NOTES

HOW THE MEANING OF INCORPORATION OVER TIME LENDS SUPPORT FOR CORPORATE FREE EXERCISE RIGHTS*

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* After completion of the editing process, but prior to publication of this Note, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 2921709 (U.S. June 30, 2014). In this decision, the Court reviewed the Tenth Circuit decision in *Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), and the Third Circuit decision in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, 724 F.3d 377 (3d Cir. 2013), and held that closely held for-profit corporations may bring claims under the Religious Freedom Restoration Act. This landmark decision is the first instance in which the Court has recognized claims of religious belief held by for-profit corporations. This Note, written in anticipation of the Supreme Court's ruling, discusses the lower court holdings at length and argues that the history of corporations in the United States demonstrates that all corporations—not merely closely held corporations, but also public corporations—merit protection for their religious beliefs. Further, this Note does not limit the discussion to for-profit corporations' claims under the Religious Freedom Restoration Act, but considers the broader issue of for-profit corporations' claims under the Free Exercise Clause of the First Amendment.

I. INTRODUCTION

As early as 1845, perceived infringement of the Free Exercise Clause of the First Amendment[1] has faced legal resistance.[2] Recently, this opposition has taken on new meaning in light of certain regulations imposed by the Patient Protection and Affordable Care Act (ACA).[3] The heart of the constitutional claim remains the same: a law is alleged to impede the right to act in accordance with religious principles. The identity of the plaintiff invoking the right, by contrast, appears in substantially new form—the corporate form, to be exact.[4] This class of corporate plaintiffs seeking free exercise protection has emerged in response to a provision of the ACA that requires employment-based group health plans to provide health insurance coverage for "additional preventive care and screenings . . . provided for in comprehensive guidelines supported by the Health Resources and Services Administration."[5] Specifically, corporations challenging the requirement object to the compelled coverage of four contraceptive methods provided for in the Health Resources and Services Administration guidelines, which differ from typical oral contraceptive pills in that they prevent the implantation of a

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

[2] *See generally* Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589 (1845) (dismissing for lack of jurisdiction the plaintiff's claim that an ordinance of the corporate authorities of New Orleans impaired religious liberty). At that time, the Supreme Court had not yet incorporated the Free Exercise Clause against the states through the Fourteenth Amendment. Consequently, the Court lacked jurisdiction to hear such a claim based on state incursion into religious liberty. In *Cantwell v. Connecticut*, the Court incorporated the Free Exercise Clause into the Fourteenth Amendment, rendering it effective against the States. 310 U.S. 296, 303 (1940).

[3] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[4] The ACA has triggered, for the first time, the invocation of the Free Exercise Clause by for-profit corporations whose articles of incorporation or bylaws do not state an exclusively religious mission. However, non-profit, purely religious entities organized as corporations have previously invoked the Free Exercise Clause in challenging various laws. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (holding for a church incorporated under the laws of New Mexico on its free exercise claim). Nor is this the first time that corporations in general have sought First Amendment rights. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that the First Amendment prohibits government suppression of political speech on the basis of the speaker's corporate identity).

[5] 42 U.S.C. § 300gg-13(a)(4) (2012). At least one federal district court has held this provision unconstitutional. Roman Catholic Archdiocese of New York v. Sebelius, No. 12 Civ. 2542(BMC), 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013).

fertilized egg rather than the fertilization of the egg itself.[6] Because these corporations adhere to religious teachings that deem these four methods sinful, they contend that forcing them to provide these medical products and services violates their free exercise rights under the First Amendment.[7] This challenge to the ACA provision begs the question: Do corporations have free exercise rights to begin with?

Thus far, the class of corporate plaintiffs challenging the ACA provision consists of privately held, for-profit companies that range from employers of several hundred employees to employers of several thousand employees. None of the corporate plaintiffs express *exclusively* religious missions in their articles or bylaws.[8] Courts have not directly confronted whether the protections of the Free Exercise Clause extend to publicly held corporations under the First Amendment, though at least one United States court of appeals judge has addressed the question in a concurring opinion.[9] This Note examines the broader question of whether the Supreme Court should extend free exercise rights to corporations of all types.[10]

The Free Exercise Clause contemplates and protects the freedom to believe and the freedom to act in accordance with the

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[6] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123–25 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) ("[Plaintiff corporations] object to providing coverage for any FDA-approved contraceptives that would prevent implantation of a fertilized egg.").

[7] *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381–82 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (observing the plaintiff corporation's contention that it is "immoral and sinful" for the corporation "to intentionally participate in, pay for, facilitate, or otherwise support drugs" that terminate a fertilized embryo).

[8] *See, e.g.*, *Hobby Lobby Stores*, 723 F.3d at 1122 (noting that one of the two corporate plaintiffs is a closely held family business with over 13,000 full-time employees, that the other is an affiliated family business with just under 400 employees, and that both businesses were expressly organized with religious principles in mind).

[9] *See id.* at 1147–52 (Hartz, J., concurring) (concluding that *all* corporations come within the protection of the Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA)).

[10] Throughout the remainder of this Note, and unless otherwise specified, I refer to "corporation(s)" to denote for-profit companies that are secular in the sense that they do not operate solely for religious purposes, regardless of whether they are privately held or publicly traded.

tenets of one's religious faith.[11] While the freedom to believe is an absolute right, the freedom to act is necessarily "subject to regulation for the protection of society."[12] For example, the highest court of one state found that prohibiting the religious practice of handling snakes in a crowded church sanctuary with young children roaming about did not violate the First Amendment because the prohibition was necessary for the protection of society.[13] By contrast, the highest court of another state found that a county ordinance forbidding driving tractors with steel wheels on highways violated the free exercise rights of Mennonite Church members, who are forbidden from driving tractors unless their wheels are equipped with steel cleats.[14] However, before inquiring into the impact of the ACA provision on religious freedom, the antecedent question of whether corporations are capable of exercising religion such that they are entitled to challenge the provision under the Free Exercise Clause in the first place must be considered.

This threshold issue has produced discord throughout the country and created a circuit split among the United States courts of appeals.[15] As of March 2014, four petitions for certiorari presenting the issue have been filed in the Supreme Court.[16] In one petition, the government seeks review of the Tenth Circuit ruling granting corporate plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc. preliminary injunctive relief from compliance with the ACA provision at issue.[17] By contrast, in the remaining petitions,

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[11] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[12] *Cantwell*, 310 U.S. at 303–04.

[13] *See* Tennessee *ex rel.* Swann v. Pack, 527 S.W.2d 99, 114 (Tenn. 1975).

[14] *See* Mitchell Cnty. v. Zimmerman, 810 N.W.2d 1, 3 (Iowa 2012).

[15] Elise Viebeck, *Supreme Court Asked to Rule on ObamaCare Birth Control Mandate*, THE HILL (Sept. 19, 2013, 10:10 PM), http://www.thehill.com/policy/healthcare /323531-supreme-court-likely-to-rule-on-birth-control-mandate.

[16] Petition for Writ of Certiorari, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354); Petition for Writ of Certiorari, Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) (No. 13-356); Petition for Writ of Certiorari, Autocam Corp. v. Sebelius (No. 13-482); Petition for Writ of Certiorari, Gilardi v. Dep't of Health & Human Servs. (No. 13-567).

[17] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1141–43 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (holding that the corporations had rights under the Free Exercise Clause and that they showed a substantial likelihood of success on the merits).

Conestoga Wood Specialties Corporation, Autocam Corporation, and the corporate plaintiffs in *Gilardi v. U.S. Department of Health and Human Services* seek review of the Third, Sixth, and D.C. Circuits' rulings denying preliminary injunctive relief, respectively.[18] Notably, while the D.C. Circuit dismissed the corporations' claims, it held that with respect to the individual shareholders' claims the ACA provision was unconstitutional for its undue hindrance on religious freedom.[19] In the wake of such discord among the circuits, the Supreme Court granted certiorari on this issue in an order dated November 26, 2013 and heard oral argument on March 25, 2014.[20]

This Note explores whether the Supreme Court should confirm that corporations enjoy free exercise rights by first examining how the historical evolution of the meaning of incorporation and the development of other corporate constitutional rights inform the current understanding of corporations and their role in society. Next, this Note addresses whether this role is consistent with entitlement to free exercise protection under the First Amendment. Finally, this Note considers the practical outcome of extending free exercise rights to all corporations. In conducting the foregoing analysis, this Note sets forth and employs a method of constitutional interpretation labeled "functional constructionism," which draws upon the theories of David A. Strauss and Richard A. Posner and stands in contrast to a strict, originalist interpretive method.[21] In using this approach, this Note ultimately concludes that the historical progression of the corporation both as a business entity and as an entity under the Constitution has shaped the

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[18] *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1215 (D.C. Cir. 2013) (holding that the secular, closely held corporations were not capable of religious exercise under the RFRA); Autocam Corp. v. Sebelius, 730 F.3d 618, 625–26 (6th Cir. 2013) (affirming the district court's judgment that Autocam was not capable of religious exercise and therefore could not bring a free exercise challenge); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (affirming the district court's finding that Conestoga could not engage in religious exercise under the Free Exercise Clause and thus could not bring a claim).

[19] *See Gilardi*, 733 F.3d at 1224 (D.C. Cir. 2013) (holding that the individual owners of the closely held corporations demonstrated a likelihood of success on the merits of their claim that the ACA requirement violated their constitutional rights).

[20] Transcript of Oral Argument, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (No. 13-354).

[21] See *infra* Parts IV and V.A for a thorough description of the approach.

meaning of incorporation in a way that steers the law toward recognizing corporate free exercise rights.

Part II of this Note discusses the issue-triggering ACA requirement, the current circuit split, and the nature of the constitutional challenge to the requirement. Next, Part III outlines the meaning of incorporation from the end of the eighteenth century to the present day. In so doing, Part III identifies key stages of corporate development in America since the adoption of the First Amendment that in turn have influenced theories on the nature of corporations—the era of special chartering, the free incorporation movement, the rise in the prevalence of subsidiary and affiliated corporations,[22] and the contemporary era typified by corporate social responsibility—and also describes the line of Supreme Court cases recognizing corporate constitutional rights. Next, Part IV discusses the various means of interpreting the Free Exercise Clause in analyzing this issue and introduces the method this Note proposes and terms "functional constructionism." Part V then proceeds to analyze the constitutional issue at the heart of this Note through the lens of functional constructionism. In so doing, Part V considers first how the progression of corporations and the extension of corporate constitutional rights paint a picture of the modern corporation that is consistent with entitlement to free exercise protection, and second how the practical effect of extending free exercise rights to corporations supports such an extension.

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[22] While the rise in the prevalence of subsidiary and affiliated corporations does not directly apply to closely held, family corporations, it nonetheless represents one of the most recent and important corporate developments in the twentieth and twenty-first centuries. STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS 82 (3d ed. 2010). This development is thus a significant aspect of the prevailing understanding of modern corporations and is central to the broader question of whether public corporations, in addition to closely held corporations, should come within the protection of the Free Exercise Clause.

II. AN OVERVIEW OF THE CONSTITUTIONAL QUERY

A. THE CATALYST: THE CONTRACEPTIVE MANDATE OF THE AFFORDABLE CARE ACT

1. The Contraceptive Mandate. The ACA was passed in 2010 and was intended to increase the number of Americans covered by health insurance and decrease the cost of healthcare.[23] A provision of the ACA that requires employment-based group health plans to cover all FDA-approved contraceptive methods for women (the "contraceptive mandate") has functioned as the impetus behind the discussion of free exercise rights for corporations.[24]

The contraceptive mandate requires coverage, without cost sharing by plan participants or beneficiaries, of "additional preventive care and screenings" for women "as provided for in comprehensive guidelines by the Health Resources and Services Administration" (HRSA), an agency within the Department of Health and Human Services (HHS).[25] When the ACA was enacted, the HRSA had not yet issued guidelines regarding additional preventive care and screenings for women.[26] Consequently, the HHS asked the Institute of Medicine (IOM) to conduct a study on women's preventive healthcare and make suggestions.[27] The IOM subsequently issued a report recommending that the guidelines require coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive

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[23] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) ("The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care.").

[24] *See* Katherine Lepard, Comment, *Standing Their Ground: Corporations' Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH L. REV. 1041, 1042 (2013) ("Prior to the [ACA's] implementation, courts had not considered whether corporations are entitled to religious protection.").

[25] 42 U.S.C. § 300gg-13 (2012).

[26] *See* Chad Brooker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 170 (discussing the fact that HRSA guidelines came after the HHS directed the Institute of Medicine to conduct a study on women's preventative healthcare and to provide recommendations).

[27] *Id.*

capacity," as prescribed by a provider.[28] The HHS adopted the IOM recommendations,[29] thereby requiring employment-based group health plans that are subject to the requirement to include coverage for the twenty FDA-approved contraceptive methods.[30]

Failure to comply with these regulations results in a $100 per day tax per employee, imposed by the Internal Revenue Service.[31] Moreover, the Department of Labor and plan participants are authorized to sue employers that fail to abide by the regulations.[32] In lieu of non-compliance, objecting employers may cease providing health insurance for employees altogether. However, employers that opt to take this route face penalties at least as severe as the penalties for non-compliance.[33]

At the heart of the dispute are four of the twenty FDA-approved contraceptive methods. These methods can function by preventing the implantation of a fertilized egg, in contrast to standard oral contraceptives, which prevent fertilization of the egg itself.[34] Of the four controversial methods, two are intrauterine devices (IUDs) and two are emergency oral contraceptives known as Plan B and Ella.[35] The corporations challenging the contraceptive mandate adhere to religious faiths that deem the fertilization of an egg to constitute the beginning of human life, the sanctity of which

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[28] *Women's Preventive Services Guidelines*, HEALTH RES. AND SERVS. ADMIN., http://www.hrsa.gov/womensguidelines (last visited May 30, 2014).

[29] *See* Lepard, *supra* note 24, at 1049 (explaining how the HHS implemented the guidelines pursuant to the IOM recommendations).

[30] *See Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013) (listing twenty approved methods of birth control).

[31] 26 U.S.C. § 4980D(b)(1) (2012).

[32] 29 U.S.C. § 1132(a) (2012).

[33] *See* 26 U.S.C. § 4980H(a) (stating that if any applicable large employer fails to offer its full-time employees the opportunity to enroll in minimum essential coverage then an assessable payment "equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees" during each month health insurance is not offered is imposed on the employer).

[34] *See* Conestoga Wood Specialties, Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (explaining that the corporate plaintiffs object to two mandated drugs that "may cause the demise of an already conceived but not yet attached human embryo" (internal quotation marks omitted)); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (describing how four of the methods are abortion-inducing and therefore differ from the remaining sixteen).

[35] *Hobby Lobby Stores*, 723 F.3d at 1123.

must be steadfastly respected.[36] Consequently, they view these four methods as abortive rather than preventive,[37] and they believe that payment for or facilitation of the use of abortion-inducing drugs or devices is sinful, immoral, and in violation of their religious principles.[38] Accordingly, they claim that the government violates their free exercise rights by forcing them to participate in a scheme that promotes what they consider abortion.[39]

2. Exceptions to the Mandate. Not all group health plans are subject to the contraceptive mandate. Plans that qualify for either grandfathered status or religious exemption are relieved from compliance with the contraceptive mandate,[40] and businesses with fewer than fifty employees are not required to participate in employer-sponsored health plans in the first place.[41] However, if a business with fewer than fifty employees *does* offer a health plan, it must wholly comply with the ACA's preventive health coverage requirements.[42]

A group health plan is entitled to grandfathered status if it was in existence on March 23, 2010, the effective date of the ACA, and has remained largely the same since.[43] Such plans retain

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[36] *See, e.g.*, *id.* at 1122 (noting that an important aspect of the plaintiff corporations' religious commitment "is a belief that human life begins when sperm fertilizes an egg" and that "it is immoral for them to facilitate any act that causes the death of a human embryo").

[37] *See, e.g.*, *id.* at 1125 ("Because the [plaintiffs] believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation . . . .").

[38] *See* Reply Brief of Appellants at 12, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) (No. 13-1144) ("It is not . . . merely a question whether plaintiffs object to third parties' decisions with respect to using or purchasing the objected to services. Instead, plaintiff' objection relates to whether [plaintiffs] will be forced to provide coverage for the objected to services in the first place." (internal quotation marks omitted) (quoting *Geneva College*, No. 12-00207, at 16 (W.D. Pa. Apr. 19, 2013))).

[39] *See, e.g.*, Brief of Appellants at 20, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294) ("The Mandate substantially burdens the [plaintiffs'] religious exercise by requiring them to cover abortion-inducing drugs on pain of multi-million dollar fines.").

[40] Lepard, *supra* note 24, at 1050.

[41] 26 U.S.C. § 4980H(c)(2)(A) (2012).

[42] 42 U.S.C. § 300gg-13 (2012).

[43] 42 U.S.C. § 18011(a)(1) (2012); *What If I Have a Grandfathered Health Insurance Plan?*, HEALTHCARE.GOV, http://www.healthcare.gov/what-if-i-have-a-grandfathered-health-plan/ (last visited May 30, 2014).

grandfathered status even if one or more of the individuals enrolled on March 23, 2010 ceases to be covered, provided that the plan has continuously covered someone since March 23, 2010.[44] However, if an employer enters into a new policy, certificate, or contract of insurance after March 23, 2010, then that policy, certificate, or contract of insurance is not a grandfathered health plan with respect to the individuals in the group health plan.[45]

More significantly for purposes of this Note, plans that meet the definition of "religious employer" to qualify for the religious employer exemption are relieved from the demands of the contraceptive mandate. This exemption is the result of public commentary leading up to the mandate that it would be a violation of religious freedom to require religious employers providing health insurance to employees to cover contraceptive services that their faiths deem sinful.[46]

The ACA thus provides that the HHS "may establish exemptions" for "group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services."[47] Initially, the ACA defined a "religious employer" to be an organization maintaining the inculcation of religious values as its purpose; primarily employing persons who share the religious tenets of the organization; primarily serving persons who share the religious tenets of the organization; *and* existing as a nonprofit organization described in a provision of the Internal Revenue Code referring to churches, their integrated auxiliaries, conventions, or associations of churches, and to the exclusively religious activities of any religious order.[48]

This definition incited a reaction among commentators who asserted that it was too narrow.[49] Such commentators expressed misgivings that group health plans of a number of religious employers whose purposes extended beyond the inculcation of

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[44] 42 U.S.C. § 18011(a)(2) (2012); 45 C.F.R. § 147.140(a)(1)(i) (2014).

[45] 45 C.F.R. § 147.140(a)(1)(ii).

[46] Brooker, *supra* note 26, at 188.

[47] 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013) (amended 2014).

[48] *Id.* § 147.130(a)(1)(iv)(B).

[49] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8459 (proposed Feb. 6, 2013).

religious values or who served or hired people of different faiths in compliance with employment discrimination laws would not qualify for the exemption.[50] In response, the Department of the Treasury, the Department of Labor, and the HHS proposed and adopted a simpler definition of religious employer.[51] Under the new definition, the first three requirements of the previous definition are eliminated and any employer that is organized and operates as a nonprofit entity and is referred to in § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code—describing churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order—is considered a religious employer for purposes of the religious employer exemption.[52] The amendment was intended to remove "any perceived potential disincentive for religious employers to provide educational, charitable, and social services to their communities."[53]

Despite these changes, for-profit businesses that seek to serve their religious faiths in their operations, but that do not recite exclusively religious purposes in their corporate documents, do not qualify for the religious employer exemption, notwithstanding their strong religious objections to providing forms of contraception that prevent the implantation of a fertilized egg.[54] The failure to alleviate these objecting corporations from compliance with the mandate has ignited a wave of attacks on its constitutional validity.[55]

B. THE CHALLENGE: THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

Corporations across the country have challenged the contraceptive mandate by bringing claims under the Free

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[50] *Id.*

[51] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147).

[52] *Id.*

[53] *Id.*

[54] *See* Kathryn S. Benedict, Note, *When Might Does Not Create Religious Rights: For-Profit Corporations' Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 79 (2013) ("The application of the contraceptive coverage mandate to for-profit corporations remains unchanged.").

[55] *See id.* (remarking that thirty-eight for-profit corporations are challenging the mandate).

Exercise, Establishment, Free Speech, and Free Association Clauses of the First Amendment,[56] as well as the Religious Freedom Restoration Act of 1993 (RFRA)[57] and the Administrative Procedures Act (APA).[58] This Note's focus is confined to the propriety of the free exercise and RFRA claims—more specifically, to the question of whether corporations are capable of exercising religion such that they are entitled to assert challenges under the Free Exercise Clause and RFRA in the first place.[59]

Significantly, the harm alleged by corporations objecting on religious grounds lies in the forced provision of certain contraceptives, not merely in the subsequent decisions of employees who do in fact opt to purchase or use such drugs or devices.[60] This distinction is important because if these corporations' religious tenets proscribed only the *actual purchase* or *actual use* of abortion-inducing drugs or devices, they would commit no act in violation of their religious teachings in merely providing health insurance coverage for such drugs and devices. However, these corporations observe religious principles that deem the *facilitation* of the use of abortifacients—in addition to the actual use of abortifacients—a sin.[61] Thus, by providing coverage for contraceptive methods that prevent the implantation of a

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

[57] Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

[58] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012). *See also, e.g.*, Monaghan v. Sebelius, 931 F. Supp. 2d 794, 799 (E.D. Mich. 2013) ("Plaintiffs brought suit contending that the ACA mandate violates the Religious Freedom Restoration Act, the Administrative Procedures Act, and the Free Exercise, Free Association, Establishment, and Free Speech clauses of the First Amendment." (citations omitted)). Some corporations have challenged the requirement as violating the Fifth Amendment Due Process Clause as well. *See* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 109 (D.D.C. 2012) (citing the Due Process Clause of the Fifth Amendment as one ground on which plaintiffs challenge the contraceptive coverage requirement).

[59] *See, e.g.*, Conestoga Wood Specialties, Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) ("Before we can even reach the merits of the First Amendment and RFRA claims, we must consider a threshold issue: whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA.").

[60] *See* Korte v. Sebelius, 528 F. App'x 583, 587 (7th Cir. 2012) ("The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* . . . in the later purchase or use of contraception or related services.").

[61] *Id.* at 586. "Abortifacients" is a term for a substance that induces abortion.

fertilized egg compliance with the contraceptive mandate, these corporations transgress their religious principles.

Consequently, objecting corporations have sought relief by bringing claims under the Free Exercise Clause and RFRA. As will be discussed below, the propriety of these corporations' free exercise and RFRA claims are inextricably intertwined.

The Free Exercise Clause guarantees an absolute right to believe according to the tenets of one's religion, but only a qualified right to act in accordance with the tenets of one's religion—subject to regulation for the protection of society.[62] However, the Supreme Court has cautioned that "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[63] While a state may not deny the right to preach or disseminate religious views, it may by non-discriminatory legislation "regulate the times, the places, and the manner of soliciting upon its streets" and may "safeguard the peace, good order and comfort of the community."[64]

Free Exercise Clause jurisprudence dates to the Supreme Court decision in *Reynolds v. United States*.[65] In that case, the Supreme Court first recognized the distinction between the freedom to believe and the freedom to act, noting that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[66] *Reynolds* remained the authoritative understanding of the Free Exercise Clause for over eighty years.[67] In *Sherbert v. Verner*, Justice Brennan, writing for the majority, asked "whether some compelling state interest enforced in the [challenged statute] justifie[d] the substantial infringement of appellant's First Amendment right."[68] Nine years later, in *Wisconsin v. Yoder*, the Supreme Court declared, "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims

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[62] Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[63] *Id.* at 304.

[64] *Id.*

[65] 98 U.S. 145 (1878).

[66] *Id.* at 166.

[67] Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1200 (2008).

[68] 374 U.S. 398, 406 (1963).

to the free exercise of religion."[69] Together, *Sherbert* and *Yoder* have been understood as requiring courts to examine with strict scrutiny laws that threaten religious freedom.[70]

In *Employment Division v. Smith*, however, the Supreme Court recanted from the demanding standards set forth in *Sherbert* and *Yoder* and stated 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).' "[71] Three years later, Congress responded to *Smith* by enacting RFRA, the explicit purpose of which was to restore the "compelling interest test" as set forth in *Sherbert* and *Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.[72] Additionally, RFRA was enacted to provide "a claim or defense to persons whose religious exercise is substantially burdened by government."[73] Section 2000bb-1 of the Act states, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[74] In *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to the states, holding it outside the scope of Congress's enforcement power under § 5 of the Fourteenth Amendment.[75] However, after the Supreme Court struck down RFRA as applied to the states, Congress responded again by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[76] The RLUIPA relied on the Spending and Commerce Clauses to establish the same "substantial burden" test as the RFRA for only

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[69] 406 U.S. 205, 215 (1972).

[70] *See* Krotoszynski, *supra* note 67, at 1203 (noting that in these cases the Supreme Court embraced a broader conception of the Free Exercise Clause that applied the most demanding standard of review in American constitutional jurisprudence).

[71] Emp't Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982)), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

[72] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b)(1) (2012).

[73] *Id.* § 2000bb(b)(2).

[74] *Id.* § 2000bb-1(b).

[75] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[76] 42 U.S.C. § 2000cc (2012).

two areas of state regulation: land use and institutionalized persons.[77] While the RLUIPA replaces the RFRA as applied to the states, the RFRA nonetheless remains applicable to the federal government.[78] Thus, plaintiffs remain free to bring claims under the RFRA if they believe a federal law substantially burdens their religious exercise and that either the law is not justified by a compelling government interest or the law is not the least restrictive means of advancing a compelling government interest.[79]

Regardless of the merits of the compelling interest test, its application is only relevant to the present religious challenges to the contraceptive mandate by corporations insofar as these corporations are deemed to come within the protection of the Free Exercise Clause.[80] As the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius* noted, "There is no indication [that in enacting the RFRA] Congress meant to alter any other aspect of pre-*Smith* jurisprudence—including jurisprudence regarding who can bring Free Exercise claims."[81] In this sense, whether corporations may bring RFRA claims is dependent on whether the First Amendment grants protection to corporations under the Free Exercise Clause.

C. THE CIRCUIT SPLIT: RATIONALES FOR AND AGAINST CORPORATE FREE EXERCISE RIGHTS

This issue has sparked vigorous debate among federal district courts across the country.[82] As of July 2013, the circuit courts are in dispute over the matter as well.[83] The corporate plaintiffs in all

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[77] Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 94–95 (1st Cir. 2013).

[78] 5 EMP'T COORDINATOR § 4:7 Religious Freedom Restoration Act (database updated October 2013).

[79] *Id.*

[80] *See* Conestoga Wood Specialties, Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) ("Since Conestoga cannot exercise religion, it cannot assert a RFRA claim.").

[81] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

[82] *See, e.g.*, MK Chambers Co. v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013) (denying plaintiffs—a corporation and its two shareholders—motion for preliminary injunction in their action against the Secretary of the Department of Health and Human Services).

[83] *Compare Hobby Lobby Stores*, 723 F.3d at 1128–29 (finding that free exercise rights may extend to some for-profit corporations), *and* Grote v. Sebelius, 708 F.3d 850, 854–55 (7th Cir. 2013) (granting corporate plaintiffs' motion for injunction pending appeal), *with*

of these cases assert essentially three principal arguments for the proposition that corporations are entitled to bring free exercise and RFRA claims. First, drawing upon language from the body of Supreme Court cases addressing free speech protection for corporations, the plaintiffs assert that the proper focus should not be on their status as corporations but instead more broadly on whether the law abridges religious activity that the RFRA and the First Amendment protect.[84] Second, these plaintiffs rely on Supreme Court precedent vindicating the free exercise rights of incorporated churches and non-profit corporations to argue that the corporate form itself is not a reason to declare an entity incapable of exercising religion.[85] Further, in *Gilardi v. U.S. Department of Health and Human Services* the corporate plaintiffs asserted that "[c]orporations, whether for-profit or non-profit, can, and often do, engage in a plethora of quintessentially religious acts such as tithing, donating money to charities, and committing to act in accordance with the teachings of a religious faith."[86] Finally, these corporate plaintiffs all assert that as a matter of statutory interpretation, the RFRA, intended to enhance free exercise protection, "protects 'persons' without distinguishing between natural or artificial persons, or between non-profit and for-profit entities."[87]

Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1215, 1224 (D.C. Cir. 2013) (denying corporate plaintiff's motion for preliminary injunction but granting that of its individual owners), Autocam Corp. v. Sebelius, 730 F.3d 618, 628 (6th Cir. 2013) (denying Autocam's motion for preliminary injunction), *and* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (denying Conestoga's motion for preliminary injunction).

[84] Brief of Appellants at 36, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294); Brief of Appellants at 16, Grote Indus., LLC v. Sebelius, 708 F.3d 850 (7th Cir. 2013) (No. 13-1077); Brief of Appellants at 21, Conestoga Wood Specialties, Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) (No. 13-1144).

[85] Brief of Appellants at 37, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294); Brief of Appellants at 20, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) (No. 13-1144).

[86] Brief of Appellants at 46, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (No. 13-5069).

[87] Brief of Appellants at 37, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294); Brief of Appellants at 45, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (No. 13-5069); Brief of Appellants at 21, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) (No. 13-1144).

The Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius* agreed with the arguments set forth above, holding that Congress did not exclude for-profit corporations from the RFRA's protections and that free exercise rights may extend to some for-profit organizations.[88] As to the first finding, the court grounded its decision in the Dictionary Act, which instructs that the word "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, unless the context indicates otherwise.[89] As to the second finding, the court observed that Congress chose to use the word "exercise" in the First Amendment, "indicating that, as the Supreme Court has frequently held, the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct*."[90] Noting that religious conduct includes religious expression, which can be communicated by individuals and for-profit corporations alike, the court thus reasoned that the corporate plaintiffs in the case, Hobby Lobby and Mardel, were entitled to free exercise rights.[91]

The Seventh Circuit is in accord with these arguments as well. In both *Korte v. Sebelius*[92] and *Grote v. Sebelius*,[93] the Seventh Circuit reasoned that because the enterprises in each of the cases were managed in accordance with the owners' religious beliefs, the fact that they were otherwise secular, for-profit corporations did not preclude their RFRA claims.

By contrast, a panel of the D.C. Circuit observed in *Gilardi* that, unlike free speech rights for corporations, "[n]o such *corpus juris* exists to suggest a free-exercise right for secular corporations," and concluded that, "[w]hen it comes to corporate entities, only religious organizations are accorded the protections of the [Free Exercise] Clause."[94] However, the majority also held that if only a few individuals own the corporation, then such owners may challenge the contraceptive mandate to defend their

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[88] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

[89] *Id.*

[90] *Id.* at 1134.

[91] *Id.*

[92] 528 Fed. App'x 583, 586–87 (7th Cir. 2012).

[93] 708 F.3d 850, 854–55 (7th Cir. 2013).

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

personal religious objections.[95] The court then proceeded to consider the heart of the owners' RFRA claim, concluding that the Gilardis were likely to succeed on the merits because they were able to demonstrate the substantial nature of their burden and the government had not demonstrated a compelling interest in the enforcement of the law.[96]

The Sixth Circuit in *Autocam Corp. v Sebelius*, in similar fashion as the Tenth Circuit in *Hobby Lobby*, began its analysis with the Dictionary Act, which states that, "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations."[97] Contrary to the Tenth Circuit, however, the Sixth Circuit concluded that there were "strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA."[98] Namely, the court determined that Congress's express purpose in enacting the RFRA was to restore Free Exercise Clause claims of the type articulated in *Sherbert* and *Yoder*—claims which were fundamentally personal.[99]

The Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services* held that it would "not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion."[100] As a result, the court held that Conestoga—a for-profit, secular corporation—could neither assert a free exercise claim nor a RFRA claim.[101]

On September 19, 2013, both Conestoga Wood Specialties Corporation and the Government filed petitions for writs of certiorari, seeking review of the Third Circuit decision in *Conestoga Wood* and the Tenth Circuit decision in *Hobby Lobby*,

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[95] *Id.* at 1216 ("[W]e are satisfied that the Gilardis have been 'injured in a way that is separate and distinct from an injury to the corporation.' " (quoting Crosby v. Beam, 548 N.E.2d 217, 219 (Ohio 1989))).

[96] *Id.* at 1219–22, 1224.

[97] Autocam Corp. v. Sebelius, 730 F.3d 618, 626 (6th Cir. 2013) (internal quotation marks omitted) (quoting 1 U.S.C. § 1).

[98] *Id.*

[99] *Id.*

[100] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

[101] *Id.* at 388.

respectively.[102] On November 26, 2013, the Supreme Court granted the petitions for writs of certiorari in both cases.[103]

III. THE MODERN UNDERSTANDING AND ROLE OF CORPORATIONS IN SOCIETY

In determining whether corporations should possess free exercise rights, consideration of the development of corporations on a practical and theoretical level is enlightening. Contemplation of the extension of other constitutional rights to corporations is equally instructive and warranted.[104]

A. THE DEVELOPMENT OF CORPORATIONS: LATE EIGHTEENTH CENTURY TO THE PRESENT

The development of corporations in the United States may be characterized in stages, with each stage lending support for, or contributing to, a theory of corporate personality. The first major stage in the history of corporations may be thought of as the "special chartering" stage. After the American Revolution, the power to grant corporate charters was vested exclusively in state legislatures.[105] Each entity seeking incorporation had to show how its operation would benefit the community before the legislature would grant the entity a corporate charter.[106] In this sense, corporations existed mainly to the extent that they served a public function.[107] For example, the early American states used chartered corporations to help build the nation's infrastructure, including "universities . . ., banks, churches, canals, municipalities, and

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[102] Lyle Denniston, *U.S., Business Appeal on Birth-Control Mandate (UPDATED)*, SCOTUSBLOG (Sept. 19, 2013, 2:29 PM), http://www.scotusblog.com/2013/09/birth-control-mandate-issue-reaches-court/.

[103] Lyle Denniston, *Court to Rule on Birth-Control Mandate (UPDATED)*, SCOTUSBLOG (Nov. 26, 2013, 12:20 PM), http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/.

[104] *See* Lepard, *supra* note 24, at 1046 ("[A]n examination of the courts' extension of constitutional rights to corporations aids in understanding the ability of a corporation to exercise religion.").

[105] PRESSER, *supra* note 22, at 79.

[106] *Id.*

[107] *Id.* (noting that most of the early American corporations could be conceived of as "public utilities").

roads."[108] This view of the corporation as an entity created by and for the state during the era of special chartering came to be known as the concession theory.[109]

The next major stage in the development of corporations is characterized by the movement for free incorporation, which occurred during the second half of the nineteenth century and beginning of the twentieth century.[110] The movement has its roots in the fact that businessmen, dissatisfied with the limitations of the partnership form, nonetheless continued to organize as partnerships rather than as corporations because they desired to keep the state out of their private affairs.[111] In response, states gradually began to relax their grip over corporations in order to encourage and stimulate business within their boundaries.[112] By the 1930s, state legislatures allowed the drafters of corporate bylaws more leeway than ever before.[113] In the wake of the move away from special chartering, the group theory of corporations came to light. Under this theory, corporations are treated similar to partnerships.[114] Dr. Sanford A. Schane, Research Professor of Linguistics at the University of California at San Diego, explains that the group theory posits that corporations have the same rights as their component members.[115] In other words, under the group theory, corporations are not viewed as entities of the state, but rather as aggregates of the individual shareholders comprising them.

However, as Dr. Schane succinctly identifies, problems arise with conceiving corporations as akin to partnerships: first, the

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[108] JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 43 (2003).

[109] *See* Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 567 (1987) (noting that at the beginning of nineteenth-century America, the concession theory dominated thinking on corporate personality).

[110] *Id.* at 567–68.

[111] MICKLETHWAIT & WOOLDRIDGE, *supra* note 108, at 45.

[112] *Id.* at 45–46. For example, in 1830, the Massachusetts state legislature removed the requirement that a company be engaged in a public work in order to be allowed limited liability, and in 1837, Connecticut became the first state to permit incorporation without special legislative enactment. *Id.* at 46.

[113] PRESSER, *supra* note 22, at 81.

[114] Schane, *supra* note 109, at 568.

[115] *Id.* at 566 ("[A]lthough it may be convenient to speak of the rights of a corporation and therefore to think of it as a legal unit, corporate rights, in actuality, are nothing other than those of its component members.").

membership of corporations may fluctuate while the corporations themselves remain the same; second, corporations bring limited liability to their members; third, the locus of decision-making has largely shifted from shareholders to officers and directors due to the growth of publicly traded corporations on national stock exchanges.[116] In addition, the explosion of subsidiary and affiliated corporations in the twentieth century has likewise weakened the group theory.[117] Indeed, the rise of *institutional* investors renders the group theory, affording corporations rights equal to those of their *individual* members, far less tenable. As a result, the theory of corporations as entities in and of themselves, rather than as mere entities of the state or as collections of individuals, has come to predominate the legal understanding of corporations in the United States.[118] Under this theory, corporations are understood to maintain identities independent from their constituents and are believed to embody more than the sum of their parts.[119]

In the wake of corporate scandals that engulfed the nation at the beginning of the twenty-first century and the 2008 financial crisis, the modern era of corporate development places heightened focus on corporate governance and compliance.[120] Perhaps more significantly for purposes of this Note, the movement for corporate social responsibility (CSR) is a defining feature of the current

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[116] *Id.* at 568.

[117] *See* PRESSER, *supra* note 22, at 82 ("One of [the] most recent and most important developments in the operations of private corporations . . . is the increasing prevalence of subsidiary and affiliated corporations.").

[118] *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 182 (1983) ("[B]y 1900, the 'entity' theory had largely triumphed and corporation and partnership law had moved in radically different directions."). This theory has also been referred to as the "real enterprise" or "real entity" theory of corporations. Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 906 (2012).

[119] *See* Harper Ho, *supra* note 118, at 906–07 ("Extending the real entity view to the corporate group necessarily implies that the group itself has an identity independent from that of its constituent firms."); Lepard, *supra* note 24, at 1046 (characterizing the theory as conceptualizing the corporation as an entity with a separate identity greater than the sum of its constituencies).

[120] *See* David A. Skeel, Jr. et al., *Inside-Out Corporate Governance*, 37 J. CORP. L. 147, 149–50 (2011) (describing the 2001–2002 collapse of Enron, WorldCom, and other major U.S. corporations due to fraudulent accounting practices, and the 2008 financial crisis, and how these two events have "spurred a pervasive restructuring of corporate regulation").

corporate landscape.[121] At the heart of the idea of CSR is the belief that "organizations have moral, ethical, and philanthropic responsibilities in addition to their responsibilities to earn a fair return for investors and comply with the law."[122]

Despite this core understanding of CSR, the term "CSR" itself is quite elusive and has been subject to various interpretations.[123] Indeed, many consider CSR to be synonymous with the term "social entrepreneurship."[124] However, as law Professor Janet E. Kerr clarifies, CSR and social entrepreneurship are not interchangeable, but rather "can be thought of as two points on a spectrum."[125] A corporation adheres to CSR when it operates its business in keeping with socially responsible values.[126] In contrast, a corporation engages in social entrepreneurship when its business model itself is to address social concerns and solve problems in the community.[127] In other words, social entrepreneurship goes further than CSR to deploy corporate assets to improve a particular social problem.[128]

This distinction is important because many critics who oppose CSR do so because "they believe it to be something different than what those who support it believe it to be."[129] More specifically, they believe CSR and social entrepreneurship to be one and the same. Considering the use of corporate assets for social causes to be irresponsible, these critics claim to oppose CSR, while in actuality they oppose the concept of social entrepreneurship.[130] Ultimately, CSR exists when a company, in addition to full compliance with the law, seeks to make a positive impact on one or

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[121] *See* Tim Barnett, *Corporate Social Responsibility*, REFERENCE FOR BUSINESS, http://www.referenceforbusiness.com/management/Comp-De/Corporate-Social-Responsibility.html (last visited May 30, 2014) (defining CSR and presenting arguments for and against CSR).

[122] *Id.*

[123] Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 848 (2008) (noting that even though the term has been used more frequently in recent years, it is still largely ambiguous).

[124] *Id.* at 852–53 (noting that CSR and social entrepreneurship are being redefined).

[125] *Id.* at 856.

[126] *Id.* at 855.

[127] *Id.* at 855–56.

[128] *See id.* at 858 (noting that social entrepreneurship consists of businesses that exist for the "dual motive of improving a social problem as well as making a profit").

[129] *Id.* at 856.

[130] *See id.* at 853–54 (explaining that while critics claim that CSR is irresponsible, this view "presupposes that companies pass on CSR costs to consumers").

more social issues, in contrast to social entrepreneurship, where a company sets out to *solve* a social issue through the use of corporate resources.

CSR accords with—indeed substantiates—the theory of corporations as entities in and of themselves. The very premise of CSR is the notion that corporations may have their own moral and ethical compasses that direct and steer their operations. In this regard, corporations exist independently of the state and comprise more than the sum of their constituent parts, as demonstrated by the corporations' active and independent participation in social causes.

B. THE ELEVATED STATURE OF CORPORATIONS UNDER THE CONSTITUTION: *SANTA CLARA* TO *CITIZENS UNITED*

In 1886, as the shift from special chartering to free incorporation was becoming more widespread, the Supreme Court decided *Santa Clara County v. Southern Pacific Railroad Company*,[131] a case that has been heralded for granting corporations rights under the Fourteenth Amendment.[132] The case has since become the anchoring case from which other corporate constitutional rights have sprung.[133] As American legal historian and law professor Morton Horwitz illuminates, however, the *Santa Clara* Court cursorily addressed the matter without providing a rationale:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal

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[131] 118 U.S. 394 (1886).

[132] *See* Saby Ghoshray, *Examining* Citizens United*'s Expansive Reach: Looking Through the Lens of Marketplace of Ideas and Corporate Personhood*, 57 WAYNE L. REV. 373, 385 (2011) (noting that despite the otherwise mundane nature of the case, it remains important for its confirmation that corporations come within the protection of the Fourteenth Amendment).

[133] *Id.* at 387 ("[*Santa Clara*] became the foundational case from which all corporate rights flowed.").

> protection of the laws, applies to these corporations. We are all of opinion that it does.[134]

In spite of this hasty assertion, *Santa Clara* has become the bedrock of corporate constitutional rights. Twenty years later, in *Hale v. Henkel*, the Court held that while corporations do not come within the protection of the self-incrimination clause of the Fifth Amendment, they do come within the protection of the prohibition against unreasonable searches and seizures in the Fourth Amendment.[135] In 1970, the Supreme Court in *Ross v. Bernhard* implicitly affirmed that corporations enjoy a Seventh Amendment right to trial by jury.[136] There, the Supreme Court held that a shareholder in a derivative action brought against a corporation is entitled to a Seventh Amendment right to a jury trial to the extent that the corporation would have been had it brought suit in its own right.[137] Less than a decade later, the Supreme Court invoked the protection of the Double Jeopardy Clause of the Fifth Amendment with respect to corporate defendants in *United States v. Martin Linen Supply Co.*[138]

Most importantly for purposes of this Note, the Supreme Court has also considered a long line of cases addressing First Amendment free speech rights for corporations. These cases came to a head in *Citizens United v. Federal Election Commission*.[139] In *Citizens United*, the Court observed its long history of granting First Amendment free speech protection to corporations.[140] Notably, in *First National Bank of Boston v. Bellotti* the Court stated, "The Constitution often protects interests broader than those of the party seeking their vindication. . . . The proper question therefore is . . . whether [the challenged law] abridges expression that the First Amendment was meant to protect."[141]

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[134] *Santa Clara Cnty.*, 118 U.S. at 396; Horwitz, *supra* note 118, at 173–74 (noting that the Court in *Santa Clara* provided this statement "without reasons or precedent").

[135] Hale v. Henkel, 201 U.S. 43, 75–76 (1906).

[136] Ross v. Bernhard, 396 U.S. 531, 532–33 (1970).

[137] *Id.*

[138] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 567 (1977) (affirming the Fifth Circuit's holding that the Double Jeopardy Clause was a bar to further prosecution of the respondent corporations).

[139] 558 U.S. 310 (2010).

[140] *Id.* at 342.

[141] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

Ultimately, the *Bellotti* Court found no support for the proposition "that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[142] However, in *Austin v. Michigan Chamber of Commerce*, the Court upheld against a First Amendment challenge a Michigan statute that prohibited corporations from engaging in political speech by making independent expenditures on behalf of political candidates.[143] In *Citizens United*, the Court took the opportunity to reconsider and overrule *Austin*.[144] The *Citizens United* Court reasserted the principle of *Bellotti* and held that the government "may not suppress political speech on the basis of the speaker's corporate identity."[145] Consequently, the Supreme Court has repeatedly demonstrated its commitment to upholding First Amendment protections for corporations in the context of free speech cases. It is within this constitutional framework that the Supreme Court will soon consider whether the corporations challenging the contraceptive mandate come within the protection of the Free Exercise Clause of the First Amendment.

IV. CONSTITUTIONAL INTERPRETATION

In embarking upon this constitutional query, the Supreme Court will necessarily assume an interpretive stance, either expressly or impliedly. Much scholarly debate has focused on the most principled way to draw meaning from the Constitution.[146] The conversation has engendered various terms representing an array of theories of constitutional interpretation along a spectrum. At one end of the spectrum lie the "textualists," "interpretivists," or "strict constructionists." Pure textualists believe that "the written text of the Constitution is the only legitimate source for judicial action," while most other textualists—sometimes bearing

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[142] *Id.* at 784.

[143] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

[144] *Citizens United*, 558 U.S. at 319 ("We . . . hold that *stare decisis* does not compel the continued acceptance of *Austin*.").

[145] *Id.* at 365.

[146] *See* Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, *in* CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION 70, 70 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993) (noting that the question of interpretation is now the "single most debated issue of constitutional law").

the labels "interpretivists" or "strict constructionists"—would permit consideration of historical evidence "necessary to interpret the text according to the understanding of those who ratified it."[147]

At the other end of the spectrum lie those who would determine constitutional decisions on the exclusive basis of "some extrinsic measure such as moral philosophy or political orientation."[148] Judge Richard A. Posner of the Seventh Circuit aptly explained this general dichotomy as follows:

> A court has, roughly speaking, a choice between two conceptions of its role. One is narrow, formalistic; the model is that of deducing legal outcomes from a major premise consisting of a rule of law laid down by a legislature and a minor premise consisting of the facts of the particular case. The other conception is broader, free-wheeling, pragmatic; judicial discretion is acknowledged and an outcome that is reasonable in light of its consequences sought.[149]

Part V.A of this Note argues that the latter option identified by Judge Posner is the more appropriate interpretive position from which to view this particular constitutional issue and proposes a more specific interpretive method, labeled functional constructionism, for adoption in this context. Functional constructionism draws upon both the idea of pragmatism in constitutional interpretation promoted by Judge Posner[150] and the concept of common-law constitutionalism as set forth by University of Chicago Law School Professor David A. Strauss.[151] Pragmatism has three components: a skepticism of metaphysical concepts like "reality," "truth," and "nature"; an emphasis on the

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[147] MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 175 (3d ed. 2007).

[148] *Id.* at 176.

[149] Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 954 (2003).

[150] *See generally* Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990) (illuminating the essential elements of pragmatism and explaining its applicability to the law).

[151] *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (setting forth the theory of constitutional interpretation based on common-law principles).

actual results of propositions; and a practice of evaluating projects by how they serve "social or other human needs" rather than by "objective" or "impersonal criteria."[152] The notion of common-law constitutional interpretation "forthrightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text." Common-law constitutional interpretation is of course "justified on the basis of one of the oldest legal institutions, the common law."[153] In drawing from these two interpretive theories, functional constructionism posits that as society evolves and gives rise to novel questions of constitutional meaning, such questions should be resolved with attention to traditional understanding and relevant constitutional precedent paired with a critical eye toward present societal considerations. Put another way, constitutional text should not be considered in a vacuum, divorced from over two hundred years of judicial interpretation and the societal and institutional changes that have occurred over this span of time.

Functional constructionism thus stands in tension with the belief that the scope of the meaning of a constitutional provision *at the time of its adoption* should dictate its meaning *now*—a belief core to originalism.[154] However, functional constructionism should not necessarily always prevail over originalism in ascertaining the meaning of the Constitution. As Professor Strauss notes: "[T]here are undoubtedly times when originalism is the right way to approach a constitutional issue. But when it comes to difficult, controversial constitutional issues—such as whether the Constitution forbids discrimination against minorities and women . . .—originalism is a totally inadequate approach."[155] The present constitutional question of whether Free Exercise rights extend to corporations is both difficult and controversial, rendering a rigid originalist approach less helpful for a number of reasons, discussed below in Part V.A.

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[152] Posner, *supra* note 150, at 1660–61.

[153] Strauss, *supra* note 151, at 935.

[154] There are, in fact, varying degrees of originalism. As University of California, Berkeley Professor Daniel A. Farber notes, "Originalists have various shades of belief about the binding effect of original intent and about how to define 'intent.'" Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086–87 (1989). However, this central belief is the common thread running through the varying forms of originalism.

[155] DAVID A. STRAUSS, THE LIVING CONSTITUTION 4 (2010).

In keeping with the proposed functional constructionist approach, Part V.B proceeds to contemplate how the evolution of the meaning of incorporation in the United States—shaped by the development of corporations and the concurrent increase in constitutional protection afforded them—steers the law toward the recognition of corporate free exercise rights. Part V.C considers the practical outcome of such a recognition.

V. ANALYSIS OF CORPORATE FREE EXERCISE RIGHTS

A. THE METHOD OF INTERPRETATION: THE VIRTUES OF FUNCTIONAL CONSTRUCTIONISM

Functional constructionism offers the most principled way to approach this constitutional issue for three reasons: (1) the meaning of incorporation has drastically changed since the ratification of the First Amendment; (2) strict fidelity to the Framers' understanding of corporations disregards the body of Supreme Court decisions extending various other constitutional rights to corporations; and (3) functional constructionism pays due attention to the practical outcome of extending free exercise protection to all corporations.

Given the evolution of the meaning of incorporation since the ratification of the First Amendment, it would have required extraordinary foresight for the Framers to conceptualize the modern corporation and to formulate a belief about whether or not such an entity would fall within the ambit of First Amendment free exercise protection. Whether the framers would have believed corporations, as understood in their time, to possess free exercise rights resolves an entirely separate question than the one facing the nation now. Moreover, the evolution of the meaning of incorporation aside, myriad problems inhere in attempting to capture the Framers' as well as the prevailing public's attitude toward corporations at the time the First Amendment was adopted. As retired U.S. Supreme Court Justice John Paul Stevens explained, "[H]istory is at best an inexact field of study, particularly when employed by judges."[156] With the limitations of

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[156] Supreme Court Justice John Paul Stevens (Ret.), Keynote Address at the University of Georgia, Georgia Law Review Symposium: The Press and the Constitution 50 Years After

historical analysis in mind, brief attempts to uncover the attitude of the framers toward eighteenth-century corporations reveal that the proposition that corporations should have free exercise rights would have seemed quite strange, perhaps even absurd, to the Framers.[157] Writings to and from the Framers tend to evince a distrust of corporations, a fear that corporations might challenge or displace the state.[158] This mere approximate deduction, however, does *not* clarify whether the Framers would, if living today, reject the extension of free exercise rights to modern corporations. Over two hundred years have passed without the Framers' fear coming to pass. It is thus unclear, if not impossible, to deduce the Framers' beliefs about modern corporations.

Moreover, strict adherence to the Framers' view of corporations in 1789 in determining whether modern corporations should have free exercise rights blatantly ignores Supreme Court precedent extending other constitutional rights to corporations. Finally, a rigid originalist approach in this context gives no regard to the resulting consequences of a decision in favor of or against an extension of free exercise rights to corporations.

By contrast, approaching the question from a functional constructionist perspective avoids these pitfalls and offers a principled means to resolve the inquiry. Ultimately, functional constructionism considers the nature of modern corporations in determining whether free exercise rights should extend to corporations. This is essential in order to properly evaluate the issue because modern corporations, not those that existed at the time the First Amendment was ratified, seek free exercise protection in light of the ACA. To this end, examining the meaning of incorporation over time helps to inform the modern

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New York Times v. Sullivan (Nov. 6, 2013), *in Originalism and History*, 48 GA. L. REV. 691 (2014).

[157] *See* Ghoshray, *supra* note 132, at 387 n.60 (remarking Thomas Jefferson's "deep rooted apprehension about the intent of corporations" and John Adams' "similar sentiments"). In a letter to George Logan dated November 12, 1816, Thomas Jefferson wrote, "I hope we shall . . . crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." *Id.* Similarly, John Adams, in a letter to Thomas Jefferson dated August 25, 1787, wrote, "All the perplexities, confusion and distress in America arise, not from defects in the Constitution or Confederation, not from a want of honor or virtue, so much as from downright ignorance of the nature of coin, credit and circulation." *Id.*

[158] *Id.*

understanding of incorporation. In this sense, functional constructionism employs history as a tool for understanding the present circumstances that influence the constitutional question, rather than as a tool to uncover an answer directly from the original meaning of the provision.

Moreover, functional constructionism invokes key Supreme Court precedent bestowing other constitutional rights on corporations to illuminate the present constitutional question. In resolving whether corporations should have free exercise rights, cognizance of the current perception of corporations under the Constitution is important.

Lastly, functional constructionism carefully considers the practical effect of denying or extending free exercise protection to entities invoking the corporate form. Attention to the actual consequences of a constitutional or statutory interpretation is a central tenet of the legal theory of pragmatism.[159] Special regard for the practical outcome of a constitutional decision is particularly important in a context where, as here, the interpretive question involves a provision drafted in general terms. The high level of generality of the constitutional language—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."—renders the extraction of multiple meanings plausible.[160] Concern for the practical effect of how this provision is interpreted and applied is thus particularly warranted in order to distinguish among the possible meanings and ultimately settle on one. As Judge Posner writes, "A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequence."[161] A functional constructionist approach to the question of whether free exercise protection should extend to corporations satisfies this directive.

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[159] *See* Posner, *supra* note 150, at 1660 ("[The second] essential element is an insistence that propositions tested by their consequences, by the difference they make—and if they make none, set aside.").

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

[161] Richard A. Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, *in* CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 190, 192 (Michael J. Gerhardt et al. eds., 3d ed. 2007).

For all of these reasons, functional constructionism is the appropriate lens through which to ascertain whether the Supreme Court should bestow free exercise rights upon all corporations. In keeping with this perspective, this Note proceeds to consider how the understanding of corporations has evolved over time in order to illustrate the prevailing understanding of corporations today and to determine whether this understanding is consistent with recognizing corporate free exercise rights.

B. THE EVOLUTION OF INCORPORATION: SUPPORT FOR CORPORATE FREE EXERCISE RIGHTS

The development and increasingly frequent use of the corporate form since the late eighteenth century has given rise to varying theories of the corporation.[162] In the wake of this conceptual evolution and the body of Supreme Court cases extending various constitutional rights to corporations, an understanding of incorporation has emerged that warrants granting free exercise rights to entities that incorporate. First, various points in the development of corporations have nudged the nature of corporations forward along a spectrum of personhood in the sense that they have recognized further the capacity of corporations to act or refrain from acting in the same vein as individuals. Second, in tandem with this trend, the Supreme Court has granted corporations certain constitutional rights, affirming and bolstering the evolving perception of the corporation as an entity worthy of the same rights afforded individuals.[163] These observations, existing side by side, paint a modern picture of the corporation as capable of exercising religion and therefore deserving of protection under the Free Exercise Clause of the First Amendment.

1. From a Creature of the State to an Entity Greater Than the Sum of Its Parts. Corporations have come a long way from the era in which they were considered mere creatures of the state toward the modern era in which they have certain constitutional rights and guarantees traditionally thought of as only applicable to individuals. The first major nudge of corporations forward along the spectrum of personhood occurred as state legislatures began to

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[162] *See supra* Part III.A (discussing the evolving meaning of incorporation over time).

[163] *See supra* Part III.B (discussing corporations' increased constitutional rights).

relinquish state control over corporations in order to attract more corporations to their state.[164] The desire on the part of state legislatures to attract more corporations to their respective states underscored the fundamental significance of corporations as institutions distinguished from the state itself. This distinction is important because it allowed society to conceive of corporations as unique entities—like individual citizens—rather than as mere puppets of the state. Indeed, with the move away from special chartering, the law began to recognize the capacity of corporations to exist for their own purposes in the same way it recognizes a right of self-determination in individuals.[165] In a sense, the decline of special chartering and the shift toward free incorporation granted corporations a kind of autonomy that they previously lacked: no longer were they limited to performing public interest functions. As independent, autonomous bodies, corporations assumed important attributes of personhood.

The next major nudge pushing corporations forward along the spectrum of personhood occurred with the growth of subsidiary corporations and the rise of institutional investors.[166] These developments weakened the group theory of corporations—which held that corporations were nothing more than aggregates of individual shareholders[167]—and gave rise to the real entity theory of corporations under which corporations are viewed as bodies greater than the sum of their shareholders.[168] The real entity theory views corporations as capable of possessing rights and maintaining responsibilities as corporations in and of themselves, rather than as entities that comprise individual constituents who possess such rights and maintain such responsibilities.

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[164] MICKLETHWAIT & WOOLDRIDGE, *supra* note 108, at 45–46.

[165] For example, the Supreme Court has noted that self-determination is among the key values that are "implicit in the concept of ordered liberty" for purpose of substantive due process analysis. McDonald v. City of Chicago, 130 S. Ct. 3020, 3101 (2010) (Stevens, J., dissenting).

[166] *See* PRESSER, *supra* note 22, at 82 ("One of [the] most recent and important developments in the operations of private corporations . . . is the increasing prevalence of subsidiary and affiliated corporations.").

[167] *See* Schane, *supra* note 109, at 566 (describing how the group theory treated corporations' rights as nothing more than rights of its component members).

[168] *See* Lepard, *supra* note 24, at 1046 (describing how the real entity theory views the corporation as maintaining an identity greater than the sum of its parts).

In this sense, the real entity theory treats corporations in a similar vein as individuals. Associate Law Professor Virginia Harper Ho writes, "In contrast to the aggregate enterprise view, a real enterprise approach acknowledges the possibility for the corporate group itself to bear independent rights and duties apart from those of its constituent firms."[169] Notably, the real entity theory also accords best with research on the realities of organizational and corporate identity.[170] Such research finds that "the dynamic interactions among senior managers and even key employees across separate divisions and affiliates within a corporate group can together produce an independent corporate identity or culture."[171] Thus, current research and modern understanding suggests that in the same way that individual persons possess unique personalities and characteristics, so do corporations.

The CSR movement exemplifies this modern understanding of corporations under the predominant real entity theory,[172] and offers additional support for the proposition that corporations should come within the protection of the Free Exercise Clause. Because this movement calls for corporations to conduct their affairs according to socially responsible principles, the concept of CSR itself is premised on the belief that corporations, like individuals, maintain their own moral or ethical compasses. If, under the umbrella of the concept of CSR, a corporation may be called on to engage its moral or ethical compass by including "sustainable growth, equitable employment practices, and long-term social and environmental well-being" as objectives in addition to earning a profit,[173] then certainly a corporation may legitimately engage its moral or ethical compass to exercise religion by selecting business practices and company policies in compliance with a religious faith and by expressing its commitment to religious principles.

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[169] Harper Ho, *supra* note 118, at 907.

[170] *Id.*

[171] *Id.*

[172] *See* discussion *supra* pp. 1170–1172 (describing how the CSR movement substantiates the theory of corporations as real entities).

[173] John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 1–2 (2005).

Consequently, the development of corporations from the time in which they were considered nothing more than instrumentalities of the state to the present in which they are considered independent entities with the capacity to determine for themselves the kind of impact on society they wish to have illustrates how corporations have evolved in a way that merits protection under the Free Exercise Clause.

2. The Significance of Corporations' Constitutional Rights. In tandem with this progression, the Supreme Court has extended certain constitutional rights to corporations. The increased stature of corporations under the Constitution further substantiates the contention that corporations, as understood today, merit free exercise rights.

Currently, corporations possess rights under the Fourteenth Amendment,[174] the Fourth Amendment,[175] the Seventh Amendment,[176] the Fifth Amendment Double Jeopardy Clause,[177] and most pertinently, the First Amendment Free Speech Clause.[178] Corporations are not, however, entitled to the privilege against self-incrimination under the Fifth Amendment.[179] What is to be made of this breakdown of corporate constitutional rights?

In particular, the extension of rights under the Fourteenth Amendment, Fifth Amendment Double Jeopardy Clause, Fourth Amendment, and First Amendment Free Speech Clause to corporations sheds light on the constitutional perception of corporations. First, the Fourteenth Amendment maintains that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

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[174] *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (stating that Fourteenth Amendment protection extends to corporations).

[175] *See* Hale v. Henkel, 201 U.S. 43, 75–76 (1906) (holding that corporations are entitled to protection from unreasonable searches and seizures under the Fourth Amendment).

[176] *See* Ross v. Bernhard, 396 U.S. 531, 532–33 (1970) (affirming that corporations enjoy a Seventh Amendment right to trial by jury).

[177] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 566–67 (1977) (affirming the lower court's holding that Double Jeopardy Clause was a bar to further prosecution of the respondent corporations).

[178] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (holding that, under the First Amendment, the government may not suppress political speech on the basis of the speaker's corporate identity).

[179] *See* Hale v. Henkel, 201 U.S. 43, 69–70 (1906) (holding that the privilege against self-incrimination is purely personal and cannot be invoked by a corporation).

any State deprive any person of life, liberty, or property, without due process of law."[180] If corporations have been deemed by the Court to be entitled to life, liberty, and property—an entitlement which shall not be abridged without due process of law—then it is conceivable that a corporation might employ this "life, liberty, and property" to adhere to religious principles in conducting their affairs so as to merit protection under the Free Exercise Clause.

Similarly, the Fifth Amendment Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[181] If corporations thus maintain "life or limb" worthy of protection under the Constitution, then a logical extension of this assertion is the belief that corporations possess the capacity to steer their corporate "lives" in accordance with religious faiths. Why shouldn't this corporate religious exercise not also receive constitutional protection?

Fourth Amendment protection of corporations is equally instructive. Under the Fourth Amendment, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[182] The extension of this right to corporations intimates that corporations constitute distinct bodies worthy of a right to be secure. It is the corporation, acting as one being, not the individual constituents of the corporation, that possesses this right. This concept supports the proposition that corporations, apart from their individual owners, may exercise religion. If corporations maintain their own persons, houses, papers, and effects that are protected under the Fourth Amendment, then surely corporations, not merely the owners behind corporations, comprise separate and distinct entities that have the capacity to act in a manner that demonstrates devotion to religious principles and constitutes religious exercise.

Finally, the tradition of recognizing corporations' rights under the First Amendment Free Speech Clause is perhaps the most probative example of how corporations' current stature under the Constitution accords with extending free exercise rights to

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[180] U.S. CONST. amend. XIV, § 1.
[181] U.S. CONST. amend. V.
[182] U.S. CONST. amend. IV.

corporations as well. In *Bellotti*, contributions made by corporations to influence the vote on the enactment of a graduated personal income tax were conceived to amount to political speech, deserving of the utmost protection under the First Amendment.[183] If a corporation may speak by making monetary contributions, then it requires no stretch of the imagination to deduce that a corporation may exercise religion by selecting employee health insurance plans that are consistent with the religious faith it seeks to abide by in all of its dealings. Though *Austin* contravened the principles established in *Bellotti* by upholding a corporate independent expenditure restriction to further a governmental interest in preventing "the corrosive and distorting effects of immense aggregations of [corporate] wealth,"[184] the Court very recently overruled this case and reasserted the holding of *Bellotti* in *Citizens United*.[185] Notably, in the *Citizens United* opinion, Justice Kennedy touched upon a central tenet of the functional constructionist approach to constitutional interpretation: conventional understandings at the time of the adoption of constitutional provisions should not necessarily dictate interpretation issues that arise out of developments that have occurred since the provision was originally adopted. He wrote,

> The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.[186]

This line of reasoning is equally applicable to the question of whether corporations come within the protection of the Free Exercise Clause. Though it likely would have been inconceivable to the Framers that a corporation could exercise religion, the

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[183] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (holding that the corporations' wish to address the referendum at issue fell squarely within the concept of the freedom of speech).

[184] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659–60 (1990).

[185] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

[186] *Id.* at 353–54.

Court has emphasized that this type of argument should not stand as a barrier toward expanding important constitutional protection to corporations.

Still, corporations were denied the Fifth Amendment privilege against self-incrimination in *Hale v. Henkel*.[187] This outcome is indeed difficult to square with the foregoing constitutional precedent. However, careful consideration of the reasoning behind this conclusion, which somewhat contradictorily also held that corporations *do* have Fourth Amendment rights to be free from unreasonable searches and seizures, reveals that the Court straddled between two competing understandings of the corporation at the time the case was decided.[188] In discussing the applicability of the Fifth Amendment privilege against self-incrimination to corporations, Justice Brown wrote, "[T]he corporation is a creature of the State . . . . There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers."[189] The Court's discourse harkens back to the concession theory of corporations as mere instrumentalities of the state. However, in discussing the applicability of the Fourth Amendment to corporations, Justice Brown stated, "[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity."[190] Thus, in concluding that corporations have no privilege against self-incrimination, the Court viewed corporations as nothing but creatures existing because of and for the state, whereas in concluding that corporations do have the right to be free from unreasonable searches and seizures, the Court conceded that corporations are distinct legal entities not owing their existence to the state.

While *Hale* has not been overturned for its proposition that corporations are not entitled to the Fifth Amendment privilege against self-incrimination, it is clear from later constitutional precedent that the view of corporations as mere creatures of the

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[187] Hale v. Henkel, 201 U.S. 43, 69–70 (1906).
[188] *Id.* at 76.
[189] *Id.* at 74–75.
[190] *Id.* at 76.

state has yielded to the view of corporations as separate, self-determining bodies. Indeed, Dr. Saby Ghoshray notes, "There may be little practical significance to *Hale*'s holding from the Fifth Amendment perspective, as the Court relied on the artificial entity theory to hold that corporations are not protected by the self-incrimination clause of the Fifth Amendment."[191] Thus, while creating somewhat of an anomaly, the denial of the Fifth Amendment privilege against self-incrimination is explicable and does not undermine the proposition that corporations, given their current status in society and under the Constitution, deserve protection under the Free Exercise Clause.

C. CORPORATE FREE EXERCISE RIGHTS: PRACTICAL CONSIDERATIONS

While the modern meaning of incorporation steers the law toward recognizing corporate free exercise rights, it is also necessary in applying the functional constructionist interpretive method to inquire into the outcome of such a recognition. Perhaps the greatest apprehension in extending free exercise rights to corporations is the concern that a flood of litigation will ensue, and that corporations will be able to eschew government regulations by regularly bringing Free Exercise Clause claims.

These fears are unwarranted. First, scholars question the legitimacy of the "floodgates of litigation argument."[192] The Constitution commits the jurisdiction of the federal courts to Congress.[193] Consequently, the Judiciary runs the risk of offending the separation of powers doctrine when it invokes the floodgates argument as a basis for ruling one way over another.[194]

Second, as to the claim that corporations would use free exercise rights as a means to avoid compliance with government regulations, it must be remembered that a corporation invoking

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[191] Ghoshray, *supra* note 132, at 391 n.89. The "artificial entity theory" is synonymous with the concession theory, in that it views "corporations as artificial persons, created by the state, with only those powers given to them by the state." *Id.* at 384 n.47 (internal quotation marks omitted).

[192] *See generally* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation*,*"* 6 U. PA. J. CONST. L. 377 (2003) (critiquing the floodgates argument).

[193] U.S. CONST. art. 111, § 1.

[194] *See* Stern, *supra* note 192, at 379 ("[S]ince Article III of the Constitution leaves control over the jurisdiction of the federal courts to Congress, a ruling based on a concern over judicial economy would be a separation of powers violation.").

the protection of the Free Exercise Clause would face the same obligations as a natural person. Under the RFRA, which provides a claim to those asserting Free Exercise Clause violations, the corporation would first have to establish that the government regulation substantially burdens its religious exercise.[195] Even if a corporation were to prevail in making this showing, the corporation would not be relieved from compliance if the government were able to demonstrate a compelling government interest in enforcing the challenged regulation, and that the challenged regulation was the least restrictive means of furthering the compelling government interest.[196]

VI. CONCLUSION

When analyzed through the lens of functional constructionism as set forth in Parts IV and V.A the question of whether free exercise protection should extend to corporations should be resolved in favor of such an extension. The historical progression of the corporation both as a business entity and as an entity under the Constitution has shaped the meaning of corporations today in a way that steers the law toward recognizing corporate free exercise rights.

First, the narrative of corporate development in America since the adoption of the First Amendment represents the corporation's advancement along a continuum of personhood that supports recognizing the free exercise rights of corporations. Second, the body of Supreme Court decisions affording and recognizing various other constitutional rights of corporations is equally indicative of the modern understanding of corporations as deserving of free exercise protection. Finally, extending free exercise rights to corporations will not undermine the ability of the government to regulate businesses in a way that justifies denying corporations such rights.

Emily Carlton Cook

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[195] 42 U.S.C. § 2000bb-1 (2012).
[196] *Id.*