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**Corporations, Taxes, and Religion: The *Hobby Lobby* and
Conestoga Contraceptive Cases**

Steven J. Willis

University of Florida Levin College of Law, willis@law.ufl.edu

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**CORPORATIONS, TAXES, AND RELIGION: THE *HOBBY LOBBY* AND *CONESTOGA*
CONTRACEPTIVE CASES**

Steven J. Willis *

I. INTRODUCTION	2
<i>A. Background on the Hobby Lobby Litigation</i>	5
<i>B. Background on the Conestoga Litigation</i>	7
<i>C. Background on the Grote Industries and Korte Litigation</i>	8
<i>D. Issues</i>	9
<i>E. Litigants' Dilemma</i>	9
<i>F. Reasons Tax Lawyers Should Care</i>	13
1. <i>Choice of Entity Issues</i>	13
2. <i>These Cases Arise in Tax Law</i>	14
3. <i>Other Significant Religious Entanglements Also Involve Tax Law</i>	15
II. ASSERTING OWNERS' RIGHTS.....	15
<i>A. Prudential and Associational Standing</i>	16
<i>B. Corporations as Associational Entities</i>	21
<i>C. Christianity as Associational</i>	26
<i>D. Reverse Veil Piercing</i>	27
<i>E. Corporate Status as Elective</i>	30
III. ENTITIES AS RFRA PERSONS	32
<i>A. History of RFRA</i>	32
<i>B. Corporate Rights Under RFRA</i>	32
IV. CORPORATE RIGHTS	35
<i>A. Corporate Nonreligious Constitutional Rights</i>	35
<i>B. Corporate Religious Rights</i>	37
<i>C. Religion, Morality, and Commerce in General</i>	38
<i>D. Morality and Corporations</i>	44
1. <i>Corporate Social Responsibility Movement (CSR)</i>	45
2. <i>Social Entrepreneurship Movement</i>	48
<i>a. Low Profit Limited Liability Companies (L3Cs)</i>	49
<i>b. Benefit Corporations (B Corporations)</i>	51
<i>c. Sustainable Business Corporations</i>	52

* Professor of Law, University of Florida, member of the Florida Bar and Louisiana Bar (inactive) and Certified Public Accountant (Louisiana, inactive). The author thanks J. P. Dasburg (J.D. 2014 candidate at the University of Florida) for his insightful comments on corporate constitutional rights, as well as Hans Tanzler IV (J.D. 2014 candidate at the University of Florida), Kyle Griffin, (member of the Florida Bar and LL.M. candidate at the University of Florida), and Edward Waters, (member of the Florida Bar and LL.M. candidate at the University of Florida), each for valuable help in drafting and editing.

d. <i>Faith Based Companies (FBCs)</i>	55
i. <i>State Granted Religious Status</i>	55
ii. <i>Self-Granted Religious Status</i>	56
iii. <i>A Proposal for a Model Statute</i>	58
e. <i>The Profit versus Not-for-Profit Dichotomy</i>	61
i. <i>Not Code-Based</i>	61
ii. <i>“Not-for-Profits” Often Have Profits</i>	63
iii. <i>Many Types of Nonprofit Entities Exist: Lumping Them Together is Wrong</i>	66
(a) <i>Business Leagues</i>	66
(b) <i>Social Clubs</i>	67
(c) <i>Social Welfare Organizations</i>	67
(d) <i>Labor Unions</i>	68
iv. <i>The Commerciality Doctrine: That’s Not the Point, Either</i>	68
V. <i>HOW FAR MIGHT THIS REACH?</i>	70
A. <i>Corporations</i>	70
1. <i>C Corporations</i>	70
2. <i>Close Corporations and Closely Held Corporations</i>	71
3. <i>S Corporations</i>	72
4. <i>LLC</i>	73
5. <i>L3C</i>	73
6. <i>B Corporations</i>	74
B. <i>Partnerships</i>	74
1. <i>Limited Partnerships</i>	74
2. <i>Family Limited Partnerships</i>	75
3. <i>General Partnerships</i>	75
C. <i>Trusts</i>	76
D. <i>Estates</i>	76
VI. <i>CONSEQUENCES FOR LAWYERS</i>	77
VII. <i>CONCLUSIONS</i>	79
I. <i>INTRODUCTION</i>	

*Hobby Lobby Stores, Inc. v. Sebelius*¹ and related tax cases² raise serious questions about religious freedom: whether the federal government may “tax”³

1. No. CIV-12-1000-HE, 2013 WL 3869832, at *2 (W.D. Okla. July 19, 2013) (granting injunction), *on remand from* 723 F.3d 1114 (10th Cir. June 27, 2013), *rev’g and remanding en banc*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (*Hobby Lobby District I*). In her supervisory capacity over the Tenth Circuit, Justice Sotomayor previously denied an injunction pending

corporate employers that, for religious reasons, decline to provide mandated contraceptives and “early abortion” insurance coverage in employee health plans.⁴ The federal appellate courts are split four-to-two in favor of the

appellate review. *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (using a higher standard than appropriate for a district court injunction).

2. Thirty-nine other cases involve “for-profit” businesses. *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 1 (6th Cir. Sept. 17, 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 3845365, at *1 (3d Cir. Jul. 26, 2013); *Eden Foods v. Sebelius*, No. 12-11229, 2013 WL 1190001 (6th Cir. Mar. 22, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at *1 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850, 852 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012); *Hall v. Sebelius*, 667 F.3d 1293, 1294 (D.C. Cir. Feb. 7, 2012); *Order, Barron Indus. v. Sebelius*, 13-CV-1330 (D.D.C. Sept. 25, 2013); *Bindon v. Sebelius*, No. 1:13-cv-1207, slip op. at 1 (D.D.C. Aug. 5, 2013); *Armstrong v. Sebelius*, No. 1:13-cv-00563, 2013 WL 4012713 (D. Colo. Aug. 1, 2013); *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702 (E.D. Mich. July 11, 2013); *Beckwith v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *2 (M.D. Fla. June 25, 2013); *MK Chambers Co. v. Dep’t of Health & Human Servs.*, No. 13-11379, slip op. at 1 (E.D. Mich. April 3, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *1 (W.D. Pa. March 6, 2013); *Gilardi v. Sebelius*, 926 F. Supp. 2d 273 (D.D.C. Mar. 3, 2013); *Briscoe v. Sebelius*, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, at *1 (D. Colo. Feb. 27, 2013); *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 2:12-CV-92-DDN, slip op. at 2 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. United States*, No. 12-3459-CV-S-RED, slip op. at 2 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 980 (E.D. Mich. Oct. 31, 2012); *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1154 (E.D. Mo. Sept. 28, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. July 27, 2012); *Second Amended Preliminary Injunction, The QC Grp., Inc. v. Sebelius*, No. 13-1726 (D. Minn. Sept. 11, 2013); *Order, Willis Law v. Sebelius*, 1:13-cv-01124 (D.D.C. Aug. 23, 2013); *Order, Ozinga v. United States*, 1:13-cv-3292 (N.D. Ill. July 26, 2013); *Preliminary Injunction, SMA, LLC v. Sebelius*, 0:13-cv-01375 (D. Minn. July 8, 2013); *Order, Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF (E.D. Mo. April 1, 2013); *Order and Preliminary Injunction, Tonn & Blank Constr. v. Sebelius*, 1:12-cv-325 (N.D. Ind. Apr. 1, 2013); *Agreed Preliminary Injunction, Lindsay v. Sebelius*, No. 13-C-1210 (N.D. Ill. March 20, 2013); *Order, Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013); *Complaint at 2, Wieland & Weiland v. United States*, 4:13-cv-01577 (E.D. Mo. Aug. 14, 2013); *Complaint at 2, Holland v. United States*, No. 2:13-cv-11111 (S.D. W. Va. June 24, 2013); *Complaint at 6, M&N Plastic, Inc. v. Sebelius*, No. 2:13-cv-12036 (E.D. Mich. May 8, 2013); *Complaint at 3, Johnson Welded Prods., Inc. v. Sebelius*, 1:13-cv-00609 (D.D.C. Apr. 30, 2013); *Complaint for Declaratory and Injunctive Relief at 8, Hartenbower v. U.S. Dep’t of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill. March 26, 2013); *Complaint at 4 Infrastructure Alternatives v. Sebelius*, No. 1-13-cv-31 (W.D. Mich. Jan. 10, 2013); *Complaint at 6, Triune Health Grp. v. U.S. Dep’t of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Aug. 22, 2012).

3. Congress labeled § 4980D as an excise. *See* I.R.C. § 4980D (2006) (falling under subtitle D, which Congress titled “Miscellaneous Excise Taxes”). Whether it is a penalty or a tax—and whether the two differ—is beyond the scope of this article, which will refer to it as a tax.

5. The mandate requires coverage for all FDA approved contraceptives. *Hobby Lobby District I*, 870 F. Supp. 2d at 1283. “Included among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices.” *Id.* at 1284. Plan B and ulipristal “may . . . work by changing the lining of the womb (uterus) that may prevent attachment (implantation).” *Birth Control: Medicines to Help You*, U.S.

employers regarding the core standing issues,⁵ and a certiorari application is pending.⁶ District courts are also split, with the current scorecard strongly favoring the employers.⁷ The government's position, if successful, will put some closely held business owners in what the owners view as untenable positions.⁸

The three most significant cases⁹ involve Hobby Lobby Stores, Inc. in the Tenth Circuit,¹⁰ Conestoga Wood Specialties Corporation in the Third Circuit,¹¹

FOOD & DRUG ADMINISTRATION, www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Sept. 21, 2013).

5. The Seventh, Eighth, Tenth, and D.C. Circuits have granted injunctions. See *Gilardi*, 2013 WL 803153, at *2 (granting injunction on the court's own motion to reconsider its prior order denying an injunction); *Annex*, No. 13-1118, 2013 WL 1276025, at *9; *Grote*, 708 F.3d at 855, consolidated with *Korte*, 2012 WL 6757353, at *5; *O'Brien*, 2012 U.S. App. LEXIS 26633, *2 (ordering a "stay pending appeal" without opinion, which appears to be the equivalent of an injunction under *Annex*, 2013 WL 1276025, at *8), reversing 894 F. Supp. 2d 1149, 1169 (E.D. Mo. 2012) (granting the government's motion to dismiss). The Third and Sixth Circuits have denied injunctions. See *Conestoga*, 2013 WL 1277419, at *11; *Eden Foods*, 2013 WL 1190001 at *7-8; *Autocam*, No. 12-2673, slip op. at 15.

6. Petition for Writ of Certiorari, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 3845365, at *1 (3d Cir. Jul. 26, 2013).

7. Thirty for-profit taxpayers have received preliminary injunctions. See *HHS Mandate Information Central*, THE BECKET FUND, <http://www.becketfund.org/hhsinformationcentral> (last visited Sept. 29, 2013). Five for-profit taxpayers have not received injunctions. *Conestoga*, 2013 WL 1277419, at *11; *Eden Foods*, 2013 WL 1190001 at *7-8; *Mersino*, 2013 WL 3546702, at *17; *MK Chambers*, No. 13-11379, at 7; *Autocam*, 2012 WL 6845677, at *5, *aff'd*, No. 12-2673, slip op. at 15 (Sept. 17, 2013). Additionally, four for-profit taxpayers have not yet received injunction hearings. See *HHS Mandate Information Central*, *supra* (noting that Holland, Infrastructure Alternatives, M&N Plastic, and Midwest Fasteners Corp. have not received injunction hearings).

8. See *infra* Part I.E and accompanying discussion.

9. On November 1, 2013, just before publication of this Article, the D.C. Circuit decided *Gilardi v. U.S. Department of Health & Human Services*, a fourth important case. No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013). In a unanimous opinion, the court concluded that the Gilardis had shareholder standing to pursue a preliminary injunction. *Id.* at *6-7 (citations omitted). The court explained that if the company had no right to complain of a religious liberty violation, the shareholders did have such a right:

If the companies have no claim to enforce—and as nonreligious corporations, they cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to the Gilardis, existing independent of any right of the Freshway companies. Thus, the Gilardis' injury—which arises therefrom—is "separate and distinct," providing us with an exception to the shareholder-standing rule.

Id. at *7. Although the government argued that religious rights disappear when an individual creates a corporation, the court disagreed, stating it did "not believe Congress intended important statutory rights to turn on the manner in which an individual operates his business." *Id.* at *9. The majority also concluded—over one dissenting judge—that the Gilardis had a sufficient likelihood of success on the merits, but remanded the case for consideration of other preliminary injunction factors. *Id.* at *15.

On the other hand, the court ruled against Freshway Foods, Inc.—which it repeatedly denominated as a *secular corporation*—on its First Amendment and RFRA claims. See *id.* at *6-7. Of significance, the court stated that "[f]ortunately, we need not opine here on what a 'religious organization' is, as the Freshway companies have conceded they do not meet that criterion." *Id.* at *5. Whether Freshway actually conceded the issue is debatable; however, as a concession, it renders the court's comments on corporate religious rights as dicta. The court also rejected the

and Grote Industries/Korte & Lutjohan Contractors, Inc. in the Seventh Circuit,¹² all of which raise some potentially different issues. Hobby Lobby's case involves the largest dollar amount, as the company was out of compliance for nineteen days, but Hobby Lobby ultimately received an injunction.¹³ Conestoga, on the other hand, did not receive an injunction, but the company chose to comply.¹⁴ Korte received an injunction prior to the date on which the mandate became effective, but the company has materially less than 100% of its shareholders involved.¹⁵

A. Background on the Hobby Lobby Litigation¹⁶

The main issues have arisen in numerous cases,¹⁷ including *Hobby Lobby Stores, Inc. v. Sebelius*.¹⁸ Hobby Lobby operates 514 hobby stores in forty-one states and has 13,240 full-time employees.¹⁹ All of the voting stock of both

corporation's claim for standing to assert its shareholders' rights, refusing to follow the Ninth Circuit's "pass through theory of corporate standing" in *Townley*. *Id.* (citing *Equal Emp't Opportunity Comm'n v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988)). Each of the holdings pertaining to the entities also conflicted with the Tenth Circuit's en banc opinion in *Hobby Lobby v. Sebelius*. Petition for Writ of Certiorari at 1–2, *Gilardi v. U.S. Dep't of Health & Human Servs.* (filed Nov. 2013), available at <http://media.aclj.org/pdf/gilardi-petition-for-certiorari-filed.pdf>. The D.C. Circuit's reliance on Ohio law regarding shareholder rights to assert standing was also noteworthy. *Gilardi*, No. 13-5069, 2013 WL 5854246, at *7 n.5. The court distinguished *close corporations* from *large corporations*. *Id.* As noted elsewhere in this Article, state law typically controls issues of entity purposes and owner rights in relation to state-created or state-recognized entities. See *infra* notes 482–91 and accompanying text.

10. See cases cited *supra* note 1.

11. See *Conestoga*, 2013 WL 1277419.

12. See *Grote*, 708 F.3d 850, consolidated with *Korte*, 2012 WL 6757353.

13. See *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2013 WL 3869832, at *2 (W.D. Okla. July 19, 2013). Information on Hobby Lobby's compliance was obtained through a conversation with a confidential source.

14. See *Conestoga*, 2013 WL 1277419, at *2, *aff'g*, 917 F. Supp. 2d 394 (E.D. Pa. Jan. 11, 2013). Information on Conestoga's compliance was obtained through a conversation with a confidential source.

15. See *Korte*, 2012 WL 6757353, at *5.

16. See generally Mark L. Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?*, 21 GEO. MASON L. REV. (forthcoming 2013) (manuscript at 2), available at <http://ssrn.com/abstract=2229632> (offering a comprehensive look at the relationship between profitmaking and religious liberty, arguing that the act of earning money does not preclude profitmaking businesses and their owners from engaging in protected religious activities); Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. (forthcoming 2013) (manuscript at 3), available at <http://ssrn.com/abstract=2237630> (discussing whether individual business owners and their for-profit corporations have standing to raise free exercise claims).

17. See cases cited *supra* note 2. In addition, at least thirty other cases involve entities organized under state "not-for-profit" statutes. See *HHS Mandate Information Central*, *supra* note 7. To date, only one of the "nonprofit" cases has been decided on the merits. *Id.*

18. 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

19. *Id.* at 1284.

Hobby Lobby and its co-petitioner Mardel, Inc.—a non-tax-exempt Christian bookstore with 372 employees in seven states—is owned by a management trust.²⁰ Five closely related individuals comprise the trustees and beneficial owners.²¹ Both corporations elect “S” status for tax purposes.²²

Hobby Lobby has long provided its employees a “group health insurance plan.”²³ The plan uses a June 30 fiscal year.²⁴ As a result, the contraceptive mandate and the tax under section 4880D first applied to the plan beginning on July 1, 2013.²⁵ Neither Hobby Lobby nor Mardel qualify for religious exemption,²⁶ neither has “grandfathered” status²⁷ or small employer status,²⁸ and

20. See Complaint at 1, *Hobby Lobby District I*, 870 F. Supp. 2d 1278 (No. 12-1000) [hereinafter *Hobby Lobby Complaint*]. Whether the trust is simple or complex is not disclosed in the filings. See I.R.C. §§ 641 & 651; *Hobby Lobby Complaint*, *supra*. Simple trusts are passed through entities; as a result, the beneficiaries are responsible for income tax on profits. See *Types of Trusts and Living Trusts*, HG LEGAL RESOURCES, www.hg.org/types-of-trusts.html (last visited Sept. 21, 2013). In contrast, complex trusts are themselves taxpayers. *Id.* The issue is plausibly relevant for standing purposes.

21. *Hobby Lobby Complaint*, *supra* note 20, at 1.

22. Brief of Appellants at 33, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, No. 12-6294 (10th Cir. June 27, 2013) [hereinafter Brief of Appellants]. This fact, while noted in a brief, is not in evidence and was not alleged in the petition.

23. See *Hobby Lobby*, 723 F.3d at 1124; I.R.C. § 9832 (2006) (citing § 5000(b)(1)) (defining a group health plan).

24. See Brief of Appellants, *supra* note 22, at 11. The plan changed to a fiscal year as a result of the litigation. See *id.*

25. See *id.*

26. See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,502 (proposed Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 46 C.F.R. pt. 147) (defining “religious employer” for purposes of the religious exemption); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8276 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (defining “religious employer” for purposes of the religious exemption). “On February 6, 2013, the [*Geneva College*] defendants issued proposed rules . . . broadening the universe of organizations eligible for an exemption from the contraceptive requirement.” See *Geneva Coll.*, 2013 WL 838238, at *7 (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 147, 148, 156)). According to the court:

The proposed rules exclude from the contraceptive requirement those organizations that meet certain criteria: (1) “The organization opposes providing coverage for some or all of the contraceptive services required to be covered under [the final regulations] on account of religious objections;” (2) “The organization is organized and operates as a nonprofit entity;” (3) “The organization holds itself out as a religious organization;” and (4) “The organization self-certifies that it satisfies the first three criteria.”

Id. Moreover, the court stated:

In an effort to also accommodate those plan beneficiaries who may not share the beliefs of the organizations claiming the accommodation, the proposed rules also set forth proposed ways to “provide women with contraceptive coverage without cost sharing and to protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds.”

Id. (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462–64).

neither provides the mandated coverage.²⁹ Both Hobby Lobby and Mardel received preliminary injunctions on July 19, 2013.³⁰ The United States District Court for the Western District of Oklahoma initially denied the injunction—a decision which was affirmed by the Tenth Circuit; however, the Tenth Circuit, sitting en banc, later remanded the case to the district court for further proceedings.³¹ Thus, Hobby Lobby and Mardel were out of compliance for approximately three weeks.³²

B. Background on the Conestoga Litigation

Conestoga is a Pennsylvania “for-profit” corporation that manufactures wood cabinetry and has 950 full-time employees in three states.³³ Five closely related individuals—the Hahn family—own all of the corporation’s stock.³⁴ The Hahns are devout Mennonites who believe that abortion is an “intrinsic evil.”³⁵ The corporation elects S status for federal tax purposes.³⁶ Conestoga provides its employees with a group health insurance plan that uses the calendar year.³⁷ The corporation currently complies with the mandate because the United States District Court for the Eastern District of Pennsylvania denied a preliminary injunction—a decision which was affirmed by the Third Circuit.³⁸

27. See 26 C.F.R. § 54.9815-1251T(a) (2013); 29 C.F.R. § 2590.715-1251(a) (2012); 45 C.F.R. § 147.140(a) (2012).

28. Small employers are those with an average of fewer than fifty-one full-time employees during the prior year and with at least two employees at the beginning of the current year. I.R.C. § 4980D(d)(2)(A) (2006).

29. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124–25 (10th Cir. June 27, 2013) (objecting to the mandated coverage).

30. *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2013 WL 3869832, at *2 (W.D. Okla. July 19, 2013).

31. See *id.* at *1.

32. Information on their compliance was obtained through a conversation with a confidential source.

33. Complaint at 5, 9, *Conestoga v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2012) (No. 5:12-cv-06744-MSG) [hereinafter *Conestoga* Complaint]; *Employment, CONESTOGA*, <http://www.conestogawood.com/employment> (last visited Sept. 22, 2013).

34. *Id.*

35. *Id.* at 7–8.

36. This information is not publicly available, but was confirmed in a private conversation.

37. *Conestoga* Complaint, *supra* note 33, at 9.

38. *Conestoga*, 917 F. Supp. 2d at 419, *aff'd*, 724 F.3d 377 (3d Cir. July 26, 2013). The court did not state when compliance began or for how long, if any time, Conestoga was not in compliance. See *id.* According to Conestoga’s counsel, Conestoga currently complies with the mandate.

C. *Background on the Grote Industries and Korte Litigation*

Grote Industries is an Indiana for-profit corporation that manufactures safety valves and has 1,148 full-time employees.³⁹ Six closely related individuals—the Grote family—own all of the corporation’s stock.⁴⁰ The Grotes are devout Roman Catholics who believe that abortion is an “offense against God.”⁴¹ The corporation elects S status for federal tax purposes.⁴² Grote Industries also provides its employees with a group health insurance plan that uses the calendar year.⁴³ The Seventh Circuit granted an injunction in *Grote v. Sebelius*⁴⁴ on January 30, 2013, and consolidated the case with *Korte v. Sebelius*.⁴⁵

Korte, an Illinois for-profit corporation, is a construction contractor that has ninety full-time employees.⁴⁶ Two closely related individuals—the Korte family—own 87.348% of the stock.⁴⁷ The Kortes are devout Roman Catholics who believe that abortion is “gravely sinful.”⁴⁸ The corporation elects S status for federal tax purposes.⁴⁹ Korte provides its nonunion employees with a group health insurance plan that uses the calendar year.⁵⁰ The Seventh Circuit granted an injunction in *Korte* on December 28, 2012, and later consolidated the case with *Grote Industries*.⁵¹

39. Verified Complaint at 2, 10, *Grote v. Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012), (No. 4:12-cv-134) [hereinafter *Grote* Complaint]. The Grote family also owns Grote Industries, LLC, which is another litigant. *Id.* at 3.

40. *Id.* at 2.

41. *Id.* at 2–3.

42. This information is not publicly available, but was confirmed in a private conversation.

43. *Grote* Complaint, *supra* note 39, at 3.

44. 708 F.3d 850 (7th Cir. 2013).

45. No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012), *consolidated with Grote*, 708 F.3d at 852.

46. Complaint for Declaratory and Injunctive Relief at 3–5, 7, *Korte v. Sebelius*, 912 F. Supp. 2d 735 (S.D. Ill. 2012) (No. 3:12-cv-01072-MJR-PMF) [hereinafter *Korte* Complaint]. Seventy of the employees receive health insurance through their union rather than from Korte, which provides the other twenty with a group health insurance plan. *Id.* at 5.

47. *Id.* at 3–4.

48. *Id.* at 5.

49. This information is not publicly available, but was confirmed in a private conversation.

50. *Korte* Complaint, *supra* note 46, at 5.

51. See *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012), *consolidated with Grote v. Sebelius*, 708 F.3d 850, 852 (7th Cir. Jan. 30, 2013). The Seventh Circuit delivered its opinion in this case on November 1, 2013—just prior to publication of this Article—holding that the business owners *and* their companies could challenge the contraception mandate and that compelling them to provide the mandated coverage substantially burdened their religious exercise rights. *Korte v. Sebelius*, Nos. 12-3481 & 13-1077, at 4 (7th Cir. Nov. 1, 2013), <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-08/C:12-3841.J:Sykes:aut:T:fnOp:N:1238174:S:0>.

D. Issues

The cases raise three main issues with extensive subissues. Additionally, the cases present business owners with a dilemma involving multiple undesirable choices.⁵² The issues involve:

1. *Asserting Owners' Rights.* May a general business corporation or a limited liability company assert the religious rights of its owners under the First Amendment or under the Religious Freedom Restoration Act⁵³ (RFRA)?⁵⁴
2. *Corporations as RFRA Persons.* Is a general business corporation or a limited liability company a “person” under RFRA such that it may assert a statutory claim based on religious freedom?⁵⁵
3. *Corporate Rights.* In general, what comprises an entity’s constitutional rights, and in particular, how do religious and moral issues relate to general business corporations and limited liability companies?⁵⁶

E. Litigants' Dilemma

All beneficial owners and members of the Hobby Lobby Trust assert religious beliefs that “prohibit them from deliberately providing” abortion coverage.⁵⁷ Although they have no stated beliefs regarding Hobby Lobby and Mardel employees purchasing such coverage with wages, they object to facilitating, providing, or paying for the coverage, including through the corporate employer structure.⁵⁸ The government accepted these beliefs as sincerely held.⁵⁹ The Hahns—who own Conestoga—and the Grote and Korte families asserted similar beliefs in their respective cases.⁶⁰

52. See *infra* Part I.D and accompanying discussion.

53. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–2000bb-4 (2006).

54. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir. 2013) (stating the issue as whether RFRA and the Free Exercise Clause protect companies and their owners who “run their businesses to reflect their religious values”).

55. *Id.* at 1128 (citing 42 U.S.C. § 2000bb-1(a) (2006)) (addressing the issue of whether for-profit corporations are persons exercising religion for the purposes of RFRA).

56. *Id.* at 1133–36 (citations omitted) (discussing the distinction, or lack thereof, between the free exercise rights of nonprofit, religious organizations and for-profit, secular companies).

57. *Hobby Lobby Complaint*, *supra* note 20, at 14. Conversely, none object to providing more general contraceptive coverage. *Id.* at 15.

58. See Brief of Appellants, *supra* note 22, at 4.

59. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012).

60. See *Conestoga v. Sebelius*, No. 13–1144, 2013 WL 1277419, at *1 (3d Cir. Feb. 8, 2013); *Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013). The Grote and Korte families also object to the forced provision of contraceptive coverage. See *Grote*, 708 F.3d at 854.

Accordingly, to reconcile their own beliefs with that of the mandate, the Hobby Lobby Trust—as well as the owners of Conestoga and Grote—faced a difficult decision requiring them to choose among six unpalatable alternatives⁶¹:

1. The Hobby Lobby Trust could cease all business operations of Hobby Lobby and Mardel.⁶² Doing so would eliminate the requirement of providing the mandated contraceptive/abortion insurance, but it would be unrealistic.
2. The Hobby Lobby Trust could sell the stock in the two businesses and invest the after-tax proceeds in a manner consistent with the owners' religious beliefs. The transactional and tax consequences of this option are not publicly available; however, they would likely be substantial and time-consuming.
3. The Hobby Lobby Trust could reorganize the two businesses into a general partnership.⁶³ Although this approach would not affect the issue involving its assertion of First Amendment rights in relation to commerce, it would likely resolve the statutory RFRA issues involving the definition of a person. The transactional and tax consequences of this option are not publicly available; however, they would likely be substantial and time-consuming. The time from the date the Treasury adopted the initial regulatory mandate until the effective date for the trust was twenty-three months;⁶⁴ however, the Treasury and related agencies considered and promulgated numerous regulatory changes during that period. Hence, Hobby Lobby did not realistically have the entire period to consider reorganization.

61. The Kortes received an injunction several days prior to the effective date of the mandate and, thus, never faced the choices. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012).

62. *See Gaylord*, *supra* note 16, at 9.

63. *See Hobby Lobby District I*, 870 F. Supp. 2d at 1288 (suggesting that neither corporations nor limited partnerships have religious rights) (quoting *Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012)). While the court did not state that such rights belong to general partnerships, this would seem to be a reasonable conclusion. *See id.*

64. The mandate applies for plan years beginning after July 31, 2012. 45 C.F.R. § 147.130(d) (2012). Notice of the requirement was published on August 1, 2011. *See Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16501, 16502 (proposed Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 46 C.F.R. pt. 147). The Hobby Lobby plan uses a fiscal year ending June 30th; hence, Hobby Lobby had twenty-three months' notice of the requirements. *See Brief of Appellants*, *supra* note 22, at 11.

4. The Hobby Lobby Trust could terminate its group health insurance plan⁶⁵ for the fiscal year beginning July 1, 2013,⁶⁶ but this would undoubtedly affect significant contract rights of employees. The cost of this alternative is unclear because that contractual information is not publicly available. Because the number of employees is so large, many are likely uninsurable or insurable only at a large expense. Also, none of the employees would be entitled to COBRA coverage.⁶⁷ The mandate that insurance plans cover adult preexisting conditions does not become effective until 2014, at which time state and federal exchanges will begin to operate.⁶⁸ Hence, employees with significant preexisting conditions would likely have difficulty affording adequate coverage, even if they could find it. Realistically, some would then have less medical care, which could result in some deaths or serious difficulties—a consequence likely at odds with the owners' religious beliefs.
5. The Hobby Lobby Trust could pay—through the corporation—an excise tax under section 4980D of \$1,324,000 per day (\$483,260,000 per year) for Hobby Lobby;⁶⁹ plus, it could pay \$37,200 per day (\$13,578,000 per year) for Mardel.⁷⁰ Accordingly, the trust would have to pay a total of

65. See *Hobby Lobby Complaint*, *supra* note 20, at 24 (suggesting that the mandate forces plaintiffs to choose between violating their religious beliefs or terminating employee health insurance coverage and incurring substantial fines).

66. Both Conestoga and Grote have group health insurance plans that use a calendar year; hence, each faced similar choices on January 1, 2013. See *Conestoga v. Sebelius*, No. 13–1144, 2013 WL 1277419, at *6 (3d Cir. Feb. 8, 2013) (Jordan, J., dissenting); *Grote v. Sebelius*, 708 F.3d 850, 853 (2013).

67. The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986, 5 U.S.C. § 8905a (2012), requires employers who provide health insurance to make continuation coverage available to employees whose employment terminates at the former employee's expense. Termination of a plan by an employer is not listed as a qualifying event for COBRA coverage. See *id.*

68. See *State PCIP Transition*, HEALTHCARE.GOV, <https://www.pcip.gov> (last visited Sept. 22, 2013) (describing how the government suspended enrollment in preexisting condition plans effective January 16, 2013, and how the Affordable Care Act mandates that all health insurance plans cover pre-existing conditions begins January 1, 2014).

69. See *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at *5 (10th Cir. June 27, 2013) (finding that the most immediate consequence for Hobby Lobby and Mardel would come in the form of regulatory taxes).

70. See I.R.C. § 4980D(b)(1) (2006); *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012). The calculations for daily taxes are \$100 per day times 13,240 full time employees for Hobby Lobby and \$100 per day times 372 full time employees for Mardel. See *id.* The same calculation can be used for Conestoga, Grote, and Korte. The tax for Conestoga—if it failed to comply—would be \$95,000 per day or \$34,675,000 per year; the tax for Grote would be \$114,800 per day or \$42,071,360 per year; and the tax for Korte would be \$2000 per day or \$730,000 per year.

\$496,838,000 annually. Although information on the trust's value is not publicly available, this option does not appear financially sustainable.⁷¹

6. The Hobby Lobby Trust could provide the required coverage and thereby cause the trust members who cooperated in that decision to commit what they view as a grievous⁷² sin that would, in their view, cause them to risk eternal damnation.⁷³

The Hobby Lobby Management Trust apparently chose the fifth option: to subject the corporations to the annual excise tax of nearly half a billion dollars.⁷⁴ Although the Treasury Secretary has the authority to waive the tax in section 4980D(c)(4), the waiver can only be for noncompliance due to “reasonable cause,” not due to “willful neglect.”⁷⁵ Because the trust's choice was deliberate and willful—albeit arguably forced by unacceptable alternatives—the likelihood of a *permanent* waiver appears remote. During the pendency of the litigation, however, the government has suggested—in a nonbinding brief—that it *might* waive the tax for entities that obtain injunctive relief pending litigation.⁷⁶ Further, the government suggested that during the pendency of a preliminary

71. David Green, one of the Hobby Lobby owners, reportedly has a net worth of \$2.6 billion. David Whitford, *Hobby Lobby's Religious Real Estate Hobby*, CNN MONEY NEWS, Oct. 22, 2010, available at http://money.cnn.com/2010/10/21/news/companies/hobby_lobby_philanthropy.fortune/index.htm. If that is indicative of the wealth of other owners, the family could suffer the tax for several years.

72. The distinction between “grievous” and “mortal” sin is primarily one of Catholicism; nevertheless, a fundamental tenet of Christianity concerns the distinction between the inherent sinfulness of man versus the overt choice of some to sin. Grace overcomes man's sinful nature, but one who chooses a life of sin in opposition to God commits an unforgivable act. See *Hebrews* 12:1–16.

73. See *Hobby Lobby Complaint*, *supra* note 20, at 14–15. *Mark* 3:29 speaks of continuing blasphemy against the Holy Spirit as eternal and unforgivable sin. Essentially, all sins are forgivable except for the sin of *continually* rejecting God. Thus, when Hobby Lobby briefly provided contraceptive and abortion coverage in an earlier year, that sin was forgivable because it was in the nature of a stumble—acts for which all are guilty. To the owners of Hobby Lobby, however, the deliberate, overt, and intentional facilitation of abortions would constitute sin of a very different nature—one that could not be forgiven without complete renunciation and a return to the acceptance of Grace. See *id.*

74. See Bill Flax, *Hobby Lobby Fights The Good Fight Against Obamacare Tyranny*, FORBES, Jan. 8, 2013, available at <http://www.forbes.com/sites/billflax/2013/01/08/hobby-lobby-fights-the-good-fight-against-obamacare-tyranny/> (quoting corporate counsel as saying, “The company will continue to provide health insurance to all qualified employees. To remain true to their faith, it is not their intention, as a company, to pay for abortion-inducing drugs.”). The Trust had until June 30, 2013, the end of the current non-mandated plan year, to decide. Indeed, the corporations were out of compliance for eighteen days prior to receiving a preliminary injunction. This information was obtained through confidential source.

75. I.R.C. § 4980D(c)(4) (2006).

76. Defendant's Supplemental Brief at 4, *Autocam Corp. v. Sebelius*, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), (No. 1:12-cv-01096-RJJ). The various injunctions preclude enforcement pending resolution of the cases, but they do not enjoin accrual of the tax.

injunction, the tax would be subject to the cap in § 4980D(c)(3).⁷⁷ Hobby Lobby and Mardel obtained a preliminary injunction nineteen days after becoming subject to the mandate.⁷⁸ Because thirty federal courts—including the United States Courts of Appeals for the Seventh, Eighth, Tenth, and D.C. Circuits—have granted injunctions,⁷⁹ Hobby Lobby and Mardel have a credible claim for a “reasonable cause” waiver pending litigation; however, unless the Supreme Court ultimately finds the tax unconstitutional—or strikes it under a RFRA challenge—the economic futures of Hobby Lobby, Mardel, Grote, and Korte appear grim.

In contrast, Conestoga decided to comply with the mandate, at least during litigation.⁸⁰ Choosing to commit what its owners described as “intrinsic evil” rather than face bankruptcy and other enforcement actions must have been difficult for Conestoga’s owners.⁸¹ Theologians differ on the moral consequences of succumbing to forced evil. Some believe that forced sin remains sin,⁸² while others argue that coercion mitigates the seriousness of “material cooperation with evil.”⁸³ Although courts will undoubtedly be hesitant to question the sincerity of the Hahns’ and Conestogas’ beliefs, their choice to comply with the mandate they called “intrinsic evil”—albeit under duress—is noteworthy.

F. Reasons Tax Lawyers Should Care

1. Choice of Entity Issues

Entity religious freedom differs substantially from that of other business enterprises—at least according to the government⁸⁴ and some courts.⁸⁵ Because tax lawyers often consult on “choice of entity” issues, they should be aware of consequences other than merely those that are tax- and business-related. If

77. The cap equals the lesser of \$500,000 or 10% of the entity’s health insurance costs for the prior year. I.R.C. § 4980D(c)(3)(A)(i).

78. The company did not comply with the mandate for the eighteen days it was subject to it, according to confidential sources. The tax for that period amounts to \$23,832,000 and would seem unlikely to be subject to a reasonable cause waiver. *See supra* note 70.

79. *See HHS Mandate Information Central, supra* note 7.

80. This information comes from a conversation with a confidential source.

81. *Conestoga Complaint, supra* note 33, at 8.

82. *See* Brief of 28 Catholic Theologians and Ethicists as Amici Curiae Supporting Plaintiffs-Appellants and Urging Reversal of the District Court at 29–30, *Gilardi v. U.S. Dep’t of Health & Human Servs.*, Doc. 13-104(EGS), 2013 WL 803153 (D.C. Cir. May 7, 2013) (No. 13-5069).

83. *See* Janet E. Smith, *Is it Moral to Comply with the HHS Mandate?*, CATHOLICVOTE, <http://www.catholicvote.org/is-is-moral-to-comply-with-the-hhs-mandate> (last visited Sept. 27, 2013).

84. Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 18 n.14, *Hobby Lobby District I*, 870 F. Supp. 2d 1278 (W.D. Okla. Oct. 22, 2012) (No. Civ. 12-1000-HE) [hereinafter DOJ Brief].

85. *See non-injunction cases cited supra* note 5.

religious rights vary depending upon the form of the entity, then lawyers must consider clients' religious beliefs and how entity choices impact clients' exercise of religion.⁸⁶ The duty to consider a client's religious beliefs arises regardless of how lawyers might personally regard their clients' beliefs.⁸⁷

2. *These Cases Arise in Tax Law*

The contraceptive coverage litigation involves Internal Revenue Code §§ 4980D⁸⁸ and 4980H⁸⁹—two sections affected by the Affordable Care Act (ACA).⁹⁰ Section 4980D and related regulations⁹¹ mandate “group health plans”⁹² to provide contraceptive⁹³ and early abortion coverage.⁹⁴ Section 4980D imposes a tax of \$100 per day per affected employee.⁹⁵ Beginning in 2014, entities will be taxed approximately \$2,000 per year per affected employee—pursuant to § 4980H—for failure to provide health coverage.⁹⁶

86. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

87. *Id.* R. 1.16(b)(4) (providing that a lawyer who finds a client's actions “repugnant” may withdraw, but only if the client suffers no harm). Rule 1.2 provides that a lawyer must abide by the wishes of the client but that representation does not constitute an endorsement of the client's beliefs. *Id.* R. 1.2(a)–(b).

88. I.R.C. § 4980D (2006).

89. I.R.C. § 4980H (Supp. V 2011).

90. Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

91. *See* 45 C.F.R. §147.130 (2013). The Department of Health and Human Services adopted guidelines set by the Institute of Medicine for plan years starting after July 31, 2012. Interim Final Rules for Groups Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41726 (July 10, 2010); *Women's Preventative Services Guidelines*, HRSA, <http://hrsa.gov/womensguidelines/> (last visited Sept. 22, 2013). The Treasury adopted the same rules on August 3, 2011, with an additional, narrow religious employer exemption. Interim Final Rules for Groups Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623–24 (Aug. 3, 2011). The rules have been revised several times, with the most recent proposed changes occurring on February 1, 2013.

92. I.R.C. §§ 9832(a), 5000(b)(1) (2006) (defining “group health plans”).

93. 42 U.S.C. § 300gg-13(a) (2006 & Supp. 2010) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration . . .”).

94. Some of the mandated contraceptive methods result in very early abortions, as the various petitioners use that term. *See, e.g.*, Brief of Appellants, *supra* note 22, at 4–5 & n.3 (“In this case, the government confirms that one of three ways ‘emergency contraceptive pills’ act is by ‘inhibiting implantation.’” (quoting Appellees’ Opp’n to En Banc Petition at 7 n.4, No. 12-6294 (10th Cir. Jan. 24, 2013))).

95. I.R.C. § 4980D(b)(1) (2006).

96. I.R.C. § 4980H(c)(1) (Supp. V 2011).

3. *Other Significant Religious Entanglements Also Involve Tax Law*

Examples of other significant government entanglement with religion may be found throughout the tax system, including in the parsonage allowance,⁹⁷ charitable deductions,⁹⁸ tax exemptions,⁹⁹ restrictions on church lobbying and political activity,¹⁰⁰ and church audit rules.¹⁰¹ Hence, tax law has a significant role in religious freedom discussions.

II. ASSERTING OWNERS' RIGHTS

In contraceptive cases, several of the courts have allowed the corporate petitioners to assert the religious rights of their owners,¹⁰² while others have strictly adhered to the separate entity fiction.¹⁰³ In *Legatus v. Sebelius*,¹⁰⁴ the court denied associational standing to one “nonprofit” petitioner because it did not prove the necessary “identity of interests” among some 4,000 members.¹⁰⁵ In *Briscoe v. Sebelius*,¹⁰⁶ the court denied representative standing to both single member LLCs, as well as to a single shareholder corporation.¹⁰⁷ The court mistakenly referred to the petitioners as corporations,¹⁰⁸ failing to make the distinction between an LLC and a corporation.¹⁰⁹

97. See I.R.C. § 107 (2006).

98. See I.R.C. § 170(a)(1) (2006).

99. See I.R.C. § 501(c)(3) (2006).

100. See § 501(h).

101. See I.R.C. § 7611 (2006).

102. See, e.g., *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) (holding that a closely held family corporation had standing to assert the free exercise rights of its owner); *Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d, 106, 116–17 (D.D.C. 2012) (holding that a corporation made a sufficient showing of Article III standing by asserting its owners rights as the basis for its claims); *Geneva Coll. v. Sebelius*, Op. No. 2:12-cv-00207, 2013 WL 838238, at *20 (W.D. Pa. Mar. 6, 2013) (holding that there was no legal separation between a corporation and its owner).

103. See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419, at *4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring) (holding that for-profit corporate entities do not and cannot legally claim a right to exercise or establish a “corporate” religion under the First Amendment or the RFRA).

104. 901 F. Supp. 2d 980 (E.D. Mich. 2012).

105. *Id.* at 990 n.3.

106. 927 F. Supp. 2d 1109 (D. Colo. 2013).

107. *Id.* at 1116.

108. See *id.* at 1115–17 (citations omitted). Two of the three *Briscoe* entities are limited liability companies. See *id.* at 1112. Limited liability companies are hybrids with aspects of both partnerships and corporations. See Chandler Martin, Note, *Delimiting Liability for South Carolina Limited Liability Corporations*, 64 S.C. L. REV. 801, 803 (2013) (citing Scott Y. Barnes et al., *1996 Limited Liability Company Act*, S.C. LAW., Nov./Dec. 1996, at 33).

109. See *Briscoe*, 927 F. Supp. 2d at 1115–17 (citations omitted) (listing *Briscoe*’s companies correctly as two LLCs and one corporation, but then applying the same rule to each without discussing the differences in form). At one point, the court referred to the three entities collectively as “companies,” although two are companies and one is a corporation. See *id.* at 1114. The court

A. Prudential and Associational Standing

Before the courts can reach the merits of the cases, they must first decide issues of standing, which has both constitutional and prudential aspects.¹¹⁰ Constitutionally, the matter must involve a case or controversy¹¹¹—a standing requirement that is easily met under the circumstances because the various cases involve currently applicable government mandates, taxes, and penalties.¹¹² However, courts also have the power to limit standing under notions of prudence and propriety.¹¹³ Prudential standing has various aspects, however, the only relevant aspect to *Hobby Lobby* involves whether a corporation may assert the religious rights of its owners.¹¹⁴

Associational standing is another term used in relation to groups prudentially asserting members' rights.¹¹⁵ An association's standing to assert the rights of its members is limited, but well-established.¹¹⁶ For example, in 1974, the Supreme Court held in *Allee v. Medrano*¹¹⁷ that a union had standing to assert members' free speech rights in addition to its own rights.¹¹⁸ In his concurrence, Chief Justice Burger stressed the "identity of interest" between the union and its members.¹¹⁹ Prior to *Allee*, in 1958, the Supreme Court in *NAACP v. Alabama*,¹²⁰ found a similar "identity" that justified allowing the NAACP to assert members' rights,¹²¹ including religious rights.¹²² The Court stressed the importance of freedom of association for both economic and religious claims:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group

relied on the *Hobby Lobby* district court opinion, but failed to discuss how that court implied a distinction between corporations and limited partnerships as one category, and other entities as another. See *id.* at 1115 (citing *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1292 (W.D. Okla. 2012)). The *Briscoe* court also mistakenly rejected the relevance of the *Tyndale* decision, remarking that "*Tyndale* dealt with an admittedly religious organization, which is not the case here." See *id.* at 1116 (citing *Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d 106, 116 (D.D.C. 2012)). However, *Tyndale House Publishers, Inc.* is a general business corporation that is not tax-exempt. See *Tyndale*, 904 F. Supp. 2d at 116.

110. See U.S. CONST. art. III, § 2, cl. 1; *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (noting that standing has both constitutional and prudential aspects).

111. See U.S. CONST. art. III, § 2, cl. 1.

112. See *supra* Part I.A–D.

113. See *Warth*, 422 U.S. at 498.

114. See *supra* note 102 and accompanying text.

115. See *Warth*, 422 U.S. at 511.

116. See *id.*

117. 416 U.S. 802 (1974).

118. *Id.* at 819 & n.13.

119. See *id.* at 830 (Burger, C.J., concurring in part and dissenting in part).

120. 357 U.S. 449 (1958).

121. See *id.* at 459 ("Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical.").

122. See *id.* at 460–61.

association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, *economic, religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹²³

In the 1980 *Harris v. McRae*¹²⁴ decision, the Supreme Court denied associational standing because the members had a diversity of opinions; hence, the Court felt individual members were required participants:

In the present case, the Women’s Division concedes that “the permissibility, advisability and/or necessity of abortion according to circumstance is a matter about which there is *diversity of view within . . . our membership*, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God.” It is thus clear that the participation of individual members of the Women’s Division is essential to a proper understanding and resolution of their free exercise claims.¹²⁵

In *Hobby Lobby*, the shareholders have the identity of interest aspect found in both *Allee* and *NAACP* that was lacking in *Harris* because undisputed evidence exists that Hobby Lobby adhere to common beliefs.¹²⁶ No *Harris*-type diversity of view exists on the issue of facilitating abortions. In addition, the number of shareholders is very small¹²⁷—making proof of an identity of interest easier to establish—unlike the members in *Legatus*, which numbered in the thousands.¹²⁸ Also, the *Hobby Lobby* claims involve fundamental rights—free

123. *Id.* (emphasis added) (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

124. 448 U.S. 297 (1980). The *Harris* Court merely referred to “standing” of the entity on behalf of its members and did not use the term “associational standing.” See *id.* at 320–21. The case involved an agency of the United Methodist Church. *Id.* at 304.

125. *Id.* at 321 (emphasis added).

126. Brief of Appellants, *supra* note 22, at 19 (asserting that the material facts were based on the Verified Complaint and were not in dispute).

127. See *id.* at 2.

128. *Legatus* involved multiple petitioners. See *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 984 (E.D. Mich. 2012). *Legatus*, a “nonprofit” association with over 4,000 members, did not receive an injunction. *Id.* at 990 n.3, 999 (finding the entity not subject to the mandate). In contrast, a competitor, *Weingartz*—a “for-profit” corporation—did receive an injunction. *Id.* at 988, 999. The court used representational standing to allow the corporation to represent the interests of its owners

expression of religion, establishment of religion, and freedom of association¹²⁹—that are important to the determination of representative standing.¹³⁰ Further, the case involves injunctive relief, which is recognized as a significant factor for associational standing in the 1975 *Warth v. Seldin*¹³¹ decision. Some of the other contraceptive cases, however, arguably involved a lesser identity of interest. For example, in *Legatus*, the government stated that “[t]he plaintiffs’ theory in these cases is that, if the *controlling* shareholder of a for-profit, secular corporation asserts a religious objection to a federal law that regulates the corporation, then the law must be subjected to strict scrutiny.”¹³²

Such an argument—if indeed made by petitioners¹³³—appears contrary to the close identity expected by *Allee*.¹³⁴ In any event, the district court found Weingarzt (one of the *Legatus* petitioners) to be a “closely held family corporation,”¹³⁵ and the complaint alleged that the religious views represented those of the “family.”¹³⁶ The reference to *controlling* shareholder¹³⁷ thus appears to be a misstatement of the petitioners’ position by the government: because all of the petitioners have unanimity, or close to it, they did not likely seek a standard greater than that which was needed under their facts.

Two opinions handed down in the Ninth Circuit are particularly relevant. In the 1988 *Equal Employment Opportunity Commission v. Townley*¹³⁸ case, the court permitted a closely held corporation to assert the unanimous religious views and rights of its shareholders.¹³⁹ Although the Ninth Circuit did not tie its holding to associational standing, it relied on the Supreme Court’s progeny of

who had substantial identity of interests. *Id.* at 988 (citing Complaint at 8, *Legatus*, 901 F. Supp. 2d 980 (No. 2:12-cv-12061-RHC-MJH)).

129. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012).

130. *Allee v. Medrano*, 416 U.S. 802, 830–31 (1974) (emphasis added) (“The union, to the extent that it has standing, will be seeking interference with state court prosecutions of its members. There is an *identity of interest* between the union and its prosecuted members; the union may seek relief only because of the prosecutions of its members, and only by insuring that such prosecutions cease may the union vindicate the *constitutional interests* which it claims are violated.”).

131. *See Warth v. Seldin*, 422 U.S. 500, 515 (1975). The *Warth* court summarized:

[W]hether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. *Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.*

Id. (emphasis added).

132. Brief of Appellant at 10–11, *Legatus v. Sebelius*, No. 13-1092 (6th Cir. Mar. 20, 2013).

133. The government brief does not provide a citation for this alleged position.

134. *See supra* notes 118–19 and accompanying text.

135. *Legatus*, 901 F. Supp. 2d at 988.

136. *Legatus* Complaint, *supra* note 128, at 14.

137. *See* Brief of Appellant at 10–11, *Legatus v. Sebelius*, No. 13-1092 (6th Cir. Mar. 20, 2013).

138. 859 F.2d 610 (9th Cir. 1988)

139. *Id.* at 619–20.

the *NAACP* case.¹⁴⁰ The court focused on the small number of shareholders and the shareholders' unanimity of viewpoint, as well as the fundamental nature of the right¹⁴¹—three aspects which are also present in *Hobby Lobby*.¹⁴² The Ninth Circuit—in conjunction with all of the other circuits—declined to decide whether a for-profit corporation has religious rights of its own.¹⁴³ Ultimately, the court denied Townley's requested relief, concluding that the government had a compelling interest in preventing an employer from requiring mandatory devotional attendance.¹⁴⁴

The 2009 *Stormans v. Selecky*¹⁴⁵ decision reaffirmed the holding in *Townley* regarding representative standing, although it specifically described it as something other than “associational.”¹⁴⁶ The court limited the associational standing doctrine to associations other than corporations.¹⁴⁷ Nevertheless, the court used a representative type of standing that is very similar to associational standing.¹⁴⁸ The case involved a state mandate that required pharmacies to provide Plan B contraception.¹⁴⁹ The corporate pharmacy was “a fourth-generation, family-owned business whose shareholders and directors [were] made up entirely of members of the Stormans family”¹⁵⁰

Several of the injunctions granted by courts in the contraceptive cases were based on representative standing and reliance on *Townley* and *Stormans*.¹⁵¹ For example, *Legatus* adopted the Ninth Circuit approach and concluded that the Sixth Circuit lacked a similar theory.¹⁵² The court described its approach as a “*Stormans* pass-through instrumentality theory.”¹⁵³ *Tyndale House Publishers, Inc. v. Sebelius*,¹⁵⁴ which is appealable to the D.C. Circuit, likewise adopted *Stormans*, emphasizing how the owners were “indistinguishable” from the corporation largely because of unanimity in mission and belief.¹⁵⁵ In contrast, the *Hobby Lobby* district court rejected the relevance of both cases without

140. *Id.* at 619 n.14. *Townley* relied on *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), which relied on *NAACP. Alamo Found.*, 471 U.S. at 303 n.26.

141. *See id.* at 619.

142. *See supra* Part I.A.

143. *Townley*, 859 F.2d at 621–22 (citing *United States v. Lee*, 455 U.S. 252, 257–58 (1982)).

144. *See id.*

145. 586 F.3d 1109 (9th Cir. 2009).

146. *See id.* at 1121.

147. *See id.*

148. *See id.*

149. *See id.* at 1117.

150. *Id.* at 1120.

151. *See, e.g., Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 116 (D. D.C. 2012).

152. *Legatus*, 901 F. Supp. 2d at 988.

153. *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).

154. 904 F. Supp. 2d 106 (D.D.C. 2012).

155. *Id.* at 116.

explanation.¹⁵⁶ The Third Circuit also rejected the relevance of representative standing in *Conestoga*.¹⁵⁷ Further, Judge Garth—who concurred in *Conestoga*—specifically rejected representative standing by emphasizing the separateness of the corporate entity:

Conestoga further claims that it should be construed as holding the religious beliefs of its owners. This claim is belied by the fact that, as the District Court correctly noted, “[i]ncorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs’ It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations.”¹⁵⁸

Judge Garth also rejected the petitioners’ stated beliefs¹⁵⁹ that petitioners must operate their corporation consistently with Mennonite teachings.¹⁶⁰ The judge exclaimed that “the purpose—and only purpose—of the plaintiff Conestoga is to make money!”¹⁶¹ That a federal *appellate* judge would so firmly and indelicately¹⁶² reject undisputed¹⁶³ factual allegations is noteworthy.¹⁶⁴ Indeed, Judge Jordan took issue with the comment in his dissent:

156. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1292 n.13 (W.D. Okla. 2012) (citing *Stormans*, 586 F.3d at 119; Equal Emp’t Opportunity Comm’n. v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988)).

157. *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *2 (3d. Cir. Feb. 8, 2013) (citing *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 409 (E.D. Pa. 2013)) (adopting the district court opinion), *aff’d sub nom.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (Jan. 11, 2013).

158. *Id.* at *4 (Garth, J. concurring) (quoting *Conestoga*, 917 F. Supp. 2d at 408).

159. *Conestoga Complaint*, *supra* note 33, at 7–8 (stating petitioners’ belief that they must operate the corporation in line with their religious beliefs).

160. *See Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 2013 WL 1277419, at *4 (Garth, J., concurring) (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d at 408).

161. *Id.*

162. One must struggle to interpret what the Judge fully meant to say. On its face, the statement appears to flatly reject the owners’ undisputed religious views—that they operate the entity to fulfill their religious commandments. The reference to “money,” along with the exclamation, suggest a dichotomy reminiscent of the Biblical constraint that one cannot serve both God and money: “No servant can serve two masters. Either he will hate the one, and love the other, or he will be devoted to the one and despise the other. You cannot serve God and [m]oney.” *Luke* 16:13 (NIV).

The dichotomy raises serious theological issues. The stated views of the petitioners, as well as those in *Hobby Lobby*, are more nuanced than what Judge Garth appeared to profess. To the petitioners, one may—and indeed *must*—live one’s whole life, including his commercial endeavors, for the glory of God. *See Conestoga Complaint*, *supra* note 33, at 7–8. Making money does not equate to worshipping money and is not inconsistent with Christianity. Judge Garth’s statement—which goes to the heart of the religious issues—creates the appearance that he believes otherwise.

That assumes the answer to the question the Hahns have posed. As a factual matter, it is un rebutted that Conestoga does not exist solely to make money. This is a closely held corporation which is operated to accomplish the specific vision of its deeply religious owners, and, while making money is part of that, it has been effectively conceded that they have a great deal more than profit on their minds. To say that religiously inclined people will have to forego their rights of conscience and focus solely on profit, if they choose to adopt a corporate form to conduct their business, is a controversial position and certainly not one already established in law.¹⁶⁵

The standing question—whether it is associational or representative—centrally involves a determination of the nature of a for-profit corporation.¹⁶⁶ Do for-profit corporations, as Judge Garth asserted,¹⁶⁷ solely exist to make money; or do they have broader purposes, as asserted by the various petitioners and supported by Judge Jordan?¹⁶⁸ The analysis is complex and involves two distinct issues: (1) the nature of a corporation as associational and (2) the moral responsibilities of a corporation.

B. Corporations as Associational Entities

Corporations exist for many reasons, one of which involves the pooling of capital among persons with common economic and commercial goals.¹⁶⁹ While other forms of conducting business—such as partnerships—also allow pooling, they often lack the perpetuity of life-granted corporations, which facilitates changes of ownership and, thus, greater ease of association.¹⁷⁰ State statutes

See Conestoga, 2013 WL 1277419, at *4–5 (Garth, J., concurring). Whether he may properly impose such a profound view on the litigants is another matter. That he would appear to impose his personal view on them under the guise of preventing them from imposing their religious views on others is noteworthy.

163. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d at 400 n.3.

164. Judge Garth, who is ninety-two years old, took senior status in 1986. Justice Alito once clerked for him. Office of Communications, *U.S. Supreme Court Justice Samuel Alito to Deliver Inaugural Judge Leonard Garth Lecture at Rutgers*, RUTGERS-NEWARK, <http://www.newark.rutgers.edu/news/us-supreme-court-justice-samuel-alito-deliver-inaugural-judge-leonard-garth-lecture-rutgers> (last updated Nov. 10, 2011).

165. *Conestoga*, 2013 WL 1277419, at *10 n.8 (Jordan, J., dissenting).

166. *See id.* at *4 (explaining that the nature of a for-profit corporation is to make money); *id.* at *10 n.8 (Jordan, J., dissenting) (noting that for-profit corporations exists for many reasons other than making money).

167. *Id.* at *4.

168. *See id.* at *10 n.8 (Jordan, J., dissenting).

169. *See generally* 1 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 5, at 13–14 (perm. ed., rev. vol. 2006) (describing the attributes of a corporation).

170. *See generally id.* § 6, at 15–16 (describing the continuity of a corporation).

routinely required multiple incorporators until 1962.¹⁷¹ Indeed, the notion of a single shareholder corporation is relatively new.¹⁷²

The government does not directly argue against associational or representative standing; instead, it asserts that the burden imposed by the mandate falls only on the corporation rather than upon its owners.¹⁷³ Hence, even if associational standing is appropriate, the owners can assert no injury.¹⁷⁴ The government's argument relies heavily on the separate entity wall.¹⁷⁵ Essentially, this argument suggests that the owners elected to form a corporation separated from themselves and, thus, waived their representative rights.¹⁷⁶ The government's (and Judge Garth's) approach,¹⁷⁷ however, is flawed because it simplistically views corporations as fully separate from their owners.

Indeed, corporations exist as separate persons for many purposes: for limited liability protection of owners (assuming adequate capitalization);¹⁷⁸ for procedural rules (allowing the entity to sue and to be sued without naming the owners);¹⁷⁹ and, under the separate entity assumption of accounting,¹⁸⁰ for bookkeeping convenience.¹⁸¹ But corporations remain associational persons for many other reasons.¹⁸²

Early in United States tax history, the Supreme Court held that corporations would "generally" be respected as separate from their owners—at least for their losses,¹⁸³ an issue presented in the *Burnet v. Clark*¹⁸⁴ decision. Yet, Congress later decided otherwise. In 1958,¹⁸⁵ Congress enacted section 1244,¹⁸⁶ which

171. See generally Ernest L. Folk, III, *Corporation Statutes: 1959–1966*, 1966 DUKE L.J. 875, 878 (1966) (explaining that only recently had statutes begun allowing single individuals to act as incorporators).

172. See *id.* at 896.

173. See DOJ Brief, *supra* note 84, at 17–19.

174. See *id.*

175. *Id.* at 16.

176. *Id.* at 17.

177. See *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Human & Health Servs.*, 2013 WL 1277419, at *4 (Garth, J. concurring).

178. See 1 FLETCHER ET AL., *supra* note 169, § 14, at 32.

179. See *id.* § 7, at 17–18 (describing a corporation's separate existence from its owners).

180. See LOREN NIKOLAI ET AL., *INTERMEDIATE ACCOUNTING* 51 (11th ed. 2010).

181. See generally 1 FLETCHER ET AL., *supra* note 169, § 25, at 47, 50–51 (explaining how corporations can exist as distinct entities).

182. See generally *id.* §§ 29–40, at 67–111 (listing a variety of ways in which corporations can be treated as distinct entities).

183. *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (respecting the chosen form "generally," except in "exceptional circumstances").

184. 287 U.S. 410.

185. Small Business Tax Revision Act of 1958, Pub. L. No. 85-866, § 202(b), 72 Stat. 1676.

186. See I.R.C. § 1244 (2006). Section 1244 treats losses incurred on "small business" stock sales as ordinary rather than capital. See *id.* This effectively reversed *Clark*, which disallowed such losses as not "in the ordinary course of business." See *Clark*, 287 U.S. at 415. The ordinary/capital dichotomy did not exist at the time of *Clark*, but the effect was essentially the same. By treating the losses as ordinary, small-business owners essentially ignore the corporate form for purposes of losses but respect it for purposes of gains.

legislatively reversed *Clark* for many “small business corporations.”¹⁸⁷ Congress also chose in 1958 to further ignore corporate formalities by allowing S corporation status.¹⁸⁸ Legislative history from a 1954 bill described closely held corporations as “essentially partnerships.”¹⁸⁹ Initially, such entities could have ten shareholders at most.¹⁹⁰ Currently, corporations with fewer than 101 shareholders may elect S status,¹⁹¹ which effectively ignores the corporate form and allows the stockholders to realize their proportional share of income.¹⁹² The S corporation must separately state all items of income, loss, deduction or credit, which if separately stated, might affect the tax liability of any shareholder.¹⁹³ As a result, tax law determines the *character*¹⁹⁴ of various items at the *shareholder* level—as if the corporation did not exist. The “gross income” of a shareholder includes the proportional share of the corporate gross income¹⁹⁵—again, as if the corporation did not exist. An individual shareholder’s losses may not exceed his own basis in the stock,¹⁹⁶ which further identifies the shareholder and the entity. Even S corporation charitable contributions are treated as if made pro rata by the shareholders, rather than by the entity.¹⁹⁷

Similarly, most states permit entities to organize as limited liability *companies* (LLCs), which have limited liability—as do corporations—but are often taxed as partnerships for federal purposes.¹⁹⁸ Single member LLCs are generally “disregarded entities” for federal tax purposes.¹⁹⁹ Multiple member LLCs are taxed as partnerships,²⁰⁰ unless they elect to be taxed as

187. A “small business corporation” is defined as one with initial capitalization of under \$ 1,000,000. § 1244(c)(3)(A).

188. BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 6.01 (6th ed. 1998).

189. S. REP. NO. 83-1622, at 119 (1954). The use of the phrase “essential partnerships” is significant because the report viewed *closely* held corporations as not fully separate from their owners. *See id.* The Senate passed the bill, which “was eliminated in the conference committee.” BITTKER & EUSTICE, *supra* note 188.

190. *See* S. REP. NO. 83-1622, at 119 (1954).

191. I.R.C. § 1361–62.

192. *See id.* § 1366(a).

193. *See id.*

194. Tax character might involve investment activities, at-risk limitations, passive activities, and capital gain or loss transactions. *See id.* §§ 163(h), 465, 469, 1221.

195. *See id.* § 1366(c). An individual’s statement of § 61 “gross income,” as opposed to § 62 “adjusted gross income,” or § 63 “taxable income” is significant for many reasons. *See, e.g., id.* § 6501(e) (extending the statute of limitations on deficiencies to six years if the taxpayer omits a “substantial” amount of “gross income”).

196. *Id.* § 1366(d)(1)(A).

197. *See id.* §§ 1366(d)(4), 1367 (2006 & Supp. 2011).

198. ROBERT J. HAFT & PETER M. FASS, *TAX-ADVANTAGED SECURITIES HANDBOOK* § 13.5 (2013).

199. *Single Member Limited Liability Corporation*, INTERNAL REVENUE CODE, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Single-Member-Limited-Liability-Companies> (last updated Sept. 3, 2013).

200. *See* Treas. Reg. § 301.7701-3(b) (2006). The default status for an LLC is that of a partnership for federal tax law. *See id.*

corporations.²⁰¹ As partners, the owners must include their allocated share of income, deductions, gains, losses, and credits.²⁰² As with S corporations, the *character* of such items is determined at the owner–partner level.²⁰³ For federal diversity jurisdiction, an LLC is an “aggregate of its members”; hence, the residence of each member, rather than the state of registration of the “entity” is significant.²⁰⁴

The above rules directly contravene the view that corporations—or *companies* in the case of LLCs—are wholly distinct entities: they are certainly not distinct for income tax purposes if they elect “S” status, as Hobby Lobby²⁰⁵ and W & P Management, LLC did.²⁰⁶ Indeed, under either election, the shareholders or members must pay tax on the company’s income regardless of whether the entity retains or distributes it;²⁰⁷ thus, for tax purposes, both S corporation and LLC retained income “belongs” directly and immediately to the owners.²⁰⁸ Judge Garth may be correct—in part—that one purpose of a corporation is to make money;²⁰⁹ however, for S corporations, that purpose is to make money taxed to the owners, not some distinct entity.²¹⁰

But as compelling as the S corporation tax consequences are to support corporate/shareholder identity, they are trivial compared to the family law effects. For purposes of family law, states sometimes impute retained corporate income to the shareholders—at least for closely held entities.²¹¹ The theory

201. *See id.* An LLC may elect to be taxed as an S corporation (or even a C corporation) by filing Form 8832. *See id.* § 310.7701-3(c).

202. *See* I.R.C. § 704 (2006).

203. *See id.* § 703

204. Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism*, 40 WAKE FOREST L. REV. 827, 859–60 (2005) (citing *Hale v. MasterSoft Int’l Pty. Ltd.*, 93 F. Supp. 2d 1108, 1112 (D. Colo. 2000)).

205. Brief of Appellants, *supra* note 22, at 33 & n.23.

206. This information was obtained through a conversation with a confidential source.

207. I.R.C. § 1368(c) provides for the later exclusion of previously taxed retained earnings.

208. Income is not an asset and thus does not actually “belong” to anyone; instead, the proceeds of the income belong to the shareholders. *See id.* § 61. Common vernacular, however, often describes the income as belonging to the owners.

209. *See Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *4 (3d. Cir. Feb. 8, 2013) (Garth, J., concurring).

210. *See* I.R.C. § 1363 (2006).

211. *See, e.g., J.S. v. C.C.*, 912 N.E.2d 933, 942–44 (Mass. 2009) (remanding the case to lower court to determine the extent to which an S corporation’s undisputed earnings should be considered income in light of certain factors, including the shareholder’s level of control over corporate distributions, the legitimate business interest for retaining the corporate earnings, attempts to shield income by means of retained earnings, and the allocation of the burden of proof); *Zold v. Zold*, 911 So. 2d 1222, 1233 (Fla. 2005) (holding that Florida courts must look at the equities involved to determine whether to respect the corporate form of closely held businesses for purposes of determining income for alimony and child support purposes); *Roberts v. Roberts*, 666 N.W.2d 477, 484 (S.D. 2003) (concluding that profits from an S corporation should not be included in calculations for child support); *In re Marriage of Brand*, 44 P.3d 321, 330 (Kan. 2002) (holding that the court must do case-by-case analysis to determine whether to attribute retained profits of an S corporation as income for calculating child support); *In re Marriage of Perlenfein*, 848 P.2d 604,

stems from the almost undeniable notion that corporations are significantly an extension of their owners.²¹² Without such imputation rules, soon-to-be-ex-spouses could easily park their income in corporate format to the detriment of their families.²¹³ However, the notion that entities are *fully* distinct from their owners is generally foreign in family law—although not all states agree.²¹⁴

For accounting and tax law purposes, some entities must file consolidated returns to ignore intercompany transactions;²¹⁵ otherwise, multiple entities could distort the required clear reflection of income. Also, in some cases, owners prepare partially consolidated statements with their entities to clearly reflect income statements and balance sheets.²¹⁶ Indeed, under SEC rules, owners are sometimes required to file such statements by law.²¹⁷ The above rules flow from the financial recognition that a substantial owner—particularly a controlling one—is not distinct from its legal fictions.²¹⁸ To clearly reflect income and worth, affected individuals must combine that which the government so cavalierly denominates as wholly distinct.

For corporate law purposes, shareholders have governance voting rights,²¹⁹ demonstrating the essential nature of a corporation acting for its owners rather

605 (Or. 1993) (holding that income from S corporations should be attributed to the shareholder as income for the purpose of determining a child support obligation); *In re Marriage of Nasirpour*, No. DO56839, 2011 WL 6101022, at *8 (Cal. Ct. App. Dec. 7, 2011) (assuming that California law allows for the inclusion of a “closely held corporation’s retained earnings” in a parent’s income when calculating child support); *Tebbe v. Tebbe*, 815 N.E.2d 180, 185 (Ind. Ct. App. 2004) (holding that income from an S corporation of which the husband was a minority shareholder should not have been included in the calculation of child support); *Dagley v. Dagley*, 695 So. 2d 521, 523 (La. Ct. App. 1977) (concluding that trial court properly included profits from the S corporation in calculating alimony pendente lite); *see also* *Bleth v. Bleth*, 607 N.W.2d 577, 579 (N.D. 2000) (citing *Quamme v. Bellino*, 540 N.W.2d 142, 146 (N.D. 1995) (holding that when a shareholder controls his own salary, courts may consider his earning capacity).

212. The corporate nature fills much of corporate legal scholarship. Since 1937, many scholars have taken a “contractarian” approach under which corporations are viewed as a collection of contracts involving owners, creditors, and others. *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390–91 (1937) (offering a theory of why people form business entities, or “firms,” rather than using a series of contracts); Charles R.T. O’Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 *SEATTLE U. L. REV.* 1247, 1247–48 (2012) (proposing a different understanding of Coase’s theory of the “firm” that would support a “very different contractarian account of the corporation”).

213. *See* Steven J. Willis, *Family Law Economics, Child Support, and Alimony Ruminations on Income: Part Two*, 78 *FLA. B. J.* 34, 36 (June 2004).

214. *See generally* Steven J. Willis, *Family Law Economics, Child Support and Alimony Ruminations on Income: Part One*, 78 *FLA. B. J.* 34 (May 2004) (examining myriad entity types in relation to alimony and child support obligations).

215. *See generally* Treas. Reg. § 1.1502–13 (2013) (outlining the rules pertaining to intercompany transactions for accounting purposes).

216. *See* 17 C.F.R. § 210.3-17 (2013).

217. *See id.*

218. *See id.*

219. MODEL BUS. CORP. ACT § 7.21 (2010).

than for itself. Owners are not mere “potted plants”²²⁰ who sit around while a separate entity acts; they are essential actors who direct the entity. Further, shareholders have derivative rights to assert, on their own, that which the corporation fails to assert.²²¹

Even the root of the word “corporation”—*corpus* in Latin—suggests a body of associated parts.²²² Thus, the government’s position on standing—that corporations are wholly distinct entities from their owners²²³—is flawed because it is contrary to many areas of law that treat corporations and their owners as one.

C. Christianity as Associational

Associational standing and the associational nature of corporations form an apt metaphor for a basic Christian doctrine: the Trinity as a relational Being. An essential element of Christianity is the Trinity: God in Three Persons—Father, Son, and Holy Spirit.²²⁴ Christians believe they are called to live their lives consistently with that nature—in relationship and in association with others—whether it be with spouses, families, members of the Body of Christ, or with others in commercial activities.²²⁵ In stark contrast, noted humanist and existentialist Jean-Paul Sartre famously wrote, *L’enfer, c’est les autres*,²²⁶ or “Hell, is other people.” Sartre suggested that misery is found in other people, especially in their perceptions of us.²²⁷ Christianity, in contrast, teaches that ultimate joy and everlasting life are found through relationships and associations,

220. Brendon Sullivan, who represented Colonel Oliver North during a Senate Hearing, answered Senator Inouye’s request that the Colonel object for himself, rather than allow counsel objections: “Well, Sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.” *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. TIMES, July 10, 1987, at A7, available at <http://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html>.

221. See MODEL BUS. CORP. ACT §§ 7.40–7.47 (2010) (citations omitted) (setting out the requirements for shareholder derivative suits).

222. See Allan C. Hutchinson & Ian Langlois, *Salmon Redux: The Moralities of Business*, 35 SEATTLE U. L. REV. 1109, 1109 (2012) (citing ALLAN C. HUTCHINSON, THE COMPANIES WE KEEP: CORPORATE GOVERNANCE FOR A DEMOCRATIC SOCIETY 39–58 (2005)).

223. See Brief for the Appellees at 24, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013) (citing *Seitsinger v. Dockum Pontiac, Inc.*, 894 P.2d 1077, 1079–80 (Okla. 1995)).

224. See generally Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 146 n.16 (1994) (explaining that Christian theologians identify the Trinity with the “reciprocal relationships of Father, Son, and Spirit to each other”).

225. See Acts 2:1–13 (noting that the founding of Christ’s church at Pentacost involved the gathering of many people from all walks of life).

226. See JEAN-PAUL SARTRE, HUIS CLOS 91 (Jacques Hardré & George B. Daniel, 1962) [hereinafter SARTRE, HUIS CLOS]; JEAN-PAUL SARTRE, NO EXIT 45 (Stuart Gilbert trans., Vintage Int’l 1989) [hereinafter SARTRE, NO EXIT].

227. See SARTRE, HUIS CLOS, *supra* note 226, at 91; SARTRE, NO EXIT, *supra* note 226.

but only if one looks to *all* associations—not just some—in a segmented life.²²⁸ Hence, segmentation of one’s commercial life from one’s religious life—whether government or self-imposed—is fundamentally inconsistent with Christianity.

D. Reverse Veil Piercing

Professor Stephen M. Bainbridge wrote a recent article supporting the assertion of owners’ religious rights by corporations.²²⁹ His theory arises from the doctrine of “reverse veil piercing.”²³⁰ According to the reports²³¹ documented in the article, Judge Walton raised questions in oral argument indicating a willingness to entertain such a theory.²³² The exchange involved the question of whether, by incorporating as an LLC, a physician relinquished her religious rights in how she practiced.²³³ Apparently, the government argued that she did.²³⁴ As discussed below, issues involving LLC assertion of religious rights are not necessarily the same as those involving S corporations, let alone C corporations or other types of entities.²³⁵ Nevertheless, the discussion illustrates how far-reaching the government’s assertion may be.²³⁶

Traditionally, courts pierce the corporate veil—thus treating the shareholders and the entity as one—in cases involving either creditors and undercapitalization or a lack of attention to formalities.²³⁷ Reverse piercing—which Professor Bainbridge describes as an established doctrine—involves shareholders asserting their own rights as if their chosen separate entity did not exist.²³⁸ His most convincing example involved a Minnesota shareholder who sought homestead protection for the residence she placed in the corporate form.²³⁹ The court, finding the public policy of protecting the home to be critical, pierced the

228. Peter called on believers to follow God with their entire lives, including how they relate to government, spouses, and masters. *See 1 Peter* 2:13–37 (NIV); *Matthew* 16:18 (NIV) (“on this Rock I will build my Church . . .”).

229. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013).

230. *See id.* at 236–37.

231. Terence P. Jeffrey, *DOJ to Federal Judge: We Can Force Your Wife to Violate Her Religion*, CNS NEWS (Feb. 25, 2013, 7:34 PM), <http://cnsnews.com/news/article/doj-federal-judge-we-can-forceyour-wife-violate-her-religion>.

232. *See* Bainbridge, *supra* note 229, at 235–36 (citing Transcript of Motion Hearing, Tyndale House Publishers, Inc. v. Sebelius, No. CV 12-1635 (D.D.C. Nov. 9, 2012)).

233. *See id.*

234. *See id.*

235. *See infra* Part II.O.9–12.

236. *See* Brief for the Appellees at 24, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013) (citing *Seitsinger v. Dockum Pontiac inc.*, 894 P.2d 1077, 1079–80 (Okla. 1995)).

237. *See id.* at 242 & n.22 (citing I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 517 (1912)).

238. *See id.* at 241, 243.

239. *See id.* at 243 (citing *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985)).

corporate veil and treated the shareholder and her chosen corporate form as the same entity.²⁴⁰ As with associational standing, the closeness of identity between the entity and the shareholders, as well as the great significance of the rights involved, was paramount.²⁴¹

Similarly, in *Hobby Lobby*, the corporation and its owners are closely identified: essentially, they are one and the same in terms of beliefs because the owners are small in number and unified in position.²⁴² Further, the *Hobby Lobby* litigation involves fundamental religious rights that are at least as critical as state protection of the homestead. Thus, as with tax law, securities law, and family law, state corporate law sometimes ignores the arbitrary corporate/shareholder wall, even at the behest of the shareholders who elected corporate status.²⁴³ The corporate law treatment further illustrates the simplistic nature of the government's black-and-white insistence on recognition of the corporate status.

Analogously, Chief Justice Burger, who concurred in part in the 1974 *Allee* decision on associational standing, referred to a union as having rights derived from the members.²⁴⁴ Typically, a derivative action by shareholders is the reverse, as shareholders derive rights from the entity.²⁴⁵ Chief Justice Burger's language was the opposite because it described the entity as deriving rights from its members—essentially a reverse veil piercing:

If, as claimed by the union, union members were subject to unlawful arrest and threats of arrest in their First Amendment protected organizational activity on behalf of the union, the union would have derivatively suffered or have been in the position to suffer derivatively real injury and would have standing to complain of that injury and bring this action. If a person who was a member of the union both at the time of that person's arrest and at the present time would have standing individually to challenge the constitutionality of one of the five statutes, then the Union itself would have such standing, since the inability of the union member to communicate freely restricts the ability of the union to communicate. As the Court states, a union "can act only through its members."²⁴⁶

240. See *Cargill*, 375 N.W.2d at 479–80.

241. See *id.* at 479.

242. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013).

243. See, e.g., *Cargill, Inc. v. Hedge*, 375 N.W.2d 477, 479 (Minn. 1985) (piercing the corporate veil and treating the shareholder and her chosen entity the same).

244. See *Allee v. Medrano*, 416 U.S. 802, 829–30 (1974) (Burger, C.J., concurring in part and dissenting in part).

245. See *Karten v. Woltin*, 23 So. 3d 839, 840–41 (Fla. 4th Dist. Ct. App. 2009) (quoting *Braun v. Buyers Choice Mortg. Corp.*, 851 So. 2d 199, 203 (Fla. 4th Dist. Ct. App. 2003); *Fort Pierce Corp. v. Ivey*, 671 So. 2d 206, 207 (Fla. 4th Dist. Ct. App. 1996)).

246. *Id.* (footnote omitted).

The analogy is apt because unions have long been recognized as “separate entities.”²⁴⁷ Although they exist as tax-exempt organizations,²⁴⁸ they are consummately commercial—albeit at the opposite end of the management/employee spectrum from Hobby Lobby.²⁴⁹ They have lobbying and political rights of their own, which are often at odds with a significant portion of their members; hence, sometimes the separate entity nature is respected.²⁵⁰ Yet, at other times, unions and their members have an identity of interests.²⁵¹ In *Allee*, not only did such an identity exist, but the interests also involved First Amendment rights.²⁵² Similarly, in *Hobby Lobby*, the corporation undoubtedly acts as a separate entity for tort and contract law purposes; yet, it also—in the matter involving abortion insurance—has an identity of interests with its owners, who make all decisions.²⁵³ Indeed, as explained below, the Hobby Lobby argument is *a fortiori*: while a tax-exempt organization exists ultimately for itself and cannot permit its commercial interests or profits to ensure the benefit of members or shareholders, the opposite is true for a traditional business corporation.²⁵⁴ Its commercial purpose is to benefit the financial interests of its owners.²⁵⁵ Thus, the for-profit associational argument appears stronger for business corporations than for the not-for-profit sector—the exact opposite of what the government claims.²⁵⁶

247. See e.g., *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385–86 (1922) (“[I]n every way the union acts as a business entity, distinct from its members . . .”). State laws allow unions to operate as unincorporated associations or as corporations. See, e.g., FLA. STAT. § 447.02 (West 2013) (stating that labor organizations may or may not be incorporated). Each type of union must be registered and may be a party to a legal action. See *id.* §§ 447.06 (requiring registration), 447.11 (granting labor organizations the right to maintain and be subject to any action or suit).

248. See I.R.C. § 501(c)(5) (2006).

249. See *supra* Part I.A.

250. See, e.g., *Marker v. Schultz*, 485 F.2d 1003, 1004 (D.C. Cir. 1973) (providing an example of a case in which plaintiffs dissented from union political activity and sought an injunction). In *Marker v. Schultz*, the court recognized accommodations for dissenters and permitted the union to act consistently with the majority view, essentially recognizing it as an entity separate from its individual members. *Id.*; see also *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 750–64, 770 (1961) (citations omitted) (detailing how Congress essentially granted personhood to the particular union under the Railroad Labor Act and recognizing the right of the union to act despite the dissenters).

251. See, e.g., *Allee*, 416 U.S. at 830–31.

252. See *id.*

253. See generally *infra* Part V.A (discussing the different types of corporations and the legal implications of each).

254. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. June 27, 2013) (Hartz, J., concurring).

255. *Id.*

256. See *id.*

E. Corporate Status as Elective

In the contraceptive cases, several courts relied on the elective nature of corporations to support a denial of standing or to recommend the denial thereof.²⁵⁷ These conclusions tend to stem from a mistaken reliance on unfortunate language in the 1982 decision in *United States v. Lee*²⁵⁸: “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”²⁵⁹

Looking at the language in the context of the case, however, makes it far less deadly than it seems. In *Lee*, the employer sought not to pay Social Security taxes, believing that the Amish faith required members to support themselves and others of their faith.²⁶⁰ As Chief Justice Burger suggested, the notion of Social Security as an insurance program is incorrect.²⁶¹ Social Security taxes paid by employers are merely excises on employment and the revenues are general revenues.²⁶² Social Security taxes are no different from gambling taxes or excises on tires, telephones, or travel by air. Similarly, the employee share of Federal Insurance Contributions Act (FICA) is but a general revenue income tax.²⁶³ Nothing whatsoever binds Congress to spend these revenues—or any other revenues—on retirement; nevertheless, Congress chooses to go through the appropriations process instead of repealing the Social Security system.²⁶⁴

257. *Cf., e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J.) (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)) (referencing *Lee* as support for the fact that the Court had not previously addressed free exercise claims brought by “closely held for-profit corporations and their controlling shareholders” challenging mandatory provisions of employee benefits as burdening their free exercise of religion); *Grote v. Sebelius*, 708 F.3d 850, 859 (7th Cir. 2013) (Rovner, J., dissenting) (quoting *Lee*, 455 U.S. at 261) (discussing the Plaintiffs’ voluntary decision to engage in corporate enterprise and noting the Court’s language in *Lee*); *Mersino Mgmt. Co. v. Sebelius*, 2013 WL 3546702, at *15 (E.D. Mich. July 11, 2013) (noting that Mersino selected the corporate form); *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (discussing the implications of the corporate form).

258. 455 U.S. 252 (1982) (Burger, C.J.).

259. *Id.* at 261.

260. *Id.* at 254–55.

261. *See id.* at 260 (“There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.”).

262. *See id.* at 254 n.1.

263. *See* 26 U.S.C. § 3102(a) (2006); *see also What is the Meaning of FICA?*, SOC. SEC. ADMIN., http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/392/~/what-is-the-meaning-of-fica (last updated Jan. 28, 2013, 03:29 PM) (“The payroll taxes collected for Social Security are of course taxes, but they can also be described as contributions to the social insurance system that is Social Security . . . FICA is nothing more than the tax provisions of the Social Security Act, as they appear in the Internal Revenue Code.”).

264. For a discussion of the annual appropriations process for Social Security, see generally SOC. SEC. ADMIN., FISCAL YEAR 2014 BUDGET JUSTIFICATION: PAYMENTS TO SOCIAL SECURITY TRUST FUNDS (2013), *available at* <http://www.ssa.gov/budget/FY14Files/2014PSSTF.pdf>.

Indeed, if Congress were to repeal the system but retain the taxes, no one would have a claim for breach of contract—or anything like it—because the United States Government has no obligation to provide the benefits.²⁶⁵ The analysis would be quite different if the United States mandated participation in a vested retirement system, but it does not.

Thus, an employer has no greater objection to paying an excise on employment (FICA) than it has to paying an excise on profits (what is generally called the corporate income tax, but which is actually an excise)²⁶⁶ or an excise on tires for its vehicles; how Congress ultimately appropriates the taxes raised has nothing to do with the raising of those taxes.²⁶⁷ Congress need not spend “Social Security” revenue on social security; indeed, for decades it has not.²⁶⁸

The Social Security tax differs markedly from an excise on an employer’s failure to provide health insurance²⁶⁹ or an excise on the failure to provide contraception/abortion coverage.²⁷⁰ One is an excise on an activity the corporation *chooses to do* (earn income and employ persons)—and which generates general revenues—and the other is an excise on something the corporation *chooses not to do*. The former has only a mythical relationship to a forbidden religious practice—through general and subsequent appropriations to retirement insurance—and the latter intrinsically involves a religious practice of opposing abortion—or, for some, health insurance in general.

Although Chief Justice Burger seemed clear about the distinction between Social Security and contraceptive/abortion coverage,²⁷¹ such clarity has not stopped several judges from misusing his remarks.²⁷² The seemingly toxic effect of his unfortunate words—quoted above²⁷³—on the *Hobby Lobby* and *Conestoga* litigation results only because his words are so often taken out of context. Chief Justice Burger focused on a choice—or an election²⁷⁴—but the choice to which he referred was the choice to employ someone, not the choice to incorporate.²⁷⁵

265. See John Tammy, Op-Ed, *The Ugly Truth About Social Security Is Revealed*, FORBES (June 13, 2012, 6:41 PM), <http://www.forbes.com/sites/johntammy/2012/06/03/the-ugly-truth-about-social-security-is-revealed/>.

266. See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 157–58 (1911) *overruled on other grounds as stated in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 542 (1985).

267. Steve Vernon, *The Social Security Trust Fund Myth*, CBS NEWS (Feb. 1, 2011, 10:49 AM), http://www.cbsnews.com/8301-505146_162-39942944/the-social-security-trust-fund-myth/ (“There is—and never has been—any real link between our Social Security benefits and the FICA taxes that we pay.”).

268. See *supra* notes 264–65 and accompanying text.

269. See I.R.C. § 4980D (2006).

270. See *id.*

271. See *United States v. Lee*, 455 U.S. 252, 261 (1982).

272. See *Mersino Mgmt. Co. v. Sebelius*, 2013 WL 3546702, at *13 (E.D. Mich. July 11, 2013) (arguably misusing Chief Justice Burger’s words).

273. See *supra* note 246 and accompanying text.

274. See *Mersino Mgmt. Co. v. Sebelius*, 2013 WL 3546702, at *13 (E.D. Mich. July 11, 2013) (arguably misusing Chief Justice Burger’s words).

275. See *id.* at *15 (referring to Mersino’s choice to incorporate).

III. ENTITIES AS RFRA PERSONS

The Religious Freedom Restoration Act (RFRA) provides a statutory opportunity for litigants—arguably including corporations and companies—to assert their own religious rights.²⁷⁶

A. History of RFRA

Enacted by Congress and signed by President Clinton in 1993, RFRA directs federal courts to use a “compelling interest” approach in evaluating free exercise claims of any *person*.²⁷⁷ Thus, what might not be protected under traditional constitutional theory may receive statutory protection under such a high standard of review.²⁷⁸ The statute broadly applies to “government,” as opposed to Congress—as the First Amendment does facially—and imposes the high standard for all cases, regardless of which standard courts have adopted.²⁷⁹ The act was Congress’s response²⁸⁰ to the 1990 Supreme Court decision in *Employment Division of the Department of Human Resources of Oregon v. Smith*,²⁸¹ which upheld an Oregon law restricting the use of peyote by a religious entity.²⁸² In 1997, the Court struck down RFRA to the extent that it applied to the states but retained its application to the federal government.²⁸³

B. Corporate Rights Under RFRA

The first hurdle presented by RFRA is that a *person* asserts the religious issue.²⁸⁴ Traditionally, corporations are persons under both state²⁸⁵ and federal

276. 42 U.S.C. §§ 2000bb-1 through -4 (2006).

277. *See id.* § 2000bb-1(b). Section 2000bb-1(b) provides:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

278. *See, e.g., Hobby Lobby Complaint, supra* note 20, at 3 (claiming the plaintiff’s First and Fifth Amendment rights were violated under RFRA).

279. *See generally* 42 U.S.C. §§ 2000bb-2(1), 2000bb-3(a) (defining “government” and stating that the chapter applies to all federal law).

280. *See id.* § 2000bb(a)(4).

281. 494 U.S. 872 (1990).

282. *Id.* at 890.

283. *See City of Boerne v. Flores*, 521 U.S. 507, 532, 536 (1997) (explaining that the wide scope of the RFRA violated separation of powers principles).

284. *See* 42 U.S.C. § 2000bb-1(c) (stating that a “person” whose religious exercise has been burdened has the right to assert that violation in a judicial proceeding).

285. *See, e.g., FLA. STAT. § 607.01401(11), (19) (2013)* (defining an entity as including corporations and a person as including an entity).

law.²⁸⁶ Indeed, the United States Code specifically provides that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”²⁸⁷

Additionally, the Internal Revenue Code, which contains the operative section 4980D, provides:

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) Person. The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.²⁸⁸

While these IRS provisions might appear to resolve the matter, the *Hobby Lobby* district court suggested that it would exclude both corporations and limited partnerships from the definition.²⁸⁹ The district court, however, did not allude to other business structures such as general partnerships, trusts, estates, or sole proprietorships.²⁹⁰ Other courts have disagreed. In *Korte*, the Seventh Circuit stated:

[T]he government’s primary argument is that because K & L Contractors is a secular, for-profit enterprise, no rights under RFRA are implicated at all. This ignores that Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to

286. See, e.g., *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 12 U.S. 181, 189 (1888) (stating that the designation of a person under the Fourteenth Amendment undoubtedly includes a private corporation).

287. 1 U.S.C. § 1 (2012).

288. I.R.C. § 7701(a)(1) (2006).

289. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1291–92 (2013).

290. See *id.* In *Geneva College v. Sebelius*, the district court expressly allowed owners of a sole proprietorship to proceed, but dismissed the sole proprietorship, WLH, for not being a separate entity. No. 2:12-CV-00207, 2013 WL 838238, at *20 (W.D. Pa. Mar. 6, 2013).

violate their religious beliefs to operate their company in compliance with it.²⁹¹

In *Geneva College v. Sebelius*,²⁹² the court sidestepped the issue regarding whether a corporation is a person under RFRA;²⁹³ instead, the court permitted the corporation to assert the rights of its owners.²⁹⁴ In contrast with the *Hobby Lobby* district court, the court in *Geneva* also found no distinction regarding the type of entity asserting the owners' claims.²⁹⁵ The court then stressed the significance of the many exceptions to the contraceptive mandate and, applying RFRA, concluded that the government lacked a compelling interest.²⁹⁶

Similarly, the district court in *Tyndale* permitted the entity to assert its owners' rights, but "like others before it, [the court] decline[d] to address the unresolved question of whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause."²⁹⁷

Two non-tax cases from the Ninth Circuit are also relevant to the issue of whether corporations are persons under RFRA. In *Townley*, a closely held corporation required employee attendance at devotional services contrary to an Equal Employment Opportunity Commission (EEOC) regulation.²⁹⁸ In 1988—prior to the enactment of RFRA—the Ninth Circuit permitted the entity in *Townley* to assert the First Amendment religious claims of its owners.²⁹⁹ Similarly, in the 2009 *Stormans* decision, the Ninth Circuit considered a case involving a corporate pharmacy that objected to a state regulation requiring the sale of Plan B contraceptives.³⁰⁰ *Townley* and *Stormans*, as non-tax cases, do not necessarily control the application of § 4980D. Because the taxing power, for example, is not subject to general due process limitations,³⁰¹ it is not necessarily subject to First Amendment objections. No court, however, has denied an

291. *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. 2012) (citation omitted).

292. No. 2:12-CV-00207, 2013 WL 838238, at *1.

293. *Geneva College*, 2013 WL 838238, at *41 (denying in part the government's motion to dismiss).

294. *See id.* at *19–21 (relying on *Stormans, Inc. v. Sleckley*, 586 F.3d 1109 (9th Cir. 2009); *Equal Emp't Opportunity Comm'n v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988)).

295. *See id.* at *21 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

296. *Id.* at *25 (stating that the court need not address whether the mandate is the least restrictive path for achieving the government's stated goals).

297. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d at 114 (D.D.C. 2012).

298. *See Townley*, 859 F.2d at 611–13.

299. *See id.* at 620 & n.15 (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 n.26 (1985)).

300. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1113, 1119 (9th Cir. 2009) ("We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause . . .").

301. *See Magnano v. Hamilton*, 292 U.S. 40, 44 (1934) (citing *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916)).

otherwise valid RFRA claim simply because it implicated the taxing power; further, the government has not argued in favor of such a limitation.

IV. CORPORATE RIGHTS

A. *Corporate Nonreligious Constitutional Rights*

No federal appellate court has found business corporations to have religious freedom under the First Amendment;³⁰² indeed, several courts have specifically declined to address the issue.³⁰³ But courts have long recognized that many constitutional rights belong to business corporations. For-profit business corporations have First Amendment rights to freedom of speech³⁰⁴ and freedom of the press.³⁰⁵ They have long received equal protection under the Fourteenth Amendment.³⁰⁶ Likewise, for-profit business corporations receive protection under the Fifth Amendment against unreasonable takings³⁰⁷ and under the Fourth Amendment against unreasonable searches and seizures.³⁰⁸ Corporations, however, do not receive the Fifth Amendment protection against self-incrimination.³⁰⁹ The district court in *Hobby Lobby* emphasized the varied

302. However, non-business religious corporations have religious rights. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (upholding the claim of a Santeria church, a not-for-profit corporation, that a statute prohibiting animal sacrifice violated the church's constitutional right to the free exercise of religion); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381 (1990) (recognizing the religious rights of Jimmy Swaggart Ministries, a nonprofit religious corporation organized in Louisiana); *Bob Jones Univ. v. United States*, 461 U.S. 574, 579–85, 602–04 (1983) (rejecting Bob Jones University's and Goldsboro Christian Schools' tax-exempt status based on policies of racial discrimination, but recognizing that the fundamental religious rights under the First Amendment were applicable to nonprofit religious corporations).

303. *See, e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (declining to address "whether corporations have the full measure of rights that individuals enjoy under the First Amendment"); *Stormans*, 586 F.3d at 1119 (declining to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1271, 1280 n.7 (5th Cir. 1981) (declining to decide whether a church could assert an institutional right to free exercise).

304. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010); *Bellotti*, 435 U.S. at 777 n.14 (citing *United States v. White*, 322 U.S. 694, 698–701 (1944)).

305. *See, e.g., Citizens United*, 558 U.S. at 352 (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (6th Cir. 1989))); *Bellotti*, 435 U.S. at 784.

306. *See County of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

307. *See Ilya Shapiro & Caitlyn W. McCarthy, So What if Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 708 (2011) (explaining that there would be no incentive to form corporations if they did not have some constitutional rights).

308. *See id.*

309. *See Application to Enforce Admin. Subpoenas Duces Tecum of the Secs. & Exch. Comm'n v. Knowles*, 87 F.3d 413, 416 n.3 (10th Cir. 1996) (citing *United States v. Rice*, 52 F.3d 843, 845–46 (10th Cir. 1995); *United States v. Hansen Niederhauser Co.*, 522 F.2d 1037, 1039 (10th Cir. 1975)).

treatment of corporate rights in denying the existence of corporate religious rights:

Corporations have constitutional rights in some circumstances, such as the right to free speech, but the rights of corporate persons and natural persons are not coextensive. Courts have not extended all constitutional rights to all corporations. Corporations do not possess a “right to exercise a privilege against self-incrimination.” They have been denied “[c]ertain ‘purely personal’ guarantees . . . because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals.” “Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”³¹⁰

The above analysis, however, is flawed. The court mistakenly chose to distinguish the type of person—natural versus corporate—rather than the mechanical nature of the right asserted.³¹¹ However, the quoted language involving “certain ‘purely personal’ guarantees” was not suggesting that only natural persons have the guarantee; rather, it was suggesting that the Fifth Amendment can only be pleaded for oneself—not for a third party.³¹² Consider the history of the statement the Court made in *Hale v. Henkel*,³¹³ which the Court later relied upon in *United States v. White*³¹⁴ and *First National Bank of Bos. v. Belotti*.³¹⁵ According to the Court:

[W]hile the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. *This is true, but the answer is that it was not designed to do so.* The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. *The*

310. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1287–88 (W.D. Okla. 2012) (citations omitted).

311. *See id.* at 1287 (“[T]he rights of corporate persons and natural persons are not coextensive.”).

312. *See id.* at 1288 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)).

313. 201 U.S. 43, 69–70 (1906).

314. 322 U.S. 694, 699 (1944) (citing *Hale*, 201 U.S. at 69–70).

315. 435 U.S. 765, 779 (1978) (citing *White*, 322 U.S. at 699).

*question whether a corporation is a “person” within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees.*³¹⁶

Thus, the district court in *Hobby Lobby* quoted the language in a manner inconsistent with its intended meaning.³¹⁷ A parallel exists between *Hale* and *Hobby Lobby*: in both cases, corporations asserted constitutional rights to protect themselves.³¹⁸ However, the distinction missed by the district court involves the Fifth Amendment mechanics: the right is personal to the witness.³¹⁹ Hence, *Hobby Lobby* is more akin to *Citizens United v. Federal Election Commission*,³²⁰ in which the Court recognized corporate speech rights as being personal to the speaker, but allowed a corporation to assert them because a corporation can speak.³²¹ Further evidence exists in the religious corporation cases, in which courts have long recognized the existence of a corporation’s right to religious expression. If a religious corporation has religious rights, then such rights are *not* akin to the self-incrimination rights of *Hale*, which belong only to individuals who can testify.³²²

B. Corporate Religious Rights

Religious beliefs vary widely on the central issues of abortion and the extent of one’s duty to behave consistently with one’s beliefs.³²³ The abortion issue is not particularly pertinent, as no one questions the sincerity of the beliefs of *Hobby Lobby*’s owners—at least for purposes of the litigation. Hence, one’s views on that issue are not relevant to the issues that tax lawyers must understand and will likely face. The remaining issues, however, are both controversial and fundamental.

The government’s case appears grounded in three facially seductive propositions:

316. *Hale*, 201 U.S. at 69–70 (emphasis added).

317. *See Hobby Lobby District I*, 870 F. Supp. 2d at 1287.

318. *See Hale*, 201 U.S. at 66; *Hobby Lobby District I*, 870 F. Supp. 2d at 1283.

319. *See Hale*, 201 U.S. at 69 (“The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness.”).

320. 558 U.S. 310 (2010).

321. *Id.* at 342.

322. *See Hale*, 201 U.S. at 69 (explaining that the Fifth Amendment right against self-incrimination belongs only to individuals); *but see* cases cited *supra* note 257 (listing examples of cases discussing the religious rights held by religious corporations).

323. *See, e.g., Hobby Lobby Complaint, supra* note 20, at 2 (detailing the plaintiffs’ belief that they must operate their business in accordance with their faith).

1. Religious freedom does not extend to commercial activities, at least not through the corporate format.³²⁴
2. Corporations are secular entities with no religious beliefs of their own.³²⁵
3. An appropriate distinction involves the for-profit versus not-for-profit dichotomy.³²⁶

C. Religion, Morality, and Commerce in General

As discussed below, many people seek to impose moral standards on various entities through movements involving corporate social responsibility (CSR), social entrepreneurship, and social justice.³²⁷ While this phenomenon does not necessarily grant religious rights to corporations, it is consistent with the notion that humans often involve their moral beliefs and practices in their commercial activities. Thus, one arguably may not leave morality—and, by implication, religion—to personal, noncommercial matters.

Different religions treat duty, morality, and commerciality differently. Christians believe one must live one's life fully, and in all aspects, according to Christ's teachings.³²⁸ To them, one cannot behave according to such rules in personal or social settings but then act amorally in commercial settings.³²⁹ Two widely known New Testament³³⁰ examples should suffice. First, Christ harshly criticized "money changers" in the temple.³³¹ Their behavior, along with that of

324. DOJ Brief, *supra* note 84, at 2 ("Nor can the owners of a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owners have chosen because it benefits them, to impose their personal religious beliefs on the corporate entity's employees.").

325. *Id.* at 2–3 ("[A] secular entity by definition does not exercise religion.").

326. *See id.* at 2 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)) (emphasizing the fact that the corporation voluntarily organized itself as for-profit).

327. *See infra* Parts II.E–F.

328. *See, e.g., Vocation of the Business Leader: A Reflection*, PONTIFICAL COUNCIL FOR JUSTICE & PEACE, at 5, available at <http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf> ("Building a productive organisation [sic] is a primary way in which businesspeople can share in the unfolding of the work of creation. When they realize [sic] that they are participating in the work of the Creator through their stewardship of productive organisations [sic], they may begin to realise [sic] the grandeur and awesome responsibility of their vocation.").

329. *See supra* note 225 and accompanying text.

330. In a similar vein, the Old Testament also requires one to live one's whole life according to God's law. The story of King David and his adulterous affair with Bathsheba provides an example. David valiantly fought the philistines and helped unify the Israelites; however, he suffered because of his failings despite his great works. *See 2 Samuel* 11.

331. *See Matthew* 21:12–13; *Mark* 11:15–18; *Luke* 19:45–46; *John* 2:13–17. Biblical scholars differ on exactly why Christ acted in this manner. Some believe he wanted to rid the temple of all commerce, while others focus on the excessive profits of the moneychangers. *See, e.g., Dr. Richard*

those who sold sacrificial animals, was consummately commercial and was also contrary to His teaching—and not simply for its location.³³² Similarly, Christ cautioned His followers of their final judgment, the time of which cannot be known.³³³ Ultimately, some will be taken and others left behind; some will be judged favorably and others condemned.³³⁴ This warning applies not only to religious officials, but also to the master in its relationship with servants in the field or vineyard³³⁵—servants performing two common commercial activities. Thus, to the Christian, one cannot limit one’s beliefs and practices to time in the synagogue or church; instead, one must fulfill those beliefs in works³³⁶ during more mundane, everyday activities. This includes those acting as employers of employees.³³⁷

Nothing suggests that those teachings have a corporate loophole, as in “masters will be judged in how they treat vineyard servants, but only if they employ them directly, rather than through a corporate entity.” To the Christian, God’s Covenant would unquestionably pierce that corporate veil just as certainly as it tore the temple veil.³³⁸

Regardless of whether one subscribes to the specific beliefs of the Hobby Lobby owners, one cannot credibly deny that those beliefs are commonly held,

P. Burcher, *A Bible Study on the Cleansing of the Temple Passages*, OUR REDEEMER LUTHERAN CHURCH, <http://www.orldutheran.com/html/bscleans.html> (last visited Nov. 4, 2013) (noting both theories and advocating that Christ wanted to rid the temple of all commerce). Still, others believe that the real focus was upon the animals sold alongside for sacrifice: as Christ was about to become the ultimate sacrifice for all humanity, the need for animal sacrifice had come to an end. See, e.g., William F. Dankenbring, *What’s All This About the New Covenant*, TRIUMPHPRO.COM, <http://www.triumphpro.com/covenants-of-god.pdf> (last visited Oct. 22, 2013) (“Christ is the fulfillment of the animal sacrifices. All the animal sacrifices pointed to Him, who was our ‘true sin offering’” (citing 2 Corinthians 5:21)).

332. See *supra* note 225. This view stems specifically from the Gospel of Matthew, which quotes Christ—who was quoting *Jeremiah 7:11*—as labeling the money changers and animal sellers as either thieves or robbers, depending upon the translation. Whether He objected to the specific overcharging, or more broadly to the use of commerce, to hide other wickedness is unclear; but, *location* apparently was not the only issue.

333. See *Matthew 24:35–44*.

334. See *Matthew 24:40–41*.

335. See *id.*

336. See *Colossians 3:23* (NIV) (“Whatever you do, work at it with all your heart, as working for the Lord, not for men . . .”). The relevance of “good works” is itself controversial among Christian denominations. Very generally, some believe good works are essential to salvation, while others focus solely on acceptance of Grace as essential. All, however, accept that good works flow naturally from faith. As the Apostle James remarked, “faith without deeds is dead.” *James 2:26* (NIV).

337. See *Colossians 4:1* (NIV) (“Masters, provide your slaves with what is right and fair, because you know that you also have a Master in heaven.”).

338. See *Matthew 27:50–51*. The temple veil acted as a reminder that a sinful man was unworthy of being in the presence of God. See generally *Hebrews 9:2–14* (explaining the sanctity of the tabernacle’s second veil in which only the high priest would enter once a year). How ironic that the government and courts would now use a corporate veil to separate Christians from Christ’s message.

traditional, and clear.³³⁹ In the viewpoint of Hobby Lobby’s owners, they can no more provide—directly or indirectly³⁴⁰—abortion coverage to their employees through their corporation than they can do so themselves, as sole proprietors, or than they can directly perform an abortion on another.³⁴¹ For them, those distinctions do not exist.³⁴²

Putting aside the specific issue of abortion, the more general government argument that divorces religion from public life is also at odds with fundamental Christianity—at least as it is commonly professed. In the eyes of many—including at least three former Supreme Court Justices—that argument, if fully adopted by the courts, *establishes* a religion just as certainly as, for example, the government choosing Methodism as the state church.³⁴³ The majority view, in contrast, is far more restrictive and sharply limits government entanglement with

339. *See generally* United States v. Seeger, 380 U.S. 163, 185 (1965) (emphasizing that “while the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held’”).

340. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). This proposed regulation permits some religious organizations to opt out from the mandate if their insurance provider separately allows employees the required contraceptive coverage. *See id.* at 8463. However, this indirect option is not available to Hobby Lobby.

341. *See* Hobby Lobby Complaint, *supra* note 20, at 1.

342. *See id.*

343. *See* School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963). In his dissent, Justice Stewart stated:

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child’s life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. *And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.*

Id. (Stewart, J., dissenting) (emphasis added). Similarly, Justices Goldberg and Harlan remarked: [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a *brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.* Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Id. at 306 (Goldberg & Harlan, J.J., concurring) (emphasis added); *see also* Patrick Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 499–500 (2004) (recognizing a misunderstanding of religion which has led to suppressive adjudication favoring a secular society).

religion.³⁴⁴ According to the government's arguments, those limitations extend to most persons engaged in commerce.³⁴⁵

A broader view is further illustrative. The *Hobby Lobby* case presents a striking example of government action in conflict with a person's religious beliefs.³⁴⁶ While courts typically decide cases in a manner narrowly tailored to the facts, academics and policymakers might examine the issue in a larger context. For example, § 170 rewards those who report charitable donations.³⁴⁷ Per § 170(f)(8), that reward is generally available only to those who retain a receipt.³⁴⁸ Two religious problems are apparent: (1) the reward rests upon double disclosure—both to the recipient and to the government³⁴⁹—and (2) many people believe giving is its own reward, which is sullied if done other than anonymously.³⁵⁰ Thus, if such people stay true to their beliefs, they pay greater taxes *because* of their beliefs: they may give to charity, but they cannot obtain receipts. More controversial—yet just as apt—are a myriad of government regulations regarding employment, hiring, firing, and operation of the workplace.³⁵¹ An employer might reject a more qualified person, thereby selecting a less qualified candidate, because the government imposed a choice grounded on moral beliefs that protect some classes, genders, races, or ethnicities more than others. Although that decision might advance the moral beliefs of some, it may also be contrary to the moral and religious beliefs of others who, because of the rule, feel compelled to harm another through exclusion. Some might view such a system of laws to be for the common good, while others might see it as wasting talents³⁵² for the sake of worshipping diversity. Indeed, the government warns repeatedly in its briefs of precisely that example, asserting that a victory by petitioners will cast doubt on the application of employment laws to those who assert religious objections.³⁵³ Hence, the contraceptive/abortion facts of the *Hobby Lobby* litigation raise merely one

344. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (explaining the three criteria courts consider when determining if there is an “excessive government entanglement”).

345. DOJ Brief, *supra* note 84, at 2–3, 9–10, 14–16 (asserting a “secular” versus “religious” distinction and suggesting that “secular” “for-profit” activities are nonreligious).

346. See *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012).

347. See I.R.C. § 170 (2006).

348. See *id.* § 170(f)(8) (requiring a receipt for any contribution over \$250).

349. See *id.*

350. *Matthew* 6:1–4 (NIV) (“Be careful not to do your acts of righteousness before men, to be seen by them. If you do, you will have no reward from your Father in heaven. So when you give to the needy, do not announce it with trumpets, as the hypocrites do in the synagogues and on the streets, to be honored by men. I tell you the truth, they have received their reward in full. But when you give to the needy, do not let your left hand know what your right hand is doing, so that your giving may be in secret. Then your Father, who sees what is done in secret, will reward you.”).

351. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2006).

352. *Matthew* 25:14–30; *Luke* 12–28. Talents were a measure of weight or coinage.

353. See DOJ Brief, *supra* note 84, at 15–16 (citing 42 U.S.C. § 2000(e)-1(a) (2006); 42 U.S.C. 2000bb-1(b) (2006); *Corp. of the Presiding Bishop of Church of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987)).

factual example of the government entangling itself with religious beliefs in commerce.

That, however, does not answer the ultimate legal questions regarding the role of morality and religion in commerce.³⁵⁴ Just because many people believe morality, religion, and commerce are necessarily intertwined does not mean that the government must respect those beliefs—let alone any particular subset of such beliefs. Perhaps the government may pick and choose, favoring some belief systems over others. For example, perhaps it must reject those beliefs grounded in religion, while accepting and enforcing those grounded in morality. Others, however, may view “secular humanism,” as well as the CSR, diversity, and environmental movements, as religions themselves.³⁵⁵ Tax lawyers in particular often consider the definition of religion in dealing with §§ 170(b)(1)(A)(i),³⁵⁶ 107,³⁵⁷ 501(h),³⁵⁸ and 7611.³⁵⁹ Typically, a religion involves beliefs in one’s relationship to others and to the cosmos.³⁶⁰ Religious

354. *See supra* Part IV.C.

355. *Cf.*, *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting) (declaring that a compulsory state mandate finding religious education impermissible except when conducted in private is effectively an establishment of a state “religion of secularism”); *id.* at 306 (Goldberg, J., concurring) (noting that a devotion to religious neutrality can lead to hostility towards the nonsecular); Bron Taylor, *Earth and Nature-Based Spirituality (Part 1): From Deep Ecology to Radical Environmentalism*, 30 RELIGION 175, 175 (2001) (“Earth and nature-based spirituality is proliferating globally.”); Spencer H. Harrison et al., *Organizational Sacralization and Sacrilege*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 225, 227 (2009) (discussing how nonreligious organizations actively import theistic and non-theistic principles); Lucas Johnston, *The Religious Dimensions of Sustainability: Institutional Religions, Civil Society and International Politics Since the Turn of the Twentieth Century*, 4 RELIGION COMPASS 176, 177, 184 (2010) (referring to the religious dimension of sustainability discourse); Blake E. Ashforth & Deepa Vaidyanath, *Work Organizations as Secular Religions*, 11 J. MGT. INQUIRY 359, 365 (2002) (“A secular religion, as noted, provides a system of beliefs and practices tied to fundamental questions about meaning and one’s role in the world. As such, a secular religion—like any religion—provides a basis for valuing and therefore for morality and behavior. Secular religions are thus powerful things.”).

356. *See* I.R.C. § 170(b)(1)(A)(1) (2006) (treating “churches” as favored charities for charitable deduction limitations and, through a cross-reference from section 509(a), as public charities).

357. *See id.* § 107. This section provides:

In the case of a minister of the gospel, gross income does not include—

- (1) the rental value of a home furnished to him as part of his compensation; or
- (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

Id.

358. *See id.* § 501(h) (excluding “churches” and related organizations from the elective lobbying rules).

359. *See id.* § 7611 (providing favorable church audit rules).

360. *See* *United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (dealing with conscientious objectors to war and holding that an orthodox belief in a Supreme Being was not required for one’s belief to qualify as religious).

organizations involve organized groups supporting religious beliefs,³⁶¹ which are doctrines, symbols, books or other documents, leaders, members, fervor, and general thoughts of how their beliefs are superior to those of others—and thus some level of condemnation of nonbelievers.³⁶²

Indeed, one might easily wonder why openly professed religious beliefs are *religious*—and thus subject to one level of protection *and* restriction, *as in elimination from commerce*—while the mere *moral* beliefs of others receive different protections *and* restrictions.³⁶³ This is particularly troubling when the most significant distinction is that some people self-label their beliefs as *religious*, while others self-label their beliefs as *moral* and nonreligious.³⁶⁴ Certainly form often controls over substance,³⁶⁵ however, a system in which mere form and labels affect constitutional liberties is at least suspect. If formalities and labels ultimately have legal and constitutional significance, lawyers need to understand that point so they may fully advise clients.

In summary, the question regarding whether religion has a broad place in commerce remains unanswered; however, the majority appears to believe that it does, at least when asserted by individuals.³⁶⁶ Thus, the question then becomes

361. See generally I.R.S. Priv. Ltr. Rul. 200712046 (Mar. 23, 2007) (explaining alternative definitions of a “church” and distinguishing one, in part, from an organization which is merely religious).

362. See generally *id.* (citing *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 n.2 (1980)) (explaining the IRS’s fourteen-part test for determining whether a religious organization qualifies as a church).

363. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 n.12 (3d. Cir. 1981) (citing *Malnak v. Yogi*, 592 F.2d 197, 207 (3d. Cir. 1979) (Adams, J., concurring); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969); *Alim v. Bryne*, 521 F. Supp. 1039 (D. N.J. 1980); *Womens Servs., P.C. v. Thone*, 483 F. Supp. 1022, 1034 (D. Neb. 1979), *vacated by* 452 U.S. 911 (1981); *Remmers v. Brewer*, 361 F. Supp. 537, 540 (S.D. Iowa 1973)) (summarizing many decisions that treat non-theist views as “religious” for purposes of extending First Amendment protections). In *Africa*, the court adopted a three-part test for determining whether a set of ideas constituted a religion within the meaning of the First Amendment: (1) whether the beliefs address fundamental questions of the human condition; (2) whether they are comprehensive; and (3) whether they are manifested in external forms. *Id.* at 1032 (citing *Malnak*, 592 F.2d at 207–10); see also *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (holding that “The Gay Imperative” was not “exclusively” or even “substantially” religious, but nevertheless finding it had at least some religious aspects); I.R.S. IRM 4.76.7.1(2) (adopting this distinction, at least in part, in that it defines a church as an entity claiming to be a church).

364. See generally *Africa*, 662 F.2d at 1032 n.12 (highlighting how courts can view non-theist views as religious).

365. See *Gregory v. Helvering*, 293 U.S. 465, 469 (1932) (citing *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873); *Superior Oil Co. v. Mississippi ex rel. Knox Att’y Gen.*, 280 U.S. 390, 395–96 (1930); *Jones v. Helvering*, 71 F.2d 214, 217 (1934) (standing for the proposition that form controls over substances, except when it does not)). The *Gregory* Court stated:

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted

But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.

Id.

366. See *supra* Part IV.C.

whether a corporation may assert the beliefs of its owners, or whether it may have beliefs of its own.

D. Morality and Corporations

Although the government couches its position with a “secular” label, the proposition essentially rests on the notion that corporations are “amoral.”³⁶⁷ For example, a table or a plastic bag has no morality of its own. Likewise, a corporation is *merely* a legal fiction—an entity in many, but not all, respects separate from its owners.³⁶⁸ This notion exists in corporate law—at least for contract and tort purposes—as well as in the separate entity assumption of accounting and, thus, has great significance.³⁶⁹ Hence, one might easily be seduced into believing that a corporation is amoral—as it is nonhuman and nonliving—if one *fully* respects the legal and accounting fictions.

Yet, recent history suggests otherwise. Three movements over the past few decades suggest a broad view of business corporations, describing them as having at least moral rights and responsibilities. Two of the movements are top-down: the CSR movement attempts to impose moral responsibilities on corporations, as does the social justice movement.³⁷⁰ The other movement is bottom-up: the social entrepreneurship movement recognizes the moral rights of for-profit enterprises.³⁷¹

Of particular note is that the government repeatedly describes the litigating corporations as “secular.”³⁷² This terminology arguably assumes the conclusion regarding whether business corporations have moral responsibilities and rights, or even religious responsibilities and rights—assuming one can distinguish morality from religion. Unfortunately, most of the court opinions have adopted the government’s denomination of the corporations as secular and for-profit.³⁷³ As noted above, the *Hobby Lobby* petitioners all assert traditional Christian beliefs that they must operate their businesses consistent with religious teachings; hence, in their minds, the entities are not secular and are not primarily *for-profit*.³⁷⁴

367. See DOJ Brief, *supra* note 84, at 2–3.

368. See 18 AM. JUR. 2D *Corporations* § 44 (2004) (citations omitted).

369. See NIKOLAI ET AL., *supra* note 180.

370. See discussion *infra* Part IV.D.1.

371. See discussion *infra* Part IV.D.2.

372. DOJ Brief, *supra* note 84, at 3, 15–16.

373. See *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1112 (D. Colo. Feb. 27, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 838238, at *19 (W.D. Pa. 2013); *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1285, 1288, 1296 (W.D. Okla. 2012). The Seventh Circuit used the term “secular” once on its own and once in quoting the government. *Grote v. Sebelius*, 708 F.3d 850, 853–54 (7th Cir. 2013). The dissent used the term three times. See *id.* at 856–57 (Rovner, J., dissenting). The court used the term “for-profit” twice, excluding quotations. See *id.* at 853–54 (majority opinion). The dissent used the term four times. *Id.* at 856–57, 859–60 (Rovner, J., dissenting).

374. *Hobby Lobby* Complaint, *supra* note 20, at 2.

The secular/religious dichotomy thus presents a difficult line for courts to draw—or at least it should be difficult. As many scholars have noted, a variety of nominally secular social movements are essentially religious: “Earth and nature-based spirituality is proliferating globally . . . [A]lthough participants in countercultural movements often eschew the label religion, these are religious movements, in which these persons find ultimate meaning and transformative power in nature.”³⁷⁵

1. Corporate Social Responsibility Movement (CSR)

Corporate social responsibility movements are common. Many entities claim to be good “corporate citizens.”³⁷⁶ They often advertise themselves as being eco-friendly, sustainable, family-friendly, diverse, and in support of the current *cause célèbre*.³⁷⁷ Many entities have substantial philanthropic foundations that, while nominally distinct entities, exist to fulfill the “charitable obligations” of the corporate founder.³⁷⁸ A cynic might suggest that such actions are mere marketing ploys with no underlying moral reality.³⁷⁹ Others, however, suggest

375. Taylor, *supra* note 355, at 1.

376. *CR Magazine* annually lists the “100 Best Corporate Citizens,” as noted in *Forbes*. Jacquelyn Smith, *The 100 Best Corporate Citizens*, *FORBES* (Apr. 18, 2012), <http://www.forbes.com/sites/jacquelynsmith/2014/04/18/the-100-best-corporate-citizens/>. Listed number one, Bristol-Myers told *Forbes*: “Our top ranking on this list and similar lists year after year recognizes the positive impact our company’s commitments to promoting economic, social and environmental sustainability are having on our patients and customers, our employees, our shareholders, our global communities, and our environment.” *Id.* The company lists this, and similar rankings, prominently on its website. *Achievements*, BRISTOL-MEYERS SQUIBB, <http://www.bms.com/responsibility/Pages/achievements.aspx> (last visited Sept. 24, 2013). The company also emphasizes its responsibility culture on its website, consistently using jargon such as “sustainability,” doing the “right thing,” being a “good neighbor,” “public trust,” “personal integrity,” “values,” and “ethical business practices.” *Responsibility Message from the CEO*, BRISTOL-MEYERS SQUIBB, <http://www.bms.com/responsibility/Pages/responsibility-message-from-CEO.aspx> (last visited Sept. 24, 2013). Further, the company maintains the Bristol-Myers Squibb Foundation, which it presents as a legitimate philanthropic institution. *How to Apply for Bristol-Myers Squibb Foundation Grants*, BRISTOL-MEYERS SQUIBB, http://www.bms.com/foundation/Pages/bristol_myers_squibb_foundation_grants.aspx (last visited Sept. 24, 2013). The foundation website, however, closely connects to the commercial website, raising questions about its legitimacy.

377. *See, e.g., Responsibility Message from the CEO*, BRISTOL-MEYERS SQUIBB, <http://www.bms.com/responsibility/Pages/responsibility-message-from-CEO.aspx> (last visited Sept. 24, 2013) (exemplifying the company’s advertising of these values).

378. *See* Steven J. Willis, *People in Glass Houses*, 113 *TAX NOTES* 477, 477 (2006) (arguing that the Bank of America Charitable Foundation “lacks a valid charitable purpose and thus should be denied exempt status . . .”).

379. *See* Harrison, *supra* note 355, at 237. The article explained:

Part of the reason for willfully sacrilegious acts that are ostensibly consistent with business goals is that organizations may enact covenants and conventions strictly for impression management purposes, as a cynical means of gaining legitimacy. Legitimacy fosters trust among stakeholders and induces them to relax their vigilance thereby providing a veil of discretion that the organization can exploit. Perhaps more commonly,

that corporations owe real duties to be responsible citizens.³⁸⁰ According to the Council on Foundations:

Corporate citizenship is now defined by what a company “does,” not what it “gives.” A 2010 survey by the Edelman public relations firm shows that 69 percent of consumers globally now believe corporations are in a uniquely powerful position to make a positive impact on good causes. The figure reaches 80 percent in the United States. *Two-thirds (64 percent) believe it is no longer enough for corporations to give money; they must integrate good causes into their everyday business.*³⁸¹

Thus, while many people may cynically believe that corporate support of “good causes” is purely the result of profit-seeking motives, others appear to believe that such support has elements of reality—as opposed to public relations³⁸²—suggesting that imposing a moral code is relevant to corporations.

Examples of public pressure on corporate entities to behave in ways viewed by some groups as “moral” are common. In 2012, Chick-fil-A, Inc.—a chain of fast food chicken restaurants—became notoriously associated with its owners’ beliefs, viewed by many as homophobic and immoral.³⁸³ The association between his views and Chick-fil-A affected not only the owners, but also the corporation, tarnishing it in the eyes of many and brandishing it in the eyes of others.³⁸⁴ Similarly, Apple, Inc. has faced widespread criticism for at least indirectly using child labor—contrary to the moral standards of many potential

organizations may actually aspire to the values they espouse, but be tempted by more expedient routes to their business goals.

Id. (citations omitted).

380. *Increasing Impact, Enhancing Value: A Practitioner’s Guide to Leading Corporate Philanthropy*, COUNCIL ON FOUNDATIONS 8, <http://www.cof.org/files/Bamboo/whoweserve/corporate/documents/corporateguide.pdf> (last visited Sept. 24, 2013) (citing EDELMAN, CITIZENS ENGAGE! EDELMAN “GOODPURPOSE” GLOBAL STUDY 22 (2010), available at [ppqty.com/GoodPurpose2010globalPPT_WEBversion%20\(1\).pdf](http://ppqty.com/GoodPurpose2010globalPPT_WEBversion%20(1).pdf)).

381. *Id.*

382. *See id.*

383. *See generally* Kim Severson, *Chick-fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, at A7 (July 25, 2012), available at http://www.nytimes.com/2012/07/26/us/gay-rights-uproar-over-chick-fil-a-widens.html?_r=0 (explaining the public’s reaction to the president of the company’s remarks on gay marriage).

384. *See* Chris Good, *Chick-fil-A CEO and Gay Activist Are Now Friends*, ABC NEWS (Jan 28, 2013, 2:53 PM), <http://abcnews.go.com/blogs/politics/2013/01/chick-fil-a-ceo-and-gay-activist-are-now-friends/>. According to this report, the company responded to the intense public pressure:

For years, Chick-fil-A donated to socially conservative groups, drawing the ire of gay-rights activists. In July, Equality Matters examined tax forms and found that in 2010 the restaurant chain had donated over \$1.9 million to “anti-gay causes.” *Id.* In September, the restaurant chain pledged to stop donating to anti-gay groups. Windmeyer says those donations stopped in 2011.”

Id. (citations omitted).

consumers.³⁸⁵ The two examples mentioned above present different underlying issues and effects. Chick-fil-A is a closely held entity that is easily associated with its owners' beliefs.³⁸⁶ In contrast, Apple has millions of distinct shareholders and, thus, cannot be so easily associated with the beliefs of its investors; instead, its moral responsibility, if any, more plausibly exists because the corporation itself is more than an amoral entity.³⁸⁷ With Chick-fil-A, the public and the government³⁸⁸ can easily pierce the legal fiction and thus tie the entity's beliefs to those of its owners.³⁸⁹ In contrast, with Apple, an imposition of morality into its corporate responsibilities results not from piercing the veil, but rather from recognition of corporate morality.³⁹⁰

Harrison, Ashforth, and Corley discuss multiple examples of how corporations—both traditional nonprofit as well as for-profit—have “sacrilized” the secular.³⁹¹ Many examples provided by the authors involve subsequent violations of what was promoted as *sacred*, as well as the resulting consequences. The authors emphasize a situation involving Jet Blue Corporation, which professed to “bring the humanity back to air travel.”³⁹² Yet, when Jet Blue stranded hundreds of passengers in planes for many hours on the runway, customers and analysts reacted as if the company had committed a sacrilege.³⁹³ The authors continue with a fascinating study of how society has turned the secular into the sacred—and, all too often, *vice versa*.³⁹⁴

CSR theorists and supporters generally appear to have “moral,” rather than “religious,” motives; hence, the application of morality to corporations does not

385. See Juliette Garside, *Child Labour Uncovered in Apple's Supply Chain*, THE GUARDIAN (Jan. 25, 2013, 2:22 PM), <http://www.guardian.co.uk/technology/2013/jan/25/apple-child-labour-supply>.

386. See generally Severson, *supra* note 383 (explaining that Chick-fil-A is owned by a “Baptist family”).

387. See, e.g., Andrew Winston, *Apple's Greatness, and Its Shame*, HARV. BUS. REV. BLOG NETWORK (Jan. 31, 2012, 11:21 AM) (indicating that Apple has a moral responsibility to improve working conditions).

388. At least one Chicago alderman attempted to use his power as a government official to block a restaurant because of the shareholder's expressed beliefs. See Hal Dardick, *Alderman Flip-Flops Again on Chick-fil-A*, CHI. TRIB. (Oct. 19, 2012), http://articles.chicagotribune.com/2012-10-19/news/chi-alderman-flipflops-again-on-chickfila-20121019_1_block-chick-fil-a-gay-marriage-dan-cathy.

389. See Severson, *supra* note 383 (detailing how the public has related the president of the company's beliefs with the company itself).

390. See Winston, *supra* note 387 (arguing that because Apple and other companies have many of the same rights as humans, they should be required to share some of the moral responsibility).

391. See generally Harrison, *supra* note 355, at 226–33 (citations omitted) (discussing examples of corporations whose actions have been perceived by consumers as violating a sacred ideal).

392. See *id.* at 233.

393. See *id.* at 226.

394. See generally *id.* at 228–48 (discussing a study of the process of sacralization).

necessarily raise religious issues, let alone corporate religious rights.³⁹⁵ Nevertheless, the moral/religious distinction is arguably a distinction without a difference: religion fundamentally concerns morality.³⁹⁶ At the very least, the widespread CSR movement casts doubt on the government's *Hobby Lobby* arguments to the extent that those arguments stem from the viewpoint of corporations as amoral entities.³⁹⁷

2. *Social Entrepreneurship Movement*

The social entrepreneurship movement began in the 1980s, as many traditionally nonprofit entities sought revenue from traditionally commercial activities.³⁹⁸ Sometimes, the concept is known as “philanthrocapitalism.”³⁹⁹ As one author explained, a social entrepreneur is “someone who works in an entrepreneurial manner, but for public or social benefit, rather than to make money.”⁴⁰⁰

The social entrepreneur movement largely centers on two relatively new entities: L3Cs and B corporations.⁴⁰¹ Each entity limits profits, follows a list of “socially responsible” rules, and aims to create public benefit.⁴⁰² At least one entity describes its “social conscience” and claims to be “*the for-profit with a nonprofit soul*.”⁴⁰³

Two points are immediately evident. First, the movement rests on the notion that the process of earning profits commercially can serve a moral purpose. Whatever *public benefit*, *social responsibility*, and *social conscience* might mean, they seem self-evidently based on someone's concept of morality. An extension of this notion—which was at issue in *Hobby Lobby*—is the implied assumption that other entities somehow lack a social conscience or soul.

This raises the second point: the distinction between a “social entrepreneur” and a “faith based company”—as Mardel labels itself—is, at best, thin.⁴⁰⁴ As explained earlier, a fundamental tenant of Christianity requires one to live one's

395. *See id.* at 227 (citations omitted) (theorizing that a majority of business sacrificing is nontheistic and “quasi-religious”).

396. *See supra* Part IV.C.

397. *See* DOJ Brief, *supra* note 84, at 2–3.

398. *See* Jaclyn Cherry, *Charitable Organizations and Commercial Activity: A New Era—Will the Social Entrepreneurship Movement Force Change?*, 5 J. BUS. ENTREPRENEURSHIP & L. 345, 348 (2012).

399. *See* MICHAEL EDWARDS, JUST ANOTHER EMPEROR? THE MYTHS AND REALITIES OF PHILANTHROCAPITALISM 7 (2008).

400. Cherry, *supra* note 398, at 348.

401. *See id.* at 347.

402. *See id.* at 348–49 (citing EDWARDS, *supra* note 399, at 17).

403. *Our Mission*, INTERSECTOR PARTNERS L3C, <http://www.intersectorl3c.com/mission.html> (last visited Oct. 22, 2013).

404. *See Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012) (describing Mardel as a faith based company).

whole life—including one’s commercial endeavors—for the glory of God.⁴⁰⁵ Also, whatever the guiding rules and goals are for the particular L3C or B corporation, they are unlikely to fundamentally differ from those of traditional religions—other than, of course, the words used. The social entrepreneurship movement works for “social good,” while religion tends to work for the glory of a Supreme Being.

a. Low Profit Limited Liability Companies (L3Cs)

Vermont was the first⁴⁰⁶ of nine states to enact an L3C statute.⁴⁰⁷ L3C entities “signal to foundations and donor directed funds that entities formed under this provision intend to conduct their activities in a way that would qualify as program related investments.”⁴⁰⁸ These program related investments (PRIs) are relevant for private foundations’ donor advised funds.⁴⁰⁹

405. See Luke 16:14.

406. *Low-Profit Limited Liability Company*, VT. SEC’Y OF STATE: CORPS. DIV., <http://www.sec.state.vt.us/corps/dobiz/l3c/l3c.htm> (last visited Sept. 24, 2013).

407. See 805 ILL. COMP. STAT. 180/1-26 (2012); LA. REV. STAT. ANN. § 12:1302 (2012); ME. REV. STAT. tit. 31, § 1611 (2012); MICH. COMP. LAWS ANN. § 450.4102 (West 2013); N.C. GEN. STAT. § 57C-2-01 (2011); R.I. GEN. LAWS § 7-16-76 (Supp. 2012); UTAH CODE ANN. § 48-3a-1302 (Supp. 2013); VT. STAT. ANN. tit. 11, § 3001 (2010); WYO. STAT. ANN. § 17-29-102 (2013).

408. *Low-Profit Limited Liability Company*, *supra* note 406. “Program related investments” is a concept relevant under §§ 4943(f)(5) and 509(d) for “Type III supporting organizations.” See I.R.C. §§ 4943(f)(5) & 509(f) (2006). The term appears twice in the Internal Revenue Code at § 4944(c) (relating to private foundations) and in § 501(n)(4)(A) (relating to charitable risk pools). See *id.* §§ 4944(c) & 501(n)(4)(A). The term also appears in the Department of the Treasury regulations. See Treas. Reg. § 53.493-10(b) (2013).

409. One could write a dissertation about the selfish motives inherent in *all* private foundations and donor advised funds. Private foundations, defined in Internal Revenue Code § 509, are subject to many tax disadvantages. See I.R.C. § 509(a). These include excise taxes under §§ 4940 through 4945, lower contribution limitations under § 170(b)(1)(B), and lower contribution amounts under § 170(b)(1)(E). See *id.* §§ 4940–45, 170(b)(1)(B), (E). One would need to look very hard to find any foundations or funds that accomplish anything either not already accomplished, or which could not easily be accomplished, by public charities. But, such entities do not exist primarily to accomplish their stated goals, for if they did, the donors would give the money away to someone who would accomplish those goals. See generally Ruth Masterson, *The Best of Both Worlds: Using Private Foundations and Donor Advised Funds*, ASS’N OF SMALL FOUNDS. 4 (2010), <http://www.fidelitycharitable.org/docs/Using-Private-Foundations-and-Donor-Advised-Funds.pdf> (discussing how private foundations and donor advised funds can be utilized effectively for tax purposes). Instead, private foundation donors create their foundations and suffer the many adverse effects for one reason: they get to control the money after they donate it. See *id.* at 4, 7–8. Donor advised funds exist for *even more* cynical reasons. See, e.g., *id.* at 9 (discussing how donor advised funds offer tax-deductible donations with less paperwork). Because private foundation status is intricate and subject to many pitfalls, many “public charities” accept contributions for donor funds that would otherwise be private foundations. See generally *id.* at 4, 9 (discussing the types of public charities that will accept donor funds and articulating that funds could also be used to establish a private foundation). Further—with the consent of Congress—they permit donors to effectively control them. Essentially, the funds amount to a privatization of the myriad private foundation excise taxes. See *id.* §§ 4940–45. The creators of L3Cs and B corporations often emphasize their “social conscience” and “soul.” After teaching charitable tax law for thirty-two

The Wyoming statute—typical of others—limits the entity to a charitable purpose under § 170(c)(2)(B) of the Internal Revenue Code and forbids lobbying and political activity.⁴¹⁰ A general business corporation could easily satisfy either of these requirements with an amendment to its articles of incorporation.⁴¹¹ Thus, these standards serve little more than a cosmetic or bureaucratic purpose: they help identify entities that meet the standards, but they do not otherwise have any direct legal significance. An additional standard under the statute provides that profits will not be a “significant” purpose, but provides no consequence, let alone a definition, of either *profits* or *significant*.⁴¹²

years, this Author can find little purpose for a private foundation or a donor advised fund other than to serve the “glory” of the individual creator. In contrast, Hobby Lobby exists—at least according to its complaint—to serve the “glory” of “God.” *Hobby Lobby* Complaint, *supra* note 20, at 5–6.

410. WYO. STAT. ANN. § 17-29-102 (2013). The entire Wyoming statute reads:

(ix) “Low profit limited liability company” means a limited liability company that has set forth in its articles of organization a business purpose that satisfies, and which limited liability company is at all times operated to satisfy, each of the following requirements:

(A) The entity significantly furthers the accomplishment of one (1) or more charitable or educational purposes within the meaning of section 170(c)(2)(B) of the Internal Revenue Code and would not have been formed but for the entity’s relationship to the accomplishment of charitable or educational purposes;

(B) No significant purpose of the entity is the production of income or the appreciation of property provided, however, that the fact that an entity produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property; and

(C) No purpose of the entity is to accomplish one (1) or more political or legislative purposes within the meaning of section 170(c)(2)(D) of the Internal Revenue Code.

Id.

Oddly, the statute—which is verbatim to the statutes in all other states—limits the purpose to a *charitable* or *educational* purpose under § 170(c)(2)(B) of the Internal Revenue Code. *See* I.R.C. § 170(c)(2)(B). First, § 501(c)(3) lists the purposes for federal tax exemption, while § 170 lists the same purposes for charitable deductions. Why the drafters chose the reference to § 170 rather than § 501, under which most substantive law exists, is unclear. Also, §§ 501 and 170 list multiple exempt purposes, of which “charitable” is a catchall category that includes the others. *See id.* §§ 170 & 501. *Educational*, however, is *not* a catchall; thus, the selection of these two purposes is strange. Additionally, *furthering* an exempt purpose differs from *accomplishing* an exempt purpose under federal tax law. Apparently, the drafters confused the two concepts. Next, the act refers to the *production of income*, which is a tax term under Internal Revenue Code § 212—connoting what are relatively passive activities, as opposed to *trade or business* activities under § 162—which connote more activity—or for-profit activities under § 165. *See id.* §§ 162, 165, 212. While the use of federal tax terminology is not controlling for a state statute, the many other references to tax terms and provisions suggests some general—but apparently incomplete—knowledge of tax law on the part of the drafters. For other criticism of L3C statutes, see J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2012).

411. *See generally* E.G.K., Annotation, *Power of Corporation to Amend Its Charter in Respect of Character or Kind of Business*, 111 A.L.R. 1525 (1937) (discussing the process through which a corporation can amend its articles of incorporation).

412. *See* WYO. STAT. ANN. § 17-29-102.

Overall, the nine L3C statutes appear well-intentioned but superfluous because nothing they allow adds to that which would already be permissible under the respective state's general business corporation act. Further, to the extent that the statutes benefit donor advised funds and private foundations, they suffer from the stigma inherent in such entities.⁴¹³ Therefore, the singular advantage is cosmetic: organizing under an L3C statute announces the "social conscience" of the entity to the world.⁴¹⁴ Whether the goal of such an announcement is to attract investors or customers is undeterminable. One thing, however, is clear: the spread of L3C entities demonstrates an expanding societal view that business corporations and morality are compatible.⁴¹⁵

b. Benefit Corporations (B Corporations)

Benefit corporations involve a similar, but separate, movement in eleven states: California,⁴¹⁶ Illinois,⁴¹⁷ Louisiana,⁴¹⁸ Maryland,⁴¹⁹ Massachusetts,⁴²⁰ New Jersey,⁴²¹ New York,⁴²² Pennsylvania,⁴²³ South Carolina,⁴²⁴ Vermont,⁴²⁵ and Virginia.⁴²⁶ Few distinctions exist between an L3C and a B corporation, although B corporation statutes are uniformly longer than L3C statutes. A benefit corporation is a *corporation*—taxed as either an S or a C corporation⁴²⁷—and an L3C is a limited liability *company*—*potentially* taxed as a partnership.⁴²⁸ The typical B corporation statute provides for director protection from shareholder actions if the director acts in good faith and consistently with the articles of incorporation or with a third-party certification.⁴²⁹ Another distinction—of uncertain importance—may be found in the typical benefit corporation provision for independent third-party certification.

413. *See supra* note 409.

414. *See supra* notes 401–03 and accompanying text.

415. *See supra* Part IV.D.2.

416. CAL. CORP. CODE § 14610 (West 2013).

417. 805 ILL. COMP. STAT. 40/1 (2013).

418. LA. REV. STAT. ANN. § 12:101 (2012).

419. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (Supp. 2012).

420. MASS. GEN. LAWS ch. 156E § 1 (2013).

421. N.J. STAT. ANN. § 14A:18-1 (2013).

422. N.Y. BUS. CORP. § 1701 (McKinney 2013).

423. 15 PA. CONS. STAT. § 3301 (2012).

424. S.C. CODE ANN. § 33-38-110 (Supp. 2012).

425. VT. STAT. ANN. tit. 11A, § 21.01 (2012).

426. VA. CODE ANN. § 13.1-782 (2013).

427. *Compare supra* notes 416–26, with *supra* note 201.

428. *See Benefit Corp. Quick FAQ's*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/quick-faqs> (last visited Aug. 29, 2013).

429. *See, e.g.*, VA. CODE ANN. § 13.1-789 (2011) ("An officer of a benefit corporation shall have no liability for actions taken that the officer believes, in his good faith business judgment, are consistent with (i) the general public benefit or specific public benefit specified in the articles of incorporation or bylaws or otherwise adopted by the board of directors and (ii) the requirements of any third-party standard then in effect for the corporation.").

Certification provides the rough equivalent of an audit such that investors can rely on the B corporation's validity.⁴³⁰ Thus, donor advised funds and private foundations may make program-related investments more securely with or through the entity.⁴³¹

Overall, however, the benefit corporation statutes provide little substance not already available to traditional business corporations. In states that lack a "benefit" statute, a corporation should be able to amend its articles to require or limit whatever benefit the statutes require or limit. Entities with such amendments could then seek the same independent third-party compliance audit. Possibly, directors may find some solace in the clear statutory limitation of director liability, which may not be as "guaranteed"⁴³² through general business corporation article amendments. Hence, as with L3C statutes, the movement appears largely cosmetic.⁴³³ Once again, however, that does not mean benefit statutes are of no consequence, as they further demonstrate the recognized role of morality in corporate commercial operations.⁴³⁴

c. Sustainable Business Corporations

In 2011, Hawaii enacted a provision on sustainable business corporations in chapter 420D:

This chapter authorizes a designation and code of conduct for a business corporation to offer entrepreneurs and investors the option to build and invest in businesses that operate in a socially and environmentally sustainable manner. Enforcement of those responsibilities comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this chapter.⁴³⁵

This act appears to further remove the profit goal from business corporations and substitute the goals of "social sustainability" and "environmentalism" that appear to be morally based.⁴³⁶ Although Hawaii is the only state that recognizes "sustainable" businesses as a distinct form, the sustainability movement is

430. *See Selecting a Third Party Standard*, BENEFIT CORP. INFO. CTR., <http://www.benefitcorp.net/selecting-a-third-party-standard/overview> (last visited Sept. 12, 2013) (listing of some of the third party standards).

431. *See, e.g., id.* (discussing the selection of a third-party standard and the benefits of having one).

432. However clearly one might limit director liability for good faith article-consistent actions, one can imagine director wariness. Undoubtedly, a statute provides greater assurance than an opinion of counsel to the effect that an article amendment would accomplish the same thing.

433. *See supra* Part IV.D.2.a.

434. *See supra* Part IV.C–D.

435. HAW. REV. STAT. § 420D-1 (2013).

436. *See id.*

widespread.⁴³⁷ Universities offer degrees in “sustainability,”⁴³⁸ which contain elements remarkably close to religious fervor—albeit without the label of religion. For example, one organization linked to the University of Florida sustainability degree program states its vision as “[a] world where human activities live in harmony with the earth’s carrying capacity.”⁴³⁹

Through core literature, sustainability programs promote changes in legal structures to include what appear to be morally based goals.⁴⁴⁰ The manner in which states, universities, and corporations promote “sustainability” is consistent with what some authors describe as *sacrilizing* the secular.⁴⁴¹ The movement’s existence and manner of operation demonstrate two points. First, the movement has increased the spread of moral views in the commercial world and, thus, further debunked the notion of corporations as amoral institutions.⁴⁴² Second, the movement appears to be a substitute for religion; as Harrison explained, such practices are evidence of man’s continuing search for meaning and

437. For example, the American Sustainable Business Council is an organization dedicated to advancing a sustainable business agenda; its website claims that its council has a network of over sixty business associations across the United States. *American Sustainable Business Council Mission*, AM. SUSTAINABLE BUS. COUNCIL, <http://asbcouncil.org/mission-history> (last visited Sept. 11, 2013).

438. See, e.g., *Bachelor of Arts in Sustainability Studies*, UNIV. OF FLA., <http://sustainability.clas.ufl.edu/major.html> (last updated Jan. 26, 2010) (detailing courses required for the sustainability degree).

439. See *About SustainableBusiness.com: We Help Green Businesses Grow*, SUSTAINABLEBUSINESS.COM, <http://www.sustainablebusiness.com/index.cfm/go/info.aboutus> (last visited Sept. 12, 2013). The organization even uses a green font for its mission statement, which is reminiscent of the various colors used in the seasons of Christianity.

440. World Comm’n on Environment and Development, Rep. on its 96th Sess., U.N. Doc. A/RES/42/187, Ch. 12, §§ 4.2 & 5 (Dec. 11, 1987). The report stated:

Industry is on the leading edge of the interface between people and the environment. It is perhaps the main instrument of change that affects the environmental resource bases of development, both positively and negatively. Both industry and government, therefore, stand to benefit from working together more closely. . . . Today, legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.

Id.

441. Harrison, *supra* note 354, at 229 n.3, 245 (providing examples of preservation of ecosystems and sacrilizing environmental preservation). See generally Taylor, *supra* note 355 (describing the sacrilization process of the environmental movement).

442. See, e.g., *American Sustainable Business Council Mission*, AM. SUSTAINABLE BUS. COUNCIL, <http://asbcouncil.org/mission-history> (last visited Sept. 24, 2013) (stating the mission of the sustainable business movement and demonstrating its support for the injection of moral views).

justification.⁴⁴³ Or, as Justice Stewart suggested, these movements are arguably religions themselves, just without the name.⁴⁴⁴

The growing sustainability movement is arguably relevant to the *Hobby Lobby* litigation because the case does not include an establishment of religion claim.⁴⁴⁵ According to petitioners in other current cases,⁴⁴⁶ the government effectively establishes a religion when it favors one religious view over another: those who agree with promoting contraception and abortion, rather than those who do not.⁴⁴⁷ Movements for sustainability, social justice, corporate responsibility, and social entrepreneurship—all of which have garnered substantial government complicity—illustrate how the government frequently promotes morality, and thus arguably religion, in disguise.⁴⁴⁸ Whether government involvement in these movements actually violates the First Amendment is unclear; however, the widespread government involvement, coupled with the overwhelming government penalty imposed on Hobby Lobby for asserting its owners' longstanding religious convictions, should give courts pause. Fundamentally, the *Hobby Lobby* litigants are both too religious and not religious enough. They are insufficiently religious to claim government-granted exemptions from providing abortion coverage; yet, they are too religious—in the eyes of the government—to be consistent with a for-profit business.⁴⁴⁹ The fact that so many other pseudo-religious movements receive government support while overtly religious movements suffer oppressive taxation ought to be at least disconcerting to the courts.

443. See Harrison, *supra* note 355, at 225, 243 (citing James J. Preston, *Purification*, in THE ENCYCLOPEDIA OF RELIGION 7503, 7507 (Lindsay Jones ed., 2005); T.C. O'Brien, *Conversion*, in ENCYCLOPEDIA OF RELIGION 911, 911 (P.K. Meagher et al. 1979)) (likening the corporate responses to sacrilege to religious responses).

444. See *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

445. Although the *Hobby Lobby* complaint does not assert an establishment of religion issue, at least one amici does. See *Hobby Lobby* Complaint, *supra* note 20; Brief for Association of Gospel Rescue Mission et al. as Amici Curiae Supporting Appellants at 29, *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013).

446. See, e.g., Complaint at 16–17, *Triune Health Grp. v. United States*, No. 12-6756 (N.D. Ill. Aug. 22, 2012) (arguing that the federal mandate requiring that group health plans include coverage for contraceptives discriminates among religious groups by providing exemptions to some, but not others) [hereinafter *Triune* Complaint]; Complaint at 28–29, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (asserting that the mandate discriminates among religions) [hereinafter *Tyndale* Complaint]; Verified Complaint at 23, *Autocam Corp. v. Sebelius*, No. 12-cv-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012) (arguing the mandate under the Patient Protection and Affordable Care Act violated the Establishment Clause of the First Amendment) [hereinafter *Autocam* Verified Complaint]; *Grote* Complaint, *supra* note 39, at 25 (stating that the government mandate violated the Establishment Clause of the First Amendment).

447. See, e.g., *Grote* Complaint, *supra* note 39, at 25 (“The [m]andate adopts a particular theological view of what is acceptable moral complicity in provision of abortifacient, contraceptive and sterilization coverage and imposes it upon all religionists who must either conform their consciences or suffer penalty.”).

448. See *supra* Part IV.C.

449. See DOJ Brief, *supra* note 84, at 2–3 (labeling corporations as “secular”).

d. Faith Based Companies (FBCs)

Mardel—as well as some other petitioners—describes itself as a “faith based company.”⁴⁵⁰ Similarly, Tyndale emphasizes various corporate codes, adopted by its directors, which provide a moral and religious structure to the company.⁴⁵¹ Various websites and organizations exist to promote or connect similar entities.⁴⁵² Yet, no state explicitly grants a faith based status.⁴⁵³

i. State Granted Religious Status

Some states explicitly grant particular corporate status to religious organizations.⁴⁵⁴ Title 16 of the New Jersey Statutes, for example, applies to religious corporations and associations.⁴⁵⁵ Chapter 10A provides for the incorporation of the United Methodist Church.⁴⁵⁶ Section 15 provides that “[t]o be qualified to vote . . . at a meeting of the membership of a local church of . . . [t]he United Methodist Church . . . a person shall be a full member of such church or organization who is not less than 18 years of age.”⁴⁵⁷

Similar provisions exist for a variety of mainstream denominations. In other states, a local Methodist church would presumably be a not-for-profit corporation.⁴⁵⁸ The fact that New Jersey—or any state—would presume to restrict the membership requirements of a particular church, while interesting, is not particularly important here. What is important is that states have the power to incorporate religious organizations and to restrict—at least generally—how

450. Brief of Appellants, *supra* note 22, at 3 (citing *Hobby Lobby Complaint*, *supra* note 20, at 13) (referring to Mardel as faith based). In referring to its owners, Hobby Lobby states, “Their faith is woven into their business.” Plaintiffs’ Motion for Preliminary Injunction and Opening Brief in Support at 1–2, *Hobby Lobby District 1*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

451. *Tyndale Complaint*, *supra* note 446, at 7–9.

452. *See, e.g., Working for a Christian Business*, FAITH BASED JOBS, <http://www.jobmonkey.com/faithbasedjobs/business-opportunities.html> (last visited Sept. 25, 2013) (explaining what a Christian business is and how to start one); *Faith Based Business*, AM. HEALTH CARE PROF’LS, <http://www.ahcpofva.com/overview/faith-based-business> (last visited Sept. 25, 2013) (explaining that, as a faith based business, the organization’s goal is to “unite faith and mission”); *Christian Entrepreneurship*, BUS. AS MISSION, <http://www.christianbusinessasmission.org> (last visited Sept. 25, 2013) (explaining the organization’s mission to help Christian entrepreneurs and faith based businesses); *A Faith Based Company—Armstrong International*, ARMSTRONG INT’L, <http://www.armstronginternational.com/faith> (last visited Sept. 25, 2013) (explaining the business’s mission to “share God’s love to all employees and their families,” as a faith based company).

453. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1166 (10th Cir. 2013) (Briscoe & Lucero, J.J., concurring in part and dissenting in part).

454. *See, e.g., N.J. STAT. ANN. § 16:1-1* (2008) (explaining the process of incorporating a religious society or congregation).

455. *See id.* §§ 16:1-1 to :20-7.

456. *See id.* § 16:10A.

457. *See id.* § 16:10A-15.

458. *See id.* §§ 16:1-1 to :20-7.

such entities operate.⁴⁵⁹ Whether business corporations generally possess religious freedom is unresolved; however, religious entities undoubtedly have religious rights—at least so far as they act consistently with and in fulfillment of their religious beliefs.⁴⁶⁰

ii. *Self-Granted Religious Status*

As previously discussed, each of the for-profit corporate litigants asserted religious beliefs in their respective cases. Of note is that all of the litigants failed to cite a particular provision in their articles of incorporation regarding such beliefs.⁴⁶¹ While several litigants listed good works—including support of various religious causes⁴⁶²—none of the litigants imposed requirements within their own charter—or at least none alleged that they did so.⁴⁶³

For purposes of associational or representative standing, corporate charter limitations regarding religious beliefs would be irrelevant because standing results in the assertion of the owners' rights and beliefs.⁴⁶⁴ But, for a corporation to assert its own rights and beliefs under either RFRA or the First Amendment, the corporate charter is at least superficially relevant.⁴⁶⁵ Generally, corporate articles grant very broad powers,⁴⁶⁶ hence, the power to engage in furthering religious beliefs would be included. But state general business corporation statutes permit entities to limit or restrict their operations as well.⁴⁶⁷ Restrictions on operations, if violated, can result in legal difficulties for actions deemed ultra

459. *See, e.g.*, *Smith v. Calvary Baptist Church*, 826 N.Y.S.2d 431, 432 (App. Div. 2006) (holding that a church member had standing to sue Calvary Baptist under the New York not-for-profit corporation law).

460. *See, e.g.*, 805 ILL. COMP. STAT. ANN. 110/35 (2013) (explaining the requirements for the incorporation of any “church, congregation, or society formed for the purposes of religious worship”).

461. *Tyndale Complaint*, *supra* note 446, at 7 (citing to its articles of incorporation, which state that Tyndale’s purpose is to publish Christian and faith based books).

462. *See id.*; *Hobby Lobby Complaint*, *supra* note 20, at 2.

463. *See id.*

464. *See Affiliated Constr. v. W. Va. Dep’t of Transp.*, 713 S.E.2d 809, 815 (W. Va. 2011) (“[A]n organization has representative standing to sue on behalf of its members when the organization proves that: (1) at least one of its members would 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.”).

465. *See Beckwith Elec. Co., Inc. v. Sebelius*, No. 8:13-CV-0648, 2013 WL 3297498, at *12 (M.D. Fla. 2013) (citing *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 116 (D.D.C. 2012) (finding a corporation’s corporate charter relevant to the inquiry of whether the corporation has standing to sue under RFRA and the First Amendment).

466. *See* 2 ALAN S. GUTTERMAN, *BUSINESS TRANSACTIONS SOLUTIONS* § 8:74 (West 2013) (“[D]irectors are empowered to direct all the business and affairs of the corporation.”).

467. *See id.* (noting that corporate power is limited by state law and corporate articles).

vires.⁴⁶⁸ Thus, one cannot ignore the failure of all the litigants to restrict their own operations.

Looking just at the *Hobby Lobby* litigation, the facts alleged in the verified complaint do not inform the court about the existence—or lack thereof—of charter restrictions regarding religious beliefs.⁴⁶⁹ Several responses are thus possible. The court could plausibly find that such limitations are critical;⁴⁷⁰ however, if it did, presumably both corporations could quickly amend their charters to require operations consistent with what already existed. Or the court could even more plausibly consider such limitations unimportant. Because both Hobby Lobby and Mardel have only a few shareholders,⁴⁷¹ amendment of the articles to require what already exists would arguably be a mere formality that could be easily obtained and, thus, superfluous.

The court could also remand the case for fact-finding, which could include an amended complaint alleging charter restrictions, if they do exist. If, perchance, the Hobby Lobby and Mardel charters contain no such restrictions, the two petitioners could easily and quickly amend their charters. It is doubtful that a court would view an amendment as insincere because no one doubts the sincerity and unanimity of the owners' beliefs.⁴⁷² Accordingly, while a recent amendment to the charter to include religious belief restrictions might have some real impact on entities with less unanimity of shareholder beliefs, it should not adversely affect Hobby Lobby or Mardel. Thus, the analysis is circular: while the existence—or non-existence—of article limitations seems facially significant, it seems unimportant in this particular case.

More broadly, the various contraceptive cases involve several dozen corporate petitioners,⁴⁷³ each of which could easily amend its charter to require adherence to the religious beliefs stated by its owners.⁴⁷⁴ This could plausibly have some impact. Thus, each petitioner should carefully consider that path. Additionally, corporate lawyers should consider similar restrictions for other clients who choose to assert religious beliefs—at least until the outcome of the

468. See MODEL BUS. CORP. ACT. § 3.04 (2010).

469. See *Hobby Lobby* Complaint, *supra* note 20 (failing to mention the existence of charter restrictions).

470. A court restricting corporate religious rights to entities overtly professing a religious purpose would be an understandable—albeit a largely meaningless—and easily met standard. But a court restricting corporate religious rights to entities overtly requiring themselves to do particular good works would be disturbing. An important doctrinal distinction between Protestantism and Catholicism involves the importance of good works. See *Faith and Good Works*, CATHOLICISM.ORG (Mar. 18, 2009), http://catholicism.org/faith-and-good-works.html#_ftnref1. This illustrates the difficulty courts would face in attempting to distinguish one professed belief from another.

471. See *supra* notes 20–21 and accompanying text.

472. See *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012) (noting that the government did not dispute the sincerity of the plaintiff's religious beliefs).

473. See cases cited *supra* note 2.

474. See *supra* note 355 (describing the process by which a corporation amends its articles of incorporation).

Hobby Lobby litigation is clear. Perhaps the courts will approve associational standing or permit general business corporations to assert religious rights; conversely, perhaps they will not. If the courts do not permit the assertion of religious rights, general business corporations with self-restricted charters may have a stronger claim to religious rights.

One problem with a self-imposed restriction, however, is the ease with which it could be undone. Generally, shareholders have no property right in continued article provisions.⁴⁷⁵ Also, a mere majority vote can typically amend the articles.⁴⁷⁶ As a result, entities seeking to self-restrict their operations with the hope of strengthening their claims to religious rights should consider requiring a supermajority—or even unanimity—for an amendment altering religious goals. Even then, however, a closely held entity would likely face little difficulty in obtaining the needed vote. Thus, articles restrictions—while not harmful—may be of little help in swaying a court regarding the religious nature of a corporation.

iii. *A Proposal for a Model Statute*

Because mere articles of incorporation restrictions are likely insufficient to sway the issue of corporate religious status,⁴⁷⁷ states should consider a new form of entity modeled after the benefit corporation statutes. This new statute would create an entity incorporated as a faith based corporation (FBC).⁴⁷⁸ Organization and operation would be dedicated to furthering, and also accomplishing, specific religious beliefs. As is the case with charities, the assets could be permanently—

475. See MODEL BUS. CORP. ACT § 10.01(b) (2010).

476. See *id.* § 10.03(e).

477. However, two dissenting judges from the Tenth Circuit stressed the lack of restrictions in *Hobby Lobby's* articles of incorporation as hurting its argument:

Notably, there is not a single reference to religion in either certificate. Instead, the certificates state simply that *Hobby Lobby* and *Mardel* were created for the purpose of “engag[ing] in any lawful act or activity for which corporations may be organized under the Oklahoma General Corporation Act.” Consistent with these certificates, the plaintiffs’ complaint concedes that both *Hobby Lobby* and *Mardel* are “privately held, for-profit corporations[s] . . . organized under Oklahoma law.”

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1165 (10th Cir. 2013) (en banc) (Briscoe & Lucero, JJ., concurring in part and dissenting in part) (citations omitted). Thus, such article restrictions may sway some judges. In contrast, however, the two dissenting judges also stated:

[I]f all it takes for a corporation to be categorized as a “faith based business” for purposes of RFRA is a combination of a general religious statement in the corporation’s statement of purpose and more specific religious beliefs on the part of the corporation’s founders or owners, the majority’s holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs

Id. at 1174 (suggesting that article restriction might be insufficient or at least problematic).

478. The Tenth Circuit’s en banc plurality in *Hobby Lobby* twice used the term “faith-based,” once while quoting the *Mardel* complaint and once while referring to a Ninth Circuit opinion. *Id.* at 1122, 1131 (majority opinion).

or for a term—dedicated to be used for the stated purposes.⁴⁷⁹ The entity would be authorized to enter commercial transactions but would do so in a manner restricted either by statute or by the articles of incorporation. Such restrictions might require Sabbath closings and educational programs, and they might forbid actions contrary to the religious beliefs—such as serving alcohol or funding abortions. Restrictions would also require that a portion of the profits be used directly⁴⁸⁰ for the accomplishment of goals consistent with the stated religious beliefs.⁴⁸¹

States already incorporate churches, either as not-for-profit entities or as special religious entities.⁴⁸² Hence, no constitutional objections should arise because any restrictions would be voluntary. The statute could, similar to the typical B corporation statute,⁴⁸³ provide for annual certification by a third party—perhaps a religious denomination or group of churches, synagogues, or mosques.

An entity organized under such a statute should be a person for purposes of RFRA; after all, it would be a specific type of religious entity. Thus, if Hobby Lobby and other litigants were to reorganize as such an entity, the standing issues they currently face would become moot. While conversion to FBC status might not alter the First Amendment rights of an entity, it would provide courts with a mechanism for distinguishing commercial nonreligious entities from commercial religious entities. Accordingly, FBC status would have real, practical effects, as opposed to the questionable effectiveness of both B corporation and L3C statutes.⁴⁸⁴

Significantly, two dissenting judges in the Tenth Circuit's en banc *Hobby Lobby* opinion effectively invited states to adopt such a statute.⁴⁸⁵ Chief Judge Briscoe, joined by Judge Lucero, stressed not only the federal but also the “state law” characterization of corporations as religious.⁴⁸⁶ Judges Briscoe and Lucero emphasized an important point that was missed in most, if not all, of the cases:

479. *See, e.g.*, S.C. CODE ANN. § 33-31-202 cmt. 1 (2006) (stating that for nonprofit corporations to meet the requirements of tax provisions their articles “contain limitations on corporate activity and restrictions on the use and distribution of corporate assets”).

480. *Direct use*, as opposed to *indirect use*, is a distinction common to the law of charities. *Direct* connotes the entity actually doing something, rather than merely making grants to other entities, which would be an *indirect* act. *See* I.R.C. §4943(d)(1) (2006).

481. “Accomplishing” a charitable (or religious) purpose—as opposed to merely “furthering” such a purpose—is an important distinction in the tax law of charities. *Compare* Treas. Reg. § 1.501-1(c)(3)-1(c)(1) (2013) (referring to accomplishing an exempt purpose), *with* Treas. Reg. § 1.501-1(c)(3)-1(e) (2013) (discussing activities which “further” an exempt purpose).

482. *See, e.g.*, N.J. STAT. ANN. § 16:1-1 (2008) (explaining the process of incorporating a religious society or congregation).

483. *See* 1A FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 70.50 (Supp. 2013).

484. *See supra* Part IV.D.2.a-b.

485. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1166 (10th Cir. 2013) (Briscoe & Lucero, JJ., concurring in part and dissenting in part).

486. *Id.*

corporations are almost always creatures of the states,⁴⁸⁷ and *state* law is, therefore, arguably critical in determining whether a particular entity is religious. Yet, state law has been an insignificant factor in all of the litigation.⁴⁸⁸ In particular, the dissenting judges stated:

Significantly, the majority, despite employing the unique characterizations of “faith based companies” and businesses with “a religious mission,” *does not cite to a single source* in support of this new legal category of for-profit corporation.

That is because it cannot. As far as I can determine, neither the United States Supreme Court *nor any federal circuit court, until now, has ever used the phrase “faith based company,”* let alone recognized such a distinct legal category of for-profit corporations. Nor, as far as I can tell, has the United States Supreme Court or any federal circuit court, until now, recognized a for-profit corporation as having a “religious mission.” *Finally, Oklahoma state law, under which Hobby Lobby and Mardel were formed and currently exist, does not recognize any such unique class of corporation.*⁴⁸⁹

The first three sentences of the quotation included above are arguably misleading. In any event, the last sentence is the most important, for it suggests that Oklahoma—or any state—could effectively moot the standing controversy by officially recognizing faith based commercial entities either as faith based corporations or as faith based limited liability companies. Indeed, legislators in

487. Under Title 36 of the United States Code, Congress charters approximately 100 entities—such as the Boy Scouts of America—which generally are corporations domiciled in the District of Columbia. *See, e.g.*, 36 U.S.C. § 30901 (1916) (chartering the Boy Scouts of America).

488. *See generally* cases cited *supra* note 2.

489. *Hobby Lobby*, 723 F.3d at 1166 (10th Cir. 2013) (emphasis added) (Briscoe and Lucero, concurring in part and dissenting in part). Thus, the dissent harshly—and arguably inaccurately—criticized the majority. Yet, the plurality—incorrectly denominated by the dissent as the majority—cited a Ninth Circuit opinion referring to a “faith-based . . . organization.” *Id.* at 1131 (citing *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (per curiam)). Granted, that was not quite a “faith-based company,” but to be precise, World Vision, Inc. was a corporation and thus a “company,” albeit one organized under a state not-for-profit act. Further, Judge O’Scannlain, concurring in *Spencer*, cited Justice O’Connor’s concurrence in *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v. Amos*, which declined to make a nonprofit versus for-profit distinction. *Spencer*, 633 F.3d at 734 & n.13 (O’Scannlain, J., concurring) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 349 (1998) (O’Connor, J. concurring) (“In *Amos*, the Supreme Court expressly left open the question of whether a for-profit entity could ever qualify for a Title VII exemption.”)). Granted, this was not quite a Supreme Court or circuit opinion recognizing the category of faith based for-profit entities; however, it does comprise of concurring opinions from both the Supreme Court and a federal circuit stressing that the existence of the category is an open question. Hence, it arguably amounts to something more than “not a single source,” as asserted by the *Hobby Lobby* dissenters. *Hobby Lobby*, 723 F.3d at 1166.

multiple states—led by members of the Oklahoma House and Senate—are actively preparing legislation precisely aimed at accomplishing this goal.⁴⁹⁰

e. The Profit versus Not-for-Profit Dichotomy

The government refers multiple times to “for-profit secular corporations,”⁴⁹¹ apparently distinguishing them from not-for-profit corporations, which may or may not be religious.⁴⁹² Similarly, the *Hobby Lobby* dissent distinguished between for-profit and not-for-profit entities.⁴⁹³ The dichotomy, however, is both simplistic and misleading. To the extent that the dichotomy exists, the government has it exactly backwards because the argument logically favors Hobby Lobby’s position and hurts the government’s argument.

i. Not Code-Based

First, the categories for-profit and not-for-profit are merely state law creations with labels only loosely related to financial or economic reality.⁴⁹⁴ Nothing in the typical state not-for-profit act requires not-for-profit entities to suffer losses, and nothing penalizes them for making profits.⁴⁹⁵ Thus, the label is one of convenience, at most, and not one of substance. Indeed, nothing would preclude a charitable entity from organizing under a general business corporation

490. Interview with members of the Oklahoma House and Senate (July 12, 2013) (notes on file with author).

491. See, e.g., DOJ Brief, *supra* note 84, at 2–3, 15–16.

492. For a discussion of the false secular/religious dichotomy, see *supra* note 375.

493. See, e.g., *Hobby Lobby*, 723 F.3d at 1172 (en banc) (Briscoe & Lucero, JJ., concurring in part and dissenting in part) (distinguishing between for-profit and nonprofit entities). The *Conestoga* majority repeatedly stressed the *for-profit* nature of the corporation as an important factor, but did not use the term *nonprofit*; however, the dissent criticized the majority for its “flawed” for-profit versus nonprofit distinction. See *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419, at *1, *2 (3d. Cir. 2013); *id.* (Jordan, J., dissenting) at *6–7, *9–10 (citations omitted).

494. See, e.g., *Consumer Union of U.S., Inc. v. State*, 840 N.E.2d 68, 93 (N.Y. 2005) (discussing the similarities of influence exerted and power wielded between not-for-profit and for-profit corporations).

495. The Model Nonprofit Corporations Act expressly permits commercial transactions such as buying, selling, and leasing property, as well as investing and lending money. See MODEL NONPROFIT CORP. ACT (3d ed. 2008). Although the Act defines a “business corporation,” it never defines the term “nonprofit.” It defines a “charitable corporation” as follows:

(5) “Charitable corporation” means a domestic nonprofit corporation that is operated primarily or exclusively for one or more charitable purposes.

(6) “Charitable purpose” means a purpose that:

(i) would make a corporation operated exclusively for that purpose eligible to be exempt from taxation under Section 501(c)(3) or (4) of the Internal Revenue Code, or

(ii) is considered charitable under law other than this [act] or the Internal Revenue Code.

Id. § 1.40(5)–(6).

act.⁴⁹⁶ The charitable entity might suffer greater organizational costs⁴⁹⁷ or greater state maintenance costs; it may also incur some inconvenient collateral consequences if it were to apply for state property or sales tax exemptions.⁴⁹⁸ But such an entity—if it met all the technical requirements of the collateral statutes—could operate a church or a food bank, and could still qualify for property tax exemptions, sales tax exemptions, and other such benefits. The for-profit label might precipitate bureaucratic questions and result in unnecessary accounting or legal fees, but the entity should ultimately prevail. The not-for-profit label conferred by states thus streamlines such collateral issues by providing a basic framework of rules that otherwise would need to appear in the articles of incorporation, bylaws, or both.⁴⁹⁹

For example, Florida has both a general business corporation act⁵⁰⁰ and a not-for-profit corporation act.⁵⁰¹ Florida also imposes a tax on real property⁵⁰² and grants exemptions to property used for “religious, literary, scientific, or charitable”⁵⁰³ purposes, but only if the entity “is not used for profitmaking purposes.”⁵⁰⁴ To determine whether “the property is used for a profitmaking purpose,” the statute does not focus on which act—the general business corporation act or the not-for-profit act—authorized the entity; instead, it applies criteria that focus on how the entity operates.⁵⁰⁵ Most of the factors in the statute look to the “reasonableness” of various transactions, such as salaries and prices; however, both human shareholder-owned corporations, as well as traditional charities, can satisfy those factors by simply paying and charging fair market value for property and services.⁵⁰⁶ The real distinguishing factor tests whether

496. See generally MODEL BUS. CORP. ACT §§ 3.02–03 (2010) (describing the lawful purposes and powers of corporations).

497. In Florida, at least, the incorporation cost is the same, and the annual maintenance fees are also the same. *Corporation Fees*, FLA. DEP’T OF STATE DIV. OF CORPS., <http://smbiz.org/feecorp.html> (listing total fee for incorporation for both for-profit and nonprofit corporations as \$78.75) (last visited Sept. 25, 2013).

498. One can easily posit a revenue agent or a property appraiser initially balking at granting a sales tax or property tax exemption to a general business corporation; however, the relevant statutes do not typically preclude it. See, e.g., *Sales tax exempt organizations*, N.Y. STATE DEP’T OF TAXATION & FIN., <http://www.tax.ny.gov/bus/st/exempt.htm>. (listing “not-for-profit” status as a factor for a sales tax exemption) (last visited Sept. 13, 2013). The New York Department of Taxation and Finance also—incorrectly—equates the term generally with “(c)(3)” status, which has no “not-for-profit” substantive, let alone organizational, requirement. See *id.*

499. See, e.g., *Wilson Area Sch. Dist. v. Easton Hosp.*, 747 A.2d 877, 878, 882 (Pa. 2000) (finding that a hospital operated by a for-profit parent corporation was a charitable entity and therefore eligible for a property tax exemption).

500. See FLA. STAT. §§ 607.0101–607.1907 (2007 & Supp. 2013).

501. See §§ 617.01011–617.2105.

502. See §§ 200.001–200.185 (determining the millage rates which the counties and other taxing authorities, as opposed to the state, actually impose).

503. See FLA. STAT. § 196.196 (2007).

504. See § 196.196(b)(4).

505. See § 196.195 (determining profit or nonprofit status of an applicant).

506. See *id.*

“no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of its members, directors, or officers or any person or firm operating for-profit or for a nonexempt purpose.”⁵⁰⁷ Essentially, this provision mirrors the federal private inurement requirement for charitable status, which has nothing to do with the existence of profits.⁵⁰⁸ Thus, the title to the act, as well as some of the operative language, *appears* to make a profit/nonprofit distinction; however, the actual distinction regards the people with whom the profits inured are used, as opposed to whether the profits exist.⁵⁰⁹

Second, the profit/nonprofit dichotomy does not exist for federal *charitable* tax purposes,⁵¹⁰ and it only nominally exists for general federal tax-exempt purposes.⁵¹¹ The most favored type of federal tax exemption—under § 501(c)(3)—confers charitable status such that the entity is *partially* exempt from income taxes, and contributions to it are generally deductible.⁵¹² Nothing in the Internal Revenue Code, the Treasury Regulations, or the jurisprudence requires charities to be nonprofits.⁵¹³ Similarly, nothing requires them to organize or operate under state not-for-profit statutes.⁵¹⁴ Thus, the dichotomy the government repeatedly propounds does not exist.⁵¹⁵ As a result, the courts should be especially cautious not to fall into the same mistake.

*ii. “Not-for-Profits” Often Have Profits*⁵¹⁶

Many charities make profits, with hospitals and schools being the most common examples. Certainly, both the statute and the regulations permit charities to operate profitmaking activities that comprise a majority—or even all—of what they do.⁵¹⁷ In such cases, the for-profit activities must be *per se*

507. *See* § 196.195(3).

508. *See* I.R.C. § 501(c)(3) (precluding exemption for organizations whose “earnings” inure “to the benefit of any private *shareholder* or individual”) (emphasis added).

509. *See id.*

510. *See supra* note 409.

511. *See id.* § 501(c)(4) (requiring nonprofit status for social welfare organizations). However, in reality, this requirement does not exist.

512. *See e.g., id.* § 501(c)(3)–(4); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1186 n.10 (10th Cir. June 27, 2013) (noting that a variety of corporate forms do not mirror the bright line for-profit/nonprofit distinction).

513. *See supra* note 512.

514. *See supra* notes 495–96.

515. *See* DOJ Brief, *supra* note 84, at 2–3, 15–16 (referring to “for-profit secular corporations”).

516. In his dissent in *Conestoga*, Judge Jordan made the mirror point that business corporations often have goals and activities comparable to nonprofit entities. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 3845365, *18 & n.18 (3d. Cir. 2013) (relying in part on the “B corporation” movement).

517. *Presbyterian & Reformed Publ’g Co. v. Comm’r of Internal Revenue*, 743 F.2d 148, 156 (1984) (“As the Tax Court itself observed, ‘the presence of profitmaking activities is not per se a bar to qualification of an organization as exempt if the activities further or accomplish an exempt purpose.’” (quoting *Aid to Artisans Inc. v. Comm’r of Internal Revenue*, 71 T.C. 202, 211 (1978))).

charitable;⁵¹⁸ that is, they must actually *accomplish* an exempt purpose.⁵¹⁹ Charities may also conduct for-profit activities that merely *further* an exempt purpose.⁵²⁰ In those cases, the profitmaking activity must be less than primary, but may still be substantial.⁵²¹ A common example involves a beauty shop in a center for the elderly⁵²² or a gift shop in a hospital.⁵²³ Neither activity is per se charitable, and neither could stand alone and enjoy tax-exempt status; however, each—in context—can further a primary exempt purpose and, thus, *to the extent* it so furthers the purpose, be exempt from federal income taxation.⁵²⁴

In addition, charities may have substantial investment income from real property rents, royalties, interest, dividends, and capital gains—both short- and long-term.⁵²⁵ These amounts need not have the slightest relationship to the purpose for which the organization is exempt.⁵²⁶ Just how substantial the amounts can be is unclear, but they can undoubtedly involve huge sums of money, as well as large amounts of employee time and efforts.⁵²⁷ They cannot, however, be debt-financed, unless substantially all of the activity is substantially related to the exempt purpose;⁵²⁸ in that case, the charity can do as much as it wants, related or not. And even the exception to the debt-financed prohibition has an exception for debt-financed neighborhood acquisitions anticipated to be used for related purposes, generally within ten years.⁵²⁹

But that is not all. Charities may also conduct any insubstantial for-profit commercial activity, with the definition of “insubstantial” being roughly fifteen percent of all its activities.⁵³⁰ The profits are subject to tax if the charity

518. This is a phrase this Author coined in teaching and in writing about the tax law of charities over the past thirty-two years. See DARRYL JONES, STEVEN WILLIS, DAVID BRENNEN, & BEVERLY MORAN, *THE TAX LAW OF CHARITIES* 117 (West) (2d. 2007) (3d ed. forthcoming 2014, LEXIS).

519. See Treas. Reg. § 1.501(c)(3)-1(c)(1) (2013).

520. See § 1.501(c)(3)-1(e) (2013).

521. See § 1.501(c)(3)-1(c)(1) (requiring that the organization’s primary purpose be accomplishing exempt purposes).

522. See Rev. Rul. 81-61, 1981-8 C.B. 355 (1981) (stating that the operation of a beauty shop in a senior citizens center is not “unrelated trade or business”).

523. See *Mercy Med. Ctr., Inc. v. Dep’t of Revenue*, No. 3213, 1992 WL 310208, at *310 (Or. T.C. 1992) (finding a hospital gift shop eligible for tax-exempt status).

524. See Rev. Rul. 81-61, 1981-8 C.B. 355.

525. I.R.C. § 512(b)(1)–(5) (2006).

526. See generally Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 *TAX L. REV.* 283, 297–98, 99 (2011) (discussing how a charity can use its surplus income for charitable purposes or other business activities).

527. See generally *id.* at 287 (noting that “investment income is extremely important” for some charitable organizations).

528. See I.R.C. § 514(b)(1)(A)(i) (2006).

529. See *id.* § 514(b)(3)(A).

530. See JONES ET AL., *supra* note 518, at 155–57 (citing *Manning Ass’n v. Comm’r*, 93 T.C. 596, 611 (1989) (holding that did not carry its burden of proving that it operated exclusively for exempt purposes); *World Family Corp. v. Comm’r*, 81 T.C. 958, 965 (1983) (finding a religious organization was entitled to a tax exemption because no more than ten percent of its expenditures were devoted to the nonexempt activity); *Church in Bos. v. Comm’r*, 71 T.C. 102, 108 (1978)

regularly carries on the activity in a manner commensurate with its competition.⁵³¹ If, however, substantially all of the activity work is performed by volunteers, the tax does not apply.⁵³²

Indeed, this could go on; however, the point should be evident: most charities are labeled not-for-profit by state law for bureaucratic convenience, as the label aids others—including state authorities—in classifying and readily identifying organizations.⁵³³ But they need not actually *be* nonprofit, and many make substantial profits.⁵³⁴ Thus, the dichotomy that the government asserts—the for-profit versus the not-for-profit—is a layman’s fiction that does not exist for those schooled in the law of tax-exempt organizations.⁵³⁵

A related dichotomy, however, does exist: human shareholder-owned corporations exist to serve the purposes of the owners.⁵³⁶ In contrast, charities—and most other tax-exempt entities—exist to serve the purposes of themselves *as stated by* their creators.⁵³⁷ They do not, however, *operate* to serve the purposes of their members, officers, directors, or even their founders.⁵³⁸ To do so would trigger problems with private inurement,⁵³⁹ private benefit,⁵⁴⁰ self-dealing,⁵⁴¹ and excess benefit transactions.⁵⁴² From that perspective, what the government calls *for-profit* corporations have a substantially greater identity with their owners

(ruling that making expenditures amounting to twenty percent of an organization’s revenues in furtherance of a nonexempt purpose was “substantial”).

531. *See* I.R.C. § 512(a)(1) (2006).

532. *See id.* § 513(a)(1).

533. *See supra* notes 494–99 and accompanying text.

534. *See supra* notes 517–24 and accompanying text.

535. *See supra* notes 510–15 and accompanying text.

536. *See* *People v. Kelly*, 16 N.E.2d 693, 695 (Ill. 1938) (citing *Kocis v. Chi. Park Dist.*, 198 N.E. 847, 854 (Ill. 1935)) (“A corporate purpose has been defined to be some purpose which is germane to the objects for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto.”).

537. MODEL NONPROFIT CORP. ACT § 3.01(a) (3d ed. 2008) (“Every nonprofit corporation has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.”).

538. Charities must be both organized and operated for charitable purposes. *See* I.R.C. § 501(c) (requiring that charitable corporations be organized for one or more of the purposes).

539. *See id.* (prohibiting tax-exempt corporations from allocating any part of net earnings to inure “to the benefit of any private shareholder, or individual”).

540. The private benefit doctrine is related to, but distinct from, the private inurement restriction. *See generally* JONES ET AL., *supra* note 518, at 345–400 (citations omitted) (describing the private benefit restriction).

541. *See* I.R.C. § 4941(a)(1) (placing a heavy excise on “self-dealing” between a private foundation and a disqualified person).

542. *See* I.R.C. § 4958 (imposing an excise on “excess benefit transactions” between a public charity and a disqualified person). Note, however, that the § 4958 definition of “disqualified person” differs dramatically from the § 4941 definition of “disqualified person.” *Compare id.* § 4958(f)(1) (defining disqualified person as “any person who was, at any time during the 5-year period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the organization”), *with id.* § 4946(a)(1) (defining a disqualified person with respect to a private foundation).

than what the government calls *not-for-profit* entities, which in most cases cannot legally have such an identity.⁵⁴³ That point directly relates to the important associational or representative standing issue. The government appears to have no problem with nonprofit entities using associational or relational standing on behalf of members; however, the government objects to associational or relational standing by even closely held business corporations.⁵⁴⁴ The analysis, however, should result in the opposite conclusion because business corporations have much greater identity with their owners than do charities with their members.

iii. Many Types of Nonprofit Entities Exist: Lumping Them Together is Wrong

The government appears to wrongly lump all nonprofit entities together in its flawed, almost pejorative dichotomy.⁵⁴⁵ One might easily infer that for-profits exist to make money, while nonprofits exist for some eleemosynary reasons.⁵⁴⁶ Yet, there are many tax-exempt—and nominally “nonprofit for state law”—entities that have significant business or commercial purposes, as well as operations.⁵⁴⁷ Thus, *for-profit* or *profit seeking* and *not-for-profit* are not appropriate labels to use to distinguish the litigants from some category of more favorable entity.

(a) Business Leagues

Under § 501(c)(6), an organization may obtain federal tax-exempt status as a business league.⁵⁴⁸ Business league entities exist to support the “business” and

543. See N.Y. NOT-FOR-PROFIT CORP. § 102(A)(5) (McKinney 2010) (defining a not-for-profit corporation as a corporation formed “exclusively for a purpose or purposes, not for pecuniary profit or financial gain” in which “no part of the assets, income, or profit of which is distributable to, or enures to the benefit of, its members, directors or officers”). Unions, business leagues, social clubs, and veterans groups are exceptions. See, e.g., *Guide Int’l Corp. v. United States*, No. 89C2345, 1990 WL 86874, at *2 (N.D. Ill. 1990) (stating that a business league must “promote the common business interest of its members and also seek to improve conditions in one or more line of business”); I.R.C. IRM 4.76.13 (Mar. 1, 2003) (explaining the requirements of veterans groups); BORIS I. BITTKER & LAWRENCE LOKKEN, *FED. TAX’N OF INCOME, ESTATES & GIFTS* ¶ 102.4.1 (3d ed. 2012) (citing House Ways and Means Comm. & Senate Finance Comm., 91st Cong., 1st Sess., Treasury Department, Tax Reform Studies and Proposals, pt. 3, at 317 (Comm. Print 1969)) (allowing social clubs to focus on meeting the social and recreational needs of its members).

544. See *supra* Part II.A.

545. See Brief for the Appellees at 45, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (citing 78 Fed. Reg. 8462 (Feb. 6, 2013)) (comparing the religious accommodations available to nonprofit versus for-profit corporations).

546. See *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419 at *10 (3d Cir. 2013) (discussing the distinction between nonprofit and for-profit corporations).

547. See *supra* Part IV.D.2.e.ii.

548. I.R.C. § 501(c)(6) (2006).

thus the commercial purposes of a “line of business.”⁵⁴⁹ The American Bar Association and the American Medical Association are typical examples of business leagues.⁵⁵⁰ Both entities are nominally not-for-profit under state law; however, they exist for commercial—and thus ultimately profitmaking—purposes.⁵⁵¹ Generally, such organizations create separate charities—such as the American Bar Endowment—which qualify under § 501(c)(3) and serve more “public” purposes.⁵⁵²

(b) *Social Clubs*

Under § 501(c)(7), an organization may obtain federal tax-exempt status as a social club.⁵⁵³ Social clubs exist to support the “social” purposes of members.⁵⁵⁴ Country clubs are common examples.⁵⁵⁵ They operate restaurants, bars, golf courses, and tennis clubs.⁵⁵⁶ The entities are nominally not-for-profit under state law, but they often exist at least significantly for commercial—and thus ultimately profitmaking—purposes; they certainly charge members and guests for meals, greens fees, tennis courts, lessons, and facilities usage.⁵⁵⁷

(c) *Social Welfare Organizations*

Under § 501(c)(4), an organization may obtain federal tax-exempt status as a social welfare organization.⁵⁵⁸ Social welfare entities generally exist for the same purposes as § 501(c)(3) entities; however, contributions to them are not deductible, and substantial lobbying and political activities are permitted.⁵⁵⁹

549. *Guide Int’l Corp. v. United States*, No. 89C2345, 1990 WL 86874, at *2 (N.D. Ill. 1990) (stating that a business league must “promote the common business interest of its members and also seek to improve conditions in one or more line of business”).

550. *See* BITTKER & LOKKEN, *supra* note 543, ¶ 102.3.1.

551. *See, e.g., Better Bus. Bureau v. United States*, 326 U.S. 279, 285 (1945) (holding that a business league organized as a not-for-profit was overly commercial and not entitled to tax-exempt status).

552. *Charities from the American Bar Association*, AM. BAR ASS’N, http://www.americanbar.org/about_the_aba/charities.html (last visited Sept. 13, 2013).

553. I.R.C. § 501(c)(7) (2006).

554. BITTKER & LOKKEN, *supra* note 543, ¶ 102.4.1 (citing House Comm. on Ways and Means & Senate Comm. on Finance, 91st Cong., 1st Sess., Treasury Department, Tax Reform Studies and Proposals, pt. 3, at 317 (Comm. Print 1969)).

555. *See* I.R.C. IRM 4.76.16.2(b) (Apr. 1, 2003).

556. *See id.; see, e.g., Warfield v. Peninsula Golf & Country Club*, 214 Cal. App. 3d 646, 651, 655 (1989) (explaining that the country club membership in dispute was a membership at a nonprofit social club which operated a bar, restaurant, golf course, tennis courts, swimming pool, and pro shops).

557. *See supra* notes 555–56.

558. I.R.C. § 501(c)(4)(A) (2006).

559. *See* I.R.C. IRM 4.76.13 (Mar. 1, 2003).

Interestingly, § 501(c)(4) is the only provision that openly—though only nominally—requires the entity to be nonprofit.⁵⁶⁰

(d) *Labor Unions*

Under § 501(c)(5), an organization may obtain federal tax-exempt status as a labor, agricultural, or horticultural organization.⁵⁶¹ These include unions, which exist primarily to aid the commercial interests of member workers.⁵⁶² Such entities may be tax-exempt and may even be organized under a state not-for-profit act;⁵⁶³ however, they are arguably as commercial as the employer corporations with whom they deal.

iv. *The Commerciality Doctrine: That's Not the Point Either*

The government—as well as some courts—also appears to create a dichotomy between commercial and noncommercial activities.⁵⁶⁴ On the surface, the distinction is reminiscent of the “commerciality doctrine” found in federal tax law.⁵⁶⁵ Essentially, the commerciality doctrine precludes overly commercial enterprises from obtaining or retaining tax-exempt status.⁵⁶⁶ The concept of *overly commercial*, however, has many nuances.⁵⁶⁷

As explained earlier, many commercial tax-exempt entities are per se charitable, such as schools and hospitals.⁵⁶⁸ Many others conduct substantial commercial activities.⁵⁶⁹ Accordingly, two similar issues can arise. First, an entity may exist to promote the commercial interests of its creators, members, or the business community in general.⁵⁷⁰ An example is the Better Business Bureau

560. See I.R.C. § 501(c)(4)(A) (applying to “[c]ivic leagues or organizations not organized for-profit but operated exclusively for the promotion of social welfare”).

561. § 501(c)(5).

562. See I.R.C. IRM 4.76.14.3 (Mar. 18, 2002).

563. See, e.g., TEX. BUS. ORGS. CODE ANN. § 2.002 (2006) (providing that a labor union may be a nonprofit entity).

564. DOJ Brief, *supra* note 84, at 16–17 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994)).

565. See David A. Brennen, *The Commerciality Doctrine as Applied to the Charitable Tax Exemption for Homes for the Aged: State and Local Perspectives*, 76 FORDHAM L. REV. 833, 847 (2007) (“[A] charitable institution may conduct what looks like a commercial activity but still be entitled to charitable income tax exemption under federal law so long as the activity is conducted in a manner that does not significantly advance non-charitable purposes.”).

566. See *id.* (stating that a charitable organization must only be primarily charitable, not exclusively so).

567. See *id.* at 849 (citing *Better Bus. Bureau v. United States*, 326 U.S. 279 (1945)) (discussing some of the nuances of the overly commercial concept).

568. See 26 C.F.R. § 1.501(c)(3)–1(d)(1)(i)(f) (2008); JONES ET AL., *supra* note 518, at 116.

569. See Brennen, *supra* note 565, at 847.

570. See *id.* at 848 (citing *Better Bus. Bureau*, 326 U.S. at 894).

(BBB).⁵⁷¹ In 1945, the Supreme Court denied “educational” status to the BBB in *Better Business Bureau v. United States*,⁵⁷² concluding that the entity was overly commercial.⁵⁷³ The entity, however, remained nonprofit and tax-exempt as a business league.⁵⁷⁴ Exceptions to the overly commercial rule exist, such as Monterey Public Parking Corporation⁵⁷⁵—an exempt charity that was organized to foster the business climate in downtown Monterey—and Orton Standard Pyrometric Cones, which manufactures pyrometric cones for profit.⁵⁷⁶

Second, some entities conduct business activities that are commercially feasible in some parts of the country, but not in others. Common examples involve art galleries⁵⁷⁷ and theater groups.⁵⁷⁸ What exists as charitable in one part of the country may be too commercial in another.⁵⁷⁹ The distinction involves actual or *feasible* competition from similar enterprises, the operation of which inures to the benefit of the owners.⁵⁸⁰

Thus, one cannot distinguish commercial enterprises from noncommercial enterprises based on charitable or other motives just as one cannot fairly distinguish profit entities from nonprofit entities based on operations.⁵⁸¹ Instead, the real distinction involves who benefits from the commercial operations and the profits.⁵⁸² That distinction, however, says nothing about the religious or moral goals of the entity, which may or may not be consistent with either category. Instead, the distinction mostly helps identify which entities are closely related to and share the interests of their human controllers. Entities whose operations and profits benefit human owners naturally identify more closely with those owners than entities whose operations and profits inure only to themselves, noncontrolling third parties, or the public at large. Hence, in deciding which

571. *See id.*

572. 326 U.S. 279.

573. *Id.* at 284 (involving exempt status for purposes of employment taxes, which as the Court explained, closely followed those for income taxes).

574. *Id.* at 285 (reasoning the business league exemption for income tax did not apply for employment taxes).

575. *See* Monterey Pub. Parking Corp. v. United States, 481 F.2d 175, 177 (9th Cir. 1973). How a parking lot, which appears to foster a business climate to the benefit of downtown business owners, was successful in obtaining charitable exempt status is one of tax law’s greatest mysteries.

576. *See* Orton v. Comm’r, 56 T.C. 147, 148 (1971). The *Orton* court ignored the 1954 repeal of the destination of income test and thus found that the process of earning profits was exempt if the proceeds solely benefitted exempt purposes. *See id.* at 164.

577. *See, e.g.*, Goldsboro Art League v. Comm’r, 75 T.C. 337, 344 (1980) (holding that the purpose of an art gallery operated by a charitable organization was primarily to foster community awareness and appreciation of art, which therefore made it exempt from federal taxation).

578. *See, e.g.*, Plumstead Theatre Soc’y, Inc. v. Comm’r, 74 T.C. 1324, 1330–31 (1980) (holding that a nonprofit corporation operating a theatre operated exclusively for charitable and educational purposes).

579. *See id.*

580. JONES ET AL., *supra* note 518, at 152–53.

581. *See* Brennen, *supra* note 565, at 849–50.

582. *See* I.R.C. § 501(c)(3) (precluding exemption for organizations whose “earnings” inure “to the benefit of any private shareholder or individual”).

category has greater identity with the religious and moral views of those who control the entities, the nod logically goes to those entities that inure to the benefit of human shareholders. Yet, that is exactly the opposite of what the government argues.⁵⁸³

V. HOW FAR MIGHT THIS REACH?

People conduct commercial business in many formats. Perhaps the courts will find religion, standing to assert an owner's religion, or both religion and standing compatible with all. Or perhaps they will not. Assuming the courts *decide* to make distinctions, ultimately either the courts or lawmakers must actually draw the lines. As explained herein, the for-profit/not-for-profit distinction is flawed.⁵⁸⁴ The religious/secular distinction assumes the conclusion that whether an entity operates for a religious purpose is a question of fact.⁵⁸⁵ But other factors are useful, particularly the identity of interest between the entity and the owners.

The following subsections contain a list of the most common forms of doing business, along with a brief analysis of how the form might relate to the issues involved with the contraceptive cases.⁵⁸⁶

A. Corporations

Corporations are mostly creatures of the states.⁵⁸⁷ They take on different formats for both state and federal purposes, some of which overlap.

1. C Corporations

A C corporation is a taxpayer under federal law; it pays taxes on income but does not deduct dividends.⁵⁸⁸ Shareholders must pay taxes on dividends received.⁵⁸⁹ For family law purposes, retained earnings from C corporations would not traditionally be considered income to the owner.⁵⁹⁰ As a result, this category presents the most difficult case for associational or representative

583. DOJ Brief, *supra* note 84, at 16–17 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994)).

584. *See supra* Part IV.D.2.e.

585. *See supra* note 375 (showing that the distinction between secular and religious is often blurry).

586. *See infra* Part II.O.9–12.

587. 1 FLETCHER ET AL., *supra* note 169, § 2.50, at 10.

588. 14A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6972, at 453 (perm. ed., rev. vol. 2008).

589. *See id.*

590. *Cf. id.* § 6972, at 454 (explaining that corporate losses of a C corporation cannot be reported on individual shareholders' income tax returns); *see also supra* notes 211–13 (discussing cases that have imputed relating corporate income on shareholders and cases that have not).

standing. By choosing C status, the shareholders collectively choose to be as separate from the entity as possible.⁵⁹¹ Still, C status alone should not be dispositive, as it is merely one factor—albeit a significant one—in assessing how distinct owners are from the owned.

A second factor is the ability of a C corporation to have multiple classes of shares.⁵⁹² For example, it can have preferred shares, common shares, or classes in between or subordinate to both.⁵⁹³ Different classes typically have varying voting rights, as well as varying rights to distributions.⁵⁹⁴ The existence of such varying rights strongly militates against associational standing because the various classes differ in how they relate to the entity and, thus, almost certainly differ in how they relate to each other.⁵⁹⁵

2. *Close Corporations and Closely Held Corporations*

Many states have special statutes for “close corporations.”⁵⁹⁶ In such cases, the entities typically have few shareholders, which means that they are generally closely held.⁵⁹⁷ Statutes generally relax some—if not many—of the formalities normally expected of a corporation.⁵⁹⁸ As a result, the statutes tend to blur the distinction with a partnership.⁵⁹⁹ The term closely held is not a general corporate term of art;⁶⁰⁰ instead, it is descriptive of an entity with relatively few shareholders, most of whom are closely related.⁶⁰¹ One might also refer to a

591. *See generally* 14A FLETCHER ET AL., *supra* note 588, § 6973, at 454 (“A C corporation is a separate taxable entity, independent of its shareholders, for federal income tax purposes.”).

592. 11 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5086, at 47 (perm. ed., rev. vol. 2011) (explaining the traditional classes of shares).

593. *See id.* § 5086, at 48 (“Common and preferred by no means exhaust the variations in class shares.”).

594. *See id.* (describing how class shares differ).

595. *See generally id.* § 5086, at 47–51 (citations omitted) (explaining different types of classes of shares and how they relate to one another).

596. *See, e.g.*, 15 PA. CONS. STAT. §§ 2301–09 (1990) (defining a “close corporation” as a corporation that elects to become subject to the provisions of the Pennsylvania close corporation law). Oklahoma, the home state of both Hobby Lobby and Mardel, does not have a statutory close corporation provision.

597. 1A FLETCHER ET AL., *supra* note 483, § 70.10, at 6 (listing one of the characteristics of close corporations as having a small number of shareholders).

598. Typically, the shareholders run the entity rather than a board of directors. *See, e.g.*, GA. CODE ANN. § 14-2-922 (2003) (allowing for the elimination of the board of directors for close corporations); MO. ANN. STAT. § 351.805 (2012) (permitting a close corporation to operate without a board of directors).

599. 1A FLETCHER ET AL., *supra* note 483, § 70.10 (citations omitted).

600. Some states define “closely held.” *See, e.g.*, 15 PA. CONS. STAT. § 1103 (defining a business corporation as one that has less than thirty shareholders or is a statutory close corporation).

601. *See* Cynthia S. Grandfield, *The Reasonable Expectations of Minority Shareholders in Closely Held Corporations: The Morality of Small Businesses*, 14 DEPAUL BUS. L.J. 381, 383 (2002).

closely held corporation as a “family business.”⁶⁰² Family businesses have no special federal tax status; they might be Cs or they might be Ss.⁶⁰³ For associational or relational standing, however, their nature appears critical.⁶⁰⁴ A corporation with millions of shareholders could hardly have a unanimous, or nearly unanimous, religious belief;⁶⁰⁵ indeed, one strains to imagine how it could have any religious belief at all.⁶⁰⁶ Yet, one can easily imagine a corporation with three or four closely related shareholders being operated—at least in the eyes of the owners—“for” religious purposes.⁶⁰⁷ Thus, the number of shareholders and how they are related is arguably among the most significant of factors.

3. S Corporations

S status is a tax status elected for federal—and often state—tax purposes.⁶⁰⁸ It results in the entity being a “pass through entity.”⁶⁰⁹ As a result, the shareholders—of which there may only be a single class⁶¹⁰—must pay tax on the earnings.⁶¹¹ Further, many shareholders typically face significant family law consequences from S status.⁶¹² Section 1361 permits an S corporation to have up to 100 shareholders,⁶¹³ and nothing requires them to be related.⁶¹⁴ Thus, S status

602. See generally 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 844.20, at 227 (perm. ed., rev. vol. 2010) (explaining the fiduciary duties owed when the business resembles a “family business”).

603. See generally 14A FLETCHER ET AL., *supra* note 591, § 7033.30, at 597 (discussing the potential issues with taxing a closely held corporation).

604. See *supra* Part II.A.

605. Such corporations are distinguished from members of an association, such as a church, in which membership itself signifies agreement with a particular creed.

606. See *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring) (explaining that, as a “for-profit corporation designed for commercial success,” the plaintiff was “without membership in any church synagogue, or mosque and without religious convictions”).

607. See, e.g., *Hobby Lobby Complaint*, *supra* note 20, at 2 (stating that the Green family, who owns and operates Hobby Lobby, believes they are “obligated to run their business in accordance with their faith”).

608. C. Andrew LaFond & Jeffrey J. Schrader, *Multistate Tax Considerations for S Corporations*, J. ACCT., Feb. 2011, at 54.

609. See generally I.R.C. § 1(h)(10) (2006) (defining pass through entity). Twenty-five code sections use the term “pass through entity.” Generally, they do so to coordinate tax benefits between the owner/beneficiaries and the entity. See *id.*

610. See I.R.C. § 1361(b)(1)(D); see also § 1361(c)(4) (permitting variation in voting rights within the single class of stock).

611. See I.R.C. § 1(h)(10) (defining pass through entity).

612. See, e.g., *Zold v. Zold*, 911 So. 2d 1222, 1233 (Fla. 2005) (holding that Florida courts must look at the equities involved to determine whether to respect the corporate form of closely held businesses for purposes of determining income for alimony and child support purposes); see also 14A FLETCHER ET AL., *supra* note 591, § 7026.70, at 579 (describing consequences to shareholders from claiming S corporation status).

613. I.R.C. § 1361(b)(1)(A).

614. See § 1361(c)(1) (treating “related” shareholders as a single shareholder for purposes of the 100-shareholder limitation).

alone should not be determinative of associational or representative standing to assert religious rights; however, it should be a significant factor. With S status, the shareholders choose to be taxed as an association or partnership, rather than as a corporation.⁶¹⁵ Because of the significant consequences that flow from that choice, electing S status closely identifies the owners with the owned entity.⁶¹⁶ If an entity were to couple that election with having relatively few shareholders who are closely identified with each other, then the practical significance of the separate entity begins to evaporate.⁶¹⁷ As the Senate said in 1954, such an entity is “essentially a partnership.”⁶¹⁸ As such, associational standing should be easy to obtain.

4. LLC

An LLC is a hybrid because it is effectively treated as a corporation for state law purposes, but typically as a partnership for tax purposes.⁶¹⁹ An LLC is actually a “company,” rather than a corporation; thus, it is an association.⁶²⁰ If an LLC has a close identity of interests among its members, it should have little problem asserting associational standing.⁶²¹ Whether an LLC uses the default partnership tax treatment—or instead elects S status—should not affect that conclusion. If, however, an LLC were to elect C status, a court might want to examine the issue more carefully.

5. L3C

An L3C is a type of LLC⁶²² that has a stated purpose to foster particular societal goals.⁶²³ Yet, it remains a profitmaking entity with members.⁶²⁴ An L3C should have no problem asserting associational standing, assuming the requisite closeness of identity among the member’s beliefs.⁶²⁵

615. 14A FLETCHER ET AL., *supra* note 591, § 7025.50, at 577.

616. *See generally id.* (citing I.R.C. § 1366(a)–(b)) (explaining that shareholders must report the corporation’s income and losses on their own income tax returns).

617. *See supra* note 165.

618. *See supra* note 189.

619. *See* 1 FLETCHER ET AL., *supra* note 169, § 20, at 38.

620. *Id.*

621. *See, e.g.,* Allee v. Medrano, 416 U.S. 802, 830 (Burger, C.J., concurring) (stressing the “identity of interest” between the union and the members in finding that the union had standing to assert members’ free speech rights).

622. 1 FLETCHER ET AL., *supra* note 169, § 20 (perm. ed., rev. vol. Supp. 2013).

623. *See id.* (describing an L3C as a “profit-generating entity with a social mission as its primary objective”).

624. *See id.*

625. *See supra* Part II.A.

6. *B Corporations*

A benefit corporation (B corporation) is similar to an L3C, except that it is a corporation rather than an association.⁶²⁶ Its stated purposes—to foster particular social issues—suggest a significant identify of interests and beliefs among the owners.⁶²⁷ While that status alone should not be determinative of standing, it is clearly is relevant. Assuming a particular B corporation elects S corporation flow-through tax status, and further assuming that the owners are relatively few and closely identified with each other, it should not have difficulty asserting associational standing.⁶²⁸

B. Partnerships

Partnerships are associations;⁶²⁹ as a result, one might expect that associational standing would be a simple matter for these entities. But, like corporations, partnerships come in several flavors.⁶³⁰

1. Limited Partnerships

A limited partnership has at least two classes of owners: a class with general liability for partnership obligations and a class with limited liability.⁶³¹ The second class—limited partners—is roughly comparable to preferred shareholders.⁶³² Their existence is a factor that logically militates against associational standing because of limited partners' inherent conflict of identity with general partners.⁶³³

626. *See generally* 1A FLETCHER, *supra* note 483, § 70.50 (“A benefit corporation (B corporation) is a new class of corporation that uses the corporate form to solve social and environmental problems.”).

627. *See id.* (“Its purpose is to create a positive impact on society and the environment, even if it sacrifices profit to do so.”).

628. *See supra* Part II.A.

629. *See generally* 1 FLETCHER, *supra* note 169, §§ 18, at 36 (defining a partnership as “an association of two or more persons to carry on, as co-owners, a business for profit”).

630. *See generally id.* (discussing the different types of partnerships).

631. *See id.* § 19, at 37 (citing UNIF. LTD. P[’]SHIP ACT § 120(11) (2011)).

632. *Compare id.* (explaining that a limited partner is not personally liable for the obligations of the limited partnership), with 11 FLETCHER, *supra* note 592, § 5304, at 502 (explaining that state statutes can expressly exempt preferred shareholders from liability). *See also* Andrew J. Willms, *Family Limited Partnerships and Limited Liability Companies: New Estate Planning Tools for the 90s*, 67 WIS. LAW. 17, 17 (1994) (“[L]imited partners are similar to holders of nonvoting corporate stock.”).

633. *See generally* Mary E. Brumder, *Investor Protection and the Revised Uniform Limited Partnership Act*, 56 WASH. L. REV. 99, 108–09 (1980) (explaining the possible conflict of interest problems that can arise in a limited partnership).

2. *Family Limited Partnerships*

A family limited partnership (FLP) may very well have significant identity of interests among the partners, even those of differing classes.⁶³⁴ The same is true of family limited liability companies.⁶³⁵ Each is also a commonly used vehicle to hold property for transfer from one generation to another.⁶³⁶ Each is useful as an estate planning tool because the value of general partnership interests is more likely to appreciate than the value of limited partnership interests.⁶³⁷ As a result, the use of the vehicle results in a “freeze” of the owner’s investment and, thus, potentially reduces the estate tax.⁶³⁸

Despite the valuation discounts often granted to FLPs because of the non-unity of ownership, few people actually create such an entity unless the family is generally unified.⁶³⁹ Though the government has been unsuccessful in combating such entities for estate tax purposes, the identity of familial interests is likely strong.⁶⁴⁰ As a result, associational standing should be possible. Thus, courts should be hesitant to make a sharp limited partnership/general partnership distinction.

3. *General Partnerships*

General partnerships are business associations in which the partner-owners own the business property and are directly responsible for tax liabilities.⁶⁴¹ Associational standing should be easy to obtain, assuming the requisite identity of interests is present.⁶⁴²

634. See generally Willms, *supra* note 632 (stating that a family limited partnership usually issues general and limited partnership interests).

635. See generally Ronald H. Jensen, *The Magic of Disappearing Wealth Revisited: Using Family Limited Partnerships to Reduce Estate and Gift Tax*, 1 PITT. TAX REV. 155, 155 n.1 (2004) (explaining that a family limited partnership can have the same tax implications as a limited liability company).

636. See *id.*

637. See *id.*

638. See Troy Renkemeyer, Comment, *The Family Limited Partnership: An Effective Estate Planning Tool*, 64 UMKC L. REV. 587, 591 (1996) (citing David Evald et al., *New Estate Freeze Rules: Tax and Business Planning Impact on Partnerships*, 9 J. PARTNERSHIP TAX’N 48, 48 (1992) (explaining that one of the ways family limited partnerships can reduce taxes is through estate freezes).

639. See generally Jensen, *supra* note 635, at 198–99 (discussing how a family limited partnership which can be very effective in a “happy family scenario,” can cause more trouble when disputes arise).

640. See generally Evald et al., *supra* note 638, at 48–49 (explaining how family limited partnerships are still useful for estate planning purposes despite Congress’s attempt to reduce anti-estate freeze rules).

641. 1 FLETCHER ET AL., *supra* note 169, § 18, at 36.

642. See *supra* Part II.A.

C. Trusts

Trusts come in two flavors: complex and simple.⁶⁴³ Complex trusts are taxpayers: beneficiaries pay tax on distributed income, but the trust pays tax on retained income.⁶⁴⁴ Beneficiaries later receive some credit for taxes previously paid on distributions of retained income.⁶⁴⁵ Because the trust is separate from the beneficiaries for tax purposes—or at least substantially so—the trust and the beneficiaries do not have an identity of interests.⁶⁴⁶ Indeed, the ability of the trustee to retain income separately places him in conflict with the beneficiaries.⁶⁴⁷ This is unlike a corporate decision to retain income because shareholders and management are often the same in corporations.⁶⁴⁸

In contrast, simple trusts are not taxpayers.⁶⁴⁹ They exist when the trustee is required to distribute all income at least annually.⁶⁵⁰ The income beneficiaries must report their distributive share of income.⁶⁵¹ Tax law requires this result regardless of whether the trust actually makes the required distributions.⁶⁵² Although simple trusts are entities, their strong identity with income beneficiaries suggests the likelihood of associational standing—assuming no conflict exists between the income and principal beneficiaries.⁶⁵³

D. Estates

Estates are entities under most state laws,⁶⁵⁴ as well as federal tax law.⁶⁵⁵ During administration, which can be brief or long, an estate is a taxpayer.⁶⁵⁶

643. See GEORGE TAYLOR BOGERT ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 266 (2012).

644. See *id.* § 267.

645. See *id.*

646. See *id.*

647. See BOGERT ET AL., *supra* note 643, § 266 (explaining that when trustees retain income in the trust it can be taxed at a higher rate).

648. See Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 192 n.5 (2005) (“In practice, debtholders, employees, and management are all shareholders at the same time.”).

649. See BOGERT ET AL., *supra* note 643, § 266. However, if the trustee elects not to distribute all of the trust’s income, it will be taxed as a complex trust. See *id.* (citing I.R.C. § 641 (2006); Treas. Reg. § 1.641(b)-1 (2013)).

650. See *id.* (citing I.R.C. § 651(a)(1)).

651. *Id.* (citing I.R.C. § 252(a)).

652. *Id.* (citing I.R.C. § 252(a)).

653. See *supra* Part II.A.

654. In Louisiana, one refers to it as the “succession of X” rather than the “estate of X.” See LA. CIV. CODE ANN. art. 871 (2010) (defining a succession as the “transmission of the estate of the deceased to his successors”). Although a succession exists to manage the decedent’s property, it is less than a separate entity. Prior to 1825, a Louisiana succession was a fictitious entity, but changes in the Code of 1825 adopted the French concept of immediate seisin (sometimes *seizen*) rather than the more traditional deferred seisin used in Roman and Spanish law. See Kathryn Venturatos Lorio, *LOUISIANA CIVIL LAW TREATISE*, Vol. 10, “Successions and Donations” at § 4:4 (2012) (citing *Las Siete Partidas*, Bk. 6, Tit. 6, L. 11 & Bk. 6, Tit. 14, L. 1 (1252)).

State laws vary, but generally, the executor owes fiduciary duties to the various beneficiaries.⁶⁵⁷ Conceivably, a faith based sole proprietorship—for which associational standing is irrelevant—might be subject to estate administration for a significant period. During such a period, the sole proprietorship status of the business would cease. As a result, standing issues could arise regarding whether the estate might assert the religious beliefs of the heirs or legatees. As with other forms of doing business, the issues are complex. They should center, however, on the identity of interests among the relevant beneficiaries, as well as the extent to which those beneficiaries agree on the religious beliefs asserted.

VI. CONSEQUENCES FOR LAWYERS

However the courts ultimately decide *Hobby Lobby* and similar cases, tax and entity planners should be familiar with the issues involved. Unless the courts hold that religious freedom extends to all aspects of commerce—however conducted—the cases will provide distinctions, if not bright lines. Practitioners should be familiar not only with the constitutional distinctions,⁶⁵⁸ but also with the statutory ones under RFRA.⁶⁵⁹ At the very least, one planning a commercial transaction should heed the following:

1. Know your client and know whether any religious beliefs—whatever that may mean—are important to your client and whether the loss of the power to exercise them is a deal breaker. Thus, some clients might prefer sole proprietorship or partnership forms, rather than corporations.
2. Understand the importance of labels and whether labeling the client's views as religious might cause the client to be less protected than if the client's views are labeled as nonreligious. The courts are unlikely to decide this issue directly; however, if the government's arguments prevail, such labeling distinctions will be plausible. In contrast, consider whether overt religious statements in entity charters might have an impact. Consider how far the government's view might reach.

655. See generally 85 C.J.S. *Taxation* § 2080 (2013) (describing state and federal tax implications of estates).

656. See *id.*

657. See, e.g., *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App. 2004) (“The relationship between an executor and the estate’s beneficiaries is one that gives rise to a fiduciary duty as a matter of law.” (citing *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996))).

658. See *supra* Part II.

659. See *supra* Part III.

3. Recognize that the government's view sharply limits religious claims by corporations—both C corporations and S corporations. According to the Oklahoma district court, it also limits claims asserted by limited partnerships.⁶⁶⁰ To be consistent, that view—if successful—might also extend to LLCs and complex trusts, each of which has significant aspects of separate entity status. General partnerships, simple trusts, cooperatives, and sole proprietorships, however, appear fundamentally different. How this might apply to an estate is also interesting. Estates are entities in most, but not all, states;⁶⁶¹ however, the doctrine of *seisin*⁶⁶²—and the limited life of an estate—suggests it is more akin to a human.

Of significance here, the Court may ultimately decide that separate entities (such as corporations) lack religious rights, but that nonentity forms (such as general partnerships) retain the religious rights of their owners.⁶⁶³ If so, then logically states that recognize estates as separate fictitious entities may cause sole proprietorships to lose religious rights upon the death of their owners. In contrast, domiciliaries of states that follow the doctrine of *seisin*—such as Louisiana—would see proprietorship religious rights continue upon the death of an owner.⁶⁶⁴ *Hobby Lobby* and related cases, however, are unlikely to provide an answer beyond the specific facts involved, which deal with closely held corporations.⁶⁶⁵

660. *Hobby Lobby District I*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012).

661. *See supra* note 655.

662. The doctrine of *seisin* is one of civil law. *See supra* note 654. Heirs are *seised* of property immediately upon the death of the prior owner, even if an administered estate has legal title for a period: “En termes de Jurisprudence, *Le mort saisit le vif*, Dès qu'un homme est mort, ses biens passent à son héritier légitime, sans qu'il soit besoin d'aucune formalité de justice.” *Dictionnaire de l'Académie Française*, UNIV. OF CHICAGO, http://portail.atilf.fr/cgi-bin/getobject?p.21:25./var/artfla/dicos/ACAD_1932/IMAGE/ (last visited Sept. 14, 2013). “In law, Death seizes life: When a person dies, his property passes to his legitimate heirs without the need for any legal formalities.” *See* LA. CIV. CODE ANN. art. 934 (2012). The equivalent essentially exists in common law jurisdictions to the extent that an executor owes fiduciary duties to the beneficiaries. The executor may have legal title through the estate, but not be an equitable owner; instead, traditionally in England and the United States, equitable ownership vests immediately in the heirs. *See, e.g.,* *McArthur v. Scott*, 113 U.S. 340, 378 (1885) (noting that it has long been settled in England and America that estates “should always be regarded as vesting immediately”).

663. *See supra* Part V.D.

664. *See supra* note 654.

665. *See supra* Part I.A.

VII. CONCLUSIONS

Morality is relevant to commerce. Perhaps several decades ago the business of a corporation was solely to make money for the owners.⁶⁶⁶ Wisely—or not—American society and legal thought appears to have discarded that single-minded viewpoint.⁶⁶⁷ Businesses widely appear to embrace social responsibility and moral codes.⁶⁶⁸ In many instances, the government imposes such obligations on them.⁶⁶⁹ Inevitably, such a changed atmosphere has given rise to businesses claiming religious rights for themselves or for their owners.

In all likelihood, courts will adopt a standing theory akin to associational standing such that some general business corporations will be able to assert the religious beliefs and rights of their owners. Courts will likely limit such holdings to closely held businesses that elect S status for tax purposes and have unanimity—or very close to it—in shareholder beliefs. Failure to do so will encourage such businesses to reorganize as general partnerships, simple trusts, or perhaps as LLCs, depending on where courts appear to draw the lines. As a result, the ultimate consequences of owners asserting religious rights in commercial affairs would be the same. The difference would be an effective penalty on religious owners who adopt the corporate format; hence, courts would be ill-advised to adopt such an arbitrary line.

If that prediction is correct, courts will not soon reach the more substantial question regarding whether corporations themselves have religious rights either under RFRA or under the Constitution.

666. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

667. See Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 27–28 (1998).

668. See *id.*

669. See *id.*

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