# Closely Held Conscience: Corporate Personhood in the Post–*Hobby Lobby* World

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*This Note seeks to reframe scholarly criticism of* Hobby Lobby *by evaluating the case in the context of the evolving doctrine of corporate personhood and, specifically, the Obama Administration's recent regulations that cabin the decision by implementing a new federal definition of "closely held corporations." This Note suggests that, although problematic in certain regards,* Hobby Lobby *does not represent the return of* Lochner. *Indeed, the innovation of* Hobby Lobby *is not its interpretation of RFRA or the Free Exercise clause, but rather its extension of standing under RFRA to corporate parties. Accordingly, the concerns over* Hobby Lobby *are better articulated in the realm of corporate personhood rather than in the debate surrounding the First Amendment, making a focus on "Free Exercise Lochnerism" an ill-fitting mode of analysis. Moreover, by examining the progressive response to* Hobby Lobby*, epitomized by the resulting Department of Health and Human Services (HHS) regulations, the advantages of viewing the decision in terms of corporate personhood will become apparent. Part II of this Note examines the events precipitating* Hobby Lobby*, the decision in* Hobby Lobby *itself, and the debate surrounding and subsequent implementation of the resulting HHS regulations, which set the most comprehensive federal definition to date of closely held corporations. Part III critiques the HHS regulations by pointing to several problems, which both undermine the efficacy and goals of the regulation itself and pose precedential issues for the treatment of corporations in other contexts. Particularly, Part III comments that the post–*Hobby Lobby *effort to protect reproductive rights has undermined* Hobby Lobby*'s powerful language about corporate personhood, which could be used to advance corporate social responsibility, a key move for many progressive causes like*

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*environmentalism and workers' rights. Part IV suggests an alternative to the current regulations that relies on the internal sincerity-testing model of RFRA, which evaluates whether the belief professed by plaintiff is authentic; this could prove to be less problematic than the current regime.*

## I. INTRODUCTION

The potential for corporate abuse of civil liberties law has increasingly concerned commentators. To be sure, anxiety about the corporate abuse of the First Amendment is not a new phenomenon.[1] Such anxiety reached a new height, however, in response to the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby*, which granted a religious exemption to two closely held for-profit corporations that refused to comply with federal regulations requiring businesses to provide their employees with insurance coverage for contraceptive services.[2] While the case has attracted the most attention — and the most negative treatment — from First Amendment and religious liberty scholars, *Hobby Lobby* has not been adequately explored in the context of corporate law. After all, perhaps the most startling development of *Hobby Lobby* from a civil liberties point of view — the extension of a Free Exercise right to for-profit corporate entities[3] — fits neatly into the history of American law's evolving perception of corporate entities.

The debate surrounding corporate personhood has raged for more than a century and, at least in popular discourse, remains as hot as ever. When Mitt Romney, then a presidential candidate, remarked, "[c]orporations are people too, my friend," the public reacted with scorn.[4] While for-profit corporations are indeed considered people for many legal purposes,[5] the question of which specific traits of personhood for-profit corporations possess remains an open one. A complete answer to this question depends on a prior determination about the legitimate purposes of for-profit corporations. The twentieth century was marked by a

1. *See* Buckley v. Valeo, 424 U.S. 1 (1975) (striking down campaign finance reform measures on First Amendment Grounds).

2. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

3. *Id.*

4. Phillip Rucker, *Mitt Romney Says 'Corporations Are People,'* WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html [https://perma.cc/B54Y-RS5A].

5. 1 U.S.C. § 1 (2012) ("[T]he words 'person' and 'whoever' include corporations . . . as well as individuals . . . .").

radical turn toward a view of corporate personhood that identified profit maximization as the sole legitimate corporate motivation.[6] In response, theorists of corporate social responsibility (CSR) have advocated for a broader range of legitimate corporate motivations, such as environmentalism and social justice. The conflict between the profit maximization and CSR models of corporate personhood has increased over the last decade. For example, the controversial Supreme Court decision *Citizens United* broadened the traits of personhood available to the corporate form when it proclaimed that corporations had access to certain First Amendment free speech protections.[7] Though CSR advocates have noted the positive powers of corporate personhood, their calls have been largely overshadowed by fears of corporate abuse and manipulation of personhood.[8]

More recently, *Hobby Lobby* marked the Court's most aggressive step forward in the debate over corporate personhood. By announcing that corporations could exercise religion, the Court adopted a very broad understanding of corporate personhood.[9] While some have celebrated the decision as a definitive expansion of corporate rights, subsequent efforts to limit *Hobby Lobby*'s impact on the provision of reproductive rights could also limit the extent to which corporations may possess a moral or religious conscience under the law.

These efforts to limit the scope of the *Hobby Lobby* decision are animated, in part, by the fear that the Supreme Court's recognition of "corporate conscience" risks "Lochnerizing" reli-

6. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Naomi Lamoreaux & William Novak, *Getting the History Right: Tracking the Real History of Corporate Rights in American Constitutional Thought*, SLATE (Mar. 24, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/hobby_lobby_and_corporate_personhood_here_s_the_real_history_of_corporate.html [https://perma.cc/KX43-VQ57].

7. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

8. *See* 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, 260 (2011) ("The case may turn out to be only one skirmish in what will be a long battle over the meaning of the First Amendment and its relationship with corporate America."); Anne Tucker, *Flawed Assumptions: Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 550 (2011) ("By examining the constitutional questions evoked in *Citizens United* through a corporate law lens, these assumptions are shown to be false and based on an inherently flawed conceptualization of corporations.").

9. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

gious liberty law.[10] There are few more famous cases in the constitutional "anticanon"[11] than *Lochner v. New York*, which struck down a New York public health law regulating the maximum hours bakers could work.[12] In *Lochner*, the Court posited that the bakers had freedom to contract, which prohibited the government from imposing limits on the number of hours they could work.[13] The intuitive perverseness of the decision is readily apparent: a law designed to benefit bakers at the expense of their employers was struck down not because of a right the employers had, but for the sake of the bakers, the intended beneficiaries of the law. Similarly, commentators have become concerned that religious liberty rights can be used at the expense of employees and give the courts a powerful tool for preserving corporate interests.

Over the years, as the Supreme Court issued new opinions appearing to shield common law property and contract rights from economic regulation, those displeased with the result have been quick to proclaim the return of *Lochner*.[14] Comparing a case to *Lochner* is one of the more-damning criticisms, and the tactic has slowly moved into the area of First Amendment and civil liberties law more broadly.[15] Most recently, *Hobby Lobby* triggered a wave of literature arguing that *Lochner* is alive and well, resurrected through the Free Exercise rights codified in the Religious Freedom Restoration Act (RFRA) as applied by the *Hobby Lobby* Court. Perhaps most relevant among these criticisms is Elizabeth Sepper's *Free Exercise Lochnerism*.[16] For Sepper, the prioritization in *Hobby Lobby* of corporate religious claims over employees' ability to access health care (i.e., birth control) is a clear indication of what she calls "Free Exercise Lochnerism."[17] Others have gone even further, proclaiming that *Lochner* is prime to re-

10. *See*, *e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

11. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

12. Jack Balkin, *Wrong the Day It Was Decided:* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

13. Lochner v. New York, 198 U.S. 45 (1905).

14. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

15. *See, e.g.*, Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421 (2006); Jack Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384 (1990).

16. Sepper, *supra* note 10.

17. *Id.*

turn, not veiled but in full-blown force.[18] Jeremy Kessler has responded with a historical approach, pointing out that "Free Exercise Lochnerism" may not be new or as scary as the initial perception.[19] He notes the long history of religious minority interests aligning with those of broader, entrenched economic groups.[20]

This Note seeks to reframe scholarly criticism of *Hobby Lobby* by evaluating the case in the context of the evolving doctrine of corporate personhood and, specifically, the Obama Administration's recent regulations that cabin the decision by implementing a new federal definition of "closely-held corporations." This Note suggests that, although problematic in certain regards, *Hobby Lobby* does not represent the return of *Lochner*. Indeed, the innovation of *Hobby Lobby* is not its interpretation of RFRA or the Free Exercise clause, but rather its extension of standing under RFRA to corporate parties. Accordingly, the concerns over *Hobby Lobby* are better articulated in the realm of corporate personhood rather than in the debate surrounding the First Amendment, making a focus on "Free Exercise Lochnerism" an ill-fitting mode of analysis.[21] Moreover, by examining the progressive response to *Hobby Lobby*, epitomized by the resulting Department of Health and Human Services (HHS) regulations, the advantages of viewing the decision in terms of corporate personhood will become apparent. Part II of this Note examines the events precipitating *Hobby Lobby*, the decision in *Hobby Lobby* itself, and the debate surrounding and subsequent implementation of the resulting HHS regulations, which set the most comprehensive federal definition to date of closely held corporations. Part III critiques the HHS regulations by pointing to several problems, which both undermine the efficacy and goals of the regulation itself and pose precedential issues for the treatment of corporations in other contexts. Particularly, Part III comments that the post–*Hobby Lobby* effort to protect reproductive rights has undermined *Hobby Lobby*'s powerful language about corporate personhood, which

18. *See* Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).

19. *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

20. *See id.*

21. Additionally, it is worth noting that ostensibly *Hobby Lobby* is not a First Amendment or Free Exercise case at all but rather a case decided under RFRA. The limits of the Free Exercise clause are thus presumed to be more narrow than those of RFRA, rather than coterminous.

could be used to advance corporate social responsibility, a key move for many progressive causes like environmentalism and workers' rights. Part IV suggests an alternative to the current regulations that relies on the internal sincerity-testing model of RFRA, which evaluates whether the belief professed by plaintiff is authentic; this could prove to be less problematic than the current regime.

The Trump Administration's vocal commitment to repealing the Patient Protection and Affordable Care Act (PPACA, or, colloquially, "Obamacare") may signal the end of the requirement that corporate employers provide access to contraception in their employee health plans, and subsequently make irrelevant the HHS regulation limiting corporate religious exemptions to closely held corporations. However, as of the writing of this Note, the repeal of Obamacare and the subsequent HHS regulations has not occurred. In fact, early Republican efforts to repeal and replace the PPACA have floundered.[22] Second, and most importantly, despite the potential mootness of this individual controversy, the debate surrounding corporations' exercise of religion is here to stay. It is only a matter of time before such a conflict springs up in a new context. Therefore, the lessons of *Hobby Lobby* may prove crucial to future debate surrounding corporate personhood and religious exercise.

## II. THE ROAD TO *HOBBY LOBBY* AND THE SUBSEQUENT HHS REGULATIONS

This Part focuses on the debate around corporate personhood and rights, which culminated in the Supreme Court's *Hobby Lobby* decision. It analyzes the different theories suggested by courts and scholars and the concluding theory of corporate rights endorsed by the Court. It continues to examine the promulgation of new HHS regulations and the decision to focus these regulations on a definition of closely held corporations, which is the most comprehensive federal definition to date.

22. Robert Pear, Thomas Kaplan and Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Care Law Fails*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html?_r=0 [https://perma.cc/WK3G-ZXRP].

## A. *HOBBY LOBBY* AND CORPORATE RIGHTS

For most of the twentieth century, the Supreme Court interpreted the First Amendment, through the Free Exercise Clause, to provide limited religious exemptions from general legislation.[23] Under the *Sherbert* test, individuals had a right to exemption when law burdened their religious exercise, unless the government could demonstrate both a compelling interest in the law and that it was narrowly tailored.[24] This all changed in 1990 with *Employment Division v. Smith*, in which the Court asserted that the government was not required to create legal exemptions on account of personal religious beliefs.[25] The Court cited the concern that such a right would allow each individual to be a law unto himself or herself, creating a network of exemptions from any government action.[26] The decision was met with bipartisan criticism, particularly from traditionally progressive groups concerned with the protection of religious minorities.[27] By 1993, Congress responded to *Smith* in a widespread bipartisan effort by passing RFRA, which was signed by President Bill Clinton.[28]

RFRA is peculiarly positioned as a statutory fix to a perceived problem with First Amendment case law.[29] However, there are some important differences between the First Amendment and RFRA. Most notably, the word person appears in RFRA, though it does not appear in the First Amendment. Additionally, while RFRA was initially applicable to both federal and state government action, it was later limited to only federal government ac-

23. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish school children had a right to exemption from compulsory education laws); Thomas v. Review Bd. of the Indiana Emp't Sec. Div., 450 U.S. 707 (1981) (holding broadly that a worker with pacifist religious beliefs could not be denied unemployment compensation benefits due to his refusal to be involved in manufacturing military weapons).

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

25. Employment Division v. Smith, 494 U.S. 872 (1990).

26. *Id.* at 888–89.

27. *See* Linda Greenhouse, *Court Is Urged To Rehear Case On Ritual Drugs*, N.Y. TIMES (May 11, 1990), http://www.nytimes.com/1990/05/11/us/court-is-urged-to-rehear-case-on-ritual-drugs.html [https://perma.cc/3PS8-ULXJ].

28. *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html [https://perma.cc/6LRP-9Z8Q].

29. This odd positioning has led some critics to argue that RFRA is unconstitutional. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998).

tion in *City of Boerne v. Flores*.[30] Today, RFRA remains a source of contentious litigation.

Much of the recent fight surrounding RFRA has focused on the "contraceptive mandate" of the Patient Protection and Affordable Care Act. In 2010, President Obama signed the PPACA transforming the American healthcare system.[31] In 2011, the contraceptive mandate was enacted through HHS regulation. The contraceptive mandate requires, with the threat of a fine, that employers include a long list of contraceptive options in their employee health care coverage without co-pay.[32] Many religious organizations, which either were morally opposed to contraception entirely or were against specific types of contraception they believed to be abortifacients (and equally against providing it for others, including their employees and constituents), objected to the regulation.[33] Though the regulation initially exempted religious institutions like churches, it did not exempt other religiously affiliated non-profit groups.[34] Accordingly, the regulation was adjusted to allow specific exemptions from the contraceptive mandate to religious institutions and religious non-profit organizations.[35] The regulation did not provide an exemption for the religious beliefs of for-profit corporations.[36]

The religious challenge to the limits of the contraceptive mandate culminated in the 2014 Supreme Court case *Burwell v. Hobby Lobby*, which for the first time granted an exemption from the contraceptive mandate to two for-profit corporations.[37] In *Hobby Lobby*, the owners of a large national hobby supply store argued that the requirement to supply employees with health insurance that covered certain forms of contraception, which they considered to be abortifacients, involved them in the process of abortion,

30. City of Boerne v. Flores, 521 U.S. 507 (1997).

31. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended primarily in scattered sections of 42 U.S.C.).

32. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) [hereinafter Coverage of Certain Preventive Services].

33. *See* N.C. Aizenman, Peter Wallsten & Karen Tumulty, *White house compromise still guarantees contraceptive coverage for women*, WASH. POST (Feb. 10, 2012), https://www.washingtonpost.com/politics/white-house-to-announce-adjustment-to-birth-control-rule/2012/02/10/gIQArbFy3Q_story.html [https://perma.cc/2QQJ-AA8G].

34. *Id.*

35. *Id.*

36. Coverage of Certain Preventive Services, 80 Fed. Reg. 41,318 (July 14, 2015).

37. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

which violated their religious beliefs.[38] Though a RFRA case, *Hobby Lobby* turned just as much on corporate rights theory as it did on religious liberty doctrine. At issue in *Hobby Lobby* was the prerequisite question of whether for-profit corporations could exercise religion.

The Court in *Hobby Lobby* was presented with several different theories of corporate rights, which lead to different outcomes. There are three primary legal theories of corporate personhood: the artificial entity theory, the aggregate entity theory, and the real entity theory.[39] The artificial entity theory treats corporations as artificial creations of the state, due only the rights that states determine are appropriate to afford corporate entities.[40] The aggregate theory, arguably the theory adopted by *Hobby Lobby*, provides that corporations derive power from the amalgamation of their shareholders' power.[41] Lastly, the real entity theory asserts that corporations are independent, intentional actors.[42]

One common tool of these models is to allow for what is called veil piercing in select situations. In these situations, the owners and corporate entity are conflated, oftentimes to allow claims against the corporation to pass to the owners, or, more rarely, as was debated in *Hobby Lobby*, to allow owners' beliefs to be imposed on the corporate entity.[43]

*Hobby Lobby* commentators tend to argue for variations of these three models, with critics lining up on all sides of the debate surrounding corporate personhood. Some critics adamantly argue that corporations have consistently been granted rights as if they were natural persons,[44] while others argue that rights are

38. *Id.* It is worth noting that though the literature often focuses on smaller corporations like kosher butchers or Muslim convenience store owners, *Hobby Lobby* actually concerned a national, billion-dollar company with thousands of employees.

39. This terminology is borrowed from Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015).

40. *Id.* at 56.

41. *Id.* This is the view that lends itself most easily to "veil piercing."

42. *Id.* This is the strongest form of corporate personhood. Interestingly, it would seemingly not allow for "veil piercing," disallowing the religious beliefs of the owners to be imposed on the independent corporate entity. *Id.*

43. This latter position is often referred to as "reverse veil piercing."

44. *See, e.g.*, Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 235 (2013) (arguing the religious beliefs of the owner should be imposed on the corporate entity when the corporation is sufficiently controlled by the owner using a process called reverse veil piercing); Andrew B. Kartchner, *Corporate Free Exercise: A Survey of Supreme Court Cases Applied to a*

limited to natural persons and the extension of rights to corporate entities is an exercise in formalist absurdity.[45]

Prior to the Supreme Court's ruling in *Hobby Lobby*, various circuit courts addressed the question of corporate personhood in this context with varying results. Before the circuit split was resolved, the Third,[46] Sixth,[47] Seventh,[48] Eighth,[49] Tenth[50] and Dis-

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*Novel Question*, 6 REGENT J.L. & PUB. POL'Y 85 (2014) (noting most constitutional rights are extended to corporations suggesting religious rights should be no different); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013) (proposing that corporations that are constitutive communities should be granted RFRA standing); Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm*, 127 HARV. L. REV. F. 273 (2014) (arguing there is nothing in corporate law that would permit corporations from asserting RFRA standing since veil piercing); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers*, 21 GEO. MASON L. REV. 59 (2013) (arguing individuals should not have to compromise their beliefs when they enter into business and religious belief can be held harmoniously with profit motive); Robert K. Vischer, *Do For-Profit Business Have Free Exercise Rights*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013) (positing while corporations are likely due standing under RFRA courts should address such determinations, better left to the legislature, with trepidation); Jeremy M. Christiansen, Note, *"The Word[ ] 'Person' . . . Includes Corporations": Why The Religious Freedom Restoration Act Protects Both For- And Nonprofit Corporations*, 2013 UTAH L. REV. 623 (2013) (arguing since RFRA uses the word persons and corporations are considered persons under the Dictionary Act, corporations have standing to bring RFRA claims absent contextual indicators to the contrary); Thad Eagles, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589 (2014) (arguing the individuals should be allowed to bring RFRA or Free Exercise claims when it is clear that the regulation would sufficiently burden a religious belief held by a shareholder in the corporation).

45. *See, e.g.*, Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, Sebelius v. Hobby Lobby Stores, Inc., 723 F.3d 1114 (10th Cir. 2013) (Nos. 13-354 and 13-356) (arguing the corporate form needs to remain distinct from its shareholders and that what Bainbridge calls reverse veil piercing is conceptually and practically inappropriate); Thomas E. Rutledge, *A Corporation Has No Soul — The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014) (arguing shareholders' beliefs do not inform the belief of the corporate entity, which as an independent form is unable to have a religion); Caroline Mala Corbin, *Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions*, AM. CONSTITUTION SOC. (2014) (arguing the nature of religion demands that only natural persons can exercise religion); Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 345 (Chad Flanders, Zoe Robinson, & Micah Schwartzman, eds. 2015) (arguing that metaphysical group theories of corporate rights are unhelpful in resolving the moral questions which corporate personhood poses).

46. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 417 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. 2013) (denying the corporate plaintiff standing).

47. *See* Autocam Corp. v. Sebelius, 730 F.3d 618, 620 (6th Cir. 2013) (denying the corporate plaintiff standing).

48. *See* Korte v. Sebelius, 528 F. App'x 583 (7th Cir. 2012) (granting the corporate plaintiff to have standing).

49. *See* Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb.1, 2013).

trict of Columbia[51] Circuits all addressed claims requesting religious exemption for for-profit corporations with differing results. The circuit courts looked to a variety of interesting arguments. For example, the Third Circuit looked closely at the history of Free Exercise claims to determine if corporations historically could exercise religion.[52] The Sixth Circuit relied on the District of Columbia Circuit's ruling in using the legislative history of RFRA to limit the scope of the word "person" to natural persons.[53] In direct contrast, other courts, like the Seventh Circuit, heavily relied on the word "person" appearing in RFRA in combination with the owners' ability to assert beliefs onto corporate entities to grant standing.[54]

These divisions in result and logic ultimately compelled the Supreme Court to take up the case, granting certiorari in the cases from the Tenth and Third Circuits, which would become known as *Burwell v. Hobby Lobby*. The Court, with Justice Alito writing for a five-justice majority, held that for-profit corporations are eligible for RFRA protection and that the corporations in question could receive exemption from the contraceptive mandate.[55]

Though the literature surrounding *Hobby Lobby* and the amicus briefs submitted in the case proposed a deep inquiry into corporate law theory when evaluating corporate rights, the majority opinion took a very straightforward, simple route to establishing corporate standing under RFRA. Justice Alito began by pointing out that the pre-RFRA Free Exercise Clause cases often allowed small business owners and other corporations to bring claims.[56] The opinion then offered a fairly formalist argument based on the Dictionary Act. The majority argued that, since the word "person" appears in RFRA, and the Dictionary Act includes corporations in its definition of the word "person,"[57] corporations have

50. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (granting the corporate plaintiff to have standing).

51. *See* Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (denying the corporate plaintiff standing).

52. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384 (3d Cir. 2013), cert. granted, 134 S. Ct. 678 (U.S. 2013).

53. *See* Autocam Corp. v. Sebelius, 730 F.3d 618, 623 (6th Cir. 2013).

54. *See* Korte v. Sebelius, 528 F. App'x 583, 668 (7th Cir. 2012).

55. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

56. *Id.* at 2756.

57. 1 U.S.C. § 1 (2012). The Dictionary Act is a unique piece of legislation, which reads like a dictionary. It defines words and applies the definition to all other legislation

standing under RFRA absent a contextual indication that the Dictionary Act definition ought not apply.[58]

In refuting the Third Circuit's argument that corporations separate from their owners cannot take any action, Justice Alito wrote that this is "quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[59] Thus, while the corporate theory behind the decision is opaque, it is clear that the Court did not adopt the real entity theory of corporate personhood. Additionally, Justice Alito pointed out that fiduciary duties do not prohibit the exercise of religion, as corporations support altruistic charitable causes connected with religious charities or motivated by religious ideals with great frequency.[60]

The two companies before the Court in *Hobby Lobby* were closely held corporations. However, there is very little in the Court's syllogism that would easily confine the decision regarding standing to closely held corporations. In fact, in the discussion of RFRA standing, the Court only addressed the difference between closely held and publicly traded corporations when addressing the government's argument that a ruling for Hobby Lobby could result in widespread proxy battles between companies like IBM and General Electric.[61] In response, the Court observed that publicly traded companies had not asserted RFRA claims in the past, and that it is unlikely that they would be able to do so due to structural boundaries created by the size of these corporations and complexity of their management structures.[62] Differentiating publicly traded corporations' ability to access RFRA protections

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unless the legislation independently defines the word. Some of the words defined by the Dictionary Act are intuitive like county, vehicle, or company. *Id.* Other entries are more peculiar, like defining "products of American fisheries" to include certain frozen fish products. *Id.* § 6. Recently, the Dictionary Act was at the center of public controversy when it was used to define marriage as a union between only members of different sexes. *Id.* § 7.

58. *Hobby Lobby*, 134 S. Ct. at 2768. Justice Alito closely mirrors the argument made by Jeremy M. Christiansen, *supra* note 44.

59. *Id.* at 2769.

60. *Id.* This point will become of greater importance in Part III, as this Note suggests that the progressive move to cabin corporate rights to closely held corporations might undermine other progressive causes, which Justice Alito accurately reflects include corporate altruism.

61. *Id.* at 2774.

62. *Id.* at 2774–75. This argument suggests that the sincerity testing model put forth in Part IV may in fact be more in line with what the Court envisioned as a limiting principle to *Hobby Lobby* rather than the HHS focus on closely held corporations.

due to structural boundaries does not address whether the situations are differentiable as a matter of law.

## B. THE SUBSEQUENT HHS REGULATIONS

In order to comply with the *Hobby Lobby* ruling, HHS promulgated new regulations, which expanded eligibility for exemption from the contraceptive mandate to certain closely held corporations, effective September 14, 2015.[63] As of this writing, although there has been no legal challenge to the new regulations, it is possible and even perhaps likely that such challenges will soon emerge. In addition to affecting the debate around both religious liberty and reproductive rights, the new regulations provide the most direct and important definition of a closely held corporation in federal law.

HHS decided to focus the new regulations on the definition of a closely held corporation, keeping publicly traded for-profit corporations from being eligible for exemption. This decision was based on a reading of *Hobby Lobby* that focuses on the fact that the plaintiffs were closely held corporations.[64]

Though the definition of a closely held corporation has traditionally been left to the states, the Internal Revenue Service (IRS) does use a definition of closely held corporations for tax purposes. The IRS requirements to qualify as a closely held corporation are very simple, only demanding that the corporation have more than 50% of its stock owned by five or fewer individuals and that the corporation is not a personal service corporation.[65] Due to this fairly broad definition, over 90% of corpora-

63. Coverage of Certain Preventive Services, 80 Fed. Reg. 41,318, 41,329 (July 14, 2015).

64. *Id.* As suggested above, this reading of *Hobby Lobby* is precarious. Though the decision is limited to closely held corporations due to the nature of the plaintiffs, it is difficult to distinguish the logic of the Court between publicly traded and closely held corporations. Moreover, the Court indicates that it is not concerned about the ability of publicly traded corporations to access RFRA standing. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014). Though it does not come up in the opinion, Hobby Lobby is actually considered an "S corporation." "S corporations" cannot have more than 100 shareholders. Rather than paying corporate taxes, "S corporations" pass profits and losses to their owners who pay for the corporation through their personal income taxes. Thus, an "S corporation" can be but is not necessarily a closely held corporation. Drew DeSilver, *What is a 'closely held corporation,' anyway, and how many are there?*, FactTank (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/ [https://perma.cc/T362-CEHP].

65. *Entities FAQs*, INTERNAL REVENUE SERV., https://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-

tions in the United States are considered closely held.[66] Therefore, the new HHS regulations, which are more complicated, represent both an expansion of federal involvement in the definition of closely held corporations and the most comprehensive federal definition available. This new definition may change the conception and identity of closely held corporations across federal law.

Prior to implementation, the new HHS regulations were widely contested during the mandatory comment period, receiving more than 75,000 comments.[67] Several groups of law professors submitted compelling comment letters from across the ideological spectrum. One group of professors questioned whether HHS should rely on the term closely held corporation at all, positing that the *Hobby Lobby* decision was not limited to such entities.[68] They went on to suggest that the nature of the corporations in *Hobby Lobby* as family-owned companies was neither relevant to the decision nor to the definition of closely held corporations.[69] In contrast, a comment led by Columbia Law School faculty attempted to contain the regulations to the specific facts of *Hobby Lobby*, advocating that the regulation should include only family-operated businesses constrained by the number of shareholders.[70] A third letter from University of California, Berkeley, School of Law, faculty suggested that instead of using a numerical test, the regulations should adopt traditional corporate law indicators for veil-piercing, relying on a self-certification of the unification of interests between the corporation and its owners.[71]

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Business,-Self-Employed,-Other-Business/Entities/Entities-5 [https://perma.cc/CHE9-4LM9] (last visited Apr. 21, 2017).

66. Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does 'Closely Held' Mean?*, WALL ST. J. (June 30, 2014), http://www.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577 [https://perma.cc/MQX2-JKNT].

67. Coverage of Certain Preventive Services, 80 Fed. Reg. 41,318, 41,324 (July 14, 2015).

68. LYMAN JOHNSON ET AL., COMMENTS ON THE HHS' FLAWED POST–HOBBY LOBBY RULES (Oct. 20, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512860 [https://perma.cc/T2SU-B3GJ].

69. *Id.* at 6–7.

70. KATHERINE FRANKE ET AL., COMMENT ON THE DEFINITION OF "ELIGIBLE ORGANIZATION" FOR PURPOSES OF COVERAGE OF CERTAIN PREVENTATIVE SERVICES UNDER THE AFFORDABLE CARE ACT (Oct. 21, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_by_re_profs_for_submission.pdf [https://perma.cc/7BKQ-AJU9].

71. ROBERT P. BARTLETT III ET AL., U.C. BERKELEY SCH. OF LAW, COMMENT ON THE DEFINITION OF "ELIGIBLE ORGANIZATION" FOR PURPOSES OF COVERAGE OF CERTAIN PREVENTATIVE SERVICES UNDER THE AFFORDABLE CARE ACT (Oct. 8, 2014),

In the end, HHS opted for a middle ground between these opposing views in its final regulations. The HHS final regulations, titled Coverage of Certain Preventive Services Under the Affordable Care Act, adopted a complicated, multi-faceted test, implementing the most complex federal definition of a closely held corporation.[72] In order to qualify as closely held and be eligible for exemption, the corporation must first object to providing services based on the owners' religious belief.[73] Second, the corporation must have no publicly traded stocks.[74] Third, the corporation must "have more than 50 percent of the value of its ownership interests owned directly or indirectly by five or fewer individuals, or must have an ownership structure that is substantially similar."[75] The "substantially similar" criterion is designed to allow increased flexibility for arrangements that are close but nearly miss the requirements.[76] Fourth, unlike the IRS definition, the regulation does not exclude personal service corporations.[77] Moreover, the HHS regulations set the process by which newly eligible organizations can request exemption.[78] These new regulations pose several practical problems and convey dangerous implications for the development of corporate law beyond the narrow context of *Hobby Lobby*'s conflict between employers' religious liberty and employees' reproductive rights.

## III. THE TROUBLE WITH THE NEW REGULATIONS

The progressive response to *Hobby Lobby*, led by President Obama's administration, is fragile and inherently fraught with problems. Limiting *Hobby Lobby*'s scope by narrowing its holding to a new definition of closely held corporations makes more sense

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https://www.law.berkeley.edu/files/bclbe/Berkeley_Law_Professors_Final_Comment.pdf [https://perma.cc/Y75H-4DMV].

72. Coverage of Certain Preventive Services, 80 Fed. Reg. 41,318, 41,336 (July 14, 2015).

73. *Id.* at 41,324.

74. *Id.*

75. *Id.* at 41,326. For these purposes, members of the same family count as only one individual.

76. *Id.* This hesitation to fixing a bright line, though it accounts for some concerns of numerical qualifications, poses its own problem in lacking limiting principles to describe exactly how similar a structure is, or in other words, how nearly a corporation missed the requirement.

77. *See id.*

78. Coverage of Certain Preventive Services, 80 Fed. Reg. 41,318, 41,327–30 (July 14, 2015).

from the perspective that the case is about civil liberties rather than corporate law. The current strategy threatens not only to be ineffective, but also to undermine the development of broader corporate responsibility in other areas of the law. This Part of the Note focuses on several issues raised by the new regulations, including their potential tension with *Hobby Lobby* itself, their inability to account for third-party harms (a major concern of the regulations' supporters), and the possibility that they may undermine CSR development.

## A. LACK OF STAYING POWER

One of the most problematic features of the progressive response to *Hobby Lobby* is that it presents a model ripe for litigation and is likely to be successfully defeated. The *Hobby Lobby* Court did not define closely held corporations, and it is more likely that the Court did not extend its holding to other types of corporate entities because it limited its decision to the case before it, rather than because it believed that closely held corporations created a limiting principle on RFRA protections. In other words, the Court's decision can be read as only applying to closely held corporations because only closely held corporations were before the Court, not because *Hobby Lobby* indicates that only closely held corporations can exercise religion. Importantly, throughout his opinion, Justice Alito does not distinguish between closely held corporations and publicly traded corporations in discussing the application of RFRA to for-profit corporations.[79] Nothing in *Hobby Lobby* itself indicates that the Court would be likely to reject a challenge from a non-closely held corporation.

The formalistic syllogism employed by Justice Alito makes it difficult to keep future cases out of the scope of *Hobby Lobby*. As discussed earlier, the majority opinion relied heavily on the Dictionary Act and RFRA's extension of protection to all persons.[80] In concluding that corporations are persons under RFRA, the Court in expansive language declared that: "[n]o known understanding of the term "person" includes *some* but not all corpora-

79. For example, in his discussion of RFRA standing, Justice Alito writes: "but this principle applies equally to for-profit corporations . . . ." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014).

80. *See id.*

tions."[81] This makes it unlikely that a court could find a corporation unable to exercise religion without directly contradicting *Hobby Lobby*.

Moreover, *Hobby Lobby* made clear that RFRA is not coterminous with pre-*Smith* Free Exercise doctrine but instead creates a new line of statutory jurisprudence.[82] This position is at odds with the Court's subsequent reliance on pre-*Smith* case law to show a history of First Amendment protections to corporate entities.[83] However, it also undercuts any strategy that uses case law from before RFRA's enactment to try to limit *Hobby Lobby*.

The Court brought up the concern raised by HHS of "the specter of 'divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.'"[84] The Court responded by quickly noting that there is "no occasion in these cases to consider RFRA's applicability to such companies," since only closely held corporations appeared before the court.[85] However, the majority posited that other pragmatic factors, aside from a lack of standing, might keep companies of this size from asserting RFRA claims.[86] This suggests that, although the holding is confined to closely held corporations, the new HHS regulations are still ineffective because, at best, other factors will be sufficient to keep publicly traded corporations out of court, and at worst, publicly traded corporations will not be easily differentiated from closely held corporations for RFRA purposes. Thus, the move to narrow *Hobby Lobby* to a strict definition of closely held corporations might be futile and unnecessary.

## B. THIRD-PARTY HARMS: OVER AND UNDER INCLUSIVITY

One of the gravest concerns of *Hobby Lobby* critics is the potential for harm to third parties. That is, the religious party's exemption from the generally applicable law or regulation could have collateral effects on other individuals, in this case the employees of the objecting company. The situation in *Hobby Lobby*

81. *Id.*
82. *See id.* at 2772.
83. *See id.*
84. *Id.* at 2774 (quoting Brief for Petitioner at 30, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354)).
85. *Id.* at 2774.
86. *See id.*

itself is one where the corporation's religious rights are directly at odds with the employees' reproductive and healthcare rights; one must give way.[87] Arguably, while the fight over religious accommodations used to be between the religious objector and the state, which had an interest in efficient administration, the religious objector now competes against other citizens with interests that may be impaired by the objection and subsequent exemption.[88] In a situation where the religious objector's rights are at odds with third-party claims, *Hobby Lobby* critics argue that third-party claims to equality-implicating rights, like reproductive rights, should be prioritized.[89]

Undoubtedly, third-party harms are an important factor in any policy evaluation.[90] Moreover, *Hobby Lobby* is not the only time third-party harms have been implicated. In *Holt v. Hobbs*, a case decided under a statute very similar to RFRA, the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court unanimously held that an inmate should be allowed to grow a short beard in accordance with religious convictions.[91] Justice Ginsburg noted in her concurrence that failure to consider third-

87. *See* Kara Lowentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014).

88. *See id.* at 467. This Note does not take a position on this argument but only uses it to help sketch out a particular response and concern. However, it is worth noting that this distinction may be more fluid than it initially appears. After all, the State's interests are ideally only proxies for the interests of affected citizens who benefit from the State's efficiency.

89. *See id.* at 482.

90. However, third-party harms may not be an independent side constraint on RFRA analyses; instead, they may be built into the RFRA test through the compelling interest examination. The compelling interest analysis should include third-party harms. For example, a compelling interest in prison security is based on the notion that an unsecure prison may cause harms to others. Thus, as some have argued, the issue with third-party harms might not be that they are a side constraint on RFRA, but rather, that they may raise potential establishment clause issues. *See* Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (holding a Connecticut law that required employers to grant leave to Sabbath observant employees for either Saturday or Sunday without exception violated the establishment clause); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323-41 (Chad Flanders, Zoe Robinson, & Micah Schwartzman, eds. 2015) (concluding "that courts may not grant RFRA exemptions when doing so will materially burden the rights and reasonable interests of third parties who believe and practice differently. No American should have to pay for the exercise of someone else's religion"); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 42 HARV. C.R.-C.L. L. REV. 343 (2014) (arguing third-party harms may indicate an unconstitutional accommodation of religion).

91. Holt v. Hobbs, 135 S. Ct. 853 (2015).

party harms could pose an establishment clause problem, where one person's belief, bolstered by state exemption, negatively burdened non-believers.[92] In fact, Justice Ginsburg differentiated the case from *Hobby Lobby* to justify her concurrence, noting that unlike in *Hobby Lobby*, "accommodating petitioner's religious belief in [*Holt*] would not detrimentally affect others who do not share petitioner's belief."[93] Justice Ginsburg's *Hobby Lobby* dissent mirrors this prominent focus on third-party harms.[94]

Applying this reasoning, once *Hobby Lobby* was decided, scholars shifted their energy to concocting systems within the boundaries of the case that could minimize third-party harms.[95] However, the move to rely on a definition of closely held corporations to limit *Hobby Lobby* is not such a system, because it does not efficiently limit third-party harms. Specifically, the new HHS regulations do a poor job at differentiating between situations where third-party harms are likely and situations where such harms are not an issue.

Closely held companies are not less likely to cause third-party harms. In fact, though there is no estimate for how many corporations fall under the new, complex definition, it has been estimated that up to 90% of U.S. corporations are closely held corporations under the IRS definition.[96] Additionally, since the original mandate only applied to employers with 50 or more full time employees, most small businesses were never affected.[97] Thus, there are only a small percentage of companies that fall outside the definition of closely held corporations and are bound by the mandate. Allowing religious exemption only for closely held corporations is not a good proxy for limiting third-party harms. For example, some of the most profitable corporations in America are closely held. These companies tend to be very large with many employees who would be affected by a potential exemption. As Professor Sarah Barringer Gordon astutely pointed out, some of America's most famed companies are closely held, including Mars

92. *See* Micah Schwartzmann, Richard Schragger, & Nelson Tebbe, Holt v. Hobbs *and Third Party Harms*, BALKINIZATION (Jan. 22, 2015), http://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html [https://perma.cc/V9ML-BCQC].

93. *Holt*, 135 S. Ct. at 867.

94. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

95. *See, e.g.*, Toni M. Massaro, *Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions Post*–Hobby Lobby, 92 DENVER L. REV. 325 (2015).

96. Armour & Feintzeig, *supra* note 66.

97. 26 U.S.C. §§ 4980H(a), 4980H(c)(2), 5000A(f)(2) (2012).

Inc., which employs 72,000 people, and Cargill Inc., which employs 140,000 people.[98] Even the lead plaintiff in *Hobby Lobby* is a national chain with over 600 locations and 30,000 employees,[99] far from a "mom and pop" operation. In a world where corporations can object to generally applicable law on religious grounds, attempting to limit that ability to closely held corporations is not an effective means of limiting third-party harms, because whether a corporation is closely held is not a good proxy for the corporation's capability to produce third-party harms. Advocates who focus solely on this option foreclose the possibility of exploring other, perhaps better, alternatives.

### C. CORPORATE SOCIAL RESPONSIBILITY

*Hobby Lobby* critics miss that limiting corporate personhood can also restrict a corporation's ability to assert moral beliefs that promote issues under the theory of Corporate Social Responsibility. Corporate Social Responsibility (CSR) is a concept that expands corporate responsibilities and conscience beyond strictly profit-making motivations to more altruistic, societal concerns in making corporate decisions. CSR has a long history and has often been supported by more progressive, liberal movements. The attempt to limit corporations' ability to exercise religion collides with traditional understandings of CSR, because it may also restrict their ability to exercise moral beliefs outside of their profit motive. Doing so may serve as dangerous precedent to block a corporation's attempts to exercise other forms of conscience often designed to promote societal welfare.

General theories about corporate responsibilities and actions beyond pure profit motive have existed since the nineteenth century.[100] Underlying CSR is the shift from a conception of shareholders to stakeholders. On the one hand, conceptualizing corporations' constituents as shareholders will only take into account the interests of those who are directly and financially invested in

98. Armour & Feintzeig, *supra* note 66.

99. *Our Story*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story [https://perma.cc/2GG2-7UUT] (last visited April 21, 2017); Armour & Feintzeig, *supra* note 66.

100. *See Corporate Social Responsibility: The Shape of a History, 1945–2004, History of Corporate Responsibility Project* 4 (Ctr. for Ethical Bus. Cultures, Working Paper No. 1, 2015), http://www.cebcglobal.org/wp-content/uploads/2015/02/CSR-The_Shape_of_a_History.pdf [https://perma.cc/LDD6-B5KU].

a corporation. Thinking in terms of stakeholders, on the other hand, allows corporations to make decisions that take into account the interests of broader groups like customers, employees, or society at large.[101] Thus, CSR encourages companies to go beyond profit-making motives and consider other factors like their employees' quality of life or their environmental impact.

Often, what begins with a focus on religious conscience expands over time to encompass broader moral conscience. Therefore, what may begin as a denial of corporate ability to exercise religion, based on a limited theory of corporate rights that does not allow for broader conscience, may expand to prohibit other forms of corporate moral conscience, sacrificing progressive goals concerning, for example, workers' rights and the environment. In fact, religion may not be special at all, but just another form of a wider conception of moral conscience.[102] If religion is like other forms of moral conscience, it makes understanding the Constitutional text more difficult, since the Constitution directly mentions religious but not moral belief.[103] However, it also makes it difficult to reconcile prohibiting corporations from having a religious conscience with lauding corporate social responsibility proposals.

The story of conscientious objection in the military draft context provides a useful analogue. Though exemption from military service was initially reserved for those who believed in traditional religions, confined to the tenets of an established, organized religion, it was expanded to include those who had less orthodox spiritual beliefs.[104] Later, in *Welsh v. United States*, the exemption was extended to those who held non-religious, moral beliefs in pacifism.[105] *Welsh* limited the extension to those objecting to war in general rather than those who questioned the moral or political soundness of a particular war.[106] Even with its limits,

101. *See id.* at 5. Interestingly, CSR in this sense has a built-in calculation of third-party harms.

102. *See* Micah Schwartzmann, *What if Religion Isn't Special?*, 79 U. CHI. L. REV. 1352 (2013).

103. *See* U.S. Const. amend. I.

104. *See* United States v. Seeger, 380 U.S. 163 (1965) (granting exemption from the military draft to an individual who professed a pacifist belief due to a religious belief not associated with a singular religion).

105. Welsh v. United States, 398 U.S. 333 (1970) (granting exemption from the military draft to an individual who professed a pacifist belief based in moral rather than religious conscience).

106. Gillette v. United States, 401 U.S. 437 (1971) (denying exemption from the military draft to an individual who did not profess a pacifist belief in general but rather only in connection to the specific war responsible for his being drafted).

the expansion of exemptions from religious to moral convictions has strong precedent, specifically in the context of military conscription.

Accordingly, *Hobby Lobby*, though difficult to accept for certain reasons, can be praised as one of the first examples of Supreme Court recognition of broader corporate conscience, opening the door to allow corporations to pursue broader moral agendas, whether that be environmental preservation or social justice issues. Cutting off this application with respect to publicly traded companies limits the value of the decision in future cases.

Thus, *Hobby Lobby* can be viewed as an opportunity to advocate an agenda of broader corporate responsibility and moral agency. Justice Alito, likely for the first time, recognized the proliferation of corporations with a dual purpose: "benefit corporations" that seek both profit and the public good.[107] "Benefit corporations" are quickly spreading through the states as a new corporate form.[108] Those corporate scholars who do not believe in broader corporate agency now face in *Hobby Lobby*'s direct confirmation of corporate personhood a "formidable judicial foe."[109] Other self-identified conservative legal commentators were quick to note that progressive rejection of the broader corporate rights theory expressed by Justice Alito could undermine other progressive issues.[110] It is true that the Court did not adopt a theory that views corporations as real, independent people, but the Court's theory allows for company owners to guide the corporation in social- or religious-conscience endeavors.[111] Religious leaders are also part of the chorus, advocating the ability of reli-

107. Usha Rodrigues, *The Supreme Court's View of the Corporation in* Burwell v. Hobby Lobby, CONGLOMERATE (July 2, 2014), http://www.theconglomerate.org/2014/07/the-supreme-courts-view-of-the-corporation-in-burwell-v-hobby-lobby.html [http://perma.cc/Z9AN-UMGB].

108. *See* Robert T. Esposito & Shawn Pelsinger, *The Supreme Court's First Brush with Social Enterprise: A Look at How* Hobby Lobby *Affects Emerging Corporate Forms,* STANFORD SOC. INNOVATION REV. (July 21, 2014), http://ssir.org/articles/entry/the_supreme_courts_first_brush_with_social_enterprise [https://perma.cc/KA7W-ASAF].

109. Haskell Murray, *Lyman Johnson* — Hobby Lobby*, a Landmark Corporate Law Decision*, LAW PROFESSORS BLOG NETWORK (July 2, 2014), http://lawprofessors.typepad.com/business_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html [https://perma.cc/7S5C-843Q].

110. *See* Brett McDonnell, *Ideological blind spots: The left on* Hobby Lobby, STAR TRIB. (July 10, 2014), http://www.startribune.com/ideological-blind-spots-the-left-on-hobby-lobby/266684261/ [https://perma.cc/D3ML-793C].

111. *See id.*

gion to curtail corporate abuses.[112] Moreover, those religious leaders argue that if corporate owners cannot impose a religious belief on their corporation, then companies similarly would not be able to pursue an agenda to support the environment, end world hunger, or a bevy of other causes that do not strictly maximize profits.[113] Even if *Hobby Lobby* does not endorse the broad power of corporate directors to pursue far-flung altruistic policies, it does, at a minimum, allow for a weaker version of CSR that allows shareholders in unity to advance interests outside of pure profit-making motives.[114] Though this is not the ideal venue through which CSR advocates hoped CSR would be embraced by the Court, nor is it the ideal political result, CSR advocates can take advantage of *Hobby Lobby*'s broad proclamation on corporate personhood to progress causes where a corporation seeks to assert a moral stance. In fact, now that *Hobby Lobby* is law, burying, ignoring or resisting the Court's move to broader corporate agency is counterproductive and puts in jeopardy the ability of the progressive movement to advocate for CSR in future cases.

Allowing publicly traded corporations to exercise religious conscience may be beneficial rather than disastrous, as it would push companies to take moral stances on issues at the behest of their shareholders. Indeed, it can promote "shareholder activism" where shareholders use their voting power to push corporate managers toward socially conscious goals.[115] Shareholder activism is not a new phenomenon but a technique that has been used for decades.[116] Though most commonly used to gain a financial advantage, shareholder activism has also been used for a wide variety of socially conscious purposes, like promoting equal employment opportunities, discouraging weapons production, or even encouraging companies to institute policies related to cli-

112. *See* Seamus P. Finn, *The Power of Religion to Influence Corporate Responsibility*, HUFFINGTON POST (Sept. 15, 2011), http://www.huffingtonpost.com/rev-seamus-p-finn-omi/religion-corporate-responsibility_b_897715.html [https://perma.cc/CE4G-CZS3].

113. *See* Keith P. Bishop, *44 Law Professors Make A Case Against Corporate Social Responsibility*, ALLEN MATKINS (Feb. 10, 2014), http://calcorporatelaw.com/2014/02/44-law-professors-make-a-case-against-corporate-social-responsibility/ [https://perma.cc/EP47-GFGQ].

114. *See* Alan Meese, Hobby Lobby *and Corporate Social Responsibility: A View From The Rights*, CONGLOMERATE (July 16, 2014), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1327&context=popular_media [https://perma.cc/K8H4-Q76U].

115. *See* Michele Bendetto Neitz, Hobby Lobby *and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 SMU L. REV. 243, 248–49 (2015).

116. *See id.* at 250.

mate change.[117] After *Hobby Lobby*, which eroded the wall between shareholders and the corporate conscience, activist shareholders may be able to more successfully push corporations towards good.[118] Using a too-narrow definition of closely held corporation not only fails to take into account the potential benefits of *Hobby Lobby*, but also fails to minimize problems with the *Hobby Lobby* decision itself.[119]

The regulations do not achieve their intended goals because they are not tailored closely enough to the problems they seek to address. They do not properly curtail harms to third parties. Additionally, they work against the realization of one potential benefit of *Hobby Lobby*, which is that shareholders of publicly traded corporations may wish to push those companies towards socially responsible policies.

## IV. INCREASED SINCERITY TESTING

The distinction between closely held and publicly traded corporations, on which the HHS has relied in promulgating its new regulations, poses a serious concern in its effectiveness as a proxy for who can and cannot bring RFRA claims. This Note argues that, rather than applying that distinction, policymakers should utilize the basic sincerity test embedded in RFRA, which requires a Court to determine that the belief professed by the plaintiff is indeed sincere. This would be simpler and would avoid the pitfalls described in Part III associated with limiting *Hobby Lobby* to closely held corporations.[120] Moreover, Courts are well-positioned to test for sincerity and have a long history of doing so. Some have already started to ponder what *Hobby Lobby* might mean for sincerity testing.[121] Sincerity testing would allow all corporations to bring RFRA claims. However, it would be much easier for a small corporation with limited ownership to show a sincerely held belief than it would be for a national or international conglomerate, because the requirements of sincerity testing are diffi-

117. *Id.* at 250–52.
118. *See id.* at 263.
119. *See id.* at 268.
120. *See supra* Part III.
121. *E.g.*, Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN L. REV. ONLINE 59 (2014), http://www.stanfordlawreview.org/online/questioning-sincerity [https://perma.cc/JXC3-UZH9].

cult to prove for a corporation that has many goals, actors, and a complex structure for making corporate decisions.

In *Hobby Lobby* itself, Justice Alito seemed unconcerned about the possibility of large publicly traded corporations asserting RFRA claims because of the structural boundaries that would inhibit just claims.[122] He notes, "the idea that unrelated shareholders . . . would agree to run a corporation under the same religious beliefs seems improbable."[123] Continuing, he points out that insincere claims would quickly be rooted out and dismissed: "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reason would fail."[124] Following Justice Alito's reasoning, it is possible that sincerity testing could provide a way to differentiate future cases from *Hobby Lobby*, finding that future plaintiffs are professing insincere beliefs. In contrast, Justice Ginsburg conveyed deep discomfort with evaluating sincerity. She argued the Court should accept the sincerity of the belief in question on its face.[125] Though Justice Ginsburg's concern of a court meddling in religious belief is valid, sincerity testing does not ask the Court to evaluate if a religious belief is reasonable, ethical, or it conforms to the generally accepted understanding of a religion. Instead, it only asks if the party professing the belief sincerely holds the belief. Luckily, sincerity testing is not a foreign concept but has long been part of Free Exercise doctrine.[126]

In some form or another, a judge's everyday work, from criminal intent to the evaluation of good faith in everything from contracts to employment practices, is similar to sincerity testing. The judge is asked to see past any pretextual motivations and evaluate the motivations of the party before the court. Here, the inquiry is no different.

Others have proposed limiting factors on parties' ability to bring RFRA claims that are similar to sincerity testing. For example, James D. Nelson has proposed that only corporations that are "constitutive communities" should be able to bring RFRA claims.[127] Nelson's new theory of conscience proposes that there

122. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014).
123. *Id.*
124. *Id.* at 2774 n.28.
125. *Id.* at 34 (Ginsburg, J., dissenting).
126. *See* Iuliano, *supra* note 39, at 55 (citing Gonzales v. O Centro Espírita Beneficiente União de Vegetal, 546 U.S. 418, 428 (2006)).
127. *See* Nelson, *supra* note 44.

are two types of collective conscience identities: identification, "where one's membership in a group is intimately tied to personal identity, and detachment, where one's role in a group is external to the self."[128] Only the first type of community would be allowed to bring RFRA claims. Though this theory is compelling, it may not be required to create an effective system of sincerity testing. Sincerity testing indirectly accounts for the differences that Nelson describes, because companies that are able to speak compellingly with a unified voice or community will be able to make much more persuasive appeals of sincerity.

## A. SINCERITY TESTING THROUGHOUT THE LAW

Sincerity testing is not a new concept, but one that is present throughout the law. Judges are frequently asked to evaluate sincerity, whether in the form of witness credibility or claims of bad faith. Adopting sincerity testing to constrain corporate RFRA claims allows the process of evaluating the claim to stay in the courts rather than undergo a complex administrative process. Sincerity testing would allow the courts to evaluate claims on an individualized level and develop clear guideposts for sincerity.

### 1. *The Military Draft*

Once again, the military draft provides a useful analogue for developing a robust system of sincerity testing. As discussed earlier, exemptions from the military draft were granted to those who had strong universal moral or religious beliefs opposing violence.[129] In *Witmer v. United States*, the Supreme Court found that the petitioner's professed belief, seeking to avoid conscription, was insincere and merely a pretext for a personal desire to avoid service, rejecting the claim.[130] There was sufficient evidence that Witmer's motives for avoiding military service were primarily financial and not religious.[131] The Court went so far as to call Witmer's contention "mere caviling."[132] The Court did not evaluate whether the beliefs submitted by Witmer were valid or

128. *Id.* at 1568 (emphasis removed).
129. *See supra* Part III.
130. Witmer v. United States, 348 U.S. 375 (1955).
131. *Id.*
132. *Id.* at 384.

morally just; rather they only evaluated whether he truly held those beliefs. This distinction alleviates Justice Ginsburg's concern about the Court wading into religious doctrine and indicates the ability of sincerity testing to adequately address the legitimacy of the believer's claim rather than the belief itself.

2. *Bankruptcy*

Evaluating sincerity is frequently required in bankruptcy proceedings, although those proceedings are unique and subject to procedural eccentricities. For instance, courts have evaluated whether large charitable donations made by individuals or companies before filing a bankruptcy petition were made sincerely, or if they were made fraudulently and are consequently invalid.[133] Section 548(a)(1) of the Bankruptcy Code allows for even small donations to be invalidated if there is evidence that the donor had dubious intent.[134] Thus, the role of the judge in evaluating sincerity extends as far as bankruptcy court.

3. *Free Exercise*

Sincerity testing has been consistently employed in the context of Free Exercise doctrine. This provides evidence that courts have proved effective arbiters between religious belief and personal desires in the context that is directly at issue in *Hobby Lobby*. For example, in a recent case, *United States v. Quaintance*, the Tenth Circuit determined that petitioners' claim that marijuana was a deity and sacrament was insincere and merely a pretext for their personal desire to consume marijuana recreationally.[135] Justice Alito cited *Quaintance* with approval in *Hobby Lobby* in suggesting that sincerity testing could be a limit of deceptive corporate RFRA claims.[136] Importantly, courts regularly decline Free Exercise claims premised on insincere beliefs including requests for special prison privileges,[137] avoiding drug laws,[138] and engaging in pedophilia.[139]

133. *See* Adams & Barmore, *supra* note 121.
134. *See id.*
135. *See* United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010).
136. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014) (citing *Quaintance*, 608 F.3d at 718–19).
137. Iuliano, *supra* note 39, at 94 (citing Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex. 1978)).

4. *Constitutionality of Sincerity Testing*

The courts have consistently confirmed the constitutionality of sincerity testing. The essential case on this issue is *United States v. Ballard*.[140] In *Ballard*, the three leaders of a newly formed religious movement were charged with fraud for soliciting donations on the basis of their proclamation that they held supernatural powers.[141] The court instructed the jury not to consider the validity of the claim that they had supernatural tendencies, but rather only to evaluate if the defendants sincerely believed the claims.[142] This is an important distinction. Clearly, no reasonable jury would believe that the defendants possessed supernatural abilities. However, even in this extreme example, the court steered away from evaluating the validity of the claim, instead calling for a subjective evaluation of the sincerity of the belief, even if the underlying belief is ludicrous. *Ballard* did not explicitly endorse sincerity testing and instead simply remanded the case.[143] Since *Ballard*, however, the Supreme Court has consistently applied *Ballard* in upholding subsequent challenges to sincerity testing.[144]

Some may argue that this approach protects those who espouse ridiculous or fraudulent beliefs. Sincerity testing does weed out fraud by looking to see if the proprietor of the belief actually holds that belief, or if it is merely a fraud to take advantage of the unsuspecting. But, sincerity testing can allow beliefs that are widely considered absurd to circulate. However, the calculation is that the harm caused by these beliefs is less than the harm that would come from judicial regulation of which beliefs are within the realm of reason, and thus acceptable to hold and practice.

138. *Id.* (citing United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968)).
139. *Id.* (citing Hansell v. Purnell, 1 F.2d 266 (6th Cir. 1924)).
140. United States v. Ballard, 322 U.S. 78 (1944).
141. *Id.*
142. *Id.*
143. Iuliano, *supra* note 39, at 95.
144. *Id.*

## B. HOW SINCERITY TESTING WORKS

When evaluating sincerity, courts look to the other actions of the individual professing the belief as well as the potential pretextual motivations and consequences of that individual standing by their religious conviction. These two techniques allow judges to more accurately dismiss insincere claims while recognizing the validity of sincere religious beliefs. In the corporate context, it will be much more difficult for large, publicly traded corporations to meet the rigors of a sincerity test, because it will prove difficult to obtain consistent action and practice among a diverse array of agents, and there are often clear financial motivations for fabrication.

### 1. *Insincere Motivations*

When evaluating if a professed belief is sincere, courts look to the presence of factors that might incentivize a party to fabricate a belief. As Thad Eagles writes: "[s]trong incentives for faking should require proportional evidence of sincerity . . . ."[145] Evidence that the claimant benefits directly, particularly financially, from the professed belief and subsequent exemption is strong evidence that the individual may be feigning an insincere belief.[146] Conversely, if a claimant's belief puts a strong burden on the believer, like suffering punishment or persecution, then this is strong evidence of a sincere belief.[147] In *Quaintance*, mentioned earlier, the defendant's confession that they were in the marijuana business and desired to stay out of prison were very clear indicators of motive for fabrication.[148]

For-profit corporations will often have a clear, financial incentive to express insincere beliefs, making overcoming this evidence and gaining exemption more difficult. For-profit corporations usually, but not always, act primarily with their financial interests in mind. Therefore, if a for-profit corporation asks for a religious exemption to pursue a policy that will also make the corpo-

145. Thad Eagles, Note, *Free Exercise Inc.*, 90 N.Y.U. L. REV. 589, 611 (2015).

146. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981).

147. *See* Iuliano, *supra* note 39, at 59 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (Black and Douglas, JJ., concurring)).

148. Adams & Barmore, *supra* note 121, at 62–63 (citing United States v. Quaintance, 608 F.3d 717, 722 (10th Cir. 2010)).

ration a lot of money, a court can more easily conclude that the religious conviction is an insincere front for profit motive.[149] It would also be easy for judges to evaluate the inverse situation. For example, in *Hobby Lobby*, the failure to comply with the contraceptive mandate would have cost the company as much as $1.3 million per day, or $475 million per year.[150] Internal communications could also prove to be crucial indicators of insincere motivations on the part of corporations.[151] As *Quaintance* indicates, if the exemption is intricately linked with the business of the corporation, as in that case, where a religious belief in marijuana was linked with the profit motive of selling marijuana, it is more likely that there are insincere motives than if the exemption is only incidentally related to running a business in general.[152]

2. *Prior Consistent Behavior*

Courts also seek to determine whether the claimant's behavior is consistent with the professed belief. It naturally follows that an individual who does not abide by his or her own beliefs cannot sincerely hold those beliefs. There are two slight variations on this theme. The first is when an individual acts in a manner that is directly inconsistent with the belief professed as the basis for exemption. This situation is fairly straightforward for courts to evaluate sincerity. Moreover, courts will sometimes grant some leniency in evaluating the sincerity of these sorts of challenges if the claimant has only deviated on occasion from the belief.[153]

The second situation is much trickier. This is where deviation from other aspects of a system of belief could be used against the claimant's assertion of sincerity. *Dobkin v. District of Columbia* illustrates this situation.[154] Dobkin, under trial for an unrelated event, contended that continuing the trial past sundown on Friday evening, the beginning of the Jewish Sabbath on which work is prohibited, violated his religious rights.[155] Though the court

149. *See* Eagles, *supra* note 145, at 611.
150. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014).
151. *See* Iuliano, *supra* note 39, at 97.
152. *See Quaintance*, 608 F.3d at 722.
153. *See* Iuliano, *supra* note 39, at 96 (citing Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006)). Iuliano also notes there have been other cases where courts have found a single deviation from practice enough to refuse future exemption. *Id.* at 96 n.286.
154. Dobkin vs. District of Columbia, 194 A.2d 657 (D.C. 1963).
155. *Id.* at 659.

agreed that this was problematic, they relied on evidence that Dobkin worked in his office on Saturdays to show that he did not have a sincere belief in keeping the Jewish Sabbath and abstaining from work.[156] Though at first glance, the plaintiff in *Dobkin* may appear to have acted in direct contradiction to his stated beliefs, his actions may be viewed differently depending on the level of specificity with which the act is defined. Specifically, the inconsistent act, working in the office, is not precisely the same as the act for which Dobkin sought exemption, being on trial. The court is correct that both of these activities would be prohibited on the Jewish Sabbath according to Rabbinic authorities, but to make this conclusion, the court must cross-reference Dobkin's actions against the court's understanding of what the religion allows and forbids. This type of analysis comes much closer to the fears of court involvement in the evaluation of religion, poignantly articulated by Justice Ginsburg in her *Hobby Lobby* dissent.[157] Thus, when conducting sincerity tests, courts should be very careful to narrowly define the beliefs professed and not wander into the waters of religious doctrine when looking at evidence of inconsistent behavior.

Large publicly traded for-profit corporations will likely have great difficulty illustrating consistent actions with respect to a professed belief. The wide array of shareholders and interests will make it challenging to present a unity of belief and action. Smaller corporations, like many closely held corporations, have fewer individuals asserting control over the identity of the corporation and are therefore more likely to be able to show consistent action. However, a publicly traded corporation could still pursue a RFRA exemption if it were able to show unity in action and belief resulting in consistent behavior, which would allow it to assert that it holds a sincere religious belief.

156. *Id.*

157. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

## V. CONCLUSION

Reframing *Hobby Lobby* around a discussion of corporate rights helps to illuminate the path forward. Rather than creating a doomsday situation feared by some critics, *Hobby Lobby*, though clearly imperfect, presents an exciting opportunity. However, the new regime waved in by the recent HHS regulations confining *Hobby Lobby* to closely held corporations fails to take advantage of the positive implications *Hobby Lobby* presents. Moreover, the HHS definition of closely held corporations, which is the new standard of complexity and specificity in federal law, fails to account for the third-party harms that are at the core of many critics' concerns with *Hobby Lobby*. Additionally, it may undermine expanding notions of corporate social responsibility, which are increasingly helpful in pushing corporations toward protecting social concerns, like the environment or workers' rights. Instead, progressives, conservatives, and the courts alike should push for a model of sincerity testing. Sincerity testing occurs in different forms throughout the legal landscape. By looking at potential corrupt motivations for fabricating a belief and consistency of action and conviction, judges are able to effectively weed out insincere claims. In the RFRA context, all corporations could bring RFRA claims, but only those with sincere beliefs would be granted relief. It would be much easier for small, family run corporations to demonstrate a sincere belief than publicly traded international companies, which would address the concerns of HHS. Accordingly, sincerity testing has similar benefits to the current regime but provides a more flexible approach that allows for the evolution of corporate responsibility.