WHEN CORPORATIONS GO TO CHURCH: FREE EXERCISE UNDER *HOBBY LOBBY*

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In 2014, the Supreme Court incited controversy in *Burwell v. Hobby Lobby* ("*Hobby Lobby*") when it held that the Affordable Care Act ("ACA") violated the Religious Freedom Restoration Act ("RFRA") and Free Exercise Clause by requiring closely-held for-profit corporations with purported religious objections to pay for insurance with contraception coverage.[1] The Court's five-to-four holding made it permissible for closely-held corporations to bring claims based on religious beliefs under RFRA and to opt out of statutorily mandated healthcare insurance coverage.[2]

The Court ultimately concluded that for-profit corporations have rights to free exercise of religion and act as vehicles for ecclesiastical practices in the same way as non-profit religious organizations.[3] However, the decision

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

[2] *See id.* at 2782-85.

[3] Travis Weber, *Hobby Lobby Symposium: The exercise of religion is inseparable from human activity – including supporting one's family*, SCOTUSBLOG (June 30, 2014, 10:20 PM), http://www.scotusblog.com/2014/06/hobby-lobby-symposium-the-exercise-of-religion-is-inseparable-from-human-activity-including-supporting-ones-family/.

was made upon narrow margins.[4] The dissent described the majority holding as "a decision of startling breadth" and feared it would allow unprecedented refusals to comply with statutory mandates based on protections typically reserved to the individual.[5]

Of the many issues presented in *Hobby Lobby*, this paper will focus on the Court's problematic aggregate theory of corporate personhood. However, before doing so this paper will analyze the context of the decision by considering relevant statutes objected to and relied upon in *Hobby Lobby*,[6] the medical background that led to religious protest of contraception coverage,[7] and the relevant free exercise precedents.[8] This paper will then describe the details of the majority, concurring, and dissenting opinions in *Hobby Lobby*[9] and the Court's fluctuating theories of corporate personhood.[10] Finally, this paper will argue that the aggregate theory is an improper characterization of the corporation, particularly in the free exercise context.[11]

I. CONTEXT OF THE *HOBBY LOBBY* DECISION

Hobby Lobby was decided in the aftermath of the 2010 landmark *Citizens United v. FEC* ("*Citizens United*") decision, which departed from previous precedent and held that freedom of speech protections prohibited the government from restricting corporate independent expenditures directed at political activity.[12] *Citizens United* broadly asserted that the First Amendment protects corporate free speech in the same manner as individual free speech.[13] Four years later, *Hobby Lobby* built on the theory of corporate personhood articulated in *Citizens United* by holding that corporations are also protected under the Free Exercise Clause and have the same rights to protected religious beliefs under RFRA as individuals.[14] In

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[4] *See Hobby Lobby*, 134 S. Ct at 2751 (5-4 decision).

[5] *See id*. at 2787 (Ginsburg, J., dissenting).

[6] *See infra* Section I.A.

[7] *See infra* Section I.B.

[8] *See infra* Section I.C.

[9] *See infra* Section II.

[10] *See infra* Section III.

[11] *See infra* Section IV.

[12] Citizens United v. FEC, 558 U.S. 310, 311 (2010).

[13] *Id*. at 349 ("the worth of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual") (citing First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)).

[14] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct 2751, 2768-69 ("RFRA applies to a person's exercise of religion . . . the word person . . . includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.") (internal quotations omitted).

order to understand this highly impactful decision, it is necessary to first understand the statutory context, medical context, and legal precedents that gave rise to the questions addressed in *Hobby Lobby*.

A. *Statutory Background*

The legal issue in *Hobby Lobby* arose after the ACA became law in 2010. The ACA required employers providing group health plans to offer "preventive care and screenings" and "essential coverage" to women without "any cost sharing,"[15] but did not specify what type of preventive care the employers' group health plans had to cover.[16] The ACA delegated to the Department of Health and Human Services ("HHS") the authority to decide what "essential coverage" would entail and promulgate regulations regarding preventative care.[17] Subsequently, HHS required nonexempt employers to cover twenty contraceptive methods approved by the Food and Drug Administration ("FDA").[18]

The ACA exempted churches and other religious employers from the contraceptive coverage mandate.[19] HHS authorized the Health Resources and Services Administration ("HRSA") to codify these religious exemptions.[20] HRSA revised the scope of the exemptions several times, each time broadening the availability of religious exemptions to various entities.[21] Furthermore, religious non-profit organizations that objected to providing coverage for contraceptive services were effectively exempt through an ACA accommodation that required insurance issuers to "exclude contraceptive coverage from the employer's plan [to] provide plan participants with separate payments for contraceptive services without imposing any cost-sharing on the employer, its insurance plan, or its employee beneficiaries."[22] The ACA did not, however, provide an exemption from the contraceptive coverage mandate for for-profit

[15] Sharon James, et al., *The Status of Women in 2014: A Global Snapshot*, 49 YEAR IN REV. (ABA/Section of Int'l Law), 2015, at 275, 285.

[16] Lyle Denniston, *The ACA birth-control controversy, made simple*, SCOTUSBLOG (July 15, 2015, 12:04 AM), http://www.scotusblog.com/2015/07/the-aca-birth-control-controversy-made-simple/.

[17] 26 U. S. C. § 5000A(f)(2); §§ 4980H(a), (c)(2).

[18] Health Insurance Reform Requirements, 45 C.F.R. § 147.131 (2015); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed. Reg. 8,725 (Feb. 15, 2012) (to be codified at 26 C.F.R. part 54).

[19] 45 C.F.R. § 147.131 (2015).

[20] 45 C.F.R. § 147.131(a) (2015).

[21] *Id.*; Denniston, *supra* note 16.

[22] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

corporations.[23]

RFRA was equally relevant to the *Hobby Lobby* decision.[24] RFRA became law in 1993 and states that the Federal Government is prohibited from "'substantially burden[ing] a *person*'s exercise of religion even if the burden results from a rule of general applicability' unless the Government '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.'"[25] RFRA effectively overturned the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which used a balancing test to assess Free Exercise Clause claims.[26] RFRA reestablished the strict scrutiny standard used in *Sherbert v. Verner* ("*Sherbert*") and *Wisconsin v. Yoder* ("*Yoder*").[27] Then, in 2000, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amended RFRA[28] and clarified that RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[29]

Ultimately, the test established by RFRA to evaluate the constitutionality of laws alleged to violate the Free Exercise Clause asks: (1) whether the law at issue places a substantial burden on any exercise of religion, (2) if the law does so, whether the burden furthers a compelling government interest, and (3) whether the law is the least restrictive alternate?[30] RFRA also prohibits the courts from questioning whether religious beliefs are logical, reasonable, or consistent and requires courts to evaluate laws that allegedly

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[23] Scott W. Gaylord, *Article: For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 600 (2014).

[24] *See id*. at 593 ("[T]he pending HHS mandate cases require the courts to look more closely at the proper scope of religious exercise under the Free Exercise Clause and RFRA.").

[25] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) and (b) (1993) (emphasis added). RFRA originally applied to the Federal Government and the States but *City of Boerne v. Flores*, 521 U.S. 507, 533, limited the Act's application to the Federal Government, which led Congress to pass RLUIPA. *See Hobby Lobby*, 134 S. Ct at 2761.

[26] *See* Micah Schwartzman, et al., *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html; *see also* Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[27] Yoder, 406 U.S. 205 (1972); Sherbert, 374 U.S. 398 (1963).

[28] Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc et seq.

[29] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-3(g) (2000); 42 U.S.C. § 2000cc-5(7)(A) (2000).

[30] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a), (b).

violate the Free Exercise Clause under the strict scrutiny standard of review.[31]

B. *Medical Background*

The contraceptive coverage mandate included four contraceptives, Mirena and Paragard (IUDs or intrauterine devices) and Plan B and Ella (emergency contraceptives), which prompted controversy in the free exercise context.[32] According to a 2012 Gallup poll, 89% of Americans believe that the use of contraception is morally acceptable.[33] However, some groups, particularly those affiliated with the Roman Catholic faith, believe that certain forms of birth control destroy human life.[34] During the five years that followed the institution of the contraceptive coverage mandate, non-profit and for-profit corporations filed approximately forty lawsuits objecting to the contraceptive coverage mandate.[35]

The crux of the controversy surrounding IUDs and emergency contraceptives depends on how the beginning of life is defined.[36] According to FDA-approved product labels, IUD contraceptives are inserted into the uterus and either prevent fertilization of the egg by interfering with sperm transportation or prevent implantation or attachment of a fertilized egg to the uterine wall.[37] On the other hand, emergency contraceptives alter the body's endometrium in a way that prevents

[31] Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, STAN. L. REV. ONLINE, Nov. 7, 2014, at 59, 59-60.

[32] Jen Gunter, *The Medical Facts About Birth Control and Hobby Lobby – From an OB/GYN*, NEW REPUBLIC (July 7, 2014), https://newrepublic.com/article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn.

[33] Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally Ok*, GALLUP (May 22, 2012) http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx ("Eighty-two percent of U.S. Catholics say birth control is morally acceptable, nearing the 89% of all Americans and 90% of non-Catholics who agree"); *see also* Margaret Talbot, *Why is the Catholic Church Going to Court?*, THE NEW YORKER (May 30, 2012), *available at* http://www.newyorker.com/news/daily-comment/.

[34] *See* John K. DiMugno, *The Affordable Care Act's Contraceptive Coverage Mandate*, 25 No. 1 Cal. Ins. L. & Reg. Rep. 1 (Feb. 2013).

[35] *Id.*

[36] Jen Gunter, *supra* note 32.

[37] FDA-approved label for ParaGard T 380A Intrauterine Copper Contraceptive 3 (June 11, 2013), http://www.accessdata.fda.gov/drugsatfda?_?docs/label/20132005/018680s060lbl2013/018680s066lbl.pdf; FDA-approved label for Mirena (levonorgestrel-releasing intrauterine system) 18 (Aug. 7, 2013), http:// www.accessdata.fda.gov/drugsatfda_docs/label/2013/021225s032lbl.pdf; FDA-approved label for Skyla (levonorgestrel-releasing intrauterine system) § 12.1 (Sept. 13, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/ 203159s002lbledt1.pdf.

implantation of a fertilized egg in the uterus.[38] Fertilization is defined as the meeting of the sperm and the egg.[39] Implantation is defined as when the fertilized egg implants successfully in the uterine wall within about a week after fertilization.[40] Conception is a term colloquially used to refer to some stage in between fertilization and implantation, depending on how the term is used.[41] Federal regulations define pregnancy as beginning at implantation.[42] As such, the Food and Drug Administration does not classify IUDs or emergency contraceptives as abortion-causing, or abortifacients.[43]

In contrast, the respondents in *Hobby Lobby* define life as beginning at contraception, by which they mean fertilization; therefore, they identify IUDs and emergency contraceptives as abortifacients.[44] There is still a degree of uncertainty as to whether or not these forms of contraception prevent fertilization (the only definitive way to avoid conception, by any definition). This troubles a number of religious groups who view this stage as the beginning of life and therefore believe that these drugs cause abortions.

C. *Legal Background.*

This section describes several legal suits that set the stage for *Hobby Lobby* and involved assertions of protection under the Free Exercise Clause. The Free Exercise Clause of the First Amendment, made applicable to the states by incorporation through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or

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[38] FDA-approved label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl021998lbl021045s015lbl.pdf; FDA-approved label for ella (ulipristal acetate) tablet § 12.1 (May 2, 2012), http://www.accessdata.fda.gov/drugsatfda_docs/label/20122010/022474s000lbl2012/022474s002lbl.pdf.

[39] Alberto Monroy, *Fertilization*, ENCYCLOPEDIA BRITANNICA (last updated Sept. 27, 2016), https://www.britannica.com/science/fertilization-reproduction.

[40] *Implantation: Reproduction Physiology*, ENCYCLOPEDIA BRITANNICA (last updated June 6, 2016), https://www.britannica.com/science/implantation-reproduction-physiology.

[41] Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER INSTITUTE (May 9, 2005), https://www.guttmacher.org/gpr/2005/05/implications-defining-when-woman-pregnant.

[42] Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610-11 (Feb. 25, 1997); Protections for Pregnant Women, Human Fetuses and Neonates Involved in Research, 45 C.F.R. § 46.202(f) (2013)).

[43] American Congress of Obstetricians and Gynecologists, *Facts are Important: Emergency Contraception (EC) and Intrauterine Devices (IUDs) are Not Abortifacients* (June 12, 2014)), https://) www.acog.org/-/media/Departments/Government. . .-Relations-. . .and. . ./-Outreach/. . ./FactsAreImportantEC.pdf.

[44] J.A. 147-48 (Verified Compl. Para. 106).

prohibiting the free exercise thereof."[45]

In 1990, the United States Supreme Court set forth its interpretation of the Free Exercise Clause in the employment context in *Employment Division, Department of Human Resources of Oregon v. Smith* ("*Smith*").[46] The case arose when an employer dismissed several employees for their religious use of sacramental peyote, which disqualified the employees from Oregon's unemployment compensation benefits.[47] The Supreme Court held that the Free Exercise Clause did not bar application of Oregon drug laws to ceremonial use of peyote and the State could deny unemployment compensation based on such drug use without violating the Free Exercise Clause.[48] The Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[49]

The Court held that the First Amendment only bars neutral and generally applicable laws when claimants make free exercise claims in conjunction with another constitutional protection, such as freedom of speech or of the press.[50] As such, the Free Exercise Clause did not protect the ceremonial use of peyote because the employees' claim involved a "free exercise claim unconnected with any communicative activity or parental right."[51] Consequently, the Free Exercise Clause, by itself, could not protect the ceremonial use of peyote.[52] The Court rejected the respondents' argument that "when otherwise prohibit[ed] conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[53] The Court stated, "[w]e have never held that, and decline to do so now."[54]

The *Smith* Court cited *United States v. Lee*, in which the Court rejected an Amish employer's request for a religious exemption from the payment of Social Security taxes despite his religious beliefs, which prohibited his participation in governmental support programs.[55] The Court held that the Constitution does not require such an exemption because it would be

[45] U.S. CONST. Amend. I.

[46] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990), *overturned due to legislative action* (Nov. 16, 1993).

[47] *Id.* at 874-875, 879 (internal quotations omitted).

[48] *Id.* at 882.

[49] *Id.* at 879.

[50] *Id.* at 881.

[51] *Id.* at 882.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id*. at 879.

impossible to distinguish objections to Social Security taxes from objections to other collections or uses of taxes.[56]

> If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.[57]

However, legislative action under RFRA overturned the *Smith* balancing test for free exercise claims.[58]

Nevertheless, in 2004 the Supreme Court of California upheld the fundamentals of *Smith* in *Catholic Charities of Sacramento v. Superior Court* in which a church employer sought a declaratory judgment claiming that the Women's Contraception Equity Law ("WCEL") was unconstitutional.[59] The California law aimed to end gender inequality in health insurance and required employers to provide employees with contraception coverage but provided an exception, resembling the accommodation in the ACA, for churches.[60]

Specifically, WCEL exempt "religious employers" who "primarily hire people who embrace the tenets of the faith and exist mainly to inculcate religious beliefs" from its health insurance requirements.[61] Catholic Charities did not meet these qualifications and therefore had to provide the contraceptive coverage.[62] The California Supreme Court held that WCEL did not impermissibly interfere with employer's religious autonomy and the exemption did not offend the Free Exercise or Establishment Clause.[63] *Catholic Charities* upheld the constitutional validity of laws of general applicability serving a legitimate state interest, even when such laws placed burdens on religious practices, so long as the context and legislative history

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[56] United States v. Lee, 455 U.S. 252, 260 (1982).

[57] *Id.*

[58] 42 U.S.C.A. § 2000bb.

[59] *See generally* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004).

[60] National Women's Law Center, *Contraceptive Equity Laws in Your State: Know Your Rights – Use Your Rights, A Consumer Guide* (August 27, 2012), https://nwlc.org/resources/contraceptive-equity-laws-your-state-know-your-rights-use-your-rights-consumer-guide/.

[61] Margaret Talbot, *Why is the Catholic Church Going to Court?*, THE NEW YORKER (May 30, 2012), http://www.newyorker.com/news/daily-comment/.

[62] *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 76.

[63] *See id*. at 79.

showed no intent to place such burdens.[64]

Most significantly, the California Supreme Court left the Free Exercise Clause standard of review unsettled but stated that regardless of whether strict scrutiny or rational basis applied, WCEL survived review.[65] The Court stated that WCEL left Catholic Charities "free to express its disapproval of prescription contraceptives and to encourage its employees not to use them."[66] Two years later, Catholic Charities and nine other non-profit organizations sued the State of New York based on a similar New York law, the Women's Health and Wellness Act of 2002.[67] The New York Court of Appeals came to the same conclusion as the California Supreme Court did in *Catholic Charities*.[68]

II. THE SUPREME COURT'S HOLDING IN *HOBBY LOBBY*

The disagreement over the definition of the beginning of life and the uncertainty surrounding particular types of contraception, coupled with the lack of an exemption from the contraceptive coverage mandate for for-profit corporations, set the stage for Hobby Lobby Stores' suit and allegations of First Amendment free exercise protection violations.

In 2014, Hobby Lobby and two other closely-held for-profit corporations sued HHS under RFRA and the Free Exercise Clause.[69] The corporations objected to the mandatory insurance coverage of contraception on the basis that such coverage was contrary to the corporations' Christian belief that life begins at conception, meaning fertilization.[70] The corporations sought to enjoin application of the contraceptive coverage mandate that required the corporations' employee insurance to cover the aforementioned controversial contraceptives.[71]

The case was decided five-to-four with the majority opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy.[72] Justice Sotomayor joined Justice Ginsburg's dissent in whole and Justices Breyer and Kagan joined Justice Ginsburg's dissent in part.[73] Justices Breyer and Kagan wrote a separate dissent and Justice Kennedy, while joining the majority, wrote a separate

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[64] *See id.* at 86-87.

[65] *Id*. at 89, 94.

[66] *Id*. at 89.

[67] Catholics Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

[68] *Id.*; *see also* 28 No. 21 Ins. Litig. Rep. 805 (Dec. 15, 2006).

[69] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2754 (2014).

[70] *Id.* at 2755.

[71] *See id.*

[72] *Id.* at 2758.

[73] *Id.*

concurrence.[74]

In *Hobby Lobby*, the majority and the dissent disagreed about, among other things, the correct and applicable theory of corporate personhood, or a theory that attempts to characterize the corporation in order to recognize and justify the legal rights and responsibilities of the entity.[75] The majority utilized the aggregate theory from *Citizens United*.[76] This theory of corporate personhood characterizes the corporation as a collection of individuals that may assume the liberty and constitutional rights derived from its members.[77] In contrast, the dissent utilized the artificial entity theory.[78] This theory of corporate personhood characterizes the corporation as an artificial person, or creature of state law, "entitled only to rights the state chooses to grant, and subject to the removal of those rights."[79]

A. *The Majority Opinion Held that For-Profit Corporations Are Persons Protected by the Free Exercise Clause*

The majority opinion, written by Justice Alito, came to three primary conclusions. First, for-profit entities are included in the protections for "persons" under RFRA.[80] Second, the contraceptive coverage mandate under the ACA, as applied to for-profit, closely-held corporations, created a substantial burden on the exercise of religion that was impermissible under the terms of RFRA.[81] Finally, the contraceptive coverage mandate did not satisfy the requirement under RFRA for the least restrictive means standard, or that the law must be the least restrictive means of furthering the compelling governmental interest.[82]

1. For-Profit entities are "persons" under RFRA

Through its use of the Dictionary Act and the aggregate theory of corporate personhood, the majority determined that for-profit entities are persons under RFRA. The majority reasoned that RFRA did not define the

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[74] *Id.*

[75] *See* Susanna Kim Ripken, *Corporations are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 100 (2009).

[76] *Hobby Lobby*, 134 S. Ct. at 2794.

[77] Brendan F. Pons, Student Article, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 140 (2013).

[78] *See Hobby Lobby*, 134 S. Ct. at 2793-94 (Ginsburg, J. dissent).

[79] *See* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1456 (1992).

[80] *Hobby Lobby*, 134 S. Ct. at 2769.

[81] *Id.* at 2779.

[82] *Id.* at 2780.

term "person."[83] Therefore, Justice Alito looked to the Dictionary Act, which instructs the courts to apply particular definitions of certain common words and basic rules of grammatical construction to all federal statutes.[84] The definitions identified through the application of the Dictionary Act control in "determining the meaning of any Act of Congress, unless the context indicates otherwise."[85] According to the Dictionary Act, the words "person" and "whoever" include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[86]

However, the Circuit Courts disagree about how the Dictionary Act, RFRA, and the ACA interact.[87] In considering the question posed in *Hobby Lobby*, the Sixth, Seventh, and Tenth Circuits utilized the Dictionary Act, while the Third and District of Columbia Circuits did not.[88] The D.C. Circuit dismissed the Dictionary Act's relevance in interpreting RFRA holding that RFRA requires "constru[ing] the term 'person' together with the phrase 'exercise of religion.'"[89] The D.C. Circuit instead asked whether "corporations enjoy the shelter of the Free Exercise Clause."[90] Similarly, in *Sebelius v. Hobby Lobby Stores, Inc.*, Justice Sotomayor rejected the purely textualist approach of defining "person" and stated that the Court should determine whether corporations *could* exercise religion.[91]

In *Hobby Lobby*, HHS argued that RFRA does not protect a corporate entity with a profit-making element as a person.[92] The majority rejected HHS's argument and treated the corporation as a person, reasoning that the corporate entity is a "form of organization used by human beings to achieve desired ends" and "corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[93] Therefore, the majority reasoned that since corporations are operated by people and wouldn't exist without people, they are protected as people.[94]

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[83] *Id.* at 2768.

[84] 1 U.S.C.A. §§ 1-8 (West 2012); *id*. at 2754.

[85] *Hobby Lobby*, 134 S. Ct. at 2768 (quoting 1 U.S.C.A § 1 (West 2012)).

[86] 1 U.S.C.A. § 1 (West 2012).

[87] Emily J. Barnet, Note, Hobby Lobby *and the Dictionary Act*, 124 YALE L.J. 11 (2014).

[88] *Id*.

[89] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1211 (D.C. Cir. 2013).

[90] *Id.* at 1212.

[91] Transcript of Oral Arguments at 17-18, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2014) (No. 13-354).

[92] *Id.* at 8, 45-47, 51, 54.

[93] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

[94] *See id*.

Justice Alito used the aggregate theory of corporate personhood to categorize the corporation as an individual, and claimed that extending the rights of the individual to corporations would protect shareholders.[95] As such, the majority combined the principles of free enterprise and religious freedom to extend RFRA's protections to corporations.

2. The contraceptive coverage mandate created a substantial burden upon the exercise of religion that was impermissible under RFRA

Protections under RFRA are triggered by laws that create a substantial burden on the exercise of religion. [96] The Court held that laws making the practice of religious beliefs more expensive in the context of business activities impose a burden on a corporation's free exercise, for the purposes of RFRA.[97] The majority further concluded that corporations could perpetuate religious values since religion intersects with all areas of human activity, not the least of which is profit-making.[98]

According to testimony, corporate owners believed that their compliance with the contraceptive coverage mandate would facilitate abortions and violate the corporate owners' sincerely held religious beliefs, while non-compliance would lead to substantial economic consequences.[99] The majority stated that "HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."[100]

Accordingly, the majority concluded that under RFRA, the contraceptive coverage mandate created a substantial burden upon the exercise of religion.[101] Therefore, the HHS contraceptive coverage mandate triggered the protections under RFRA for the corporate person's exercise of religion.[102]

3. The contraceptive coverage mandate did not meet the least restrictive means standard

Since the majority held that the contraceptive coverage mandate created a

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[95] *See id.*

[96] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) and (b) (1993).

[97] *Hobby Lobby*, 134 S. Ct. at 2768.

[98] *Id.* at 2769-72.

[99] *See id.* at 2775-76.

[100] *Id.* at 2767.

[101] *Id.* at 2769-70.

[102] *See id.* at 2775.

substantial burden on corporate free exercise, RFRA's protections required the mandate to satisfy the two-part test of furthering a compelling government interest and using the least restrictive means to do so, the latter of which it failed to meet.

The majority did not contest the compelling government interest of protecting women's health but interpreted the least restrictive means requirement under RFRA to be exceptionally demanding.[103] This interpretation was critical because RFRA is more likely to invalidate laws and regulations when its test is highly restrictive. Justice Alito stated that the least restrictive means standard was not satisfied by HHS's contraceptive coverage mandate because the least restrictive means would have required the Federal Government to "assume the cost of providing the four contraceptives at issue to any women who [were] unable to obtain them under their health insurance policies due to their employers' religious objections."[104]

In sum, the majority held that corporations are persons protected under RFRA and the HHS contraceptive coverage mandate created a substantial burden on corporate persons' free exercise, thereby triggering protections under RFRA.[105] Despite the compelling government interest, the majority found that the mandate did not meet the least restrictive means standard and thusly, the Court invalidated the contraceptive coverage mandate.[106] Finally, Justice Alito attempted to ameliorate HHS's and the dissent's concerns—that the precedent established through the majority's holding in *Hobby Lobby* could allow corporations to reject any and all laws (barring tax laws) based on religious beliefs—by suggesting that RFRA claims will be assessed on a case-by-case basis.[107]

B. *The Concurrence Interpreted RFRA's Least Restrictive Means Standard to be Less Demanding*

Although Justice Kennedy joined the majority opinion, his concurrence has been given particular weight because it clarifies his necessary fifth vote for the majority.[108] In his concurrence, Justice Kennedy interpreted the

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[103] *See id.* at 2780.

[104] *Id.*

[105] *Id.* at 2785 (overturning 26 C.F.R. § 54.9815–2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv)).

[106] *Id.*

[107] *See id.* at 2760, 2781, 2783.

[108] *See* Vikram David Amar, *How to Read Justice Kennedy's Crucial Concurring Opinion in* Hobby Lobby*: Part II in a Series*, JUSTIA: VERDICT, LEGAL ANALYSIS AND COMMENTARY (Aug. 1, 2014), https://verdict.justia.com/2014/08/01/read-justice-kennedys-

RFRA least restrictive means standard to be less demanding than the standard articulated by Justice Alito.[109] In fact, Justice Kennedy thought the accommodation[110] from the contraceptive coverage mandate could satisfy the least restrictive means requirement.[111] Justice Kennedy asserted that the Court has not resolved whether the Government would be required to pay for contraceptives:

> In discussing th[e] [government-payment] alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program [because] [i]n these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.[112]

Justice Kennedy also opined on the cost the government must bear to accommodate free exercise. "[T]his existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise."[113]

C. *The Dissent Rejected the Definition of Corporations as Persons and the Majority's Interpretation of RFRA's Least Restrictive Means Standard.*

Justice Ginsburg's dissent targeted three areas of disagreement with the majority. First, Justice Ginsburg rejected the definition of corporations as persons.[114] Second, Justice Ginsburg considered the context of congressional action under the ACA and interpreted the least restrictive means standard under RFRA to be far less radical and restrictive.[115] Finally, Justice Ginsburg found Hobby Lobby's Free Exercise Clause argument untenable and RFRA protections inapplicable to for-profit

crucial-concurring-opinion-hobby-lobby.

[109] *See Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring).

[110] Recall that the accommodation for religious employers under the ACA required insurance issuers to directly provide employees with "separate payments for contraceptive services without imposing any cost-sharing on the employer, its insurance plan, or its employee beneficiaries." *Id.* at 2755.

[111] *Id.* at 2786 (Kennedy, J., concurring).

[112] *Id.* (Kennedy, J., concurring).

[113] *Id.* at 2787 (Kennedy, J., concurring).

[114] *Id.* at 2793-94 (Ginsburg, J., dissenting).

[115] *See id.* at 2787 (Ginsburg, J., dissenting).

corporate entities.[116]

1. Corporations are not people under RFRA

Justice Ginsburg rejected the use of the Dictionary Act in defining "person" because the Act does not control in instances where the context indicates otherwise, as RFRA does.[117] RFRA refers to "a person's *exercise of religion*," and the courts have not recognized, under RFRA or the Free Exercise Clause, a for-profit corporation's qualification for a religious exemption from a generally applicable law.[118] Therefore, the relevant term for interpretation in RFRA is "a person's exercise of religion" and corporations cannot exercise religion.[119]

Upon this logic, Justice Ginsburg rejected the majority's theory of corporate personhood as an aggregation of individuals.[120] Justice Ginsburg characterized the corporate form under the artificial entity theory, citing Chief Justice Marshal's description of the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law" and Justice Steven's concurring view in *Citizens United* that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."[121] As such, these entities are easily distinguishable from other non-profit, religion-based organizations because the latter "foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations."[122] Since Justice Ginsburg did not define corporations as persons, she asserted that they should not receive protections under RFRA.[123]

Justice Ginsburg reasoned that religious exemptions under RFRA should be confined to organizations formed "'for a religious purpose,' 'engage[d] primarily in carrying out that religious purpose,' and not 'engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts.'"[124] Justice Ginsburg stated that to do otherwise and allow RFRA to extend protections to for-profit corporations would lead to

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[116] *Id.* at 2791 (Ginsburg, J., dissenting).

[117] *Id.* at 2793-94 (Ginsburg, J., dissenting).

[118] *Id.* (Ginsburg, J., dissenting) (emphasis added).

[119] *Id.* at 2793, 2795 (Ginsburg, J., dissenting) ("No such solicitude is traditional for commercial organizations").

[120] *See id*. at 2797 (Ginsburg, J., dissenting).

[121] *Id.* at 2794 (Ginsburg, J., dissenting) (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819); Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part).

[122] *Hobby Lobby*, 134 S. Ct. at 2794-95 (Ginsburg, J., dissenting).

[123] *See id*. at 2805-06 (Ginsburg, J., dissenting).

[124] *Id*. (Ginsburg, J., dissenting).

"untoward effects."[125] Justice Ginsburg stated, there is "[l]ittle doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."[126]

2. Congress did not intend the least restrictive means standard under RFRA to be radical

Justice Ginsburg criticized the majority's assertion that the least restrictive means standard requires governmental payment for coverage of contraception.[127] According to Justice Ginsburg, the majority standard is far more radical than Congress intended when it passed the Statute.[128] Justice Ginsburg stated that under such a strict standard, the majority of laws imposing any kind of financial burden would fail the RFRA test.[129] The Legislature did not intend such a result.[130] Therefore, it was Justice Ginsburg's view that the mandate did not violate RFRA's least restrictive means standard with respect to corporations. [131]

Justice Ginsburg also disagreed with the majority's interpretation of RFRA, which demanded "accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby."[132] Justice Ginsburg viewed the majority's interpretation of RFRA as far more radical than Congress intended and believed that the majority's interpretation precludes individual free exercise protections by allowing corporate beliefs to trump employees' beliefs.[133]

Furthermore, Justice Ginsburg noted "the genesis of . . . [the contraceptive coverage mandate from congressional action in the ACA] should enlighten the Court's resolution of these cases."[134] Thus, according to Justice Ginsburg, the contraceptive coverage mandate suggests that Congress did not want numerous corporations opting out of the legislative

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

[126] *Id.* (Ginsburg, J., dissenting).

[127] *Id*. at 2801-02 (Ginsburg, J., dissenting).

[128] *See id*. at 2797 (Ginsburg, J., dissenting).

[129] *Id.* at 2801-02 (Ginsburg, J., dissenting) ("[W]here is the stopping point to the 'let the government pay' alternative?").

[130] *Id*. (Ginsburg, J., dissenting).

[131] *See id*. (Ginsburg, J., dissenting).

[132] *Id.* at 2787 (Ginsburg, J., dissenting).

[133] *See id*. (Ginsburg, J., dissenting).

[134] *Id.* at 2788. (Ginsburg, J., dissenting).

goal to provide women with essential coverage and healthcare.[135]

3. Hobby Lobby Stores' Free Exercise Clause claim is untenable and corporations are not protected under RFRA

Justice Ginsburg rejected Hobby Lobby Stores' free exercise claim because the ACA is a generally applicable, neutral law and excusing corporations from the contraceptive coverage mandate would restrict the rights of natural persons. Justice Ginsburg cited to *Smith*, pointing out its similarity with the contraceptive coverage mandate.[136] In both cases, the laws at issue applied generally and focused on the compelling government interest of protecting women's health and wellbeing, not the exercise of religion.[137] Justice Ginsburg declared that even if *Smith* did not control, the Court has clarified that accommodations of religious beliefs must not significantly impinge on the interests of third parties.[138] Recognition of corporate free exercise does just that.[139] Here, corporate free exercise "would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."[140] Justice Ginsburg found the protection of third parties to be vital because a "balanced approach is all the more in order when the Free Exercise Clause itself is at stake."[141]

Justice Ginsburg also cited *Catholic Charities*, which found no Supreme Court precedent of exempting religious objectors from neutral laws and recognized "that the requested exemption would detrimentally affect the rights of third parties."[142] Thus, Justice Ginsburg concluded that the majority holding disturbed precedence and burdened the free exercise of

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[135] *See id.* (Ginsburg, J., dissenting).

[136] *Id*. at 2790 (Ginsburg, J., dissenting).

[137] *See id*. (Ginsburg, J., dissenting).

[138] *Id.* at 2790 n.8 (Ginsburg, J., dissenting) ("Notably, in construing [RLUIPA] the Court has cautioned that 'adequate account' must be taken of 'the burdens a requested accommodation may impose on nonbeneficiaries.'") (citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) ("An accommodation must be measured so that it does not override other significant interests"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating state statute requiring employers to accommodate an employee's Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees)).

[139] *Hobby Lobby*, 134 S. Ct. at 2790 (Ginsburg, J., dissenting).

[140] *Id*. (Ginsburg, J., dissenting).

[141] *Id*. at 2790 n.8 (Ginsburg, J., dissenting).

[142] *Id.* at 2790-91 (Ginsburg, J., dissenting) (quoting Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004)).

natural persons.[143]

In sum, Justice Ginsburg found that, since the ACA is a generally applicable law, Hobby Lobby lacked a tenable claim under the Free Exercise Clause. Therefore, the corporation resorted to asserting protections under RFRA, which was intended to restore the compelling interest test, set forth in *Sherbert* and *Yoder*, to all cases where there is a substantial burden on free exercise. Congress did not intend the ACA to unsettle other areas of law, such as corporate law.[144] Therefore, Justice Ginsburg stated that the majority interpretation of RFRA is untenable.[145] Corporations are artificial entities and thus, Justice Ginsburg asserted that the Court did not protect the free exercise of a "person" by extending RFRA to for-profit corporations.[146]

D. *Epilogue – Hobby Lobby Remained Unsettled on Remand*

After the Supreme Court's 2014 ruling, the legal battle continued when Hobby Lobby requested an order to block enforcement of the contraceptive coverage mandate from U.S. District Judge Joe Heaton from Oklahoma City.[147] However, Hobby Lobby requested a comprehensive block of ACA and its regulations and not just as they applied to *Hobby Lobby*.[148] The corporation sought to avoid future legal struggles with any and all new regulations the government might issue.[149] In response, the Federal Government argued that enforcement should only be barred as it applies to *Hobby Lobby*.[150]

The Judge stated that *Hobby Lobby* won in the Supreme Court based on the regulations as they existed at the time, not potential future changes, and the order was confined accordingly.[151] In 2015, three independent agencies passed new regulations aiming to reach all the companies that had sued over ACA contraceptives.[152]

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[143] *Id.* at 2793-2796.

[144] *Id.* at 2791 (Ginsburg, J., dissenting) (citing 139 CONG. REC. 26178 (1993) (statement of Sen. Kennedy)).

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

[146] *Id.* at 2794 (Ginsburg, J., dissenting). Justice Breyer and Kagan filed their own separate dissent and refused to decide whether for-profit corporations should be permitted to bring RFRA claims. *Id.* at 2806 (Breyer and Kagan, J., dissenting).

[147] Denniston, *supra* note 16.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] *Id*.

III. THE HISTORICAL STRUGGLE TO CHARACTERIZE CORPORATE PERSONHOOD

The Supreme Court has struggled to form a cohesive and consistent legal theory of corporate personhood.[153] The historically muddled legal characterization of corporate personhood began with the artificial entity theory during 19th century and state-chartered incorporation; it was supplanted by the natural entity theory in the 1920s.[154] In 1978, the Court's focus on methodical individualism, or the view that the only real starting point for a political or legal theory is the individual,[155] culminated in its aggregate theory in *First National Bank of Boston v. Bellotti*.[156] The Court temporarily moved away from *Bellotti* and back to the artificial entity theory in the 1990 *Austin v. Michigan Chamber of Commerce* decision.[157] However, not long thereafter, the Court revived the aggregate theory in *Citizens United* in 2010 and in *Hobby Lobby* in 2014.[158] This section traces this history.

A. *The Origin of the Aggregate Theory of Corporate Personhood in Bellotti*

The *Bellotti* Court adopted the aggregate theory of corporate personhood in 1976 by treating the 1886 *Santa Clara County v. Southern Pacific Railroad* case as if it had definitively decided that corporations have First Amendment protections.[159] Although *Santa Clara* endorsed the aggregate theory, it provided very little justification.[160] The Court's opinion in *Santa Clara* was a one-paragraph-long holding that, according to some scholars, is often misunderstood and likely did not represent the change in societal and judicial perspective for which it is cited.[161] Nevertheless, the five-to-

[153] Recall, that corporate personhood is a theory that attempts to characterize the corporation in order to recognize and justify the legal rights and responsibilities of the entity. Brendan Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 120 (2013).

[154] The natural entity theory characterizes the corporation as deriving its power from its individual members, not the state, and views the corporate personhood as a separate entity from its shareholders; thereby, as a juridical person deserving of some level of autonomy from the government. *Id*. at 140.

[155] Morton J. Horwitz, *Santa Clara Revisited: The Development of the Corporate Theory*, 88 W. VA. L REV. 173, 181 (1985).

[156] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[157] Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

[158] Citizens United v. FEC, 558 U.S. 310 (2010); Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

[159] Horwitz, *supra* note 155, at 181.

[160] *See* Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394 (1886).

[161] Horwitz, *supra* note 155, at 181.

four *Bellotti* decision ultimately extended free speech to corporations by developing an aggregate theory as its legal rational.[162]

The issues in *Bellotti* arose when several corporations, including the First National Bank of Boston, sued the State of Massachusetts for a state law that prevented corporations from contributing to a referendum on tax policy.[163] The U.S. Supreme Court held that the states could not impose regulations on donations from corporations in ballot initiative campaigns.[164] Although the holding did not directly affect federal law, numerous corporate personhood and corporate free speech cases, including *McConnell* and *Citizens United*, cite to the *Bellotti* decision.[165]

The *Bellotti* Court held that the rights of individuals are bestowed upon a corporation.[166] The Court reasoned that since shareholders are willing speakers, corporations are aggregations of said speakers.[167] As such, corporations, acting as ambassadors of aggregated shareholders' rights, could exercise those rights even though they were typically reserved to the individual.[168] Thereafter, with only two exceptions, the Burger Court invalidated every commercial speech ban it considered between 1973 and 1986.[169]

Justice White, on the other hand, dissented and warned that corporations could only justifiably aggregate shareholders for business or profit purposes, not for rights and free speech purposes.[170] White preferred the artificial entity theory, which describes the corporation as a state-created entity.[171] White stated that "[t]he State need not permit its own creation to consume it."[172] This meant that states grant protections to corporations by allowing them to exist and corporations cannot compel the state to give it additional protections, such as the free speech rights of natural persons.

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[162] George W. Scofield, *Bellotti – Corporations' Freedom of Speech*, 39 LA. L. REV. 1225, 1226 (1979).

[163] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).

[164] *Id.*

[165] Citizens United v. FEC, 558 U.S. 310, 312 (2010); McConnell v. FEC, 540 U.S. 93, 206 (2003).

[166] *Bellotti*, 435 U.S. at 825 (citing Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that persons had a protected right to engage in commercial speech)).

[167] *Id*. at 784-86.

[168] *Id*.

[169] Robert A. Prentice, *Consolidated Edison and Bellotti: First Amendment Protection of Corporate Speech*, 16 TULSA L. J. 600, 605 (1980-81).

[170] *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting).

[171] *Id.* at 809. (White, J., dissenting).

[172] *Id.* (White, J., dissenting).

Justice Rehnquist also dissented under the same theory.[173] He held that individual people, not state-chartered entities, have free speech.[174]

Other critics have opined on the *Bellotti* holding. Judge Shelly Wright from the United States Court of Appeals for the District of Columbia Circuit stated that corporations are not people and the aggregate theory of corporate personhood violates the principle that there should be "one person, one vote."[175] George Scofield also wrote that corporate speech unrelated to the property interests of the corporation "becomes the purely personal views of corporate management [and is] undeserving of the constitutional protection afforded by *Bellotti*."[176]

Many regard *Bellotti* as the Supreme Court's first articulation and adoption of the aggregate theory of corporate personhood.[177] The decision departed from the artificial entity theory that dominated since the 1819 *Dartmouth College v. Woodward* decision.[178] *Bellotti* expanded corporate rights,[179] and afterwards, the average number of Supreme Court cases involving corporate interests rose by 47% and the 'win' rate for businesses increased from 20% to 55%.[180] "*Bellotti*-based attack[s]" overruled many state laws restricting corporate speech.[181]

Then, after the fall of shareholder democracy and other changes to corporate law, the Court's legal theory failed to characterize the realities of corporate structures. Corporations functioned less like ambassadors of their shareholders' views because shareholders no longer controlled corporate decisions and had no effective voice in the management of their

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[173] *Id*. at 824, 828 (Rehnquist, J., dissenting).

[174] *Id*. (Rehnquist, J., dissenting) (justifying corporate free speech as an implicit right derived from State charters).

[175] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

[176] Scofield, *supra* note 162, at 1236.

[177] *Id*.

[178] Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819). Briefly, the natural entity theory was endorsed by the Court in Hale v. Henkel, 201 U.S. 43 (1905).

[179] *See e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (holding that the state couldn't alter or compel corporate speech because it "impermissibly burdens . . . [the appellant corporation's] own expression"); Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980) (upholding corporate speech under *Bellotti* legal theory).

[180] Leighton Walter Kille, *Corporate Speech and the First Amendment: History Data and Implications*, JOURNALIST'S RESOURCE (March 26, 2015), http://journalistsresource.org/studies/politics/finance-lobbying/corporate-speech-first-amendment-history-data-implications.

[181] Mark Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 644 (1988-89).

corporation.[182] The rising economic theory accepted that shareholders' sole interest recognized by the corporate entity was profit maximization.[183] Courts began to disfavor the protections of *Bellotti* for interfering with the rights of natural persons.[184] Consequently, the Court's perspective on corporate personhood began to shift again.[185]

B. *The Austin Court Returned to the Artificial Entity Theory of Corporate Personhood*

Changes in business practices and the rise of the economic theory of the corporation in the late 20th century encouraged the move away from *Bellotti*.[186] Specifically, the aggregate theory conflicted with corporate decentralization and the concepts of limited liability and CEO management.[187] Corporate power shifted from shareholders to directors and professional managers.[188] Any expectation of shareholder unanimity in corporate decisions waned.[189] Furthermore, legal scholars could no longer maintain the paradoxical views that a corporation served as nothing more than the aggregate property of the shareholders *and also* as a holistic functioning business entity.[190]

The Court returned to the artificial entity theory in *Austin v. Michigan Chamber of Commerce* in 1990, holding that states had a compelling interest to ban corporations from using general-funds for expenditures in elections.[191] The Court found that the states could prohibit certain corporate activity without violating the Fifth or Fourteenth Amendments since corporate rights were "special advantages" received from the states.[192] In *Austin*, the Court adopted dicta from the Court's 1986 decision

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[182] Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* 8-9 (1932); George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J. L & ECON. 237, 238 (1983).

[183] *See generally* David Millon, *The Ambiguous Signifiance of Corporate Personhood*, 2 STAN. AGORA: ONLINE J. LEG. PERSP. 39, 48 (2001) ("[the] profit maximization agenda already abounded in American political discourse.").

[184] Hager, *supra* note 181, at 644.

[185] *Id*.

[186] *Id*.

[187] Horwitz, *supra* note 155, at 182-83.

[188] *Id*. at 183.

[189] *Id*. at 207.

[190] Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV, 1441, 1464 (1987).

[191] James Bopp, Jr., et. al., *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 264 (2010).

[192] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658-59 (1990).

in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* by stating that states could prohibit corporations from engaging in particular forms of speech "even though it would be unconstitutional to prohibit individuals from doing likewise."[193]

The Court's return to the artificial entity theory "subverted [the] *Bellotti*'s rule."[194] According to James Bopp, "[w]hereas Bellotti held that corporate speech cannot be restricted simply because the speaker is a corporation, *Austin* said that corporations were sufficiently different from individuals that corporate speech could be infringed in ways that individuals' speech cannot."[195] The *Austin* Court reasoned that a state's compelling interest outweighed corporate speech interests because corporate speech differed from speech by natural persons.[196]

Prior to *Austin* and under *Bellotti*, the Court only ever recognized the government's anticorruption interest against financial quid pro quo corruption as sufficient to justify limiting corporate political speech.[197] Under the aggregate theory, the Court expanded corporate rights to protect corporate free speech at the same level as individual free speech.[198] States could only pass laws interfering with corporate speech by asserting a compelling government interest and withstanding strict scrutiny.[199] In contrast, the artificial entity theory required only a rational basis and permitted the states to condition or limit corporate free speech protections.[200]

C. *Citizens United Returned to the Aggregate Theory to Expand Corporate Rights*

In 2010, the Court in *Citizens United* overturned *Austin* and the artificial entity theory and returned to the aggregate theory of corporate personhood promulgated in *Bellotti* for corporate free speech.[201] The case arose when a non-profit organization sought to air a film critical of Hillary Clinton shortly before the 2008 Democratic primary election.[202] Citizens United, a

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[193] *Id.* (citing *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 240 (1986)); Bopp, *supra* note 191, at 278.

[194] Bopp, *supra* note 191, at 277.

[195] *Id*. at 279.

[196] *Austin*, 494 U.S. at 665.

[197] Bopp, *supra* note 191, at 280.

[198] *Id*.

[199] *Id*.

[200] *Id*. at 264.

[201] *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

[202] *Id*. at 319-20.

501(c)(4) organization, filed a complaint challenging the Bipartisan Campaign Reform Act passed in the wake of *Austin*, which prohibited corporations from making such electioneering communications.[203] The corporation sought to enjoin the Federal Election Commission from enforcing its regulations against corporate political speech.[204] However, the lower courts denied Citizens United's motion for a preliminary injunction citing *Austin*.[205]

After granting certiorari, the Supreme Court addressed its own inconsistent legal theories, stating that "[t]he Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them."[206] Originally, Chief Justice Roberts wrote the Court's opinion, but Justice Kennedy convinced Roberts to reassign the writing to him and allow the Court to expand corporate rights by reestablishing the *Bellotti* rule.[207]

Justice Kennedy's majority opinion not only endorsed the *Bellotti* rule for corporate constitutional protections but also based the Court's reasoning on the aggregate theory of corporate personhood from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which stated that the rights of individuals are bestowed on a corporation.[208] Justice Kennedy used the aggregate theory of "corporate identity" by consistently referring to corporations as associations and thusly, referencing corporate speakers as indistinguishable from individual speakers.[209] As such, *Citizens United* characterized the corporation as an aggregation of shareholders.[210] Furthermore, the Court rejected *Austin*'s artificial entity theory and "that state law grants corporations special advantages."[211]

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[203] *Id*. at 320-21.

[204] *Id*. at 321.

[205] *Id*. at 322.

[206] *Id*. at 348.

[207] Jeffrey Toobin, *Annals of Law: Money Unlimited*, THE NEW YORKER, May 21, 2012, Pg 1.

[208] *Bellotti*, 435 U.S. at 825 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that persons had a protected right to engage in commercial speech)).

[209] Bopp, *supra* note 191, at 343, 347, 364 ("[U]nder *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity").

[210] *Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others") (citing *Bellotti*, 435 U.S. at 784).

[211] *Id*. at 351 (internal quotations omitted). Justice Stevens dissented under the artificial entity theory, referred to corporations as dangerous, and advocated regulation. *Id*. at 390 (J. Thomas, dissenting in part).

Ultimately, the *Citizens United* Court returned to the view that the "corporate 'whole' was nothing more than the additive sum of its 'parts.'"[212] This shift in legal theory created immense change: it marked the transition from the pro-regulatory artificial entity theory to the highly anti-regulatory aggregate theory.[213] The Court maximized constitutional protections for corporate free speech by holding that state laws burdening corporate political speech are subject to strict scrutiny.[214] Despite this complete change in corporate personhood, Justice Thomas suggested that the Court did not go far enough because all political "disclosure, disclaimer, and reporting requirements in BCRA . . . [were] also unconstitutional" since they would not be enforceable against the individual.[215]

IV. *HOBBY LOBBY* USED THE AGGREGATE THEORY TO IMPROPERLY PROVIDE CORPORATIONS WITH CONSTITUTIONAL PROTECTIONS RESERVED FOR THE INDIVIUDAL

Citizens United and *Hobby Lobby* resurrected an archaic and inappropriate theory of the corporation as an aggregation of shareholder interests. The Court's reliance on the flawed aggregate theory indicates a deeply-rooted dedication to methodical individualism in American thought, culture, and courts.[216] Methodical individualism is the view that the only legitimate starting point for a political or legal theory is the individual.[217] The fact that the Supreme Court personified the corporation as a person in *Citizens United* and *Hobby Lobby* demonstrates this trend. Unfortunately, the Court's use of the aggregate theory to justify the complicated status of the corporation no longer protects shareholders because corporations no longer represent any shareholders' interests apart from profit maximization.[218] Rather, it now harms employees, such as the thousands of women employed by Hobby Lobby Stores who no longer have access to contraception through their employer insurance plans, and impinges on the free speech and free exercise of religion of natural persons.[219]

The Court's view that corporate rights are equal to those of the individual presents numerous issues. In this section, I will argue that the Court's

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[212] Hager, *supra* note 181, at 644.

[213] *Id*.

[214] *Citizens United*, 558 U.S. at 340.

[215] *See id*. at 480 (Thomas, J., dissenting in part).

[216] *See* Horwitz, *supra* note 155, at 181.

[217] *Id*.

[218] *See supra* Section III.A.

[219] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (Ginsburg, J., dissenting).

recognition of corporate free exercise is incorrect because *Hobby Lobby*'s aggregate theory conflicts with the realities of modern developments of corporate structures and law. Furthermore, even if one were to accept *Citizens United*'s theory of corporate personhood in the free speech context, the theory of corporate personhood should not apply in the free exercise context because the *Hobby Lobby* Court erred by expanding RFRA's protections for "persons" to include corporations.

A. *The Court's Recognition of Corporate Free Exercise is Incorrect Because the Aggregate Theory Conflicts with the Realities of Corporate Structure*

Hobby Lobby used the aggregate theory of corporate personhood to expand corporate rights to include free exercise.[220] However, I argue that (1) the aggregate theory inaccurately characterizes the corporation, (2) corporate free exercise is unprecedented and contrary to traditional notions of corporate separateness, and (3) protection of a for-profit corporation's free exercise interferes with the free exercise of natural persons and paves the way for unmanageable First Amendment claims.[221] For these reasons, *Hobby Lobby*'s aggregate theory improperly characterizes the corporation and should not apply to free exercise claims.

1. The aggregate theory is an inaccurate characterization of the corporation

During the late 20th century, after *Bellotti*, reliance on the aggregate theory waned because the theory no longer represented the realities of corporate structure or law.[222] Today, the theory is even more inapt; characterizing a corporation as an aggregation of individuals conflicts with limited liability, corporate decentralization, CEO management, and the abandonment of shareholder unanimity requirements for corporate decisions (i.e., shareholder democracy).[223] These modern developments have removed liability, power, and responsibility from the shareholders and individuals who comprise the corporation to the separate and recognizable corporate entity.[224]

The aggregate theory focuses exclusively on shareholders legitimizing the corporation, but shareholders neither control business decisions nor are

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[220] *See supra* Section II.A.

[221] *See supra* Section IV.A.1-3.

[222] Hager, *supra* note 181, at 580.

[223] *See supra* Section III.A.

[224] *Id.*

they directly entitled to business profits.[225] Corporations no longer speak for their shareholders apart from seeking profit maximization, nor do they represent shareholders' religious views.[226] As Justice White stated, shareholders do not share a common set of social views, and the corporate interest is in making money, not in free speech or free exercise.[227] Most shareholders have little or no influence over corporate acts or beliefs.[228] Shareholders' only power is the power to sell their shares.[229] The modern corporate structure and shareholders' operative absence of power therein demonstrate that corporations are not an aggregation of shareholder interests but rather a separate entity. The corporation is merely a legal fiction recognized by the state for business purposes and not the equivalent of a person with associated substantive rights.[230]

2. The expansion of corporate free exercise conflicts with the legal notion of corporate separateness

Traditionally, corporate law has treated the corporate entity and its shareholders as separate and distinct in their legal interests.[231] In a *Hobby Lobby* amicus curiae brief, a group of law professors noted that the artificial entity theory of corporate personhood, which recognizes corporate and shareholder separateness, has been the basis of corporate law since the 18th century and is recognized in every state, "including Oklahoma, the home of Hobby Lobby."[232]

A fundamental principle of incorporation is state recognition of an entity separate and distinct from its shareholders.[233] Allowing a corporation to

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[225] *Id.*

[226] *Id.*

[227] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting).

[228] *See* Thomas K. McCraw, *In Retrospect: Berle and Means*, 18 REVS. IN AMERICAN HIST. 578, 585 (Dec. 1990) ("Shareholding had become so diffuse, and the law of proxies and charters so unfavorable to collective action, that any attempt to reinstate shareholder power was doomed, an anachronistic hope.").

[229] *Id.*

[230] State v. Standard Oil Co., 49 Ohio St. 137, 177-78 (1892) ("[The corporate entity], like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded.").

[231] Burnet v. Clark, 287 U.S. 410, 415 (1932); *see also* New Colonial Ice Co. v. Helvering, 292 U.S. 435, 442 (1934).

[232] Sebelius v. Hobby Lobby Stores, Nos. 13-354 and 13-356, 2014 WL 333889, at *5 (U.S., 2014) (citing Kurtz v. Clark, 290 P.3d 779, 785 (Okla. Civ. App. 2012); Dobry v. Yukon Elec. Co., 290 P.2d 135, 137 (Okla. 1955)).

[233] *See Sebelius*, 2014 WL 333889, at *5.

exercise the religious beliefs of its shareholders, or its management, to avoid compliance with a generally-applicable secular law is "fundamentally at odds with the entire concept of incorporation."[234] Unlike membership organizations, which are deemed to share the values of their members and have standing to sue on their members' behalf, for-profit corporations are not able to sue to assert the rights of their shareholders.[235] "Corporations are legally distinct entities whose shareholders may have idiosyncratic investment objectives and distinctive—and changeable—economic needs."[236] This separateness is firmly rooted in corporate, agency, and criminal law.[237]

The Supreme Court has recognized the separateness of a *sole* shareholder and a corporate entity for Fifth Amendment purposes.[238] In *Domino's Pizza, Inc. v. McDonald*, the sole shareholder of a corporation brought a claim under 42 U.S.C. § 1981 and alleged that the breach of contract between himself and Domino's was racially motivated.[239] The Court rejected the claim and stated that the "corporate form and the rules of agency protected [the sole shareholder's] personal assets, even though he negotiated, signed, performed, and sought to enforce contracts . . . . The corporate form and the rules of agency similarly deny him rights under those contracts."[240] Therefore, in *Domino's Pizza*, the Court recognized the corporation as a separate entity despite the fact that a single shareholder operated, managed, and owned it.[241]

Domino's Pizza suggests that religious values of incorporators, management, and shareholders do not pass through to the corporate entity, regardless of whether they were closely-held. Applying this reasoning to *Hobby Lobby*, the "burden" of the contraceptive coverage mandate on the corporate entity "does not constitute a cognizable "injury" to the individual shareholders."[242] This is because the for-profit corporation is an artificial entity, recognized by the state for business purposes and is separate from the shareholder.[243] Since the corporate entity is separate from its shareholders, the burden imposed by HHS's contraceptive coverage

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234 *Sebelius*, 2014 WL 333889, at *7-8.

235 *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977).

236 *Sebelius*, 2014 WL 333889, at *11.

237 *Id.* at 13.

238 Braswell v. United States, 487 U.S. 99 (1988) (holding that the sole shareholder had no Fifth Amendment right to resist a subpoena to the corporation for corporate documents incriminating him personally).

239 Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006).

240 *Id.* at 477.

241 *See id.*

242 *See Sebelius*, 2014 WL 333889, at *15-16.

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

mandate, as applied to for-profit corporate employers, does not affect shareholders' religious freedoms.

3. Free exercise of for-profit corporations interferes with the First Amendment rights of natural persons

Under the aggregate theory of corporate personhood, free speech and free exercise may be just the beginning of rights inappropriately extended to the corporation; the theory could extend all rights of natural persons to corporations. Unmanageable free exercise claims by corporations have already begun. In *Perez v. Paragon Contractors*, the Court permitted the Fundamentalist Church of Jesus Christ of Latter-day Saints to refuse to answer questions by federal investigators based on religious protections under *Hobby Lobby*.[244] Religious universities are arguing that under *Hobby Lobby* they must be excused from bargaining with labor unions.[245]

Allowing corporations free exercise protections sets a precedent that would permit a host of other problems such as intra-familial and intergenerational disputes of the religious views of closely-held for-profit corporations. This may also allow incorporated businesses to withhold services on the basis of race, gender, or religion by reason of the religious convictions.[246] Furthermore, the scope of the contraceptive coverage mandate is only a small subset of the medical insurance coverage to which a free exercise objection could be raised.[247] Other medical coverage disputes may arise over psychiatric care, treatment of illnesses related to the use of alcohol or tobacco, blood transfusions, delivery of babies born out of wedlock, and vaccination against the HPV virus.[248]

The decision in *Hobby Lobby* will undoubtedly affect numerous employees and force them to abide by the religious views of their employer. The decision has already deterred thousands of female employees and their dependents from getting essential coverage through their employer's group health plan, coverage that Congress intended they receive.[249] Just days after the decision, Wheaton College relied on *Hobby Lobby* to seek an

[244] Jeffrey Toobin, *On Hobby Lobby, Ginsburg was Right*, The New Yorker, Sept. 30, 2014, https://www.newyorker.com/news/daily-comment/hobby-lobbys-troubling-aftermath.

[245] *Id.*

[246] Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 174-77 (2012).

[247] *See* Thomas E. Rutledge, *A Corporation Has No Soul - the Business Entity Law Response to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV., at n. 74 (2014).

[248] *See id.*

[249] *See supra* Section II.C.3.

exemption from the contraceptive coverage mandate and claimed that even filling out the form for the exemption was a substantial burden under RFRA.[250]

In 2017, the Trump Administration signed an executive order and HHS passed interim final rules to expand the availability of corporate religious exemptions under *Hobby Lobby*.[251] Under the new rules, in addition to closely-held corporations, "virtually any employer" may now claim religious or moral objections to providing contraceptive coverage.[252] The University of Notre Dame attempted to take advantage of the new rules and notified thousands of its employees and students that starting next year birth control will no longer be covered under the University's insurance plans.[253] California Attorney General Xavier Becerra and the ACLU filed complaints in the U.S. District Court for the Northern District of California claiming the new rules would harm the state, by leaving "millions of women" without access to birth control.[254]

Hobby Lobby's aggregate theory sets a precedent of corporate personhood and corporate free exercise protections that will detrimentally affect the free exercise protections of natural persons. This precedent is contrary to the Court's long-held view that accommodations of religious beliefs must not significantly impinge on the interests of third parties.[255] As Justice Ginsburg stated, "with respect to free exercise claims no less than free speech claims, '[y]our right to swing your arms ends just where the other man's nose begins.'"[256]

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[250] Toobin, *supra* note 244.

[251] Amy Goldstein, et al., *Trump Administration Narrows Affordable Care Act's Contraception Mandate*, THE WASHINGTON POST, Oct. 6, 2017, https://www.washingtonpost.com/national/health-science/trump-administration-could-narrow-affordable-care-acts-contraception-mandate/2017/10/05/16139400-a9f0-11e7-92d1-58c702d2d975_story.html?utm_term=.2ab8f35b8c47.

[252] Brianna Ehley, *Trump rolls back Obamacare birth control mandate*, POLITICO, Nov. 6, 2017 11:21 AM, https://www.politico.com/story/2017/10/06/trump-rolls-back-obamacares-contraception-rule-243537.

[253] Christina Cauterucci, *Notre Dame Ends Birth Control Coverage for Students and Employees*, Oct. 31, 2017 7:21 PM, http://www.slate.com/blogs/xx_factor/2017/10/31/notre_dame_ends_birth_control_coverage_for_students_and _employees.html. After significant public outcry and student protests, the University of Notre Dame reversed its decision. Tami Luhby, *Notre Dame Reverses Decision to End Birth Control Coverage*, CNN, Nov. 8, 2017, 6:36 PM, http://money.cnn.com/2017/11/08/news/economy/notre-dame-birth-control/index.html.

[254] Angela Hart, *From birth control to the border wall: seventeen ways California sued the Trump administration in 2017*, THE SACRAMENTO BEE, Dec. 19, 2017 http://www.sacbee.com/news/politics-government/capitol-alert/article188901094.html.

[255] *See supra* Section II.C.3.

[256] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J.,

B. *Even if Citizens United Correctly Characterized the Corporation for Free Speech Purposes, Hobby Lobby Improperly Extends this Precedent and Free Exercise to Corporate Persons*

As noted, *Hobby Lobby* built upon *Citizens United*, which characterized the corporation as a person, or the equivalent of a person, for the purposes of free speech.[257] However, even if one accepts the aggregate theory for free speech purposes, a corporation still cannot be a person in the context of free exercise. The *Hobby Lobby* Court incorrectly imbued the corporation with free exercise rights by (1) extending RFRA protections to corporations in violation of congressional intent; (2) relying on the Dictionary Act's definition of 'person;' (3) ignoring the nature, history, and purpose of the Free Exercise Clause as a right reserved to the individual; and (4) conflating for-profit organizations with other entities, such as religious organizations.

First, the majority's interpretation of RFRA dramatically extends the protections for religious liberty that were available under decisions such as *Sherbert* and *Yoder*.[258] Recall that RFRA intended to reinstitute the test and protections of these pre-*Smith* holdings.[259] According to the congressional records, which at no point addressed for-profit corporations, RFRA reinstates the law as it was prior to *Smith*, without "creat[ing] . . . new rights for any religious practice or for any potential litigant."[260] There is no support in the pre-*Smith* case law that free exercise rights pertain to for-profit corporations.[261] In fact, in 2003 the D.C. Circuit in *Holy Land Found v. Ashcroft* rejected the application of free exercise rights to corporations as a "dubious proposition."[262] Therefore, the Court's expansion of RFRA's protections to create a new right for corporate free exercise is inconsistent with the congressional intent for the Statute.

Second, courts have interpreted RFRA to exclude corporations from the definition of "person." As mentioned earlier, the Third and District of

dissenting) (citing Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

[257] *See supra* Section I.

[258] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b)(1); *see also* § 2000bb(a)(5) ("T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests").

[259] *See supra* Section I.A.

[260] 139 CONG. REC. 26178 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy).

[261] *See* Gilard v. United States Dept. of Health and Human Servs., 733 F.3d 1208, 1212 (C.A.D.C. 2013); *Hobby Lobby*, 134 S. Ct. at 2793-94 (J. Ginsburg, dissenting); *see generally* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[262] Holy Land Found v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003).

Columbia Circuits declined to use the Dictionary Act to define "person."[263] According to the United State Court of Appeals for the District of Columbia in *Gilard*, the term "person" must be construed together with "exercise of religion," but neither RFRA nor RLUIPA offer clarifications as to what such exercise means.[264] As Justice Ginsburg noted, the context of RFRA indicates that the scope of the Statute extends to *persons who exercise religion*, as opposed to simply *persons*.[265] Therefore, the Court should have focused on the question of whether a corporation can exercise religion rather than whether a corporation is a person.

The *Gilard* Court reasoned that even though corporations have been recognized as free speakers under *Bellotti* and *Citizens United*, historically "the Court has only indicated that people and churches worship" under the free exercise clause.[266] The *Gilard* holding, overturned by *Hobby Lobby* only a few months later, found that the Free Exercise Clause did not extend to for-profit corporations.[267]

Third, the nature, history, and purpose of the Free Exercise Clause indicate that free exercise is a purely personal right and only extends to individuals and religious organizations.[268] The Supreme Court referred to free exercise as a right of "the mind and spirit of man"[269] and a right requiring "individual participation."[270] In 1789, one of the founding fathers of the United States, Daniel Carroll, described free exercise as a right of the conscience.[271] Even the *Bellotti* Court, which pioneered the aggregate theory, stated in dicta that free exercise is "unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[272] Justice Ginsburg's dissent in *Hobby Lobby* lamented, "until today, religious

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[263] Barnet, *supra* note 87, at 13.

[264] *Gilard*, 733 F.3d at 1212.

[265] *See supra* Section II.C.3.

[266] *Gilard*, 733 F.3d at 1214.

[267] *Id.* ("When it comes to corporate entities, only religious organizations are accorded the protections of the Clause").

[268] Zelman v. Simmons–Harris, 536 U.S. 639, 679-80 n. 4 (2002) (Thomas, J., concurring) ("In particular, these rights herein in the Free Exercise Clause, which unlike the Establishment Clause protects individual liberties of religious worship."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) ("[The purpose of the Free Exercise Clause] is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority." (emphasis added)); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1490 (1990).

[269] Jones v. City of Opelika, 316 U.S. 584, 594 (1942).

[270] Harris v. McRae, 448 U.S. 297, 321 (1980).

[271] 1 ANNALS OF CONG. 766 (remarks of Daniel Carroll, Aug. 15, 1789).

[272] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, at 778 n. 14.

exemptions had never been extended to any entity in 'the commercial, profit-making world.'"[273] Therefore, a corporation could not be a "person" for the purposes of free exercise under RFRA because "the exercise of religion is characteristic of natural persons, not artificial legal entities."[274]

Finally, for-profit corporations are distinguishable from other entities that exercise religion, such as churches and religious non-profit organizations.[275] The latter exist to serve a community of believers, whereas the former aim to make profit rather than perpetuate religious values.[276] The majority in *Hobby Lobby* purported to limit its holding to closely-held corporations, but the majority's logic and use of the aggregate theory to characterize the corporation extends to "corporations of any size, public or private."[277] Despite the majority's view that religion intersects with all areas of human activity, religion is not the primary purpose of a for-profit corporation and states should not have to recognize a "corporation's religion" as grounds for noncompliance with a generally applicable secular statute protecting employee healthcare.

Ultimately, the dissent's characterization of the corporation as an artificial entity not intended to be included in the context of "a person's *exercise of religion*," is much more in line with the congressional intent regarding RFRA and the realities of corporate structures and law.

V. CONCLUSION

Hobby Lobby arose when the ACA mandated employee insurance to include contraceptive coverage and for-profit corporations objected to providing certain forms of contraception based on religious claims under RFRA.[278] The majority extended *Citizens United* and held that for-profit corporations, as aggregate individuals, had free exercise rights to refuse providing such coverage.[279]

First, the Court should not have used the aggregate theory of corporate personhood, which is inappropriate for free exercise claims, and inaccurately characterizes the corporation.[280] The theory is contrary to traditional notions of corporate separateness and conflicts with the realities

[273] *Id.* (J. Ginsburg, dissenting) (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987)).

[274] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) (J. Ginsburg, dissenting).

[275] *Id*.

[276] *Id.* at 2796-97 (J. Ginsburg, dissenting).

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

[278] *See supra* Section I.A.

[279] *See supra* Section I.

[280] *See supra* Section IV.A.

of the corporate form.[281] Furthermore, corporate free exercise as an aggregate person interferes with the free exercise of natural persons and paves the way for unmanageable corporate First Amendment claims.[282] Therefore, both *Citizens United* and *Hobby Lobby* wrongly resurrected the archaic aggregate theory of corporate personhood.

Second, even if corporations are persons, for free speech purposes, the Free Exercise Clause does not protect corporations.[283] The *Hobby Lobby* Court erred by extending RFRA beyond what Congress intended, relying on the Dictionary Act's definition of 'person,' ignoring the historically, purely personal nature and purpose of the Free Exercise Clause, and conflating for-profit organizations with other religious entities.[284] Therefore, *Hobby Lobby* incorrectly expanded *Citizens United* to reach the absurd conclusion that corporations are persons who exercise religion; a premise we could only begin to believe when corporations go to church.

[281] *See supra* Section IV.A.

[282] *See supra* Section IV.A.

[283] *See supra* Section IV.B.

[284] *See supra* Section IV.B.