobby* that the crux of the argument advanced by HHS in opposition to the corporations' petition for an exemption from the ACA's contraception mandate was *not* whether the companies were "persons" under the RFRA (a point deemed conceded by HHS, at least as to non-profit corporations), but instead was whether corporations could engage in the "free exercise of religion." *Hobby Lobby*, 134 S. Ct. at 2769. This question poses issues of both capacity and entitlement, the former being necessary to even reach consideration of the latter.

The majority opinion draws upon a series of "straw-man" arguments derived from the HHS briefs and then proceeds to knock them down, while not fully addressing more fundamental issues regarding the unique nature of the corporate form. The corporate form argument, instead, is dealt with in a single paragraph and a sole footnote. In disposing of the question of free exercise of religion by corporations, the Court focuses upon the government's concession that non-profit corporations are entitled to RFRA protection. *Id.* at 2755. The furtherance of *an individual's* religious freedom that results from the autonomy afforded to non-profit religious organizations applies with equal force to their for-profit counterparts,

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i.e. allowing the petitioning companies to assert RFRA claims also protects the religious liberties of their closely held owners and directors. *Id.* at 2759.

The Court then handily, and somewhat summarily, disposes of the second HHS "straw-man" argument, *i.e.* whether the for-profit nature of the corporations in question precludes their rights under the RFRA. *Id.* at 2767. The Court's majority cites a 1961 plurality opinion in *Braunfeld v. Brown*, 366 U.S. 599 (1961), which authorized a for-profit sole proprietorship to assert a free exercise claim under the First Amendment. The Court then rhetorically asks why the petitioning corporations couldn't do the same under the RFRA, giving little attention to the distinction between the business platforms of a sole proprietorship and that of a corporation. *Id.* at 2767.

The litigants in the *Hobby Lobby* and *Wheaton College* cases, as well as virtually all of the cases involving for-profit and not-for-profit corporations seeking exemption from the ACA contraception mandate, are the corporate entities themselves rather than their owners, directors, or managers. *Hobby Lobby*, 134 S. Ct. 2751; *Wheaton College*, 134 S. Ct. 2806. This simple but fundamental fact gives rise to the issue of whether a corporation, as an artificial being and creature of law, is entitled to the First Amendment guaranty of "free exercise" of religion, as well as the protection of such free exercise "as an unalienable right" under the RFRA. The Supreme Court's majority appears to have based its opinion on the assumption that corporations, or at least the closely held variety, have the same religious rights as their owners, directors, and managers individually, who can utilize the corporate format as an alter-ego reflection of their religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2759. This ready insinuation of religious rights from natural persons to the corporate bodies that they own or control has not gone unchallenged by commentators on the issue, who appeal to the preservation of the distinction between the natural persons who own or run a company and the artificial "persons" under which they conduct their business.

In the vast majority of both pre- and post-RFRA cases, the subjects of the free exercise claims were individuals, not corporations, and the jurisprudence of religious rights centered around invocation of free exercise by natural persons claiming that governmental action violated their First Amendment rights. *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *Emp't. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Sherbert v. Verner*, 374 U.S. 398 (1963). Before *Hobby Lobby*, the Supreme Court had not been called upon to determine whether the same rights to free exercise of religion guaranteed to natural persons could also be invoked by secular, for-profit corporations, which objected to governmental actions on religious grounds. One would think that such a fundamental threshold issue, as the application of free exercise rights under the First Amendment and the RFRA to artificial beings such as secular for-profit corporations, would have occupied considerable space in the majority's opinion in *Hobby Lobby*, but it did not. This absence of a more extensive discussion of the source and scope of the free exercise rights of corporations is especially puzzling in light of the United States Court of Appeals for the Third Circuit's opinion in *Conestoga Wood Specialties Corp. v. Secy. of the U.S. Dept. of HHS*, 724 F.3d 377 (3rd Cir. 2013), which was consolidated with *Hobby Lobby*. It expressly held that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of the RFRA or the First Amendment. *Conestoga Wood Specialties*, 724 F.3d at 381.

As previously mentioned, the Supreme Court did not address this issue head-on, but instead rejected the position taken by HHS. The position argued that by incorporating their businesses, rather than running them as sole proprietorships or general partnerships, the religious objectors in *Hobby Lobby* simply forfeited the ability of the corporations they formed to claim any protection to free exercise of religion under the First Amendment or the RFRA. *Hobby Lobby*, 134 S. Ct. at 2775. The Third Circuit's observation in *Conestoga Wood Specialties* that "general business corporations . . . do not pray, worship, observe sacraments or take other religious-motivated actions separate and apart from the intentions and direction of their individual actors" (*Conestoga Wood Specialties*, 724 F.3d at 385) was simply swept away in the *Hobby Lobby* majority opinion as "true—but quite beside the point [since] [c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Hobby Lobby*, 134 S. Ct. at 2768.

In giving short shrift to the fundamental questions surrounding corporate entitlement to free exercise protection, the Supreme Court invoked the Dictionary Act, 1 U.S.C. § 1, to interpret the word "person" in the RFRA's statement of those entitled to the statute's protection, to include not only some corporations, such as religious not-for-profits, but also for-profit corporations. *Hobby Lobby*, 134 S. Ct. at 2769-71. The mere rejection of the HHS argument of "forfeiture of rights by incorporation,"

and the broad interpretation of the statutory term "person" under the RFRA and the Dictionary Act, does not appear to be a sufficient basis to expand decades of precedent regarding those who are entitled to constitutional or statutory protection of their religious rights. Simply furthering the religious rights of for-profit corporations in order to further the free exercise of their owners, directors, and managers is not a sufficient goal to overthrow the longstanding distinctions drawn in the law of corporations between the individual owners, directors, and managers of the corporation and the artificial entity under which the law allows them to conduct their business.

Nevertheless, the Supreme Court majority's summary treatment of the for-profit corporate religious rights issue has its support among the commentators. The advocates of religious rights for corporations say: "In the real world, shareholders impose religiously motivated policies on corporations all the time." Alan J. Meese and Nathan B. Oman, *Hobby Lobby, Corporate Law and the Theory of the Firm*, 127 Harv. L. Rev. F. 273, 274 (2014). As examples, the authors cite a Kosher supermarket that closed on Saturdays instead of Sundays, in violation of the Massachusetts Sunday closing laws; a supermarket chain that closed on Sundays while declining to sell alcohol and encouraging its employees to worship weekly; a fast food chain that prints Bible verses on its packaging and cups; and a Brooklyn coffee shop that serves only Kosher food. *Id.* at 278-79.

While these are certainly examples of ways owners of corporations can use the businesses they own and operate to reflect their own religious beliefs, none of these instances instill religious rights upon the corporation itself; they only demonstrate the right of free exercise on the part of those that run the corporations to establish company policies as they see fit. *Id.* at 288. The authors argue that "corporations are instrumentalities by which people act in the world. When individuals act religiously using corporations they are engaged in religious exercise." *Id.* at 294-95. Such an argument ignores the fact that using a corporation as an instrument through which its shareholders can express and exercise their religion is fundamentally different than bestowing actual free exercise guarantees on the corporation itself.

> The Supreme Court's prior recognition that "individuals may come together in groups, associations, and even corporations to advance First Amendment rights" makes it only logical that conduct entitled to First Amendment protection, be it related to speech, assembly, or free exercise of religion, be extended to non-profit or for-profit corporations.

Other commentators, in support of the religious rights of corporations, point out that corporations have already been accorded other First Amendment rights, specifically freedom of speech. In *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), the Supreme Court recognized that the First Amendment's protection of free speech (here, political speech) not only extends to corporations, but that corporations and other associations have the same free speech rights under the First Amendment as individuals do, and that corporations should not be treated differently under the First Amendment simply because they are not "natural persons." *Citizens United*, 558 U.S. at 343, (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Extending First Amendment protection from one constitutional guaranty (free speech) to another (free exercise) is a logical progression. *See* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 Wash. U. L. Rev. 589 (2014). Advocates of this position argue that in considering the religious rights of corporations, "courts must focus on the nature of the constitutional right, not the 'person'—whether an individual, non-profit, for-profit or sole-proprietor—who is invoking the right." *Id.* at 595. Such commentators contend that the Third Circuit, in *Conestoga Wood Specialties*, erroneously considered only whether a for-profit corporation has free exercise rights commensurate with an individual, rather than focusing on the real question they contend was presented in the case, *i.e.* "whether the Free Exercise Clause covers religious objections to the contraception coverage mandate," regardless of who (or what) asserts such objections. *Id.* According to this commentator, reliance on precedent that free exercise of religion is an individual right, of a "purely personal" nature, that does not apply to artificial beings such as corporations, is misplaced, because

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free exercise of religion, like freedom of speech, is not merely a "purely personal" right but instead impacts the whole of a free society. *Id.* at 596-97. They argue that the free exercise of religion, as it pertains to individuals, is not confined to conduct that occurs within the walls of a church, synagogue, or mosque. *Id.* at 618. Many individuals' faith permeates their lives and is reflected in the groups and associations that they join and the businesses that they run, often to the point that the practice of moral principles through the acts of a corporation is indistinguishable from the practice of such principles by the companies' owners as individuals. *Id.* at 617.

The Supreme Court's prior recognition that "individuals may come together in groups, associations, and even corporations to advance First Amendment rights" makes it only logical that conduct entitled to First Amendment protection, be it related to speech, assembly, or free exercise of religion, be extended to non-profit or for-profit corporations. *Id.* at 618. The recognition of such rights furthers not only the so-called "purely personal" rights of individual owners, directors, or managers of the corporation, but likewise serves significant societal interests when applied to the corporation itself. *Id.* at 618, 620-21.

Opponents of the extension of religious rights to corporations point out that, traditionally, the claimed constitutional right of free exercise of religion has been a right of "natural" persons, *i.e.* individuals. *Id.* at 594. Given the "nature, history and purpose" of the free exercise clause, there is no justification in extending free exercise rights to corporations or other artificial beings. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012); *Bellotti*, 435 U.S. at 778-79, n.14.

Opponents of the extension of constitutional and statutory free exercise rights to corporations also contend that a corporation is fundamentally incapable of possessing religious beliefs, and is therefore unentitled to legal protection of the free exercise thereof. Zachary J. Phillipps, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 Conn. L. Rev. Online 39 (2014). A corporation, as a "distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs" cannot properly serve as the moral alter-ego of such natural persons. *See* Zachary J. Phillipps, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 Conn. L. Rev. 39, 59 (2014), (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)). Thus, such commentators argue, the separation of rights and obligations between the corporation and its owners means that "to have free exercise rights of its own, a corporation must possess such rights *independently* from its owners." *Id.* at 59. "Religious beliefs forms within the human mind" and corporations, "have no mental capacity [to form a] religious belief." *Id.* at 60-61. For a store owner to elect to close on Sundays does not mean that the corporation that he or she owns is exercising religion. *Id.*

Other opponents of the extension of free exercise guarantees to corporations take a practical approach to the issue: a corporation cannot join a church, synagogue, or mosque as a member and "[i]f the religion would not accept a corporation as a member, then it follows that the corporation has no Free Exercise protected rights within that faith." *See* 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 (2014). This commentator goes on to point out: "Corporations do not take part in religious services, offer prayers or receive sacraments. A corporation cannot be baptized [and] cannot be confirmed . . . . A priest will administer last rights to and counsel a prisoner in anticipation of execution; similar rituals are not performed upon the dissolution of a corporation." *Id.* at 31. The RFRA's burden-allocation scheme "does nothing to create a right protected by the Free Exercise Clause [and] lacking Free Exercise rights that could be protected by the RFRA, the RFRA has no application to business entities." *Id.* at 35.

Conclusion

The debate concerning corporate ensoulment was not laid to rest with the Supreme Court's majority opinion in *Hobby Lobby*. Dozens of cases, most of them at the injunction stage in the federal appellate courts, await the Supreme Court's consideration in the terms to come, while literally hundreds of other cases seeking relief from the ACA's contraception mandate wind their way through the district courts throughout the country. The philosophical and legal issues to which these cases give rise deserve a more thorough and thoughtful analysis than previously afforded to them.