KEEPING THE FAITH: HOW COURTS SHOULD DETERMINE "SINCERELY-HELD RELIGIOUS BELIEF" IN FREE EXERCISE OF RELIGION CLAIMS BY FOR-PROFIT COMPANIES

I. INTRODUCTION

Expanding the reach of government demands or restrictions on public or private life will naturally result in increasing objections by the nation's citizenry. These clashes become especially apparent where the citizenry perceive government encroachments on fundamental, constitutional rights. One such current flashpoint occurs at the intersection of increasing government regulations in the business sphere and an increasing belief that religion, and thus religious freedom, should be present in all aspects of one's life.[1] A recent and widely-known example of government action and the ensuing battle based on religious objections captures this growing tension and its tendency to uncover new legal questions.

1. *See* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 15-27 (2013) (laying out the case for why we should expect an upward trend of cases involving government infringement on religious exercise in a variety of contexts).

In 2011 and 2012, the federal government told employers, with some exceptions, that they would have to include provisions for sterilizations; several different types of contraceptives, some of which are debated as having abortifacient characteristics; and counseling related to accessing these services in their employees' insurance policies.[2] A number of Christian denominations have teachings that oppose some or all of these drugs; thus, the mandate touched off a firestorm of litigation and religious protests.[3] The plaintiffs in the resulting litigation are a diverse set: individuals, archdioceses, universities, hospitals, nonprofit organizations, and for-profit corporations.[4] In general, they claim that being forced, at the risk of incurring substantial fines, to have insurance provisions for these drugs in employees' policies violates their free exercise of religion, both under the First Amendment and under the Religious Freedom Restoration Act.[5]

2. Colombo, *supra* note 1, at 25-26; Pew Research on Religion & Pub. Life, *The Contraception Mandate and Religious Liberty*, PEW RES. CENTER (Feb. 1, 2013) [hereinafter Pew Forum], http://www.pewforum.org/Government/The-Contraception-Mandate-and-Religious-Liberty.aspx (giving a broad overview of the issue); Pam Belluck, *No Abortion Role Seen for Morning-After Pill*, N.Y. TIMES, June 6, 2012, *available at* 2012 WLNR 11821766 (describing recent scientific research on the effects of the Plan B drug and some of the different arguments related to it). Of course the veracity of whether or not these drugs actually do have abortifacient aspects goes far beyond the scope of this paper and is not necessary in any way for this paper's treatment of the issues. The sterilizations appear to not include procedures for males. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (noting the coverage of the mandate for "all women with reproductive capacity").

3. Pew Forum, *supra* note 2; *Fortnight for Freedom*, U.S. CONF. ON CATHOLIC BISHOPS, http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-freedom/ (last visited Oct. 11, 2013) (describing the "Fortnight for Freedom" campaign to protest the HHS Contraception Mandate); *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Oct. 11, 2013) (providing an overview of the cases filed thus far in response). In addition to the well-known beliefs of the Catholic Church, various other Christian denominations, Buddhists, and Orthodox sects of Judaism oppose certain types of birth control depending on the implementation or effect. *Ethics Guide: Contraception*, BBC, http://www.bbc.co.uk/ethics/contraception/ (last visited Oct. 11, 2013) (providing access to the religious views of Christianity, Buddhism, Judaism and other religions regarding contraception).

4. More specifically, any corporation that has more than fifty employees. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284-85 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013) (citations omitted) (explaining the provisions of the "HHS Contraception Mandate").

5. Pew Forum, *supra* note 2 (explaining the basics of the various complaints). The mechanics of such a claim will be reviewed below in Section II(A).

Hobby Lobby Stores, Inc. (Hobby Lobby) provides a prime example of a for-profit corporation claiming such a violation. In the fall of 2012, Hobby Lobby, as well as Mardel, Inc. (Mardel) and the Green family, brought a suit in federal court seeking declaratory and injunctive relief from the regulations set forth in this government mandate (HHS [Department of Health and Human Services] Contraception Mandate).[6] A refusal to provide coverage for the mandated drugs would result in a fine of approximately 1.3 million dollars per day.[7]

Hobby Lobby, an arts and crafts vendor owned by the Green family, maintains 514 stores in forty-one states with more than 13,000 employees.[8] The Green family operates its companies through trusts which they control and through which they retain all voting stock in the corporations.[9] Members of the Green family are devout Evangelical Christians who attempt to ensure that their faith pervades all aspects of Hobby Lobby in accordance with their religious beliefs.[10] As to the corporation's formation, Hobby Lobby's statement of purpose points towards its Biblical principles.[11] As to its operation, Hobby Lobby has undertaken a number of services and business decisions, even in some cases incurring a cost due to those decisions,[12] which the corporation directly attributes to religious motivation.[13] And as to its output, Hobby Lobby sells products that are consistent with this faith and directs some of its profits to religious outreach.[14]

6. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120, 1125 (10th Cir. 2013). Notably the plaintiffs do not object to a number of the services required by the mandate. *See FAQS: Becket Fund's Lawsuits Against HHS*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/faq/ (last visited Oct. 11, 2013).

7. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1125.

8. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013). Mardel, also owned by the Green family, is an educational store and bookstore with a Christian emphasis which operates thirty-five stores in seven states with 372 employees. *Id.* For the sake of simplicity, the example presented here focuses only on Hobby Lobby.

9. *Id.*

10. *Id.* at 1285; Complaint at ¶ 5, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450.

11. Complaint at ¶ 42, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450 (quoting the statement of purpose, "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."); *see infra* Section III(A)(2).

12. *See infra* text accompanying note 240.

13. *See infra* text accompanying note 240.

14. *See infra* text accompanying note 238.

In this litigation, as in all similar cases thus far dealing with for-profit corporations,[15] the government first argued that a for-profit corporation cannot engage the rights which are protected by a free exercise claim because, as a blanket-rule, for-profit corporations, as opposed to individuals or religious organizations, cannot be considered to exercise religion in the first place.[16] The district court agreed.[17] A two-judge panel of the Tenth Circuit on appeal did not even address the issue of whether a for-profit corporation can bring a free exercise claim[18] (instead resolving the appeal by saying that no sufficient burden of religious freedom existed to continue on this claim),[19] and the Supreme Court only noted that it has not previously addressed the issue of a for-profit corporation claiming infringement of its free exercise rights when denying emergency relief.[20] However, a subsequent *en banc* opinion of the Tenth Circuit reversed the district court and found, among other things, that "corporations can be 'persons' exercising religion for purposes of . . . [the Religious Freedom Restoration Act (RFRA)]" and that "Free Exercise rights may extend to some for-profit organizations."[21]

This conflict raises a number of interesting questions, aside from the legality of the HHS Contraception Mandate itself (Note: That discussion is not undertaken here; rather, the HHS Contraception Mandate provides an ideal backdrop for examination of the preliminary questions of the exercise of religion of for-profit corporations).[22] First, can a for-profit

15. *See infra* Section II(A)(iii).

16. *See* Opposition to Plaintiff's Motion for An Injunction Pending Appeal at 2-3, Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012).

17. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288, 1291-92 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

18. *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *2 n.4 (declining to "distinguish at this preliminary stage . . . between the corporate and individual plaintiffs").

19. *Id.* at *2.

20. Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012).

21. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013).

22. Innumerable examples could be created either based on the HHS Mandate, the Affordable Care Act, or more generally where the government might force a corporation to do something which the corporation's constituents feel infringes on their religious freedoms. For example, because some religions object to health insurance itself, the Affordable Care Act has had to implement a system of exemptions. *E.g.*, Kelly Phillips Erb, *IRS Releases Proposed Regs for Health Care*

corporation be considered to conduct activity that engages the rights afforded by the RFRA or the First Amendment's Free Exercise clause (hereafter the "Engagement Question")?[23] Second, if a for-profit corporation can bring a free exercise claim, what should the courts consider in determining whether or not the corporation has a religious identity?

The first question concerns the biggest issue at the moment and forms the heart of an in-depth examination conducted by Professor Ronald Colombo in his work *The Naked Private Square*.[24] The second question receives a more in-depth treatment in this Comment; it reviews the theoretical foundations of the Engagement Question insofar as necessary to the ideas proposed here, but critically, this Comment presumes that courts will allow for-profit corporations in general to bring claims

Law: Who's Covered, Who's Exempt and What Happens if You Don't Pay?, FORBES (Feb. 1, 2013, 1:23 PM), http://www.forbes.com/sites/kellyphillipserb/2013/02/01/irs-releases-proposed-regs-for-health-care-law-whos-covered-whos-exempt-and-what-happens-if-you-dont-want-to-pay/. How this would apply to corporations could be a topic for further discussion. Professor Mark Rienzi also provides some hypotheticals based on extant corporations, a gas station/kosher coffee shop in Brooklyn and a halal grocery store in Minneapolis. *See* Mark Rienzi, *God and the Profits: Is there Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. (forthcoming Fall 2013) (manuscript at 19-22, 38), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229632. This Comment does not aim to provide a survey of such current conflicts, but rather to focus on one part of the resulting legal claims, and will therefore stay primarily with this one example throughout the paper.

23. For example, the Tenth Circuit addresses this question by asking whether the corporations are "persons" within the meaning of the applicable statutory provisions. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128-29 (10th Cir. 2013).

24. *See generally* Colombo, *supra* note 1. Professors Mark Rienzi, in another comprehensive discourse, and Stephen Bainbridge, focusing on one possible vehicle for making such a claim, have added to the conversation. *See generally* Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013) [hereinafter Bainbridge, *RVP-I*]; Rienzi, *supra* note 22. Since the initial drafting of this Comment, more scholarship has become available which continues to touch on various aspects of the underlying issues, including the larger theoretical questions and their more specific applications. *E.g.*, 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 (2013); Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301 (2013); Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237630.

relating to religious free exercise. This Comment acknowledges that such an outcome is uncertain and that the debate is controversial in nature. However, an effort to undertake both questions here would be a more intensive project than this Comment could hope to competently handle.

Instead, this Comment seeks to aid the courts by suggesting the most appropriate way to find an answer to a "threshold question"[25] of any claim relating to religious exercise—can the claimant show a "sincerely-held religious belief";[26] and, as a necessary corollary, is there any religious identity relevant to the claimed infringement? A number of possible approaches present themselves: Do the articles of incorporation mention an additional purpose beyond profit motives? Should the courts just look to see if the for-profit corporation is closely-held,[27] and if so, then what the beliefs of the owners/operators are? Should a poll of beliefs be taken of all constituents of a corporation, not just the operators and shareholders, but maybe the employees as well? What about just creating an alternate corporate form, like the recent innovation in benefit corporations, that allows corporations who wish to have a religious identity to assume this specific form?

Section II lays down the necessary groundwork to be able to answer some of these questions. It examines the components of free exercise claims and discusses their operation in a sampling of cases. This Section also provides a summary of the theoretical background by which a for-profit corporation could be considered capable of bringing such a claim. Finally, this Section concludes by presenting this background as a natural progression towards recognizing the necessity of protecting religious freedom in the for-profit corporate form, leading the Comment to ask and answer in Section III what the mechanics of such a claim in the for-profit corporate context would actually look like.

Section III of this Comment offers a simple, practical approach for what courts should and should not look at while attempting to identify a corporation with a sincerely-held religious belief. Courts should consider the corporation as a distinct entity, as opposed to a web of contracts, and look for

25. The threshold test of religious exercise claims under either the First Amendment or the RFRA is addressed in Section II(A) below.

26. Here this is used as a legal term of art, as explained in Section II(A)(2)(i) rather than primarily a theological inquiry.

27. Defined in Section II(A)(2)(iii).

apparent signs of its claimed religious identity in its formation, operation, and/or output, as explained in Subsection A. Because authentic religious practice often subtly and inextricably melds with what might otherwise be called "secular activities," such as ethically creating a contract, this approach will not account for many otherwise worthwhile litigants.[28] However, this approach provides a more dependable avenue for relief to litigants than merely looking at the views of some certain set of individuals, such as a random static poll of shareholders or employees; it also allows for a greater pool of litigants than that which would result from exclusively looking at a corporation's end-purpose, such as profit and/or some other civic end, as discussed in Subsection B. The necessity of apparent evidence protects the law from an overly positivistic approach. In doing so, the proposal attempts to walk a middle-line between allowing for more authentic exercise of religious beliefs, and thus more worthy claimants, while at the same time avoiding creating a claim with no real boundaries that might be vulnerable to opportunistic corporations.

II. FREE EXERCISE OF RELIGION: THE BASICS OF THE CLAIM AND LESSONS FROM RELATED CASE-LAW

Subsection A begins by dissecting the elements of a free exercise of religion claim under both constitutional and statutory causes of action, focusing especially on the "threshold test." It looks at the application of this test in case-law in a search to determine what features of a for-profit corporation will satisfy it. Subsection B helps to further build the foundation, but from a more theoretical angle. It provides an overview of how the courts might come to consider a for-profit corporation as an entity capable of bringing a free exercise claim. It does this by looking at the idea of individuals forming associations, at the related idea of corporations as associations or organizations having their own identities bestowed by, but distinct from, those individuals, and finally, at the courts' recognition of this identity by the granting of constitutional rights to corporations.

A. THE CURRENT STATE OF FREE EXERCISE JURISPRUDENCE IN GENERAL

A party can bring a free exercise claim where the government has taken some action that either forces the party to

28. *See* Rienzi, *supra* note 22 (manuscript at 11-12).

do something, prevents the party from doing something, or makes something more burdensome, in contravention of that party's religious beliefs.[29] The First Amendment, as well as certain statutory provisions, provides the basis for such a claim.

Before getting to the elements of this claim, a party needs to satisfy the requirements of Article III standing and the Engagement Question. The next step after satisfying standing and the Engagement Question requires proving the elements of the free exercise claim itself.

Any free exercise claim can be conceptualized as consisting of two primary parts: (1) the justification or balancing test and (2) the necessary antecedent of the threshold test.[30] The justification test is more prominent as the frequent point of contention in free exercise jurisprudence and has undergone considerable fluctuation.[31] The threshold test has remained largely the same.[32]

1. JUSTIFICATION/BALANCING TEST[33]

The Court adopted a strict scrutiny test for government actions interfering with one's exercise of religion in the 1963 case *Sherbert v. Verner*.[34] In *Sherbert*, Ms. Sherbert (the appellant)

29. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1292 (4th ed. 2011) (laying out the scenarios giving rise to a claim under the Free Exercise clause).

30. *See* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 104-05, 143 (2008).

31. *Id.* at 103 (noting the stability of the threshold test even while justification tests have changed).

32. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, Brennan, Marshall, & Blackmun, JJ., concurring) (opining that "today's holding dramatically departs from well-settled First Amendment Jurisprudence"), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §2, 107 Stat. 1488, *as stated in* Sossamon v. United States 131 S. Ct. 1651 (U.S. 2011); Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb (West 2012) (criticizing the *Smith* decision and mandating a return to the "compelling interest" test of precedent predating the *Smith* decision); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding 42 U.S.C.A. § 2000bb unconstitutional as to state law); Olree, *supra* note 30, at 105.

33. In other words, the government's need to undertake the action at hand must outweigh the importance of protecting the religious interest that it is allegedly burdening. Some of the more modern shifts in how these burdens are justified/balanced will be detailed here.

34. Sherbert v. Verner, 374 U.S. 398, 406-08 (1963). There is disagreement as to how much the Court actually used strict scrutiny as the dominant test in subsequent

observed the Sabbath Day of her faith on Saturday, which meant, according to her religious belief, that work was forbidden on that day, resulting in both her firing from her job and her failing to find a job that did not require her to work on Saturday.[35] She subsequently filed for unemployment compensation benefits as provided under South Carolina law.[36] The South Carolina Employment Security Commission, however, denied Ms. Sherbert's request on the grounds that she had refused employment without good reason.[37] In finding that the Commission had impermissibly inhibited Ms. Sherbert's free exercise, the Supreme Court held that the government could not show a compelling interest to justify its action, and furthermore, that even if such an interest had been shown, the government would also have to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[38] This precedent stood for twenty-seven years, although fidelity to its implementation wavered.[39]

In 1990, the justification test experienced a seismic shift. The Court's decision in *Employment Division v. Smith* unleashed a torrent of criticism, stemming from a concern that the protections afforded by the Free Exercise clause had been dangerously compromised.[40] In *Smith*, an employer fired the

cases leading up to the *Smith* decision. *Compare Smith*, 494 U.S. at 883 (Majority) ("Although we have sometimes purported to apply the *Sherbert* test in contexts other than [unemployment compensation benefit disputes]. . ."), *with Smith*, 494 U.S. at 894-95 (O'Connor, Brennan, Marshall, Blackmun, JJ., concurring) (characterizing strict scrutiny as the consistent test where a "substantial burden on religiously motivated conduct" has been shown, and criticizing the majority's "narrow reading" of that test's application).

35. Sherbert v. Verner, 374 U.S. 398, 399 (1963).

36. *Id.* at 399-00. The Establishment clause and the Free Exercise clause of the First Amendment were incorporated in *Everson v. Board of Education*, 330 U.S. 1, 8 (1947) and *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940), respectively.

37. *Sherbert*, 374 U.S. at 401.

38. *Id.* at 406-09.

39. A number of scholars have provided insightful reviews of precedent on this matter. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1126-28 (1990) (observing that while the Court did not always use a strict scrutiny test per se, it did at least use heightened scrutiny); CHEMERINSKY, *supra* note 29, at 1297-02 (analyzing language in several free exercise cases following *Sherbert* and finding application of strict scrutiny to be inconsistent).

40. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886-87 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, *as stated in* Sossamon v. United States 131 S. Ct. 1651 (U.S. 2011); *see also* McConnell, *supra* note 39, at 1111, 1134-35, 1153

respondents due to their use of peyote, a hallucinogenic drug.[41] The petitioner, Oregon's Department of Human Resources, in turn denied respondents' unemployment benefits claim, citing "misconduct."[42] Respondents brought suit, claiming that their consumption of peyote for sacramental purposes should be exempt from serving as grounds for denial of benefits.[43] The Court disagreed, setting forth the controversial principle that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'"[44] In essence, this gave an alleged free pass to government action in regard to religious infringement as long as it did not apparently target religious practice—a perceived subversion of the system of legal protections for religion up to that point.[45]

Public furor gave rise to public action. Following the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA), a legislative effort to repair protections of free exercise after the perceived damage done by *Smith*.[46] The RFRA makes clear that even burdens "result[ing] from a rule of general applicability" must be justified by "a compelling governmental interest" and a showing that the government action is "the least restrictive means of furthering that compelling governmental

(expressing concern with the "bare neutrality" sought by the Court and the possibilities this might have in harming believers' free exercise in future cases); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV 1, 2 (1990).

41. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, *as stated in* Sossamon v. United States 131 S. Ct. 1651 (U.S. 2011).

42. *Id.*

43. *Id.* at 878.

44. *Id.* at 879 (quoting United States v Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)); *see* 42 U.S.C.A. § 2000bb(a)(4) (West 2012) (finding that "in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"); McConnell, *supra* note 39, at 1120-21 (pointing out cases in which the Court has found the Free Exercise clause to require exemptions to generally applicable laws).

45. *Cf.* Jeffery D. Williams, Note, Humphrey v. Lane*: The Ohio Constitution's David Slays the Goliath of* Employment Division, Department of Human Resources of Oregon v. Smith, 34 AKRON L. REV. 919, 921-23 (2001) (noting the "radical shift" in free exercise jurisprudence).

46. The Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb-2000bb-4 (West 2012); Laycock, *supra* note 40, at 1 (remarking on the "extraordinary coalition" that demanded action in the wake of the *Smith* decision).

interest."[47] Congress recorded that it intended by this Act to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . ."[48] The Court has since used the RFRA as the first line of defense in protecting free exercise rights from federal government infringements;[49] however, the Court invalidated the RFRA as applied to state or local government action.[50]

In summary, the Court determines the level of scrutiny in a free exercise claim based on whether it is examining a federal government or state/local government action and, if the latter, whether it can be considered neutral and generally applicable.[51] For federal action, the government must justify its action under a strict scrutiny analysis as demanded by the RFRA.[52] Similarly, infringement by a state/local action not deemed to be a neutral law of general applicability must also meet strict scrutiny.[53] Finally, with some notable exceptions,[54] state/local action deemed

47. 42 U.S.C.A. § 2000bb-1(a)-(b) (West 2012).

48. 42 U.S.C.A. § 2000bb(b) (West 2012). The *Yoder* Court, reviewing the jurisprudence at the time regarding free exercise, stated "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). In *Yoder*, the Court struck down a state's compulsory school attendance law where the respondents could show that being forced to send their children to high school conflicted with their religious beliefs. *Id.* at 211, 235-36.

49. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

50. City of Boerne v. Flores, 521 U.S. 507, 533-36 (1997); Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (noting that *City of Boerne* invalidated the RFRA as to "[s]tates and their subdivisions" due to the RFRA's excessive use of "remedial powers under the Fourteenth Amendment"). Congress sought to shore up the weaknesses of the RFRA by the passage of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which focused on, as its name suggests, land-use regulation and institutionalized persons' freedom of exercise. 42 U.S.C.A. § 2000cc (West 2012); *Cutter*, 544 U.S. at 715.

51. CHEMERINSKY, *supra* note 29, at 1310.

52. *Id.*; *e.g.*, *Gonzales*, 546 U.S. at 439.

53. CHEMERINSKY, *supra* note 29, at 1310; *e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

54. State actions will receive strict scrutiny if coming within the reach of RLUIPA. 42 U.S.C.A. § 2000cc (West 2012); DEP'T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE LAND-USE PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA), *available at* http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf (last visited Oct. 16, 2013) (explaining the purposes of RLUIPA, including its targeting of state and local government actions). In addition, states might very well have their own versions of RFRA statutes or other religious protection that could also serve to add increased protection. *See* Michael W. McConnell, *Religious Freedom, Separation of Powers,*

to be a neutral law of general applicability receives rational basis, or as Professor McConnell refers to it, the "toothless rationality review."[55]

Of course, before the Court undertakes a strict scrutiny or rational basis balancing test, the claimant needs to show that a government action actually infringes on the claimant's exercise of religion.[56] How a claimant attempts to cross this threshold, and what the Court looks to in determining if a claimant has a sincerely-held religious belief, comprise the subject of the next subsection and, in large part, the focal point of this Comment.[57]

2. THRESHOLD TEST

The First Amendment demands that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[58] This text points to an obvious requirement of any free exercise claim—that an individual have some religious belief/exercise inhibited by a law. This requirement goes by the self-explanatory name of the "threshold test."[59] Subsection i begins by breaking down the components of the threshold test followed by a brief glance at how

and the Reversal of Roles, 2001 B.Y.U. L. REV. 611, 615-16 (2001) (commenting on the proliferation of state-level RFRAs). Finally, "hybrid" claims, meaning a free exercise claim paired with a claim under another provision of the Constitution, would still be reviewed under strict scrutiny. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) (commenting that only "hybrid situation" claims with free exercise components have received protection from a neutral law of general applicability), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, *as stated in* Sossamon v. United States 131 S. Ct. 1651 (U.S. 2011).

55. *E.g.*, Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002); Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999); *see* McConnell, *supra* note 39, at 1128 (implying that test would be used by lamenting that precedent does not require resort to this test even though the precedent does not consistently apply strict scrutiny).

56. Continuing with the HHS Mandate example and putting it in the normal chronological progression, even if the courts allowed for-profit corporations to bring a claim, and the specific for-profit corporate plaintiff evidenced an infringement on a sincerely-held religious belief, the question still remains if the government can justify the infringement in light of the claimed belief. That question requires its own analysis, and this Comment does not attempt to offer an answer.

57. Again, this Comment does not address the justification test either in the abstract as to for-profit corporations or as to the HHS Mandate.

58. U.S. CONST. amend. I (incorporated in *Cantwell*); *see supra* note 36.

59. *See* Thomas E. Geyer, Comment, *Free Exercise Jurisprudence: A Comment on the Heightened Threshold and the Proposal of the "Burden Plus" Standard*, 50 OHIO ST. L.J. 1035, 1037 (1989); Olree, *supra* note 30, at 105.

the Supreme Court treats this test in a claim brought by an organization in Subsection ii. Subsection iii turns specifically to the for-profit corporate context, attempting to forecast the degree of importance that the Court will give to different considerations in addressing the threshold test. It does this primarily by extrapolating lessons from relevant case-law at various levels of the court system discussing the related issue of the Engagement Question.

i. The Threshold Test Generally

The threshold test has three separate elements: "(1) the state must have imposed a burden on the claimant's belief [as well as religious or religiously-motivated activity];[60] (2) the claimant's belief must be sincerely held; and (3) the claimant's belief must be religious in nature."[61] Each element will be discussed briefly below, focusing especially on the second and third elements.

The exact contours of what creates a constitutionally significant burden have remained hazy to one looking for a clear, black-letter rule.[62] As a general overview, the Court proceeds to the justification/balancing test when the government action at issue "unduly" or "substantial[ly]" burdens free exercise, but not when it causes only a "relatively minor burden."[63] This of course leaves significant room for debate as to what infringements will

60. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (discussing First Amendment protections against laws that "target religious conduct" or "conduct with a religious motivation"); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134 (10th Cir. 2013) ("[P]rotections of the Religion Clauses extend . . . to religiously motivated *conduct*, as well as religious belief." (citations omitted) (emphasis in original)).

61. Olree, *supra* note 30, at 107 (citing Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934, 953-60 (1989)). RFRA and RLUIPA require similar showings. *Compare* 42 U.S.C.A. § 2000bb-1(a) (West 2012) (referring to a "substantial[] burden"), *and* 42 U.S.C.A. § 2000bb-1(b) (same), *and* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (taking note, in an action brought under the RFRA, that the government conceded claimant's sincerity of religion), *with* 42 U.S.C.A. § 2000cc-5(7)(a) (West 2012) (referring to the religiosity of the claim), *and* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (noting, in an action challenging part of the RLUIPA, that although judicial inquiry into the centrality of a belief is not proper, inquiry into sincerity is).

62. *See* Geyer, *supra* note 59, at 1048 (attempting to set out a clearer burden analysis); Lupu, *supra* note 61, at 966.

63. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Locke v. Davey, 540 U.S. 712, 725 (2004).

qualify as such a burden.[64] As an example of impermissible government action, the Court has found a substantial burden where the government forced an individual to choose between working on her religion's Sabbath against her beliefs or practicing her beliefs by not working on her Sabbath, but then forfeiting unemployment benefits.[65] On the other hand, the Court has found that the government's not allowing a state-issued scholarship grant to be used by theology majors constituted a burden falling below the requisite threshold for the free exercise claim to proceed.[66]

While the character of a sufficient infringement to trigger legal protections poses an interesting topic for further examination, this Comment will focus on the basic questions of what the Court should look to in the determination of whether a corporation has a religiously-based claim in relation to the claimed infringement and whether the corporation's claim is sincerely-held.[67] For purposes of convenience, these elements will be collapsed into the phrase of "the threshold test" for the remainder of this Comment.

The consideration of the second and third elements of the threshold test, collectively referred to as a "sincerely-held religious belief," can certainly at times constitute separate paths of inquiry.[68] But due in part to the Court's assiduous avoidance of questioning the centrality or truth of any claimed-religious belief,[69] inquiry into the sincerely-held religious belief is usually limited to a brief check on the sincerity of the claimed-belief—

64. *See* Jonathan Knapp, Note, *Making Snow in the Desert: Defining A Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259, 279 (2009) (noting the confusion as to when a government action becomes a sufficient burden for purposes a free exercise claim).

65. Sherbert v. Verner, 374 U.S. 398, 404 (1963). This Comment provides a lengthier description of the case in the text accompanying notes 34-38, *supra*.

66. Locke v. Davey, 540 U.S. 712, 725 (2004).

67. *See* Lupu, *supra* note 61, at 953.

68. *E.g.*, Africa v. Pennsylvania, 662 F.2d 1025, 1030, 1032 (3d. Cir. 1981) (acknowledging that the sincerity of the belief had not been challenged, but went on to find that the belief did not stem from a religion); NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1306 (9th Cir. 1991) (focusing on whether the beliefs as to unionization were religious, not whether they were sincerely-held).

69. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

frequently conceded by the government[70]—and the relation of that belief to the alleged infringement.[71] The Court's reluctance to delve into these issues is not only prudent but also logical given the apparent validity of such a threshold matter when an individual or religious organization brings the claim.[72]

The apparent nature of the "sincerity of the religious belief" (as an encompassing phrase rather than separate elements of the threshold test) becomes a significantly more difficult issue at the organizational/institutional level due to the lack of direction about where to look, unless one limits institutional exercise to an organization that is completely and explicitly religious in nature and purpose, such as a church.[73] This goes to the heart of the matter discussed in the sections below addressing, first, how an institution—especially a for-profit corporation—can be considered to have religious convictions in the first place, and even if it might theoretically have such beliefs, how a court should determine that. Before reaching those discussions in the context of for-profit corporations, however, it is helpful to see how some courts have dealt with the issue of an institution claiming religious exercise and a religious identity outside of the context of a house of worship.

70. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (recognizing the government's concession of the sincerity of belief); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (noting that neither the city nor the lower courts questioned the sincerity or religiosity of the petitioners' claims); *see also* Erin D. Coffman, Comment, Pielech v. Massasoit Greyhound, Inc.*: Can A "Sincerely Held Religious Belief" Have Meaning?*, 32 NEW ENG. L. REV. 117, 139-40 (1997) (explaining the expansive definition of religion adopted by the Court due to subjective factors and the role of sincerity in deciding on a question of religiosity). *See generally* Locke v. Davey, 540 U.S. 712 (2004) (bypassing any discussion of religiosity or sincerity).

71. *See, e.g.*, *Gonzales*, 546 U.S. at 423.

72. For example, in *Gonzales*, a religious sect brought the claim as to the government prohibition on a certain plant interfering with the religious sect's use of that plant in their ceremonies. *Gonzales*, 546 U.S. at 425-26 (2006). In *Locke v. Davey*, a student pursuing a theology degree at a Christian college with the aim of becoming a pastor brought the suit. 540 U.S. at 717-18.

73. As the individual is the prototypical believer, and a religious organization (meaning here, e.g., a church or religious charity) exists solely for explicitly religious reasons, little remains to be questioned as to a claim of religious belief. However, an organization outside of the religious organization context then requires an inquiry as to whether the individuals who have formed and operate that organization have chosen to imbue it with a religious identity.

ii. The Threshold Test in Free Exercise Claims of Institutions Other than For-Profit Corporations or Churches

Relatively little modern case-law exists to indicate how the Supreme Court would treat any difficult claims of a sincerely-held religious belief by non-church, nonprofit institutions at the threshold level. This case-law does suggest though that the Court will defer, appropriately, to lower courts' factual findings,[74] or, if resolving the issue at the threshold level, by handling the issue on other elements of the analysis, such as looking to the burden aspect.[75]

These cases also show an implicit acceptance of one principle critical to any institution's claim of free exercise—the willingness to view the institution as its own, single entity and thus the willingness to consider the institution capable of having its own institutional beliefs. In *Jimmy Swaggart Ministries*, the Court repeatedly referred to the nonprofit corporation as "appellant" in attributing its religious activities to the institution and in discussing its free exercise claim and the burden imposed.[76] This reference to the corporation as a distinct entity stands in contrast to the treatment of for-profit corporations with free exercise

74. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 602 n.28 (1983) (addressing claims of two nonprofit corporations operating private schools and accepting in one case, Bob Jones Univ. v. United States, 468 F. Supp. 890, 894 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983), the district court's extensive factual findings as showing the sincerity of the belief, and in another case, Goldsboro Christian Sch., Inc. v. United States, 436 F. Supp. 1314, 1317 (E.D.N.C. 1977), *aff'd*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983), the district court's assumption of sincerity, as satisfying the sincerely-held belief prong).

75. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391 (1990). For examples of cases at the appellate level where a lack of a sincerely-held religious belief stood as a central issue, please see *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981), and *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 669-70 (10th Cir. 2006). Another line of cases however shows a potentially troubling lack of judicial restraint in exploring what activities of a religious organization can be considered as secular or religious. *See* Lupu, *supra* note 61, at 990 (referencing the relevant cases and noting, in part, the troubling effects this can have on dictating "what constitutes religion"); *see also* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 774-75 (2001) (referring to the "subtly didactic power of the law" to shape the public's conceptualization of religion and its proper place). These thoughts will be explored in greater detail below, especially as to the potential of corporate form as a sole indicator of religious identity.

76. *Jimmy Swaggart Ministries*, 493 U.S. at 381, 390-92 (1990).

claims in the lower courts, where the courts more commonly attribute the religious activities directly to the individuals involved in the corporation.[77] Consistent with the former approach, in *Bob Jones University*, the Court refers to the schools' sincerely-held beliefs.[78] Although we still only have some implications by way of endorsements about how the Court will examine the sincerity of a religious belief in the institutional context,[79] this approach by the Court, viewing the institution as a single unit capable of having a religious identity, provides some insight into how it might approach the threshold test regarding for-profit corporations.[80]

While the Supreme Court has not yet addressed such a claim in the for-profit corporate context,[81] some lower courts have begun to wrestle with this issue. The next subsection explores the different approaches, attempting to extract the broader ideas that underlie them.

iii. Lessons for the Threshold Test from Issues of the Engagement Question in Free Exercise Claims of For-Profit Corporations

At least forty-seven for-profit corporations have brought free exercise claims in the federal and state court systems.[82] As Professor Colombo has noted, this number will likely only increase as a reawakening of spirituality encounters an ever-growing government;[83] indeed, forty of these forty-seven cases

77. *See infra* Section(II)(A)(2)(iii) immediately below.

78. Bob Jones Univ. v. United States, 461 U.S. 574, 602 n.28 (1983).

79. This is further explored *infra* Section III(A).

80. Discussed in greater detail *infra* Section II(A)(2)(iii).

81. *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012).

82. *E.g.*, Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1029 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981); Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 800 F. Supp. 2d 405, 408 (E.D.N.Y. 2011), *aff'd*, 680 F.3d 194 (2d Cir. 2012); *In re.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 845-46 (Minn. 1985); Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009); Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 789-90 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 611-12 (9th Cir. 1988); Atl. Dep't Store, Inc. v. State's Attorney for Prince George's Cnty., 22 Md. App. 381, 383, 389 (Md. Ct. Spec. App. 1974); *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Nov. 18, 2013) (providing a list of the forty lawsuits filed by for-profit corporations).

83. *See* Colombo, *supra* note 1, at 16-27 (exploring indications of increasing

have arisen since 2011,[84] precisely because of a new federal government program—the Patient Protection and Affordable Care Act, more specifically the HHS Contraception Mandate.[85]

Initially, the courts remained understandably reticent in making any firm proclamation on whether a for-profit corporation can be considered to possess the ability to exercise religion.[86] The courts generally noted that such a claim presents a difficult decision, but then avoided deciding the institution's claim by either accepting the claims of the owners as those of the corporation[87] or by weighing whether the corporation might have associational standing on behalf of its owners.[88] However, recent decisions have increased the frequency of more decisive pronouncements.[89] Such decisions can have long-term effects, as

"religious integralism" with a corresponding growth of the "regulatory state").

84. *See HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Oct. 17, 2013) (providing a list of the thirty-nine lawsuits filed by for-profit corporations).

85. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122-23 (10th Cir. 2013) (describing the particularities of the HHS Contraception Mandate).

86. For a recent example of the likely furor that such a decision would stir up, peruse the vast amount of literature on the *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) decision concerning the debate on corporate personhood and political speech that it inflamed. *See* Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717 (2011) (collecting a wide array of commentary and scholarship on the decision).

87. *E.g.*, Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012); Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 800 F. Supp. 2d 405, 416 (E.D.N.Y. 2011) *aff'd*, 680 F.3d 194 (2d Cir. 2012); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1121 (9th Cir. 2009).

88. *E.g.*, Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 790 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986). The possibility of resting on associational standing alone will be discussed in greater detail *infra* Section III(B) below.

89. *E.g.*, *Hobby Lobby Stores, Inc.*, 723 F.3d at 1133 (finding that for-profit corporations are "persons" under the RFRA and that at least some can engage free exercise rights); Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 47 (7th Cir. Nov. 8, 2013) (finding that, at least in the context of closely-held corporations, "a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated"). *But see* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d. Cir. 2013) (concluding that the Free Exercise clause and the RFRA are not available to secular, for-profit corporations); Autocam Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 730 F.3d 618, 625 (6th Cir. 2013) (finding that the corporation "is not a 'person' capable of 'religious exercise' as intended by RFRA"); Gilardi v. U.S. Dep't of Health & Human Servs., No. 13-5069, 2013 WL 5854246, at *6 (D.C. Cir. Nov. 1, 2013) (finding that there is "no basis for concluding a secular organization can exercise religion"); *Atl. Dep't Store, Inc.*, 323

is explored in Section III(B)(2)(v). Regardless, the remainder of this subsection will move beyond the Engagement Question. It will instead look to the corporate context and ask: What aspects do the courts notice relevant to a legally sufficient showing of a sincerely-held religious belief in relation to the claimed infringement? Although most of these examinations have arisen in the context of the Engagement Question, the answers indicate possible relevant factors for the closely-related inquiries of the threshold test.

The most important factor so far in the decisions that allow the claims of the corporation and the owners to go forward seems to be a finding that the company is closely-held, in which both ownership and control of a company unite in one set of persons.[90] Of course this is somewhat skewed as most corporate plaintiffs thus far have been closely-held corporations.[91] Being closely-held frequently goes hand-in-hand with being a small company, but there are departures from this generalization, as in the cases of plaintiffs such as Grote Industries, an international company with 1,148 employees, or Hobby Lobby, which has around 13,000 employees spread across 500 stores.[92] The closely-held aspect allows the courts to more easily transpose the beliefs of the individuals who simultaneously own and manage the corporation to the corporation itself, or even just disregard the corporate form altogether.[93]

A.2d at 622 (finding that, as an artificial person, corporations cannot avail themselves of the Free Exercise clause as they have neither religion nor "nonreligion"). The Eleventh Circuit has made the broad statement that corporations have free exercise rights, but that statement did not come in a for-profit corporation free exercise case and thus did not comprise a part of the holding. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1305 (11th Cir. 2006).

90. Broadly speaking, a "closely-held" corporation refers to a company that trades few, if any, stocks publicly and does not divide its ownership and control. *See* THEODORE NESS & EUGENE L. VOGEL, TAXATION OF THE CLOSELY HELD CORPORATION 1-6 (4th ed. 1986).

91. *E.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 611 (9th Cir. 1988); Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Nov. 8, 2013); Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).

92. Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013), *granting preliminary injunction sub nom.* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Nov. 8, 2013); Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (Sotomayor, Circuit Justice 2012); *see* NESS & VOGEL, *supra* note 90, at 1-4 (commenting that no part of the definition of a closely-held corporation requires that they be of smaller size, and that in fact many large ones do exist).

93. The Tenth Circuit fell back on exactly these points when coming to its

After noting this aspect, the courts seem to take a holistic approach in looking for the more obvious signs of these beliefs.[94] The resulting evidence, such as faith-based statements in the articles of incorporation;[95] faith-based mission or value statements;[96] worship services during work hours;[97] religious literature in the workplace;[98] charitable donations reflecting the claimed beliefs;[99] insurance policies reflecting the claimed beliefs;[100] programs to have the workplace better reflect faith-based principles;[101] and the beliefs of the owners/directors/shareholders,[102] all contribute to at least a preliminary finding by a court that the corporation reflects the

conclusion that Hobby Lobby and Mardel can assert rights under the RFRA. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) (noting the closely-held aspect allows the court to avoid addressing the question in the context of a large, public corporation and that the beliefs of the owners ensure the sincerity of the claimed beliefs). *See also* Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 798 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986) (Popovich, J., dissenting) (insisting that, at least when a closely-held corporation, no distinction exists between institutional rights and associational rights).

94. *See In re.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 852 (Minn. 1985) (noting that activities of the corporation resulted from sincerely-held beliefs).

95. *E.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

96. *E.g.*, Annex Med., Inc. v. Sebelius, Civil No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013); *Tyndale*, 904 F. Supp. 2d at 116.

97. *E.g.*, *Tyndale*, 904 F. Supp. 2d at 116; *In re. McClure*, 370 N.W.2d at 847; EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

98. *E.g.*, *In re. McClure*, 370 N.W.2d at 847; *Townley Eng'g & Mfg. Co.*, 859 F.2d at 612.

99. *E.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); *Tyndale*, 904 F. Supp. 2d at 115; *Townley Eng'g & Mfg. Co.*, 859 F.2d at 612.

100. *E.g.*, *Newland*, 881 F. Supp. 2d at 1292.); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

101. *E.g.*, *Newland*, 881 F. Supp. 2d at 1292.

102. *E.g.*, Annex Med., Inc. v. Sebelius, Civil No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013); Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013), *granting preliminary injunction sub nom.* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Nov. 8, 2013); Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, 2012 WL 6757353, at *1 (7th Cir. Dec. 28, 2012), *granting preliminary injunction*, No.12-3841 (7th Cir. Nov. 8, 2013); *Tyndale*, 904 F. Supp. 2d at 116; Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009).

claimed beliefs.[103] As one might expect, in some cases, the corporation failed to show any immediately apparent evidence of the owners' religious beliefs in practice, and the free exercise claims did not proceed.[104] Of course the degree to which any such evidence will be present will vary among any given corporation. A few examples help to reflect this point.

Tyndale House Publishers, Inc., involved in the HHS Mandate litigation, could hardly present a stronger case that a for-profit corporation can exercise religion. The closely-held company publishes Christian literature.[105] 96.5% of its profits go directly to its primary shareholder, a nonprofit religious entity, which in turn disburses those funds to charitable causes.[106] The trustees, who hold the majority of the voting shares of the corporation, also serve as its directors, and all sign statements of belief each year that mirror the beliefs of the primary owner.[107] The company's articles of incorporation reference its end goal of publishing Christian literature, and it states its purpose as publishing literature that is in line with the Bible.[108] The majority of employees attend a weekly chapel service on company grounds, and the board of directors' meetings include a period of prayer.[109] In its formation, operation, and output, Tyndale Publishers, Inc. explicitly displays its religious beliefs. The *Tyndale* court chose to bypass the institutional question and looked primarily at the beliefs of the owners.[110] If the Court does find that for-profit corporations undertake activity that engages rights protected under free exercise claims, Tyndale Publishers, Inc. will represent the set of corporations that can most apparently meet the threshold requirement of showing a sincerely-held religious belief.

This gets trickier where the indications of faith do not

103. *See*, *e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619-20 (9th Cir. 1988).

104. *See, e.g.*, Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1040 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981).

105. Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

106. *Id.* at 111, 116.

107. *Id.* at 116.

108. *Id.*

109. *Id.*

110. Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

manifest themselves so tangibly, or even more so where the corporation's ownership and control do not reside in the same set of individuals, i.e. in a publicly-traded company.[111] For example, in *Grote v. Sebelius*, the Grote family stated that they run their business in accord with principles of their Catholic faith and had an insurance plan that did not cover contraceptives, abortifacients, or sterilization.[112] While finding that a for-profit corporation can exercise religion under the RFRA, the Seventh Circuit notably focused on the closely-held aspect of the corporation.[113] The importance of this aspect is strikingly apparent in the court's analysis of the burden prong, when it switches from speaking about the corporate plaintiffs (for whom it found standing) to speaking about the individual owner plaintiffs.[114] The dissent, in addition to disagreeing with the majority's interpretation of the RFRA, took issue with what it saw as a reliance only on the beliefs of the individual owners while simultaneously finding for the corporate plaintiffs.[115] More specifically, the dissent noted that it is the company that employs the individuals, that pays for the policies, and therefore that suffers the harm.[116] And, proceeding from this, the dissent

111. Tyson Foods, Inc., presents an intriguing example of a publicly-traded corporation with some more apparent religious elements. A Fortune 500 company with 115,000 employees nationwide, Tyson Foods includes statements in its core values that the company "strive[s] to honor God" and is "faith-friendly"; even more compelling, the company provides an extensive chaplaincy service in many of its locations, mostly made up of Christian chaplains but including some other faiths as well. M. Alex Johnson, *Walking the walk, on the assembly line*, NBCNEWS (Mar. 24, 2005, 6:07 PM), http://www.nbcnews.com/id/7231900/ns/us_news-faith_in_america/t/walking-walk-assembly-line/#.UQ9CWL_oRf-; *Core Values*, TYSON FOODS, INC., http://www.tysonfoods.com/About-Tyson/Company-Information/Core-Values.aspx (last visited Oct. 17, 2013); TYSON FOODS, INC., http://www.tysonfoods.com/About-Tyson/Company-Information/Tyson-Today.aspx (last visited Oct. 17, 2013).

112. Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013), *granting preliminary injunction sub nom.* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Nov. 8, 2013).

113. Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 3, 53 (7th Cir. Nov. 8, 2013).

114. *Id.* at 54-60.

115. *See id.* at 100-01 (Rovner, J., dissenting). In an earlier disposition on these facts, the same dissenting judge, while stating the importance of the corporation's listed purpose in determining its religious identity, looked to Tyndale House Publishers as a for-profit corporation that could be considered to have a religious identity. *Grote*, 708 F.3d at 856-57 (Rovner, J., dissenting). This output-based focus will be critiqued in the proposal section below.

116. *Korte,* No. 12-3841 slip. op. at 123.

opined that there was insufficient evidence to show "the asserted religious interests of the two corporate plaintiffs and how those interests would be burdened . . . ."[117]

The complaints of the dissent expose some tensions that pose a number of difficult questions. For example, when we talk about a corporation's free exercise rights, are we really just talking about the owners', directors', shareholders', or employees' beliefs in some circuitous fashion, or are we talking in some ways about the institution itself? Given the courts' laudable reluctance to question an individual's sincerely-held religious beliefs, how closely do we want them to examine an institution's claim, especially that of a for-profit corporation? How explicitly religious does the evidence of religious beliefs need to be? Do we look at the formation of the corporation (e.g., articles of incorporation), the operation of the company (e.g., employee policies), or the output/end-purpose of the company (e.g., profit-making vs. running church services)? Although this comprises the subject of Section III(A) below in relation to the threshold test, the courts' initial inclinations as seen in this Subsection correctly examine all phases of a corporation's existence and also rely on at least some of the evidence being more explicitly religious in nature.

The simpler, albeit misguided (as explained below), way to handle the issue would be much like the stratification currently employed in some of the broader classifications based on purpose or output, such as labels like nonprofits, religious organizations, and for-profit companies.[118] This approach has the benefit of being straightforward and simple, allowing the courts to move efficiently and with the appearance of not getting into the thicket of how faith might pervade the workplace. Simply put, under this approach, if the company's end purpose consists of making a profit, then it does not display religious beliefs. The downside to this approach stems from the implicit endorsement that faith should stay in its own place—that it has no role, and in fact, cannot legitimately manifest itself in the for-profit sphere at the organizational level.

117. Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 3, 97 (7th Cir. Nov. 8, 2013).

118. Such as in the tax code. *See* Rienzi, *supra* note 22 (manuscript at 39) (citing 26 U.S.C. § 501(c)(3), but going on to explain why even the tax code does not suggest that profit-making and a religious identity are mutually exclusive).

The Supreme Court showed some signs of adopting this more output-based line of thinking in two cases that touched upon institutional free exercise claims, although not in the case of for-profit corporations. In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, in discussing religious organizations' exemptions from religious employment discrimination claims, Justice Brennan noted in his concurrence that "[t]he fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation."[119] And in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court noted that because some regulatory requirements applied only to "commercial activities undertaken with a 'business purpose,'" they would not have any effect on "evangelical activities."[120] The obvious import of these positions lies in the revealed underlying thought that where an organization seeks to make a profit, it forfeits its claim of having a religious identity.

Thus, there seems to be a clash—recognizing that an institution generally can have a religious identity, yet being uncomfortable in ascribing such an identity to an institution that aims to make a profit. The next subsection will discuss what it means when we say that a corporation may exercise religion, and Section III thereafter will take up the question of what the courts should look to (and what they should not look to) to see if the corporation does in fact have a religious identity.

B. FOR-PROFIT CORPORATE FREE EXERCISE: THEORETICAL FOUNDATIONS[121]

A brief review of the theoretical foundations by which the courts would come to find for institutions on the Engagement Question, bridging the gap mentioned above, will prove integral to giving form to the suggestions below in how a specific for-profit

119. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring). Justice Brennan does leave a possible door open for case-by-case consideration for the religious character of some for-profit activity and comments that his focus in this case rests primarily on a "categorical exemption" for nonprofits. *Id.* at 344 n.6.

120. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985).

121. Professor Ronald Colombo provides a comprehensive review of the theoretical foundations of, and a compelling argument for, the realization of for-profit corporate free exercise rights in his article, *The Naked Private Square*, *supra* note 1. In addition, several of the other sources in *supra* note 24 provide similar summaries.

corporation might evidence a sincerely-held religious belief.[122] In short, this subsection summarizes the ideas that humans naturally come together into organized groups to attain any number of given ends. In doing so, those individuals shape and infuse these groups or associations with their own beliefs, convictions, and ideas to varying degrees; but they also create something more than merely an agglomeration of individuals.[123] In other words, it becomes naturally more appropriate to speak about what that organization is doing than what any various collection of its members individually are doing. This conceptual distinction might tempt us to view such an organization only by its end, but this disregards its formation and operation as not just a common enterprise of individuals but also an institution reflecting a shared vision or bestowed identity (which gives rise to permanence). Following that temptation of focusing only on the output cheapens the individual by discounting the human role as little more than a mechanistic function towards that end. To a large degree, this endeavor of seeking fulfillment in common purpose, whatever that purpose might be, goes far beyond the ability of the law to capture and thus far beyond what we should be willing to ask the law to do. For example, the degree to which one infuses his faith into his work should not be something that the law tries to comprehensively describe in an absolute manner. But by implementing a categorical rule that for-profit corporations cannot have a religious identity, the law enforces exactly this separation to a needless extent.

Two things arise from the above thought. First, a good argument exists that the law generally needs to allow a for-profit corporation to bring a free exercise claim, as reviewed in this section.[124] Second, to avoid being overly positivistic and to avoid doing more damage than they have already done, the courts should look at the for-profit corporation holistically and search for apparent signs of religious identity, as proposed in Section III(A).

Below, Subsection 1 explores the idea of a for-profit

122. Each part of this section touches on areas large enough for separate law review articles, and even books, dedicated to that part alone. Again, for an actual argument on for-profit corporate free exercise, see Colombo, *supra* note 1, and Rienzi, *supra* note 22.

123. Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1736 (2008).

124. *See* Colombo, *supra* note 1, at 65-66.

corporation as an association. Subsection 2 continues this development by discussing the idea of a corporation being a distinct entity with an imbued identity in light of available corporate theory and court precedent. Subsection 3 explains the implications these theories have had for the extension of constitutional rights to corporations. Subsection 4 concludes by offering the idea that the ability of a for-profit corporation to bring a free exercise claim is the next obvious step in this progression of corporate rights and theory.

1. ASSOCIATIONS: NOT A NEW IDEA

Man naturally comes together in concert to undertake some common purpose and/or to form around some common principle.[125] This tendency to associate, the manifestation of which fittingly receives the name "association," has served as a hallmark of American democracy since the country's beginnings and has also received corresponding constitutional protection.[126]

Scholars have offered some central reasons for the importance of the association and its role as a mediating institution. Associations serve a broad range of needs more effectively than the state,[127] thus limiting state power, and also provide more effective venues to stand against state action.[128] In

125. *See* MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 7 (rev. ed. 1990).

126. In the ever-prescient reflections of Tocqueville:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 224 (Henry Reeve trans., Bantam Books 2000) (1835), *quoted in* Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 31 (2012) [hereinafter Colombo, *Tocquevillian Association*]. Professor Ronald Colombo provides a detailed analysis of the importance of associations to democracy, particularly from the standpoint of Tocqueville's observations. *See generally* Colombo, *Tocquevillian Association*. *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (addressing the right of association).

127. *See* Robert Vischer, *The Morally Distinct Corporation: Reclaiming the Relational Dimension of Conscience*, 5 J. CATH. SOC. THOUGHT 323, 325 (2008) (explaining the concept of subsidiarity).

128. Colombo, *Tocquevillian Association*, *supra* note 126, at 33-34; *see* Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 175 (1997) (discussing the role of mediating institutions). The ability to stand up to state power in the protection of conscience offers institutions a particularly

addition, outside of justifying them in reference to the state, their natural occurrence, as something engrained in our nature, stands as perhaps the primary sign of their importance.[129] This then places even more emphasis on the association's formation and its operation, allowing the cultivation of "socialization, self-realization, and the inculcation of civic republicanism."[130] Many of these core features of an association find root in the idea of an entity that can present a unified front, something that has its own identity and culture capturing something more than simply a "partnership of individuals."[131] Michael Novak points out that the corporation sprang from many of these same considerations—individuals coming together in common purpose and ordered towards a common goal.[132]

A for-profit corporation can represent yet another entity within the umbrella of associations, serving as a mediating institution and providing yet another vehicle for the shared life. Attributing rights to a for-profit corporation and acknowledging its ability to act as an association rely on viewing the corporation as a separate entity, freeing it from a view of a loose collection of individuals striving to reach some end together, under which only the individuals or the explicit purpose of the collective hold any value.[133] Corporate personhood and corporate theory both help to

important role. *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008) [hereinafter Garnett, *Do Churches Matter*] (discussing the views of John Courtney Murray while pointing out the importance for a greater institutional religious protection).

129. Timothy L. Fort & James J. Noone, *Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 LAW & CONTEMP. PROBS. 163, 176 (1999) (explaining that a view of "methodological individualism" fails to account for the full range of human nature).

130. Colombo, *Tocquevillian Association*, *supra* note 126, at 38 (citing TOCQUEVILLE, *supra* note 126, at 405-06, 430); *see* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1853-55, 1882 (2001).

131. *See* Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 529 (2011) (discussing the related Aristotelian idea of universitas); Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm Within the Catholic Social Tradition*, 4 AVE MARIA L. REV. 33, 63 (2006) (explaining that a corporation can become an authentic "community of work" through its "identity, mission, and stewardship").

132. *See* NOVAK, *supra* note 125, at 8. The effect of having a purpose of productivity and profit is explored *infra* Section II(B)(4).

133. *See* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841,

put meat on the bones of this theoretical skeleton.

2. CORPORATE PERSONHOOD AND THE CORRESPONDING CORPORATE THEORY: NOT NEW IDEAS

The idea of corporate personhood, the consideration of a corporation as a legal person, garnered significant debate in the wake of the *Citizens United* decision where the Court held that, in addition to natural persons, corporations could claim protection under the First Amendment for political speech.[134] Although that decision brought renewed attention to the subject, the idea of corporate personhood dates back to decisions of the 1800s,[135] albeit in less explicit terms.[136] Later cases however took the next step of referring to corporations as persons within certain contexts.[137] Before reaching the implications of corporate personhood, or some similar idea, for corporate rights, this section will conduct a review of the corporate theory seemingly underlying the idea of corporate personhood, helping to illuminate what it means when we talk about the corporation as a person, or maybe more accurately, as a distinct entity.

Although never directly connected by the Court, the idea of the corporation as a person finds its most comfortable niche in corporate theory under the natural entity theory.[138]

slip op. at 37 (7th Cir. Nov. 8, 2013); Vischer, *supra* note 127, at 357 ("The corporation's moral identity is not simply the sum of its parts; the corporation needs discretion to shape its own identity.").

134. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43 (2010). *See* Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 889-90 (2011) (noting the debate and criticism as to corporations claiming the same rights as natural persons); Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 212-13 (2011) (same); Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 702 (2011) (same).

135. Colombo, *supra* note 1, at 52 (discussing the cases of Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819), and Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886)).

136. *See* Ripken, *supra* note 134, at 222 (explaining how the notion of corporate personhood sprang in part from a brief statement of the Chief Justice in oral arguments of the *Santa Clara County* case); Shapiro & McCarthy, *supra* note 134, at 703-04 (noting the absence of this term in the foundational cases).

137. *See* Ripken, *supra* note 134, at 223 (citing Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896)).

138. *See* Baworowsky, *supra* note 123, at 1736.

Summarizing many of the ideas above, this theory states that humans naturally come together in groups, and those groups have an identity "over and beyond being an aggregation of individuals."[139] Such a theory allows for a consistent identity regardless of the changing of any investors, directors, managers, shareholders, or employees.[140] This also allows for those individuals to have their own identities, such as religious beliefs, separate from the identity trumpeted by the corporation.[141] The true value of the natural entity theory shines brightest when considering the most prominent alternative.

Contractarian theory, the choice of many corporate scholars such as Stephen Bainbridge,[142] provides the strongest counterpoint to natural entity theory.[143] Professor Bainbridge explains that contractarian theory sees the corporation not as a distinct entity but as "a nexus or web of explicit and implicit contracts establishing rights and obligations among the various

139. *See* Baworowsky, *supra* note 123, at 1736.

140. *Id.* at 1738.

141. *Id.* at 1739.

142. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1005-06 (1992) [hereinafter Bainbridge, *Nonshareholder Constituency Statutes*] (criticizing the view of the corporation as a distinct entity and arguing for a model based on the "nexus of contracts" model).

143. Stephen M. Bainbridge, *Contractarianism in the Business Associations Classroom: Kovacik v. Reed and the Allocation of Capital Losses in Service Partnerships*, 34 GA. L. REV. 631, 632 (2000) [hereinafter Bainbridge, *Contractarianism in the Classroom*] (referring to contractarianism as the "now-dominant" model); Baworowsky, *supra* note 123, at 1728 (explaining the rise to prominence of the contractarian theory). This followed on the heels of another theory, artificial entity theory, which held significant sway at a time when corporations and the state had an inextricably intertwined nature and saw the corporation as a state-dependent entity formed for a certain public good. *See* Baworowsky, *supra* note 123, at 1725. Early in the nation's history, state legislatures passed special acts on limited occasions to give a corporate charter when it would serve some specific public need. *See* Ripken, *supra* note 134, at 219-20. To some extent, "benefit corporations," discussed in Section III(B), reflect in part a modern-day version of an artificial entity, as their ends must be for the "public good"—likely innocuous, noncontroversial ideals that do not leave the necessary room for a religious identity. For example, see the Chik-Fil-A example in Section II(B)(4) below for one instance of a controversial stance that the state would not likely declare a public good but which is nonetheless a religious belief. Baworowsky explains that natural entity theory bridges the divide between contractarian and artificial entity theories by "show[ing] how a corporation may be both created by and composed of quasi-contractual arrangements between individuals (as in the unduly individualistic contractarian theory) and an entity specially protected by laws (as in the overly collectivistic artificial entity view)." Baworowsky, *supra* note 123, at 1742.

inputs making up the firm."[144] This then means that not only are capital, equipment, and land seen as inputs, but also the individuals themselves.[145] While this might make an accurate model and even an anthropologically unobjectionable one for economic forecasting, it is worth asking if it should *ipso facto* serve as the model for all other discussions pertaining to the corporate world, including those related to corporate identities and the human experience.[146]

A number of scholars, such as Michael Novak, apparently think not.[147] Importantly, these commentators carefully distinguish their critiques of contractarianism not as applied to economic reasoning, but on social grounds.[148] Novak points to the origins of the corporation as stemming from a need for a more productive model that could provide both continuity and independence—something that could break the bonds of individualistic limitations.[149] Corporations are created, ran, and supported by individuals; these individuals have to decide what the corporation will do, how it will run, how it will be structured, what causes it will support, what policies it will use for routine decisions, how it will treat the various constituencies, what kind of culture it will provide, what kind of brand it will establish, how it will represent itself to the outside world, what product it will

144. Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 1006.

145. Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 1005-06 (explaining the model as an "aggregate of various inputs," in which, for example, the "shareholders are simply one of the inputs").

146. The contention that this theory presents difficulties when extended to other arenas need not rely on generalizations about human nature to bolster its credibility. *See* discussion of Justice Stevens' concurrence and dissent in *Citizens United, infra* Section II(B)(3).

147. *See* NOVAK, *supra* note 125, at 46, 56-57 (noting that corporations have not only economic elements but also political and moral-cultural elements, defying an individualistic interpretation); Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181, 188-90 (2005). Michael Novak retired as the George Frederick Jewett Scholar in Religion, Philosophy, and Public Policy at the American Enterprise Institute and remains a prolific scholar on, among other things, capitalism as a cornerstone of free society. *See Michael Novak*, AM. ENTERPRISES INST., http://www.aei.org/scholar/michael-novak/ (last visited Oct. 18, 2013); *The joy of capitalism: An evening with Michael Novak*, AM. ENTERPRISES INST., http://www.aei.org/events/2012/09/27/the-joy-of-capitalism-an-evening-with-michael-novak/ (last visited Oct. 18, 2013) (giving a speech in September on that topic).

148. *See, e.g.*, Fort & Noone, *supra* note 129, 178-79, 184-90; Gerald J. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 J. CATH. LEGAL STUD. 107, 114-16 (2007); Stabile, *supra* note 147, at 188-89.

149. NOVAK, *supra* note 125, at 8.

output, and what it will sacrifice in accomplishing all of these tasks. The individuals do this with the consideration that the corporation might easily outlast those individuals involved at the outset or at any other particular point in the corporation's existence. In other words, they build the identity of the corporation to take on its own significance. It is common knowledge that the public will discuss the corporation's image, the corporation's actions, the corporation's product, and the corporation's liability apart from any discussion of the individuals involved.[150] Thus Novak observes that "[c]orporations . . . are not individualistic in their conception, in their operations, or in their purposes."[151]

Very simply, by insisting on a contractual view to apply in this context as well, one over-individualizes the individual; by bringing over this fictional character from economic models, one has now made the average person a self-serving "automaton" by stripping away his relational character for associational formation.[152] This puts into picture a "web" of inputs and contracts in which the only thing that matters is the product that web spits out at the end,[153] with no relevance given to the fulfillment (or lack thereof) of the individual in and through the corporation or the choice of corporate values and the individual gravitation to them.[154]

Regardless of attempting to fit a chosen illustration such as corporate personhood or natural entity theory to the concept, the idea remains the same[155]—that the corporation has its own

150. *See infra* Section II(B)(4) (discussing the Starbucks or Chick-Fil-A examples).

151. NOVAK, *supra* note 125, at 46.

152. *See* Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL'Y 737, 739 (2009) (reviewing MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., 2008)) [hereinafter Colombo, *Exposing the Myth*]; Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 106 (2010).

153. *C.f.* Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 1006 (discussing contractarian visualizations using similar terminology); McCall, *supra* note 131, at 521 (opining that the contractarian model, no matter how detailed an explanation, ultimately struggles to get beyond anything other than a singular focus of decisions aimed at shareholder wealth-maximization).

154. NOVAK, *supra* note 125, at 47 (explaining the centrality of the workplace in employees' lives); Vischer, *supra* note 127, at 344-46 (explaining that investors, customers, and employees share in this identity where the corporation has a moral claim that draws them, regardless of whether the corporation can be termed a "robust community").

155. Dean Vischer presents an approach allowing for a corporation's moral identity

distinct identity and thus requires its own distinct set of rights.

3. CORPORATE FIRST AMENDMENT RIGHTS: NOT A NEW IDEA

This concept of the corporation as a distinct entity inevitably leads to the question: What rights should a for-profit corporation get?[156] Ascribing constitutional rights to a corporation dates back to the defining of a corporation as a person for purposes of the Fourteenth Amendment's Equal Protection provisions, leading to a steady progression of corporate constitutional rights since that time.[157] These rights in the corporate context include some afforded by the First Amendment, as detailed below after a brief summary of other corporate constitutional rights.

Corporations now enjoy the following constitutional protections: Fourth Amendment protections as to searches and some degree of privacy, Fifth Amendment protections against double jeopardy and takings, and Sixth Amendment rights relating to trial and counsel.[158] Corporations can also claim procedural due process, in addition to equal protection rights under the Fourteenth Amendment.[159] In a number of these cases, a for-profit corporate defendant claimed the constitutional right.[160]

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even under a contractarian understanding. Vischer, *supra* note 127, at 345-49.

156. *See* Baworowsky, *supra* note 123, at 1740 (noting that the natural entity theory opened the door to the extension of many rights to the corporation). At least this question seems obvious to the individual, if not the courts, as the development of corporate theory and corporate rights have not always gone hand-in-hand. *Id.* (criticizing the lack of any unified theory to match the development of corporate rights); Colombo, *Tocquevillian Association*, *supra* note 126, at 22 (noting that corporate constitutional rights and "corporate personhood" are on a separate track from corporate theory).

157. Ripken, *supra* note 134, at 223.

158. Miller, *supra* note 134, at 910-11 (collecting authorities on this list of corporate constitutional rights).

159. *Id.*

160. *See generally* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (involving an electrical and plumbing installation business invoking the Fourteenth Amendment); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (discussing a defendant corporation's right to the Fifth Amendment); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (addressing in part a corporation's claim based on the Fifth Amendment); Ross v. Bernhard, 396 U.S. 531 (1970) (Seventh Amendment); United States v. R.L. Polk & Co., 438 F.2d 377 (6th Cir. 1971) (Sixth Amendment); United States v. Rad-O-Lite of Phila., Inc., 612 F.2d 740 (3d Cir. 1979) (same); Am. Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984) (same); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (Fourteenth Amendment); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984) (same). All of these are

Corporate rights under the First Amendment were center stage in the most recent corporate rights controversy revolving around the *Citizens United* decision relating to the First Amendment protection of political speech for a corporation.[161] However, like corporate constitutional rights in general, a determination of corporate rights under the First Amendment represents more of a contested border than a new frontier.

Because an entity can possess an identity, the Court has had no trouble in judging other organizations' claims—even nonprofit corporations—under the First Amendment's Free Exercise clause,[162] the First Amendment's Establishment clause,[163] or the Religious Freedom Restoration Act.[164] However, the Court has not yet addressed a free exercise claim from a for-profit corporation.[165]

The cases in which the Court has found the First Amendment to protect corporate political speech have not only bypassed making any distinction based on corporate form (e.g., nonprofit vs. for-profit), they have in fact forbidden it.[166] Nonetheless, while the Court in *Citizens United* declined the opportunity to make any statement on corporate theory, this ruling rests on an implicit assumption—that a corporation has expressed itself, allowing it to bring a First Amendment claim in the first place.[167] Justice Stevens expresses the trouble that a pure contractarian would have in accepting this notion in his concurrence and dissent when he asks:

> It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses

conveniently compiled by Professor Miller. Miller, *supra* note 134.

161. *See* Shapiro & McCarthy, *supra* note 134, at 706 (citing *Citizens United* while commenting that it has reignited this debate over corporate theory and rights).

162. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

163. *See generally* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990).

164. *See generally* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

165. *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012).

166. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (citing Buckley v. Valeo, 424 U.S. 1 (1976) and First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978)) (holding "that the Government may not suppress political speech on the basis of the speaker's corporate identity").

167. Baworowsky, *supra* note 123, at 1758 (noting that finding a corporation can have a voice relies on seeing the corporation as a natural entity).

> or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will conflict with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.[168]

This excerpt succinctly captures the heart of a contractarian's understanding (discussed *supra* Section II(B)(2)) and struggles with the idea of a unified entity, made up of numerous individuals, expressing a single idea—a concern which the majority implicitly rejected in coming to its conclusion.[169] The idea of a corporation, or any institution, being a distinct entity underlies the results in cases in which the Court has found a nonprofit corporation to have free exercise rights as well.

The question then of free exercise rights of a for-profit corporation appears in a less revolutionary light when put in this historical context. Many corporations, including for-profit corporations, have been assigned a number of constitutional rights.[170] Furthermore, institutions and apparently even corporations (although as yet unsaid as to for-profit corporations) can avail themselves of free exercise rights under the First Amendment. Two competing lines of thought seem to be at play in these decisions—on the one hand, a view that humans can create a distinct entity and therefore the Court disregards the

168. Citizens United v. Federal Election Commission, 558 U.S. 310, 467 (2010) (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., concurring in part and dissenting in part) (emphasis omitted).

169. *See generally Citizens United*, 558 U.S. 310.

170. *See supra* Section II(B)(3).

nature of the entity in the assignment of First Amendment rights, as in *Citizens United*;[171] on the other hand, a view that the corporation's categorization or end purpose does in fact define the extent of its rights when compared with other like entities as displayed in the Supreme Court cases discussed at the end of Section II(A)(2)(iii). One can now narrow the question to asking: "Is anything unique about the for-profit corporation that prevents it from having a religious identity?"

4. FOR-PROFIT CORPORATE FREE EXERCISE: A NATURAL IDEA[172]

In summary, the foundation to find that a for-profit corporation is capable of having a religious identity, and thus deserving of legal protection, has been laid by years of both precedent and scholarship. The next step then is not that of breaking new ground, or even laying the cornerstone. The courts need only to apply the next layer in this natural progression. The theory exists that humans are social in nature. Due to their social nature, humans come together in groups formed for a number of reasons. These groups allow for human expression, human development, and state restraint. These groups, formed and operated by humans, are given their own distinct identity. The legal system has recognized the existence and importance of these entities and has accordingly continued to grant them an

171. *Cf.* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013) (drawing the analogy between the *Citizens United* facts and the engagement of rights under the RFRA or the religion clauses of the First Amendment by a corporation).

172. The RFRA of course relies on a statutory basis. Nonetheless, the theoretical foundations reviewed here would still provide the conceptual lens through which to view a corporation's religious identity, or evidence of its sincerely-held religious belief. The statutory context raises its own issues with interpretation of what is meant by "person" under the RFRA's protection. However, Kevin Walsh points out a number of reasons why this not only does not exclude for-profit corporations, but it should rather be seen as including them: the U.S. Code has defined "person" to include corporations unless stated otherwise; RFRA claims have been previously brought by corporations; no difficulty exists in several contexts of ascribing a corporation's actions, for instance employment discrimination for religious reasons, to the corporate entity; and, the specific exclusion of for-profit corporations in other contexts, such as Title VII employment law, shows that Congress can distinguish if it so desires. Kevin C. Walsh, *The Third Circuit is wrong: RFRA protects corporations, without any carve-out of for-profit corporations from its protections*, WALSHSLAW (Feb. 9, 2013), http://walshslaw.wordpress.com/2013/02/09/the-third-circuit-is-wrong-rfra-protects-corporations-without-any-carve-out-of-for-profit-corporations-from-its-protections/. Thus, this view still relies on being able to see the corporation as a distinct entity and, as Kevin Walsh points out, that individual actors come together in giving this entity its own identity. *Id.*

increasing number of institutional rights; and these rights have included recognition of religious identities in the corporate context.[173] The only way that for-profit corporations can be differentiated is by an end-only focus on their goal of production, i.e., making profits.[174]

Such a differentiation revolves around the perception that a for-profit corporation can operate only by consideration of shareholder profit-maximization.[175] The argument then goes that as profit-maximization stands as the singular purpose, a religious identity cannot coexist with such a purpose, except as a marketing veneer.[176] Indeed, the United States government adopts precisely this view in its responses to for-profit corporations' recent freedom of religion claims.[177] There are a number of reasons why this proposition should not be dispositive.

First, some scholars dispute the accuracy of shareholder wealth-maximization as the sole operating norm. Lyman Johnson explains that the majority of states explicitly allow for actions taken on behalf of non-shareholder constituencies.[178] Johnson and others argue that the prevalence of this understanding resulted largely from simplified assumptions and a narrow scope of classroom instruction, and it remains a societal,

173. *See supra* Sections II(B)(1)-(3).

174. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1132-33 (10th Cir. 2013).

175. *See* Colombo, *Tocquevillian Association*, *supra* note 126, at 38-40 (reviewing some such arguments); Colombo, *supra* note 1, at 59-60 (noting this perception); Vischer, *supra* note 127, at 335 (same). Scholars also debate how much influence the size of the company or its public or private nature should have on its ability to have a cohesive identity. *Compare* NOVAK, *supra* note 125, at 11, n.9 (explaining the role of even large corporations as mediating institutions), *with* Fort & Noone, *supra* note 129, at 203 (noting the large size of modern organizations as an impediment to realizing mediating institutions), *and* Naughton, *supra* note 131, at 71 (stating that it becomes much more difficult to see the corporation as a "community of work" when publicly-traded).

176. Colombo, *supra* note 1, at 57-60 (summarizing the arguments); *see* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1166 (10th Cir. 2013) (Briscoe, C.J., & Lucero, J., concurring in part and dissenting in part).

177. *See, e.g.*, Rienzi, *supra* note 22 (manuscript at 50) (citing Defendants' Memorandum in Support of their Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (Docket No. 17)).

178. Lyman Johnson, *Pluralism in the Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 274-75 (2013) (citing eBay Domestic Holdings, Inc. v. NewMark, 16 A.3d 1, 35 (Del. Ch. 2010)).

self-perpetuating rumor.[179] Instead of such a singular focus, the law more accurately allows for a greater range of considerations to be taken into account.[180]

The business-judgment rule and constituency statutes give corporate directors a wide-degree of latitude in decisions that they make on behalf of the corporation.[181] This allows for a weighing of different responsibilities or preferences, including a set of decisions that can help to form a religious identity.[182] These statutes do not offer an innovation in corporate law, but simply enshrine an idea that has long been available in corporations' operations.[183] This flexibility reflects an understanding that man, including directors and the decisions they make in guiding a corporation, brings his values and beliefs into everything he does.[184] Michael Novak describes this synthesis of the end of a profit with the ability to make responsible decisions in the phrase "profit-optimization," in which the decision-makers consider a number of factors at hand other than short-term gain.[185] In addition to a corporation's flexibility

179. Johnson, *supra* note 152, at 99-100; *see* Herbert Gintis & Rakesh Khurana, *Corporate Honesty and Business Education, A Behavioral Model*, in MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 300, 323-24 (Paul J. Zak ed. 2008).

180. Judge Hartz noted these thoughts in his concurrence in the *Hobby Lobby* opinion. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1147 (10th Cir. 2013) (en banc) (Hartz, J., concurring).

181. Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 977, 980-81, 986 (discussing both the business judgment rule and non-shareholder constituency statutes, which can provide presumptions of good faith for a director's actions and allow a number of constituencies to be considered in any decision).

182. *See* Colombo, *supra* note 1, at 59-60; Vischer, *supra* note 127, at 346-47.

183. *See* Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 1001-02; Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 182 (1997). *See generally* Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) (discussing this concept in practice). The permissive nature of these statutes also helps to avoid the specter of increased state control. *See* 3 F. A. HAYEK, LAW, LEGISLATION, LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 82 (1979) (concerned that requiring consideration would invite state control), *quoted in* Fort, *supra*, at 181.

184. *See* Johnson, *supra* note 152, at 90-91. This statement does not pretend that the decisions do not sometimes reflect misguided or harmfully self-serving needs. But the capacity to choose the bad also gives way to the capacity to choose the good.

185. NOVAK, *supra* note 125, at 51-52 (going on to explain this as "including long-term new investment, consumer loyalty, and the sense of a fair service for a fair price . . ."). Michael Novak thus points to the good of profit when pursued in an ordered manner.

in pursuing its ends, the end of making a profit itself should not impose a liability on an association, i.e., corporation, in claiming a religious identity.[186]

Second, a pursuit of profit-maximization should repulse only insofar as that stands as synonymous with decisions determined by greed.[187] Profits as a concept serve the needs of society and indicate the health of the business;[188] to argue otherwise would have to equate to an argument that for-profit corporations as a category stand against the common good.[189] Indeed, most complaints about profit-maximization likely boil down to criticisms of how a corporation attains its profits[190] or what individuals at the corporation do with those profits, not that it makes a profit, period.

The first of these criticisms—how a corporation attains its profits—only more strongly makes the case that the end of profits tells one little about an organization's moral identity; instead it supports the argument that viewing the corporation's operations and formation will provide the real insight. The second of these

186. Notably, as follows from his praise of the symbiotic effects of individual and association, Tocqueville himself did not draw distinctions among associations based on the association's end-purpose, mentioning among other types, commercial entities. Colombo, *Tocquevillian Association*, *supra* note 126, at 35 (discussing more of Tocqueville's views).

187. NOVAK, *supra* note 125, at 51-52 (discussing that "irresponsible greed" drives pure profit-maximization). I do not aim to criticize the neoclassical model as an economic predictor, but instead to criticize its overeager application to other areas as a blanket model without more. *See* Colombo, *Exposing the Myth*, *supra* note 152, at 739-40. Blurring the lines between using the model as a predictor in the business world and using it to dictate a stratified human nature is unwise, or at least logically circular, when then used to ask the question of the moral identities of corporations. *See* Russello, *supra* note 148, at 115-16 (discussing the views of Blessed John Paul II that corporations ideally would express the societal nature of man, as opposed to defining man as a cog in the gear of a blindly-driven profit machine).

188. Bl. John Paul II, On the Hundredth Anniversary of Rerum Novarum: Centesimus Annus ¶35 (1991), *quoted in* Colombo, *supra* note 1, at 57; Russello, *supra* note 148, at 117 (noting the noncontroversial nature of the idea that "profit is not an improper goal for business"); Stabile, *supra* note 147, at 190 (remarking on the views of Stephen Bainbridge and Michael Novak that purposes of profit properly pursued comport with Christian norms).

189. *See* Vischer, *supra* note 127, at 327-31 (discussing the idea of the common good and the associational role in pursuing it).

190. In other words, moments where the corporation has to make choices between faithfulness to its religious identity or the attainment of profit. *See infra* the text accompanying note 240 for examples of such decisions. One might also harbor a suspicion that a corporation would use a free exercise claim to avoid financial burdens. This concern is addressed *infra* Section III(C)(1).

criticisms, what an individual might do, or does, with profits, remains mostly irrelevant to the identity of the corporation if one considers a corporation as a distinct entity.

Given this theoretical basis, the enunciation of the next step of why for-profit corporations should be considered to undertake activity that engages free exercise rights might seem anti-climactic. But if so, that tells us something about the legal development towards such a realization.

For many religious believers, faith pervades every facet of their life; it is not some separable component limited to visiting a house of worship or donating to a charity.[191] Combining this belief with man's social nature, intertwined with the teachings of many faiths about living the faith in community with others in all things one does,[192] it becomes clear that a for-profit corporation stands as just one of many possible venues for this relational, lived religious identity transcending an exclusively individualized faith.[193] It is therefore natural for faith to "intersect with and inform" the formation, operation, and production of a for-profit corporation, and the legal system needs to offer protection for that reality where it meets a legally sufficient threshold.[194]

Such an understanding includes investors, customers, and employees. Dean Vischer notes that one reality of maintaining a

191. *See* Colombo, *supra* note 1, at 18 (discussing this belief as a core feature of "Islam, Orthodox Judaism, Mormonism, fundamentalist and evangelical Protestantism, and the more traditional expressions of Catholicism"); Rienzi, *supra* note 22 (manuscript at 12-19) (describing the teachings of Christianity, Judaism, and Islam, for how faith should affect the conduct of business). As Chesteron puts it: "Religion is not the church a man goes to, but the cosmos he lives in." G. K. CHESTERON, IRISH IMPRESSIONS 215 (1919), *quoted in* Garnett, *supra* note 75, at 771. This view can be contrasted with the view adopted in Robert Browning's famous verse "God's in His heaven – All's right with the world!" Robert Browning, *Pippa's Song*, *in* THE OXFORD BOOK OF ENGLISH VERSE: 1250–1900, at 856 (Arthur Quiller-Couch ed., 1919), *available at* http://www.bartleby.com/101/718.html.

192. *See* 1 *Corinthians* 10:31-33 ("So whether you eat or drink or whatever you do, do it all for the glory of God"); 1 *Corinthians* 12:27 ("Now you are the Body of Christ, and each one of you is a part of it."). Michael Novak captures this idea as applied to for-profit corporations in modern society when he observes: "For many millions of religious persons, the daily milieu in which they work out their salvation is the communal, corporate world of the workplace." NOVAK, *supra* note 125, at 47.

193. Vischer, *supra* note 127, at 335 ("The corporation can be a powerful device for channeling the dictates of individual conscience into a shared moral purpose, identity and expression within the marketplace").

194. *See* Naughton, *supra* note 131, at 40. The evidentiary threshold is explored *infra* Section III(A).

religious identity will likely be the loss of some constituents, but also the gathering of others "who find a forum for living out the dictates of conscience."[195] This helps to highlight the existence of the entity's identity.[196] For instance, as an example of response to a corporate image (albeit not in the case of religious identity) Starbucks received outspoken praise from those opposing increased regulations on gun ownership for its perceived support of gun laws in the form of a "Starbucks Appreciation Day"[197] and then later clarified its position by asking customers to not bring in their firearms.[198] Similarly, Starbucks also received renewed attention for its support of gay marriage.[199] Chik-Fil-A has also made headlines when issuing statements on marriage: a religiously motivated activity.[200] The coverage in each case, from the media and from customer interviews, speaks to the corporation's views.[201]

Government attempts to separate faith from the workplace, and the way in which individuals might choose to form a corporate identity in response to this, impose a dichotomy that contravenes the faith of many believers.[202] As Richard Garnett

195. Vischer, *supra* note 127, at 340.

196. *See* Rienzi, *supra* note 22 (manuscript at 26-29) (giving examples of how conversations about a corporation's ethical decision-making have cemented a place in common parlance).

197. Kim Murphy, *Starbucks boycott is fought: Gun-rights backers buy coffee to counter an effort to ban weapons at the chain*, L.A. TIMES, Feb. 19, 2012, *available at* 2012 WLNR 3567855.

198. Paul Klein, *Starbucks' gun letter: are companies assuming political rules?*, GUARDIAN (Oct. 1, 2013, 08:05 AM), http://www.theguardian.com/sustainable-business/starbucks-gun-letter-companies-political-role.

199. Hunter Stuart, *Starbucks Gay Marriage Stance: CEO Puts Smackdown on Anti-Marriage Equality Shareholder*, HUFFINGTON POST (Mar. 22, 2013, 12:17 PM), http://www.huffingtonpost.com/2013/03/22/starbucks-gay-marriage-howard-schultz_n_2931734.html.

200. *Dan Cathy, Chick-Fil-A President, Stresses Company's Support of 'Biblical' Families*, HUFFINGTON POST (Oct. 3, 2012, 11:05 AM), http://www.huffingtonpost.com/2012/10/03/chick-fil-a-president-dan-cathy-biblical-families-_n_1935786.html[hereinafter *Company's Support of 'Biblical' Families*]; *see* Pew Research on Religion & Pub. Life, *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RES. CENTER (Dec. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx (describing various religions' stances on the issue).

201. *See* Murphy, *supra* note 197; *Company's Support of Biblical Families*, *supra* note 200.

202. Garnett, *supra* note 75, at 774-75; *see* Johnson, *supra* note 152, at 92 (discussing the positive impacts on a corporation when this divide is bridged). As the plurality noted in *Mitchell v. Helms*, "[I]t is most bizarre that the Court

puts it when writing about institutional free exercise: "The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them."[203] An important aspect of this protection relies on possible recourse to the law to restrain unjustified government intrusion. Although the dichotomy might be a convenient legal fiction, man's values should not be so simplistically cleaved from his actions.

Four important things should be noted here. First, as this Comment proceeds on the assumption that for-profit corporations will be recognized as being capable of having a religious identity, the above theoretical background presents a review of the underlying thoughts—in no way does it purport to be an exhaustive argument for the Engagement Question, nor do I mean to gloss over potential problems.[204] Second, this theory does not argue that for-profit corporations offer the best venue for religious identity. For example, many investors likely do not even know the particular stances of corporations in which they might invest, customers choose primarily by price, and employees, especially in tough markets, will gravitate towards any employer offering a job.[205] But nothing suggests that recognition of religious identity rests on a showing of "best possible venue" for religious identity.[206] Third, this theory certainly does not suggest that all corporations can show a religious identity for purposes of the law. To the contrary, likely only a very small number have a sufficiently coherent identity. The important thing for this section is merely to establish the theoretical foundation rebutting the apparent legal presumption that for-profit corporations, unlike other organizations or

would . . . reserve special hostility for those . . . who think that their religion should affect the whole of their lives . . . ." 530 U.S. 793, 827-28 (2000).

203. Garnett, *Do Churches Matter*, *supra* note 128, at 274; *see also* Baworowsky, *supra* note 123, at 1746-47.

204. Objections to this include, for example, the for-profit corporation's perceived shareholder wealth-maximization norm and the potential for abuse by the corporation as to, for example, employment discrimination, tax exemptions, or other evasions of regulatory responsibility. As this Comment does not presume to argue for corporate free exercise, but instead aims to explain the bases for the assumption on which it operates, it does not directly confront those issues. Some scholars have started to take on such discussions, if the reader is interested in further pursuing those topics. *E.g.*, Colombo, *supra* note 1, at 81-86 (discussing concerns in the context of employment discrimination); Vischer, *supra* note 127, at 353-61 (discussing the tensions between institutional and employee conscience).

205. *See* Vischer, *supra* note 127, at 344-45.

206. *See id.* at 345, 352.

individuals, are incapable of maintaining religious identities. Fourth, the theory thus far only proposes that corporations be able to litigate such a claim; it does not suggest any change to free exercise tests as they currently stand. Put more plainly, the government can still force corporations to do or not do certain things where it can meet the appropriate level of justification, assuming as a matter of course, that the corporation even manages to get past the threshold test: the heart of this Comment's proposal.[207]

III. A PRACTICAL APPROACH FOR APPLYING THE THRESHOLD TEST IN THE FOR-PROFIT CORPORATE CONTEXT

The proposal begins by looking at what the Court actually can and should do to handle the threshold test for a for-profit corporation in a way that more comprehensively allows for an authentic exercise of religion than the potential alternatives. It then pivots to critique current (or potential) tendencies that the Court might be tempted to take with this issue. In some cases these tendencies offer a possibility of capturing instances of religious exercise but are merely insufficient as complete solutions; in others, however, the tendencies have a more dangerous possibility of shaping society's conception of religious exercise. Finally, this Section will close by briefly addressing a few likely objections to these ideas.

A. WHERE TO LOOK

The basics of how the Court should identify a corporation's religious identity, and thus its capacity to show a sincerely-held religious belief, follow from the background laid out in Section II. The corporation needs to be viewed holistically as a single entity to be capable of having a cohesive identity,[208] and the Court will

207. For example, tax exemptions are more properly predicated on the profit-producing nature of an organization. Unlike in the context of religious freedom, the enforcement of a dichotomy based on profit in the taxation context presents no troubling theoretical dangers as to religious freedom.

208. Already discussed at length, and will not be further belabored here. Instead this Section will try to apply that theory to real-world examples. Although many facts from the *Hobby Lobby* case will be referenced, this proposal does not exactly track the majority's reasoning. The majority at first appears to use the holistic approach, treating the corporation as a distinct entity. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) ("We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but

need to discern evidence of this identity.[209] This Section will attempt to devote greater focus to a practical application of these ideas to the threshold test.

1. DISTINCT ENTITY

As discussed in Section II(B), viewing the corporation as a distinct entity provides the only way for a corporation to have a religious identity as an institution. When questioning the existence of the religious identity under a threshold test, the necessity of the single entity approach makes this only more apparent. It is impossible, or at least illogical, to try to assign a religious identity by exclusively looking at a certain, separable component or purpose.

Instead, the Court needs to look at the for-profit corporation holistically, at its formation, operation, and production all as parts pointing to one separate entity and that entity's identity. For instance, simply because someone has the goal of making a good salary, even a lot of money, few people would say that it therefore necessarily means that person cannot practice religion. Such a charge would likely be met by pointing out that the individual does so much more than just work for a profit, that person does all of these religious activities, uses that money for these purposes, and treats these people, including colleagues and customers, in this way, etc. Let's now say that there is an individual who operates almost entirely by greed, to the sacrifice of all other driving motivations. Then, by definition, that person likely does not practice any religion. The same basic ideas should apply with a corporation. As we have said, individuals come together to form, operate, and support a corporation. In doing so,

not its religious expression."). However, the majority later puts an inordinate emphasis on the closely-held aspect of the company and the owners' beliefs, making these ultimately the touchstone of its examination of the threshold test. *See id.* at 1136-38. These attributes of the corporation should be a factor, rather than a determinative aspect, as otherwise the distinction between the individuals in the corporation and the corporation itself becomes frustrated. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1172-73 (10th Cir. 2013) (Briscoe, C.J., & Lucero, J. concurring in part and dissenting in part). For an explanation of some of the dangers of this confusion *see infra* Section III(B)(2). In other words, the logical inconsistency does not affect the results in that particular case, but it both decreases the set of potential corporate plaintiffs in future cases and increases the potential of an erosion of individual religious protection, as discussed *infra* Section III(B)(2)(v).

209. The problems presented by this practical limitation of apparent evidence of a religious identity are discussed *infra* Section III(A)(2).

they choose to imbue it with a certain identity. Where the corporation serves only as a vehicle for motives such as greed to the exclusion of all others, unsurprisingly that corporation will likely not have a religious identity.[210] However, where a host of factors go into its identity, some of which are religious, it will be more likely to have a religious identity.[211] Thus, just as you would not say an individual does not have a religious identity simply because that individual aims to make a salary or does not go to a house of worship, you would not say a for-profit corporation does or does not have a religious identity simply because it seeks to make a profit or, for instance, whether or not a majority of its shareholders believe in a certain religion (i.e., separating out one component as conclusive for a determination of religious identity). This approach then also maintains the idea of permanence central to corporate formation, protecting its identity even when individuals involved with the corporation change.[212] This renders a "majority" belief of any given constituency, at any given time, an unnecessary factor in finding a religious identity.[213]

The Court not only implicitly endorsed the approach of looking at the corporation as a single entity in *Bob Jones University*, but it also seemed to implicitly accept an approach that looks at a wide variety of possible evidence to support a claim of a sincerely-held religious belief.[214] The Court, in referencing the university's sincerely-held religious beliefs, pointed to the district court's findings "on the basis of a full evidentiary record."[215] The district court noted not only the university's purpose of teaching "fundamentalist religious beliefs," but also the particular ways in which the school went

210. This presents a more likely scenario when dealing with corporations for a number of reasons, one of which is the imposed perception-as-operating-principle that corporations are bound to operate to varying degrees of only maximizing shareholder profit. *See supra* Section II(B)(4).

211. Whether this identity is something that the courts can detect asks a different question—one taken up in the subsection immediately below. *See infra* Section III(A)(2).

212. *See* Baworowsky, *supra* note 123, at 1738-39.

213. This is one of the key aspects in which this Comment's proposal departs from some of the foundational thoughts in the *en banc Hobby Lobby* opinion, which placed a heavy emphasis on the unanimity in the shareholders' beliefs and the closely-held aspect of the corporation. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013).

214. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602 n.28 (1983).

215. *Id.*

about operating to achieve this end, including classroom instruction, prayer times, and faculty recruitment.[216] In finding a sincerely-held belief, the district court also took into account student admission standards and student life policies (which gave rise to the core issue in the case).[217] Finally, the district court accepted testimony as to how the belief at issue matched with the religious claims of the university.[218] Importantly, the Supreme Court did not reject this method of judging the threshold test of the university's claim.[219]

When the Supreme Court mentioned its finding of a sincerely-held belief, it did so on the basis of acknowledging the district court's approach.[220] The Court thus impliedly considered the entity in that case to be acting itself, but furthermore looked for signs of that entity's claimed religious belief—a practical limitation of the court's ability.

Following on this model, the application of the threshold test to a for-profit corporation becomes apparent. Not only should the courts view the corporation holistically, but they should also look for evidence of the claimed religious identity in a wide variety of possible manifestations.

2. EVIDENCE OF THE IDENTITY

If viewing the corporation as a distinct entity, any action or documentation that can fairly be ascribed to the corporate entity acts as evidence of a sincerely-held religious belief, i.e., the corporation's religious identity.[221] The Court will need to rely on apparent signs of this religious identity, items able to be realistically identified by the Court.

Drawing from an earlier section reviewing case-law where a for-profit corporation has encountered the preliminary issue of the Engagement Question, or at least where the courts made even an indirect mention of it, we can propose a list of the following as evidence of a religious identity giving rise to a sincerely-held

216. Bob Jones Univ. v. United States, 468 F. Supp. 890, 894 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983).

217. Bob Jones Univ. v. United States, 468 F. Supp. 890, 894-95 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983).

218. *Id.* at 894.

219. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602 n.28 (1983).

220. *Id.* at 602 & n.28.

221. *See* Lepard, *supra* note 24, at 1062-63 (coming to a similar conclusion).

belief: faith-based statements in the articles of incorporation,[222] faith-based mission or value statements,[223] worship services during work hours,[224] religious literature in the workplace,[225] charitable donations reflecting the claimed beliefs,[226] insurance policies reflecting the claimed beliefs,[227] programs to have the workplace better reflect faith-based principles,[228] and the beliefs of the owners/directors/shareholders.[229] We could add to this list statements to the media attributed to the corporation,[230] the placement of other religious objects around the corporation's property, on-site places of worship, chaplain services, company service days related to the claimed religious identity, holidays or other working schedules fairly attributed to religious beliefs, and employee policies reflective of a certain religious beliefs, such as a focus on family dynamics. This list does not purport to be exhaustive, nor could many of these elements display a religious

222. *E.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

223. *E.g.*, Annex Med., Inc. v. Sebelius, Civil No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

224. *E.g.*, *Tyndale*, 904 F. Supp. 2d at 116; *In re.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

225. *E.g.*, *In re. McClure*, 370 N.W.2d at 847; *Townley Eng'g & Mfg. Co.*, 859 F.2d at 612.

226. *E.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); *Tyndale*, 904 F. Supp. 2d at 116.

227. *E.g.*, *Newland*, 881 F. Supp. 2d at 1292; *Tyndale*, 904 F. Supp. 2d at 116; *Townley Eng'g & Mfg. Co.*, 859 F.2d at 612.

228. *E.g.*, *Newland*, 881 F. Supp. 2d at 1292.

229. *E.g.*, Annex Med., Inc. v. Sebelius, Civil No. 12-2804(DSD/SER), 2013 WL 101927, at *1 (D. Minn. Jan. 8, 2013); Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013), *granting preliminary injunction sub nom.* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841 (7th Cir. Nov. 8, 2013); Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, 2012 WL 6757353, at *1 (7th Cir. Dec. 28, 2012), *granting preliminary injunction*, No.12-3841 (7th Cir. Nov. 8, 2013); *Tyndale House Publishers, Inc.*, 904 F. Supp. 2d at 116; Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009).

230. Such statements will likely only become more prevalent, given the ever-increasing usage of social media by businesses. Shea Bennett, *Social Media is Going Corporate*, MEDIA BISTRO (June 14, 2012, 6:00 AM), http://www.mediabistro.com/alltwitter/corporate-social-media_b24077 (describing the spread of corporate use of social media).

identity without more. For example, some policy to protect family time would likely need to also be linked to some other showing to point towards a religious identity sufficiently apparent for the threshold test. Additionally, a showing of any of these components over a period of time, rather than a sudden claim not grounded in any other showing of religious identity can help to establish the sincerity of the claim.[231] These examples help to indicate the nature of evidence that the courts could reasonably identify as aspects of a for-profit corporation's religious identity, and thus the basis for its sincerely-held belief or religiously motivated conduct.

Two practical examples display facts where a showing of a sincerely-held belief would likely succeed under this test and where it might have a significantly harder time (depending on how various courts address the timing of factors, discussed below). Both will be discussed in the context of the federal HHS Contraception Mandate.[232]

> Hobby Lobby – Think back to the introductory example. Even an inventive mind creating the infamous "law-school hypothetical" would have a tough time thinking of an example that could more perfectly reveal evidence of a religious identity than Hobby Lobby. Hobby Lobby pointed to a number of uncontested facts to evince its religious identity and the foundation for its claim that the HHS Contraception Mandate violates its religious beliefs. First, it listed the religious beliefs of its owners and operators, implying that these beliefs would infuse the corporation.[233] These owners and operators have to sign statements of faith, acknowledging their religious beliefs.[234] Second, the company could show that it has historically maintained its own insurance policies for the purpose of excluding abortifacient drugs, although those

231. *See* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) (explaining that religious nonobservance can properly be evidence of insincerity but must not be conclusive alone); *see also* Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 1022 (discussing the importance of a proposed historical factor in cases where a director seeks to avoid liability to shareholders by claiming concern for non-shareholder constituencies).

232. *See* the background discussion *supra* Section I.

233. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

234. Appellants' Motion for Injunction Pending Appeal at 2, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2012 WL 6811256.

exclusions did not previously include some of the drugs covered by the HHS Contraception Mandate until shortly before bringing suit.[235] Third, Hobby Lobby has a statement of purpose that commits it and its owners to operate in a way that "honor[s] the Lord" and "Biblical principles."[236] Fourth, the company places full-page advertisements during Christmas and Easter inviting people to learn more about the Christian faith.[237] Fifth, the company states that it monitors its merchandise to make sure that it accords with its Christian beliefs.[238] Sixth, the company provides a number of religiously themed services, including chaplains, counseling, and financial management from a Christian viewpoint.[239] Seventh, the company has a number of business practices, including some that impose additional costs, through which it more faithfully adheres to this religious identity, such as closing on Sundays, keeping work hours short for family-time, offering wages far above minimum wage, providing some on-site health clinics, and refusing offers to "back-haul" alcohol.[240]

Korte & Luitjohan Contractors, Inc. (hereafter K&L Contractors) – This company pointed to three things as evidence of its religious identity. First, the owners noted that they operated the company in accord with their individual religious beliefs.[241] Second, the company

235. *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1285; Complaint at ¶ 55, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450. The company does not object to providing coverage of what it views as "non-abortion-causing contraceptive drugs." Complaint at ¶ 57, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450.

236. Complaint at ¶ 40, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450.

237. Appellants' Motion for Injunction Pending Appeal at 2, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2012 WL 6811256.

238. *Id.*

239. *Id.*

240. Complaint at ¶ 6, 44-46, 51, Hobby Lobby Stores, Inc., 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. Civ-12-1000-HE), 2012 WL 4009450. "Back-hauling" refers to the process of using the return trip of a cargo vehicle to transport some other merchandise—in this case a beer distributor trying to arrange such offers with Hobby Lobby for use of their trucks in, presumably, transporting beer. *Id.* at ¶ 44; BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/backhaul.html (last visited Oct. 19, 2013).

241. Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 12 (7th Cir. Nov. 8, 2013).

> attempted to drop coverage for contraceptives in August of 2012 after realizing that the insurance policy inadvertently covered them.[242] Third, shortly before filing the lawsuit, the owners formalized an ethical statement for K&L Contractors stating their Catholic beliefs and the corporation's subsequent inability to provide for many of the drugs or services covered under the HHS Mandate.[243]

These examples give two potentially contrasting scenarios. The first, the case of Hobby Lobby, shows an abundance of evidence that could easily clear the hurdle of the threshold test. The only contradictory piece of evidence relates to the last-minute exclusion of certain drugs required by the HHS Contraception Mandate, but given the abundance of evidence in all other aspects, including the tailoring of its employees' insurance policies to exclude similar drugs on the same basis, such as mifepristone (RU-486), this could not overcome the showing of a sincerely-held religious beliefs as it relates to the provision of certain drugs.[244]

The second, in the case of K&L Contractors, might struggle to make the necessary showing of a sincerely-held belief by route of an institutional free exercise claim, due to the timing of the bulk of its evidence of an identity.[245] Prior to preparing for litigation, the company could only point to its owners' beliefs and also failed to show any historical record of avoiding insurance policy provisions for the offending drugs or type of drugs.[246] While the attempt to drop such coverage and the corporate adoption of ethical guidelines would be enough to tip the scales in

242. *See id.*

243. Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 13 (7th Cir. Nov. 8, 2013).

244. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013); Complaint at ¶ 55, *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (No. Civ-12-1000-HE), 2012 WL 4009450; *The Abortion Pill (Medication Abortion)*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/abortion/abortion-pill-medication-abortion-4354.asp (last visited Oct. 19, 2013) (explaining the effects of the drug).

245. If the courts do decide on some "selective piercing" (only for purposes of transposing beliefs) method for closely-held corporations, allowing the courts to just look at the individuals' beliefs, the outcome would be more easily reached. This appears to possibly be the route taken implicitly by the Seventh Circuit. *See* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 54-60 (7th Cir. Nov. 8, 2013).

246. *C.f. Korte*, No. 12-3841, slip op. at 12-13.

favor of showing an identity under this approach, it remains to be seen if other courts in similar situations might take issue with the timing of such moves shortly before litigation. If so and those courts thus discounted such showings, then these facts would present a harder case. In such a scenario, that company might very well incorporate its religious identity into its operation in much more subtle, no less authentic, ways, such as the overall corporate environment and the dignity afforded to both employees and customers. However, under the approach outlined above this does not provide a baseline in the corporate form on which the courts can rely.

In showing the practical application of the proposed focus, these examples also highlight an unfortunate reality, but a prudent limitation. The courts need to look for apparent signs of religious evidence that the various individuals have in fact imbued the corporate entity with its own religious identity.[247] This proposal does not purport to account for all authentic religious exercise; instead, it admits that it will fall far short. Rather, it aims to propose a realistic passing of the legal threshold test and thus must look to discernible elements, excluding some corporate litigants with more discreet religious identities.

This proposal remains simple in its application, but nonetheless this simple application remains critical as to what it communicates about how our country allows the living out of religious faith, especially as to how the courts might unnecessarily curtail our vision of what that means. Seeing the corporation as a single entity more realistically allows for attribution of a religious identity while protecting a greater number of entities with a religious identity, and the necessity of apparent evidence gives the courts a workable standard in applying the threshold test to such an entity.

B. WHERE NOT TO LOOK (AT LEAST, NOT EXCLUSIVELY)

A categorical or compartmentalized approach to passing the

247. Chief Judge Briscoe noted the danger of inviting the government to undertake investigative looks into claimed religious beliefs and to weigh questions of what is "sufficiently 'religious.'" Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174-75 (10th Cir. 2013) (Briscoe, C.J., & Lucero, J. concurring in part and dissenting in part). Although this is a danger, the reality of an imbued identity differentiates this from the individual context. In addition, offering no protection in this context is not a remedy for that danger.

threshold test in free exercise claims is understandable, but it is ultimately flawed. It fails to recognize authentic claims; it fails to recognize the way in which many believers attempt to practice their faiths; and finally, in seeking to avoid enmeshing itself in questions of faith, it runs the risk of shaping the way in which we conceive of faith. Those looking to employ a categorical approach have a number of means from which to choose, such as by classifying based on output, for example by end-product or corporate form, or, uncomfortable with the idea of talking about corporate exercise of religion, by reference to a certain set of individuals, for example looking directly to the beliefs of directors, shareholders, or employees. The insufficiency and/or fallacy of these approaches, both in accounting for an authentic exercise of faith and in shaping our conceptions of what that looks like, become apparent under a more detailed analysis.

1. OUTPUT-BASED DISTINCTIONS

Well-entrenched classification schemes already exist to easily separate out various institutions. The most readily apparent and available method to draw a distinction among institutions that can exercise religion consists in a parallel to the tax-exemption scheme, which distinguishes between nonprofit, religious, and for-profit institutions.[248] A related and similarly well-mapped route would be through creating variations on the corporate form allowing for additional stated purposes that include some religious end-goal, as many jurisdictions provide through new forms such as benefit corporations (B-Corps), Flexible Purpose corporations, or L3Cs.[249] The ready-made and easily applicable nature of these categorizations might sound like the final answer; they are not. Although they can offer protection for some cases of religious exercise, for example where a corporation seeks to make some religious ministry part of its chartered purpose, they fall unnecessarily short of protecting the various manifestations of religious exercise.

248. *See* Rienzi, *supra* note 22 (manuscript at 39-42) (discussing that although the government might argue for such a distinction, no firm ground exists for this argument in a wide range of legal contexts). Recent proposals by HHS suggest exactly this approach. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123-25 (10th Cir. 2013) (explaining a proposed modification to the HHS Mandate that would exempt a wider set of nonprofit organizations).

249. *See generally*, Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351 (2011) (providing an overview of these types of corporations).

i. End-Product/Corporate Purpose – A Brief Description

Arguments directly related to the end-product or output of a corporation relate more closely to the Engagement Question of for-profit corporations' free exercise claims than they do the question of showing a sincerely-held religious belief.[250] However, the possible argument would go as follows: X corporation does not contain anywhere in its articles of incorporation or corporate purpose any mention of an explicit religious aim; it only mentions profit-making. Therefore, unlike Y corporation, which does make such an explicit mention of a religious purpose, X corporation cannot show that it exercises religion as it has no religious end-intentions, e.g., spreading the Gospel by directing some of its profits towards providing extra copies of the Bible.

ii. Corporate Form – A Brief Background

Another solution that would build on a similar model arises from the recent proliferation of alternative corporate forms. In response to the perception that normal for-profit corporations, C-Corporations, can operate only to maximize shareholder profit, additional forms have flourished under which a corporation still pursues a profit but also formally commits itself to directly pursuing some other, civic end.[251] The driving force behind these alternative forms presents an idea both logical and laudable; people want to have a corporation that can make a profit, but they also want to be making some measurable, more apparent positive impact—in the case of benefit corporations, on society or on the environment.[252] The corporation therefore lists these civic purposes as purposes along with profit-motive in its articles of incorporation.[253] Also, to help ensure that this method of

250. Such as: "Can a for-profit corporation exercise religion?"

251. For example, Dharma Merchant Services, Inc., a B-Corporation, is a payment solutions provider who is both "green certified" and donates 50% of profits to client-designated charities and partners with a number of other organizations involved in the community. DHARMA MERCHANT SERVICES, http://dharmams.com/ (last visited Oct. 20, 2013).

252. *See* Page & Katz, *supra* note 249, at 1362 ("The push for new forms reflects dissatisfaction with the seemingly binary nature of existing options—the for-profit corporation, which inclines controllers to increase shareholder wealth with little regard for the interests of nonshareholders and society at large, and the traditional charitable nonprofit organization, which primarily serves social purposes but has less access to capital and less leeway to compensate high-performing executives and employees.").

253. *See* Dana Brakman Reiser, *Benefit Corporations-A Sustainable Form of*

incorporation does not serve merely as an attractive marketing façade without more, the statutes generally call for some verification process of working towards those other civic purposes.[254]

iii. Problems with All Output-Based Determinations

As to the idea of an end-purpose only approach in general, such an understanding of what it means to be religious, to shape actions in accord with a belief, cabins our notions of religious exercise to those of classic charitable deeds or direct proselytizing, e.g., helping the less fortunate in some direct way or putting Bibles in hotel rooms. Although these certainly represent examples of religious exercise, and thus could protect religious exercise in some cases, a view limited to these displays a stunted understanding if meant to embody the whole of religious exercise.[255] For many believers, a full exercise of faith requires a responding to God's Will in all aspects of one's day; in fact, this devotion in undertaking the act often eclipses the importance of the end act itself.[256] Thus, this compartmentalized approach does not account for the corporation that seeks to practice its faith through the way in which it makes business decisions, cares for its employees, interacts with its customers, and shapes its policies—showings that would be accounted for under the proposal in Subsection A above.[257]

For the same reason, an auditor or some other body that could hold a benefit corporation accountable would not be able to measure religious impact in many cases. Impact on the environment, and even on the surrounding community, under benefit corporation examples, such as by the improvements to a watershed or the hiring of individuals from poverty-stricken

Organization?, 46 WAKE FOREST L. REV. 591, 597 (2011) (explaining the conception of the "public benefit" requirement as a "material, positive impact on society and the environment" and listing examples of some public benefits these corporations can pursue).

254. *See* Reiser, *supra* note 253, at 601-03 (describing the standard-setting and evaluation process).

255. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting) (discussing the refusal to find that a corporation exercises religion unacceptably enforces a government-imposed definition of religious activity and fails to recognize the pervasive aspect of the faith of many); Lepard, *supra* note 24, at 1067-68.

256. *See* 1 Corinthians 13.

257. For problems of practical enforcement, *see infra* Section III(C).

backgrounds, can be quantified in ways that religious impact, or exercise, cannot.[258] However, this practical problem of quantifiability remains minor in comparison to the dichotomy's didactic danger.

A restricted view by the courts that a corporation can only claim a religious identity if it has incorporated under one of these alternate forms results in the logical conclusion that a C-Corporation cannot have a religious identity, i.e. that it is never operated by any religious principles. For example, some critics point out that benefit corporations might only reinforce what they seek to remedy; that by saying states must create corporate forms allowing corporations to make decisions based on something other than pure profit-maximization, they reaffirm the misperception that corporations can operate only by that principle.[259] This not only drives the root problem deeper, but C-Corporation constituencies also receive the message that if they do not focus only on profits, than they are doing something abnormal, even something wrong. This idea applies with even greater force in the context of corporate free exercise.

The government should not be imposing such a compartmentalization of religious exercise, as such a line of decisions would do. The space should be left in the private square for the determination that a normal corporation attempting to operate in accord with faith-based principles might provide an attractive option to a number of constituencies, and that determination should not be left in the government's hands.[260] In short, if the government tells corporations that it must have a special form to have a religious identity, it then says that there is no place for religion in corporations without a special form (e.g., C-Corporations) outside of an individual's own beliefs (for to not allow any protections where protections would otherwise exist means exactly this). The promotion of this dichotomy inevitably results from the enforcement of the dichotomy: society's impressions to some degree will inevitably derive from the

258. *See How to Become a B Corp*, B LAB, http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp (last visited Oct. 20, 2013) (describing the three steps to becoming a B-Corp, the first of which is a "Performance Requirement" consisting of an impact assessment).

259. J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 86, 104-05 (2012).

260. Vischer, *supra* note 127, at 344.

government's categorizations, something that Richard Garnett refers to as the "subtly didactic power of the law."[261] Undeniably, the courts will need to draw the line somewhere in determining which corporations can claim to have a religious identity relevant to some alleged infringement. However, when dealing with such a fundamental right as religious exercise, the government should reserve this line-drawing until the last moment. A line drawn by a corporation's end-purpose draws the line too early.

As a final point, and an important one, the above criticisms are not absolute, as again, output-based distinctions describe one way to exercise religion. As such, output-based queries can show a corporation's religious identity. They needlessly fall short though as the courts' final solution to the threshold test. Although legal conceptions could never capture the whole of an expressed faith, this Comment's proposal can describe a wider range of exercise of faith, and thus the presence of a sincerely-held religious belief, than do categorical forms. And even though the necessity of apparent evidence constrains its scope as it does in looking to output or corporate form, it allows for the finding of apparent evidence throughout all aspects of a corporation's existence. The idea of a focus only on a corporation's end-purpose or on an alternate corporate form can provide methods to the courts for finding a corporation's sincerely-held belief; they just must not be the only one.

2. INDIVIDUAL-BASED

A number of the cases addressed in Section II(A)(2)(iii) chose to proceed by drawing no distinction between exercise of the corporation and exercise of the individuals that own and run the corporation. Many aspects make this attractive. First, the courts can avoid discussing whether a corporation has a sincerely-held religious belief.[262] Second, the analysis becomes much simpler as to what those beliefs are if one can just look to the individual and then move on to the rest of a free exercise claim.[263] Third, in a

261. Garnett, *supra* note 75, at 774-75.

262. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619-20 (9th Cir. 1988) ("Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise clause independent of those of its shareholders and officers.").

263. *C.f.* Geneva Coll. v. Sebelius, No. 2:12-CV-00207, 2013 WL 1703871, at *8 (W.D. Pa. Apr. 19, 2013) (alternating indiscriminately between the owners and the

closely-held company, where the ownership and the operation of the company resides in the same small set of individuals, this helps to assure the courts of the sincerity of the religious belief and makes it easier to see the corporation as a mere vehicle for those individuals' expression.[264]

Unlike output-based threshold tests, the danger here deals more directly with the inadequacy of the religious protections that such an approach would offer than any danger in shaping our understandings as to the manifestations of religious exercise.

i. Associational Theory as Analogy

One common approach in handling a for-profit, corporate free exercise claim at the Engagement Question level has been to find a way to bypass the corporate entity altogether.[265] Upon examining the courts' struggles with the Engagement Question in such claims, it becomes apparent that the courts will likely use one of two intertwined theoretical vines—one that sprouts from tensions in standing in the institutional context and another that sprouts from conceptions in corporate theory, primarily the contractarian theory.[266] Both enable a court to look past the corporation and look instead at the individuals behind the corporation.

Associational theory allows an institution to have standing by virtue of bringing claims on behalf of its constituent individuals where the individuals could also bring a claim. *Hunt v. Washington State Apple Advertising Commission* laid out the elements needed to fulfill associational standing: (1) "its members would otherwise have standing to sue in their own right . . . ," (2) "the interests it seeks to protect are germane to the organization's purpose; and . . ." (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[267] The idea here, analogizing to the threshold test,

company while talking about the burden on belief).

264. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619-20 (9th Cir. 1988).

265. Albeit, the cases deal with such free exercise claims for purposes of the Engagement Question, not the threshold test.

266. Some of the cases did carefully draw a distinction in the two approaches. *See, e.g.*, Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 789-90 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986). *See generally* Baworowsky, *supra* note 123, at 1727-36 (explaining the contractarian theory as the underpinning to a consideration of a corporation as simply a mass of contracting individuals).

267. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

would be to permit the corporation to simply point to the individuals that make it up and how this would affect their free exercise rights at issue.

ii. Problems Specific to an Associational Standing Type of Approach

A specific problem with the associational approach stems from the test itself. The second element requires that the "the interests it seeks to protect are germane to the organization's purpose."[268] The output-based critiques covered above illustrate the theoretical problems with the application of this test as it pertains to the "purpose" of a for-profit corporation. In this case though, one does not need to rely solely on theoretical problems but can in fact draw upon previous decisions to show its troubled application. In *Blanding*, for example, the corporate plaintiff could not proceed with its free exercise claim as the religious, evangelical activities of the principals did not have, in the court's opinion, enough relation to the corporate purpose of profit-making under the *Hunt* test.[269] That court, constricting itself to the language of the test, found that it could look no further or deeper in discerning a religious identity.[270] Although not in an associational context, prior Supreme Court opinions have mirrored this line of thought in almost verbatim language on the connection between religious activities and corporate purpose.[271]

This Comment echoes the dissent's response in *Blanding*, noting that many believers hold the opinion that "[r]eligious values should and do permeate a person's daily activities," and to instead see faith as something "in a vacuum" exposes individuals likewise to a vacuum of religious protection, merely because they take part in a corporate form.[272] As previously noted, this would render any free exercise claim by a for-profit dead-on-arrival, except in a small set of cases where the corporation enunciated

268. Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 790 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986) (citing *Hunt*, 432 U.S. at 343).

269. *Id.*; *see also* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 95 (7th Cir. Nov. 8, 2013) (Rovner, J. dissenting).

270. *Blanding*, 373 N.W.2d at 790.

271. *E.g.*, Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985) (noting that because some regulatory requirements applied only to "commercial activities undertaken with a 'business purpose,'" they would not have any effect on "evangelical activities").

272. *See* Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 798 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986) (Popovich, J., dissenting).

some religious end-purpose or took on an alternate form with that purpose.

iii. Piercing the Corporate Veil

For purposes of the threshold test, rather than the Engagement Question, the courts can implement a framing of the issue that accomplishes the same end-goal by analogy to "piercing the corporate veil."[273] Under this approach, in certain circumstances, the corporation merely acts as the alter ego of the individuals who own and operate it.[274] A few courts have already raised this possibility in the Engagement Question context of piercing the corporate veil for the limited purpose of allowing a free exercise claim to go forward.[275] One court has permitted a free exercise claim to continue on this basis, albeit the corporate veil had already been pierced in the usual context of liability.[276] In that case, the court simply looked at the owners' beliefs and then at the corporation's actions in light of those beliefs, before denying the claim under the justification test.[277]

Stephen Bainbridge provides a doctrinal refinement of this suggestion, clarifying that it would more specifically be "Insider Reverse Veil Piercing" (RVP-I).[278] As opposed to outsider reverse veil-piercing, whereby a personal creditor of the shareholder circumvents the corporate form protecting the shareholder, under RVP-I, the shareholder himself seeks to put aside that corporate form to bring claims for his personal rights.[279] Professor Bainbridge also contends that allowing this method does not

273. *C.f.* Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 520-21 (7th Cir. 1991) (discussing veil-piercing).

274. A common formulation rests on a two part showing: a degree of unity such that no real distinction exists between the corporation and the individuals behind it, and a likely result of inequity if the court treats the corporation as a separate entity. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982) [hereinafter *Piercing the Corporate Law Veil*]. This first prong most often occurs with a closely-held corporation. *Id.* at 854-55.

275. *See, e.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012).

276. *In re.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985).

277. *Id.* at 850-53.

278. Bainbridge, *RVP-I*, *supra* note 24, at 245.

279. *Id.*

mean the loss of benefits bestowed by maintenance of the corporate form for other reasons, such as limited liability, where the shareholder has an important enough personal interest at stake.[280]

iv. Problems Specific to Piercing the Corporate Veil

A few problems relating to the particular operation of this doctrine make it an unworkable remedy, in addition to its larger conceptual pitfalls. First, as a decision to pierce the veil in general disregards the previously deliberately chosen corporate form (and eliminates one of the primary advantages of limited liability—even if only a misperception in the context of RVP-I), courts try to limit its application to very rare circumstances, probably a small subset of closely-held corporations.[281] Second, because corporations are afforded the protection of limited liability on the basis that a corporation represents a distinct entity, some courts decry an injustice in enforcing this distinction for individual liability protection but removing it for individual rights protection; they demand a more uniform application that in part requires a uniform corporate theory.[282] Third, many of

280. *See* Bainbridge, *RVP-I*, *supra* note 24, at 244-45 (citing Cargill Inc. v. Hedge, 375 N.W.2d 477 (Minn. 1985) (opining that in a case in which such an application of reverse veil piercing was allowed, the critical factor was the policy-related importance of protecting the "sanctuary" of the shareholder's home). This view of the functions of RVP-I contrasts with the view of others that do not consider veil-piercing to contain such a convenient work-around. *See* Howard M. Friedman, *My Business, Myself: Piercing the Corporate Veil*, RELIGION DISPATCHES (Jan. 12, 2013), http://www.religiondispatches.org/archive/culture/6708/my_business__myself__piercing_the_corporate_veil/ (questioning if owners bringing such claims would really want to face the ramifications of applying this doctrine); Tamara Piety, *Hobby Lobby and the Corporate "Soul*," FACULTY LOUNGE (Feb. 4, 2013, 2:43 PM), http://www.thefacultylounge.org/2013/02/hobby-lobby-and-the-corporate-soul.html (same); *see also* Baworowsky, *supra* note 123, at 1734-35 (explaining the ramifications of adopting a corporate theory that looks directly to the individual in more detail). Regardless, it is a worthwhile question if the critical importance of religious exercise might necessitate the establishment of a piercing mechanism that can be separated from a concurrent result of loss of limited liability.

281. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1182 (10th Cir. 2013) (Matheson, J., concurring in part and dissenting in part); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1073 (1991) (discussing the presumption of preserving limited liability); *Piercing the Corporate Law Veil*, *supra* note 274, at 854-55.

282. *See, e.g.*, *Hobby Lobby Stores, Inc.*, 723 F.3d at 1179 (Matheson, J., concurring in part and dissenting in part); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013), *aff'd sub nom*. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013). At

the factors which the Court would look to in applying RVP-I under Professor Bainbridge's proposal mirror those contained in Section III(A)(2), but in a more constricted and rigid framework that fails to protect other deserving plaintiffs.[283] Thus, even if the courts do have available some system of "selective piercing,"[284] this approach still fails to present the fullest picture possible of corporate free exercise and subsequently of ways in which to satisfy a threshold test. Finally, as discussed in more detail in the Subsection immediately below, the RVP-I approach invites the courts to take a more intensive look at the individual's belief than would otherwise be allowed under a normal individual free exercise claim.

v. Problems with All Individual-Based Threshold Determinations

What seems at first to be a freeing from uncomfortable so-called fictionalizations[285] turns out instead to be a constricting on practical applications. Passing the threshold test via these models will be easier in the short term, but it will limit the set of plaintiff corporations able to pass the threshold test in the longer term. Similar to the limitations of the corporate form/end-purpose model, the aim here is not in finding any way possible to frame free exercise claims; the aim instead is to avoid needless limitations, such as only allowing closely-held corporations to bring such a claim, where other options can still predictably protect fundamental rights and protect a wider range of deserving litigants within their reach.

One practical problem in trying to extract a corporate identity from a view of the corporation that sees little more than

its heart, this seems to be a demand not just for a consistent approach to application of piercing the corporate veil, but also a demand for a consistent understanding of the corporate entity. Limited liability does not make much sense if the corporation's actions cannot be considered its own. The argument goes that if the court cannot simply see a corporation's actions as those of its individual operators/owners for purposes of liability, nor should it be able to see its actions as those of the individuals for purpose of free exercise.

283. *Compare* Bainbridge, *RVP-I*, *supra* note 24, at 246-47, *with supra* Section III(A)(2).

284. *See* Piety, *supra* note 280 (suggesting this term as a definition for the concept).

285. *See* Shapiro & McCarthy, *supra* note 134, at 709 (describing the corporation as a "fiction").

a mass of individuals: which individuals matter?[286] In a closely held corporation, you generally have a synthesis between directors and shareholders, but what about the employees? What happens when different individuals comprise the director and shareholder groups? Given turnovers in management and employee positions and shareholder exit and entry, how do you manage this from an implementation standpoint? Do you have to take some sort of regular votes?[287]

A disassembly of the corporate structure to individual claims leaves the courts with a confused conception that ends up protecting neither individuals nor the corporation. In a few cases dismissing the corporate claim but permitting the individual claims, the courts still stumbled on the allegedly discarded corporate form in addressing individual rights by stating that it added an extra step or degree of separation between the disputed harm and the individual plaintiffs, making the burden too remote.[288] This not only begs the question as to what the courts might consider this extra step that proves fatal to the threshold test, but also provides the answer—the corporation itself, which the courts purportedly had already disregarded.

The individual-based approach fails to account for the corporate entity, the idea of a cohesive whole, one of the benefits of which resides in its permanency, including a corporate identity that can stand independent of being linked to any certain individual within its sphere of operation. Where contemplating a corporation characterized as closely held by family-generations all holding the same belief, the necessity of recognizing the importance of the corporate-form seems to be academic only. Even in that context, what if customers come to trust the

286. Recall Justice Stevens' quote from *Citizens United*, *supra* Section II(B)(3).

287. Professors Garden and Bodie have noted these absurdities when reducing the corporation to an individualistic, or contractarian, understanding. Matt Bodie, *The Religious Freedom Rights of Corporations and Shareholders*, PRAWFSBLAWG (Jan. 9, 2013, 8:01 AM), http://prawfsblawg.blogs.com/prawfsblawg/2013/01/the-religious-freedom-rights-of-corporations-and-shareholders.html#more.

288. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 415-16 (E.D. Pa. 2013), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013); *see* Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 08, 2013) (agreeing with the reasoning in *Conestoga Wood Specialties*, 917 F. Supp. 2d 394, and denying a stay pending appeal); *see also* Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 122-23 (7th Cir. Nov. 8, 2013). (Rovner, J., dissenting).

corporation for the way it is run and, further down the line, the directors change, and even their beliefs, but the company is still operated in accord with the same principles? For example, what if the same donations are given, employees still hold worship services once a month, and the health insurance still excludes provisions in line with the beliefs that the other practices evidence? It is not hard to imagine that because the corporation still runs in the same way, maintaining the same values, image-based customers, investors, or employees will still gravitate to it regardless of the individual change. This all goes towards the idea of permanence, an important and distinctive feature of the corporate form and one which the various constituencies should be able to rely on in the face of change to any other given constituency.[289]

A change in individuals in certain roles should not be dispositive of the corporation no longer having a religious identity.[290] An individual-based approach obviously implicates precisely this concern.[291] The instance in which "the change in guard" does affect the viability of a corporation passing the threshold test correlates to the degree that such a change alters the corporation's actions as to its claimed beliefs, i.e., the corporation might "lose the faith." For example, let's say one piece of evidence for a particular corporation's religious identity consisted of contributions to charitable organizations or religious bodies in line with a certain religious viewpoint. In addition, the current CEO and founder adheres to this same faith. A change in CEO will only affect the corporation's identity to the extent that the new CEO changes the corporation's identity. It should not lose its ability to show a sincerely-held religious belief on this basis alone where it can still show the same evidence of a sincerely-held belief, such as the charitable contributions indicative of a belief continuing nonetheless (granted some other

289. *See* Baworowsky, *supra* note 123, at 1738-39.

290. *Id.* This observation reveals a potential problem in the *en banc Hobby Lobby* majority opinion's reasoning in its reliance on the beliefs of the family behind the company and the closely-held aspect—a reliance which Chief Judge Briscoe critiqued if the majority is indeed deciding based on which rights a corporation can engage (as opposed to using this as just a factor). Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1172-73 (10th Cir. 2013) (en banc) (Briscoe, C.J., & Lucero, J. concurring in part and dissenting in part). The majority in Korte v. Sec'y of the U.S. Dep't of Health & Human Servs., No. 12-3841, slip op. at 3, 53 (7th Cir. Nov. 8, 2013) and the corresponding dissent, *id.* at 101, find along the same lines as the above.

291. *See* Baworowsky, *supra* note 123, at 1738-39.

showing would probably also need to be present; see below).

Another problem with the individual-based approach arises from the invitation to the government to do more thorough investigations of individuals claiming to have a religious belief. If one follows the approach that a for-profit corporation represents a distinct entity and individuals have to choose whether or not to imbue it with certain characteristics, then the courts appropriately inquire when they seek apparent showings and search the corporate form for evidence of this claimed belief. However, if one makes the argument that the corporate form should be disregarded and the beliefs of the shareholders themselves, and alone, should come to the forefront, but still tells the courts to examine the corporate form for signs of those beliefs, then we invite government "trolling" into the beliefs of individuals.[292] Effectively, the courts begin to categorize varying searches for sincerity based on different individuals, saying that for a shareholder, although we are discarding the corporate form and would normally presume the sincerity of an individual, now we will do a searching investigation of the corporation to determine (whose?) belief. This approach at first glance seems simple and logical, but in the end it creates only more confusion and an unnecessarily limited umbrella of protection.

The critiques of output-based and individual-based models of answering the question of "does a corporation have a sincerely-held religious belief" point in one direction: Move away from needless compartmentalizing, with its practical dead-ends and theoretical abysses. Instead, take a holistic approach that allows, simply put, free exercise.

C. COUNTERARGUMENTS

A number of counterarguments will likely jump to mind, especially as relates to the general idea of a for-profit corporation's claim of religious exercise as a general proposition.[293] However, as this Comment only seeks to offer a

292. *See* Bainbridge, *RVP-I*, *supra* note 24, at 246-47 (discussing evidence that should be sought in the corporate form under the RVP-I approach); Garnett, *supra* note 75, at 787-88 (citing Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) (plurality opinion) (describing the danger of "trolling" where the courts do extensive fact-finding investigations looking for signs of faith).

293. Please see the articles of Professor Ronald Colombo, *supra* note 1, Professor Mark Rienzi, *supra* note 24, and Dean Robert Vischer, *supra* note 127, for this broader discussion.

proposal for evaluating the threshold test of a for-profit corporation's free exercise claim, this Comment will constrain the scope of the counterarguments to that context.

1. A USEFUL FAÇADE

This objection would claim that for-profit corporations, knowing the requirement for some signs of evidence, will superficially take on some innocuous religious trappings in trying to evade some government financial burden or other liability.[294] However, a number of controls in the normal operation of a free exercise claim and in the market environment help to alleviate such a concern.

First, for a free exercise claim to succeed, not only will a sincerely-held belief need to be shown, but also the complained-of government action will need to be linked to that belief in order to also show a burden.[295] For example, in *Wisconsin v. Yoder*, respondents produced evidence that being forced to send their children to high school would infringe on their Old Order Amish beliefs.[296] Thus, a claimant will have to be able to show some link between the infringement and the claimed religious identity; for instance, a statement about God in the corporation's statement of values and a nondenominational "prayer room" would not be sufficient in claiming that the HHS Contraception Mandate placed a burden on that religious identity. On the other hand, Hobby Lobby can point to evidence of its Christian religious identity, and even more specifically, prior actions in excluding abortifacient drugs from its insurance policies due to these beliefs (thus being able to show the relation between the belief and the alleged infringement).[297] This specificity goes towards the second point.

Second, a corporation's reliance on attracting customers and investors naturally restrains it from not taking on a religious identity that might potentially alienate these constituents, unless

294. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152-53 (10th Cir. 2013) (Gorusch, Kelly, & Tymkovich, JJ., concurring) (citing United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010)); *see also* Vischer, *supra* note 127, at 356 (talking about one form of typical workplace spirituality messaging).

295. *See supra* Section II(A).

296. Wisconsin v. Yoder, 406 U.S. 205, 209-11 (1972).

297. *See supra* Section III(A)(2) for a summary of some of the evidence of Hobby Lobby's religious identity; *see supra* Section II(A)(2)(i) for a review of the courts' threshold test under a free exercise claim.

it sincerely wanted to reflect those beliefs.[298] Thus, as Vischer notes, many corporations' religious mentions remain exceedingly vague and innocuous.[299]

One concerned with the possibility of opportunistic corporations might be tempted to go one step further in considering a requirement of further evidence (maybe something like a preponderance of the evidence instead of just articulable facts) where a finding for the corporation on its free exercise claim would directly affect its financial self-interest, either in profit production or fine avoidance.[300] In discussing operational (management) and structural (change of ownership) decisions under nonshareholder constituency statutes, Stephen Bainbridge pointed out that structural decisions present a particularly tempting area for directors to serve their own self-interests while claiming their actions serve nonconstituents.[301] Analogizing that example to these claims, if a corporation's financial self-interest would be served, the idea would be that courts might find it prudent to require some higher standard for showing a religious identity in regards to that specific claim.

Although an understandable concern, too great a danger results from the increased burden. The same concern exists in the individual context, but our legal system has decided that a more stringent protection of religious freedom should take precedence over a more total defense against those who would falsely and opportunistically claim a religious belief. In addition, the above safeguards will help to guard against such a possibility. Hostility to religion would have access to too easy a means to stack the deck against a corporation imbued with a sincere religious identity by simply imposing some fine or other financial requirement.

2. ENFORCING THE FALSE DICHOTOMY

This objection would argue that in seeking to offer a way around the claimed false dichotomy that a ruling based on

298. *See* Colombo, *supra* note 1, at 83-84.

299. Vischer, *supra* note 127, at 356.

300. Although not the focus of this Comment, some concerns would likely raise issues of how this might affect various tax burdens or employment discrimination. For further discussion, please see Colombo, *supra* note 1, at 81-86.

301. Bainbridge, *Nonshareholder Constituency Statutes*, *supra* note 142, at 975-84, 1014.

corporate output would encourage, the proposal just reinforces such a dichotomy by requiring explicit signs of a religious identity. In other words, this Comment implicitly adopts the view that if it's not explicitly religious, it's not religious.

Such a requirement of evidence does pose such a danger in teaching the dichotomy.[302] Nonetheless, this approach lessens the danger by a categorization based only on purpose. Put another way, it makes the dichotomy a little less stark by refusing to decide simply because an organization operates within the business world it cannot be religious; that instead, you must look at such an entity holistically, as in other institutional claims, as to its formation, operation, and output. Furthermore, this proposal achieves this while also allowing for a greater range of protection of free exercise claimants than the alternative.

3. OVERLY POSITIVISTIC

This objection would argue that the proposal overreaches by trying to capture too much of "God's law" in our legal system.[303] In many ways, it represents an inverse argument of the above point, or even in some ways, a parallel argument.

Importantly, it bears repeating that this proposal attempts to offer a solution that not only extends protection to as many legitimate claimants of religious freedom as possible, but also does so while realizing the practical limitations of the law.[304] In other words, this Comment offers a proposal for purposes of the legal threshold test of a free exercise claim, not for capturing the whole picture of authentic religious exercise.

This is not a fatal flaw, unless it can be shown that there is an even more reliable method. The strength is not that this approach is perfect. The strength of this approach instead is that it casts aside needless categorization and a dangerous dichotomy. The necessity of apparent evidence helps to prevent this proposal

302. Garnett, *supra* note 75, at 796 (noting the danger of such a dig for evidence).

303. *See* Johnson, *supra* note 152, at 104.

304. *See* David A. Skeel, Jr., *Christianity and the Large Scale Corporation* 17 (Univ. Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-45, 2007), *available at* http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1180&context=faculty_scholarship (noting that "while God's law is pervasive, human law should be far more modest in its aspirations" in the context of using religious values in the context of corporate social responsibility).

from unrestrained positivistic tendencies.[305]

IV. CONCLUSION

The clash between for-profit corporations and the government over claimed infringements on religious exercise is here to stay. Assuming that the courts allow for-profit corporations to litigate such claims, a consistent and reliable framework for applying the current judicial tests under a free exercise claim needs to be set forth. Given the theoretical basis on which the courts would likely consider corporations as undertaking activity that engages free exercise rights, an application of the threshold test that treats the corporation as a distinct entity offers the most logically consistent approach. Furthermore, looking for apparent evidence of an imbued and lived religious identity of the corporate entity allows for verifiable conclusions of such an identity. Admittedly, this will leave some corporations that have an authentic yet more discreet religious identity without protection, but it will protect more than an alternative idea that focuses only on output of the corporation or certain individuals within the corporation at a given point in time, while helping to avoid specious claims. This more inclusive approach also helps to alleviate the didactic dangers of an unnecessarily stark dichotomy. Our religious freedoms demand more protection than the premature and overbroad alternatives offer.

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305. Nor of course would this practical approach be novel to the courts. Courts apply an objective standard not as much because they consider the subjective element irrelevant, but rather because a subjective standard offers no dependable evidence on which to make a principled decision. Often times the subjective element might refer to measures of a person's beliefs or intentions—items significantly more difficult to detect or rely on in the corporate context. It then depends on the context whether or not the courts will rely in part on such a consideration.