

## FAITH AND THE FIRM

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In his Childress Lecture essay, Professor Larry Sager addresses the clash between public accommodation laws and legal protections for the free exercise of religion.<sup>1</sup> In particular, Sager keys in on the post-*Obergefell*<sup>2</sup> conflict between small businesses and LGBT couples that wish to use those businesses for wedding-related services. These businesses may be sole proprietorships, or they may involve a business association, such as a partnership, LLC, or corporation. To what extent does the entity status of the underlying business affect the religious rights of those involved with the business? When can an artificial business “person” exercise religious freedom? These questions have obviously taken on greater import in the wake of *Burwell v. Hobby Lobby Stores, Inc.*,<sup>3</sup> which recognized the rights of corporations under the Religious Freedom Restoration Act (RFRA).<sup>4</sup>

This essay tackles questions involving the religious exercise rights of businesses. Part I discusses the legal problem of determining when a business entity has a religious identity sufficient to justify the protection of the entity’s rights to free exercise of that religion. After surveying the Supreme Court’s approach to this question in *Hobby Lobby*, and commentators’ responses to this approach, I argue that it is not enough to simply consider the religious beliefs of those who control the entity, such as shareholders or partners. The employees are also an important part of the firm, as recognized by economic theory, and we should not ignore the role of employees’ religious beliefs in determining the entity’s religious identity. In Part II, I discuss the role of an employee’s individual religious beliefs within the scope of employment.

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1. Lawrence Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U. L.J. 585 (2016).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. 134 S. Ct. 2751 (2014).

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

Traditionally, employees have been afforded legal protections from employer discrimination against their own personal faith. However, as we open the door to more robust exercise of religious faith by businesses, we must carefully consider the ramifications for individual employees within those businesses.

### I. THE RELIGIOUS IDENTITY OF THE FIRM

It came as a shock to many Americans that a for-profit corporation could be considered religious. Similar to the decision in *Citizens United v. FEC*,<sup>5</sup> in which the Supreme Court protected the free speech rights of a corporation as a “person,” the *Hobby Lobby* decision was roundly mocked for its holding that a business could exercise religious rights.<sup>6</sup> Other commentators, however, found the liberal outrage over the opinion to be strange, and even “sad,” for reflecting a shift from the traditional liberal values of pluralism and tolerance.<sup>7</sup> The Supreme Court characterized its ultimate decision to protect religious freedom as exercised through a corporation as not all that remarkable.<sup>8</sup> How do we reconcile these competing notions?

The difficulty for many, I think, is not that an organization could have religious exercise rights; the difficulty is specifically with large, for-profit business organizations. As Chris Lund has pointed out, United States corporations are “deeply secularized,” and it is therefore unusual to think of them as entities with a religious identity.<sup>9</sup> In fact, corporate law doctrine and theory has generally presumed that corporations have but one purpose: maximizing returns to their shareholders.<sup>10</sup> Although there is debate about the

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5. 558 U.S. 310 (2010).

6. See, e.g., Stephen Colbert, *Hobby Lobby Case*, THE COLBERT REPORT (July 14, 2014), <http://www.cc.com/video-clips/xivy3m/the-colbert-report-hobby-lobby-case> [<http://perma.cc/NZT6-W5KM>] (“Oh, and it’s probably not a big deal, but they also ruled that corporations have religious beliefs.”).

7. Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 822 (2015); see also Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, CATO SUP. CT. REV., 2013–2014, at 35, 68 (“On this score, note that my own sympathies on the religion issues lie with Justices Blackmun, Brennan, and Marshall, not your typical conservative icons. On these issues at least, their civil libertarian views aligned with libertarian views more generally.”); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 31 (2015) (praising the Court’s opinion for affirming that “corporate law authorizes non-profit-maximizing behavior”).

8. *Hobby Lobby*, 134 S. Ct. at 2769 (noting that the religious freedom rights of nonprofit corporations are uncontroversial).

9. Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 287 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter CORPORATE RELIGIOUS LIBERTY].

10. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (“Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the

breadth of the shareholder primacy norm and the legal power behind it, it is generally regarded as the lodestar for corporate governance.<sup>11</sup> Given that the secularized pursuit of profit has been embedded by “deeply rooted social norms and expectations,”<sup>12</sup> the recognition of some other, divinely-inspired purpose may seem inapposite. Perhaps as a result, the United States Department of Health and Human Services (HHS) chose to advocate on behalf of a bright-line rule: nonprofit corporations would have free-exercise rights under the RFRA, while for-profit corporations would not.<sup>13</sup>

However, the *Hobby Lobby* Court was faced with a unique set of for-profit corporations who could at least plausibly make a claim to religious identity.<sup>14</sup> Both Conestoga Wood Specialties Corp. and Hobby Lobby, Inc. are closely-held corporations in which all shareholders are members of the same family and the same religious community.<sup>15</sup> They both have statements of purpose and mission that focus on religious values and commitments.<sup>16</sup> And they both could sincerely claim that the inclusion of certain contraceptive devices and drugs were against their religious principles, as they were considered to be potential abortifacients.<sup>17</sup> Thus, despite the fact that these companies operated businesses that were otherwise secular in their products, they had a genuine claim that the HHS regulation requiring coverage that provided such

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value of the corporation for the benefit of its stockholders.”); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17, 33.

11. Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1033–34 (2012) (“Although the vibrancy of shareholder primacy has at times been called into question as a matter of law, both boardrooms and courts have taken the normative call for shareholder wealth maximization increasingly to heart. There is little doubt that the revolution has not only substantially affected legal theory but also legislation, court decisions, and corporate behavior.”).

12. Lund, *supra* note 9, at 287.

13. *Hobby Lobby*, 134 S. Ct. at 2771 (characterizing the HHS position).

14. As Justice Sotomayor pointed out to Paul Clement, the private parties’ counsel, at oral argument, “you picked great plaintiffs” in terms of their religious identity. Transcript of Oral Argument at 19, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_3ebh.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf) [<http://perma.cc/K87C-JV4X>].

15. *Hobby Lobby*, 134 S. Ct. at 2764–66. The shareholders of Conestoga Wood are Mennonite, while the Hobby Lobby shareholders are Christian.

16. *See id.* at 2765–66 (describing the mission of Conestoga Wood as to “operate in a professional environment founded upon the highest ethical, moral, and Christian principles,” and the purpose of Hobby Lobby as to “honor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles”).

17. *Id.*

contraceptive approaches would infringe upon the exercise of their religious freedom.

The *Hobby Lobby* Court held that these corporations were able to claim RFRA free-exercise rights as religious “persons” under the Act.<sup>18</sup> The majority rejected the sharp distinction between nonprofit and for-profit companies with the notion that for-profit companies could have religious and other “nonprofit” motivations, too:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.<sup>19</sup>

At the same time, however, the Court recognized that most corporations would likely not be able to assert cognizable RFRA claims.<sup>20</sup> The Court pointed to the unanimity of the litigant companies’ shareholders as to their religious beliefs, and noted that “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>21</sup> By basing the corporation’s religious identity primarily on shareholder religious identity, the Court seemed to back an associational approach to such identity.<sup>22</sup> At the same time, however, aspects of the organization’s mission or business practices, such as Sunday closures and statements of corporate purpose, were also highlighted by the majority.<sup>23</sup> And the Court explicitly rejected the notion

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18. *Id.* at 2768. “For all these reasons, we hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.” *Id.* at 2775.

19. *Id.* at 2771.

20. *Hobby Lobby*, 134 S. Ct. at 2774 (“These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.”).

21. *Id.*

22. See Elizabeth Sepper, *Healthcare Exemptions and the Future of Corporate Religious Liberty*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 9, at 305, 308 (finding that the Court “embraced the moral-association theory, which posits that the enterprise functions as an association (or aggregate) of individuals”). For a defense of an associational approach, see Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173, 202 (2015) (“The upshot of this Article’s arguments is that corporations are not religious, but corporations may be treated as if they possess rights of religious freedom as a way of protecting the religious freedom rights of the corporation’s controlling members.”).

23. See Sepper, *supra* note 22, at 307–08 (finding that the Court also “adopted a mission-operation theory, which finds corporate religion in the mission and politics of the business”).

that a corporation could only exercise religious rights on behalf of individual shareholders or stakeholders.<sup>24</sup>

The alternating focus on the organization and the individual shareholders leads to questions about how the Court would handle future inquiries into a corporation's religious identity. Elizabeth Sepper has pointed out the potential for confusion: "If a corporation itself is the central rights holder, courts might look to a mission statement, articles of incorporation, or policies adopted by the board of directors. If, by contrast, corporate religious liberty accords with some group of people, other evidence becomes compelling."<sup>25</sup> The Court did not resolve this ambiguity, perhaps desiring to leave room for future development. In using the Court's approach to develop a more refined standard, Professor Brett McDonnell has created a matrix for determining religious identity that looks to both organization and ownership.<sup>26</sup> McDonnell argues that the organizational dimension on the matrix should be considered more important and looks to the organization's institutional commitment to a particular set of religious beliefs and practices.<sup>27</sup> Most authoritative, in his view, would be a foundational commitment in a corporate charter to a specific religious approach.<sup>28</sup> Other corporate-law actions, such as bylaws or shareholder agreements, would also count, as would actual corporate policies and practices that demonstrated the religious identity.<sup>29</sup> On the less-important ownership side,<sup>30</sup> courts would look to the unanimity and sincerity of religious

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24. See *Hobby Lobby*, 134 S. Ct. at 2768 (concluding that corporations are protected under the RFRA as "persons"); Sepper, *supra* note 22, at 308 ("The Court did not countenance the view . . . that the rights at issue belonged to the individual shareholders and could only be ascribed to the corporation through a reverse-veil-piercing analysis.").

25. Sepper, *supra* note 22, at 308.

26. McDonnell, *supra* note 7, at 796.

27. *Id.* at 800.

28. *Id.* at 796–97; see also Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 281 (2014) ("The most obvious vehicle for imposing shareholder views on the corporation is the corporate charter.").

29. McDonnell cites as examples policy and value statements, choice of goods or services sold that reflect religious values, charitable donations or commitments, religious marketing, and formal statements to the public. McDonnell, *supra* note 7, at 797.

30. Although both McDonnell and the Court refer loosely to shareholders as the corporation's owners, commentators have pointed out that shareholders lack many of the indicia of what we generally consider to be "ownership." See, e.g., Johnson & Millon, *supra* note 7, at 31 ("Here and elsewhere in the majority opinion and in the principal dissent, shareholders are referred to as the corporation's 'owners' even though there is no legal basis for this oft-used reference."); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002) ("A lawyer would know that the shareholders do not, in fact, own the corporation."); Armen A. Alchian & Susan Woodward, *The Firm Is Dead; Long Live the Firm*, 26 J. ECON. LITERATURE 65, 72 (1988) (stating that "ownership of the team is the residual claimancy on the most team-specific resources, which may be labor or capital"). *But cf.* Stout,

belief amongst shareholders. Because a belief amongst owners could be subject to change with new owners, the ownership factor would favor religious identity if there were a relatively small number of shareholders with no active market for the shares.<sup>31</sup> By cross-referencing both organizational and ownership factors, McDonnell argues, a court could develop a more holistic sense of the corporation's ability to exercise religion as an independent entity.

Both the *Hobby Lobby* Court's approach to religious identity and McDonnell's more formalized matrix version of this approach have intuitive appeal as a method of determining corporate religious identity. If the shareholders individually and the organization as a whole share a commitment to a religious tradition or set of beliefs, it seems reasonable to characterize such an organization as having a religious identity. Given the existence of other business organizational forms that are considered to exercise religion without controversy, it is difficult to draw a bright line around the for-profit corporation as off-limits for religious expression. Indeed, as both the Court and McDonnell point out, it is contrary to progressive principles of corporate law to insist that corporations can only be single-minded pursuers of profit at all costs.<sup>32</sup> And if a for-profit corporation can exercise religion, it makes sense to look to both the shareholders and the organization culture to determine when it is doing so.<sup>33</sup> It is not enough for a set of religiously-minded shareholders to impose their religion on an otherwise secular company.<sup>34</sup> At the same time, an organization with religious orientations but pluralistic shareholders will likely not adhere to a particular religious commitment over time.<sup>35</sup>

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*supra*, at 1191 (“[I]t perhaps is excusable to loosely describe a closely held firm with a single controlling shareholder as ‘owned’ by that shareholder . . .”).

31. McDonnell, *supra* note 7, at 798.

32. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) (“[A] for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits.”); McDonnell, *supra* note 7, at 809 (“But both progressive corporate law and the *Hobby Lobby* opinion agree in seeing corporations as ways for like-minded persons to come together to pursue shared goals to advance a shared vision of the common good in ways that go beyond simply complying with the law.”).

33. For one alternative approach, see Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1742 (2015) (“We are inclined to believe that because no readily available answers exist in corporate or constitutional law, the question of who should count toward derivative rights should be analyzed pragmatically on a right-by-right basis so as to serve the intended purpose of the right.”).

34. Some commentators appear to be more comfortable with shareholder imposition of religious values on the corporation. See Meese & Oman, *supra* note 28, at 279–80 (“Corporations whose owners ‘impose their personal religious beliefs’ on the firm are common.”).

35. McDonnell paints a picture of such a firm as one that began with religiously-homogenous shareholders but gradually diversified its ownership through public markets or heavy trading with outsiders. McDonnell, *supra* note 7, at 800. Such a firm would be

However, both the *Hobby Lobby* and McDonnell tests potentially leave out a key component of corporate religious identity: namely, the work of the corporation's employees. The corporation's shareholders are represented through the "ownership" dimension, and the board and management control the "organizational" dimension in a for-profit corporation.<sup>36</sup> But what about employees? They are not given an express role in the analysis.<sup>37</sup> The *Hobby Lobby* majority does at times seem to recognize the importance of employees to the religious identity of a corporation. The Court includes employees in this description of corporate law: "An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another."<sup>38</sup> It elaborates on this point with an example using employees: "For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company."<sup>39</sup> However, when the Court ultimately settles on a test, that test seems to exclude employees from any role in the analysis. As the majority specifically states: "[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."<sup>40</sup> Control over religious expression and identity is the prerogative of the board of directors and their chosen management team.<sup>41</sup>

Moreover, the Court specifically points to corporate law as the process through which an organization resolves questions about its religious identity. Corporate law provides shareholders with the right to elect the board of directors. By exercising this power, shareholders can control the organizational

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transitioning from religious identity to secular identity, and it would be a "rarity" for such a firm to exist for any length of time. *Id.*

36. While shareholders have voting rights as to the board of directors, most corporate law commentators agree that the board exercises control over the corporation through their decisions as well as their power to appoint management. *See, e.g.,* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) ("Neither shareholders nor managers control corporations—boards of directors do.").

37. *See* Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 9, at 149, 158 ("[W]hy not also consider the interests of employees? Some of the Court's examples involved protecting employees, yet the Court ignored them here despite the issue at stake concerning employee healthcare benefits.").

38. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

39. *Id.*

40. *Id. Cf.* Blair & Pollman, *supra* note 33, at 1741 ("The Court did not explain why it would mention employees when generally referring to derivative rights logic and Fourth Amendment protections for corporations, but not when analyzing whether corporations should have religious liberty rights to exempt them from employee healthcare benefit regulations.").

41. McDonnell's analysis concurs as a matter of description, noting that those who "own and control" the corporations include shareholders, directors, and officers. McDonnell, *supra* note 7, at 803.

policies and culture through official documents, board appointees, and business practices. In addressing concerns about disputes over religion creating corporate strife, the Court reassures by pointing to these processes: “State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. . . . Courts will turn to that structure and the underlying state law in resolving disputes.”<sup>42</sup> In discussing whether a publicly-traded corporation could exercise RFRA rights, the Court stated: “[T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>43</sup>

The Court’s decision to turn to corporate law on issues of business culture is unfortunate. In the United States, corporations are legal entities that are created through state corporate law. Power is divided between the shareholders, the board of directors, and the officers appointed by the board.<sup>44</sup> The board manages the firm and may bind the corporation through contracts and transfers of property.<sup>45</sup> Shareholders select the directors at the annual shareholders meeting.<sup>46</sup> Employees find themselves outside of this governance structure. The corporation, acting through officers or other corporate representatives, hires them through a contract to be part of the business. This contract is most commonly terminable at-will.<sup>47</sup> Employees have no direct input into the control of the corporation, nor do they have any claim to its profits.

This lack of power directly contravenes the importance of employees within the economic conception of the firm. As I have written elsewhere, economists such as Ronald Coase, Armen Alchian, and Harold Demsetz have long appreciated the importance of the employee to our conception of the firm.<sup>48</sup> In fact, Coase looked to the relationship between employer and employee to demonstrate empirical support for his theory of the firm.<sup>49</sup> Under long-established agency principles, employees are agents of the firm, and the

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42. *Hobby Lobby*, 134 S. Ct. at 2775.

43. *Id.* at 2774.

44. ROBERT C. CLARK, CORPORATE LAW 21–23 (1986).

45. DEL. CODE ANN. tit. 8 §§ 122, 141 (1953).

46. *Id.* § 211.

47. RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).

48. Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 695 (2013) (citing Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) and Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972)).

49. Coase, *supra* note 48, at 403 (“We can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’”).

firm is legally responsible for the torts they commit within the scope of employment.<sup>50</sup> The firm is also legally responsible to its employees through a myriad of labor and employment laws.<sup>51</sup> When it comes to the actual business of the enterprise, employees carry out the business and are the face of the business to consumers, suppliers, and other outsiders who interact with the firm. While shareholders are legally connected to the corporation while often distanced from it in everyday life,<sup>52</sup> employees are the opposite—connected to their employers in their daily work lives but with no legal power within it.

Thus, it is not surprising that even though employees are the central players within the economic firm, they are treated as third parties in the *Hobby Lobby* litigation. The dispute is between the government and the corporation, with the employees' access to certain kinds of contraception/abortifacients as collateral damage. The Court was ultimately not put to the test of allowing employees to be denied coverage for these healthcare benefits, as HHS had already arranged for an accommodation that required insurers to cover those benefits separately, without any connection to the objecting employer.<sup>53</sup> The Court held that there was "no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraception mandate."<sup>54</sup> The Court was thus not forced to choose between contraceptive coverage and exercise of religion. Nevertheless, the employees' interests regarding the contraceptive coverage were not characterized as matters for resolution within the firm or as part of the overall religious identity of the company. Instead, they were third-party interests—interests of people who were not otherwise connected with the company's religious exercise.<sup>55</sup>

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50. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2005).

51. Bodie, *supra* note 48, at 666–68 (discussing protections).

52. The separation of shareholder ownership from managerial control forms the basis for modern corporate law and theory. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 4–5 (1932).

53. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014). The accommodation was originally limited to nonprofit organizations. *Id.*

54. *Id.* Justice Kennedy, one of the five-member majority, emphasized in a separate concurrence: "It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786 (Kennedy, J., concurring). He specifically asserted that the free exercise of religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2786–87.

55. See Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, in *CORPORATE RELIGIOUS LIBERTY*, *supra* note 9, at 323, 323–25 (discussing third parties as "persons who derive no benefit from an exemption because they do not believe or engage in the exempted religious practices"). For further explanation of the Court's third-party doctrine, see Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 52 (2015) ("A basic principle holds that governments may voluntarily lift regulatory burdens from religious actors, but not if accommodating them shifts

Employees should not be treated as third parties when it comes to the exercise of the corporation's religious beliefs. The employees' beliefs and practices are part of the corporation's religious identity. From an organizational perspective, employees are an important part of the firm—perhaps its most important set of participants.<sup>56</sup> Determining a corporation's religious identity without looking to employees distorts the true picture of religion's role in that organization's life. Perhaps more importantly, the corporation's exercise of its identity is likely to have a large impact on employees, as they will generally be tasked with carrying out the exercise or, as in *Hobby Lobby*, will be directly impacted by it. If employees are not integral to the creation of such an identity, they would simply be pawns, mere instrumentalities of the firm's owners and controllers, in the exercise of a foreign religious identity.

The controversy surrounding donations by shareholders of Chick-fil-A illustrates the concerns. In 2011, the restaurant chain became embroiled in controversy concerning the same-sex marriage debate. The company itself co-sponsored a marriage seminar by an outspoken advocacy group that opposed gay rights and same-sex marriage.<sup>57</sup> Further financial support was provided to anti-gay-marriage groups by the company's shareholders, who, like Hobby Lobby and Conestoga Wood, were family members who owned the entire business through a closely-held corporation.<sup>58</sup> As a result, the company soon took on a cultural, religious, and political identity: that of a Christian, anti-gay company.<sup>59</sup> Both supporters and critics imbued the company's chicken sandwiches with a thick layer of symbolic meaning. And employees—particularly gay employees—were caught in the middle:

One gay employee who works at Chick-fil-A headquarters in Atlanta, Ga., and asked to remain anonymous for fear of losing his job, says he is getting it from both sides. On the one hand, there is the customer who came in and said he

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burdens onto third parties. Driving that rule is the normative principle that shifting burdens in this way would improperly impose the faith of one private party on another, in violation of the government's obligation of evenhandedness in the face of religious differences among citizens.”).

56. See, e.g., ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 1–12 (1977) (discussing the role of middle- and upper-managerial employees in coordinating large firms).

57. Kim Severson, *A Chicken Chain's Corporate Ethos Is Questioned by Gay Rights Advocates*, N.Y. TIMES, Jan. 30, 2011, at A16, <http://www.nytimes.com/2011/01/30/us/30chick.html> [<http://perma.cc/CKA9-EXBL>].

58. Kim Severson, *Chick-fil-A Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, July 25, 2012, at A13, <http://www.nytimes.com/2012/07/26/us/gay-rights-uproar-over-chick-fil-a-widens.html> [<http://perma.cc/BC6Y-P6JH>] (stating that “the company's operators, its [charitable] WinShape Foundation and the Cathy family had given millions of dollars to groups whose work includes defeating same-sex marriage initiatives and providing therapy intended to change people's sexual orientation”).

59. *Id.* (noting that one group planned an LGBT “kiss-in” at Chick-fil-A restaurants, while former Arkansas governor Mike Huckabee declared a “Chick-fil-A Appreciation Day”).

supported Dan Cathy and then “continues to say something truly homophobic, e.g. ‘I’m so glad you don’t support the queers, I can eat in peace,’” the employee, who is 23 and has worked for Chick-fil-A since he was 16, wrote in an email. On the other hand, he continued, “I was yelled at for being a god-loving, conservative, homophobic Christian while walking some food out to a guest in a mall dining room.”<sup>60</sup>

Because employees are the face of an organization, particularly in retail and service establishments, they must assume the mantle of the religious (or political or cultural) identity of the corporation when on the job. The religious identity becomes theirs, at least when working.

Similarly, the *Hobby Lobby* litigation shows how protecting a corporation’s religious identity can impinge upon the terms and conditions of employment. As noted earlier, the controversy did not really threaten to deprive employees of contraceptive coverage, as HHS had already developed an accommodation that protected religious liberty while providing coverage.<sup>61</sup> However, the outrage generated by the case stemmed at least in part from the notion that a company’s shareholders and management could dictate to employees the types of contraception they could use.<sup>62</sup> Rather than simply an accommodation of one sincere religious belief, the case came across as one (powerful) group trying to impose its religious beliefs on another (less powerful) group. As this played out in the *Hobby Lobby* case, the five members of the Green family used their religious beliefs to defeat a regulatory obligation to the 13,000-plus employees at the company.<sup>63</sup> Some commentators argued that allowing Hobby Lobby shareholders to use the RFRA to dictate contraception coverage for their employees would violate the Establishment Clause, as it would allow the shareholders to establish their religious beliefs over employees through the help of the government.<sup>64</sup> But

60. Lila Shapiro, *Chick-fil-A Anti-Gay Controversy: Gay Employees Speak Out*, HUFFINGTON POST (Aug. 1, 2012), [http://www.huffingtonpost.com/2012/08/01/chick-fil-a-anti-gay-controversy-employees-speak-out\\_n\\_1729968.html](http://www.huffingtonpost.com/2012/08/01/chick-fil-a-anti-gay-controversy-employees-speak-out_n_1729968.html) [<http://perma.cc/ZX4A-MUER>].

61. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

62. See, e.g., Jake Lefferman, *Dems Strike Back on Hobby Lobby Case With ‘Not My Boss’s Business Act,’* ABCNews.com (July 9, 2014), <http://abcnews.go.com/blogs/politics/2014/07/dems-strike-back-on-hobby-lobby-case-with-not-my-bosss-business-act/> [<http://perma.cc/3CQ2-BV5Q>] (“Colorado’s [Senator Mark] Udall said women should never have to ask their bosses for a ‘permission slip’ to access birth control or other critical health services.”); *Supreme Court Rules in Favor of Hobby Lobby in Birth-Control Mandate Case*, CHI. TRIB. (June 30, 2014), <http://www.chicagotribune.com/news/chi-supreme-court-birth-control-mandate-20140630-story.html> [<http://perma.cc/9FNW-JXV2>] (“Some demonstrators chanted, ‘Keep your boardroom out of my bedroom’ and ‘Separate church and state, women must decide their fate.’”).

63. *Hobby Lobby*, 134 S. Ct. at 2765.

64. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014) (“Courts and commentators seem unaware that by shifting the material

regardless of the constitutional ramifications, exalting the shareholders' religious beliefs ignores the obvious possible conflicts with the employees' religious beliefs.

Corporations should only have the right to exercise their religion if the organization as a whole has a religious identity. It cannot simply be based on shareholders' beliefs. Instead, a more holistic perspective on the organization's identity, presented both internally and to the outside world, is critical. The most important factor is the ongoing business itself: does the corporation's business reflect the alleged religious identity? The nature of the ongoing enterprise is what makes cases involving churches and religious nonprofits to be easily seen as having religious rights, and cases like *Hobby Lobby* to be seen as problematic. The very "business" of the Catholic Church or the University of Notre Dame is religious in nature. Most for-profit enterprises, however, will not have an overtly religious business enterprise.<sup>65</sup> On this score, *Hobby Lobby* makes out a thin case. Its underlying industry—the sales of arts and crafts products—is not overtly religious in nature. *Hobby Lobby* is also not terribly religious in its sales, marketing, or branding, although the store does allegedly refuse to promote alcohol use, and its stores are closed on Sunday.<sup>66</sup> On the other hand, Mardel—a Christian bookseller operated as a for-profit entity by one of the Greens—seems inherently religious in its business.<sup>67</sup>

The religious identity of the corporation will impact employees in the ways in which they carry out their job responsibilities. The relative investment that the employee must make in the business's religious identity will depend on the

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costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exemptions from the Mandate violate an Establishment Clause constraint on permissive accommodation.”); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE (Nov. 26, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html) [<http://perma.cc/YZ5M-LM5Z>] (noting Establishment Clause concerns with imposing religious beliefs on employees).

65. See, e.g., Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN ST. L. REV. 1, 46–47 (2013) (“For instance, from a functional viewpoint, the need to give these types of corporations the right to exercise religion would be difficult to rationalize, although there is a possibility that certain entities could make a convincing case that adherence to religious beliefs or practices is in fact an essential part of their business.”); Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1264 (2011) (“A for-profit entity that proposes to save the dolphins or feed the hungry is incoherent because the knowledge that the firm’s owner is ultimately in business to make money will dim the self-same warm glow that a donor seeks in giving to the organization in the first place.”).

66. *Hobby Lobby*, 134 S. Ct. at 2766. Other sources have noted additional components of *Hobby Lobby*’s religious identity, including that it plays Christian music in its stores and provides employees with free access to chaplains, spiritual counseling, and religiously themed financial advice. Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 77–78 (2013).

67. *Hobby Lobby*, 134 S. Ct. at 2765.

nature of the business and the employee's role within the business. A retail employee at a Christian bookstore will be engaged in selling Christian books, and thus will need to be knowledgeable about such books, or at the least respectful towards them, while a maintenance employee would not really have any direct engagement with consumers, sales, or the underlying nature of the business. Regardless, however, these employees have made a choice to work for a religiously-oriented business. They are on notice that the business might call upon them to act in the corporation's religious interests—that the corporation exercises its religious rights. We can then expect employee expectations to reflect an understanding of the nature of the enterprise. Such a situation does not represent a cadre of owner-shareholders imposing their beliefs on a set of disempowered workers. It is the shareholders and employees participating together in a religiously-oriented business enterprise.<sup>68</sup>

The Court's decision in *Hobby Lobby* does not adequately reflect the importance of the religious identity of the underlying business. Yes, the Court does cite to the fact that Hobby Lobby's family members have signed a "pledge" to "run the business in accordance with the family's religious beliefs."<sup>69</sup> However, aside from the aforementioned Sunday closure and anti-alcohol stances, there is little about the religious nature of the underlying business. As far as Conestoga Wood goes, the Court cites to literally nothing about the underlying business that is religious in nature. The only religious act of the corporation mentioned in the opinion is its opposition to funding abortifacients.<sup>70</sup> Both Conestoga Wood and Hobby Lobby had mission statements or other internal documents that reflected their Christian heritage,<sup>71</sup> but such pieces of paper should not be accorded much value if not put into action. McDonnell, too, places too much importance on corporate charters and bylaws in determining the organization's religious commitment. He argues that a corporate charter provision related to religious identity would be "[t]he most

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68. Cf. Bodie, *supra* note 48, at 705 ("It is not that employees are controlled by the firm that makes them employees. It is rather that they are part of a process of joint production, acting together within one unit."). See also McDonnell, *supra* note 7, at 809 ("But both progressive corporate law and the *Hobby Lobby* opinion agree in seeing corporations as ways for like-minded persons to come together to pursue shared goals to advance a shared vision of the common good in ways that go beyond simply complying with the law.").

69. *Hobby Lobby*, 134 S. Ct. at 2766.

70. *Id.* at 2765.

71. *Id.* at 2764–66. Conestoga Wood adopted its statement on the sanctity of human life in October 2012, likely in anticipation of the ACA litigation. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 403 (E.D. Pa.), *aff'd sub nom.* *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *rev'd and remanded to sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) and *rev'd sub nom.* *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2014 WL 4467879 (3d Cir. Aug. 5, 2014).

authoritative rule” and potentially “controlling.”<sup>72</sup> McDonnell does recognize that there is a “rich array of possibilities” for demonstrating an organizational religious commitment, including marketing, choice of goods or services, and contractual commitments.<sup>73</sup> And he also states that “[w]e should be able to find *some* degree of religious commitment along the organizational dimension if we are to grant RFRA standing.”<sup>74</sup> However, he qualifies this by stating that “the degree of commitment can certainly be more modest where the ownership dimension shows a strong commitment.”<sup>75</sup> And he ultimately concludes that “the majority decision in *Hobby Lobby* fits well with the framework for determining RFRA standing elaborated here, which in turn fits well with the prevailing progressive conception of the corporation.”<sup>76</sup>

The *Hobby Lobby* decision, and McDonnell’s doctrinal formulation of that decision’s approach, both treat employees too much like outsiders to the corporation’s religious identity.<sup>77</sup> Employees are part of that identity. They need not share the religious identity personally, but they can be expected to share that identity within the scope of their employment. Just as we expect employees of the St. Louis Cardinals to be fans of the team and of baseball while on the job, and employees of Nike to share some commitment to athletics, we can expect employees of a religious corporation to participate in the company’s religious identity. The Court itself recognizes this when it notes that a corporation concerns “the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another,” and that corporations “cannot do anything at all” without “the human beings who own, run, and are employed by them.”<sup>78</sup> The specific holding in *Hobby Lobby*, however, threatens to allow a small set of shareholders to leverage their personal religious beliefs over a large set of employees in a business that otherwise has no demonstrable religious attachments. Such a reading improperly privileges the personal religious

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72. McDonnell, *supra* note 7, at 796–97.

73. *Id.* at 797.

74. *Id.* at 801 (emphasis in original); *see also id.* at 806–07 (“In determining what the purposes of an *organization* are, we do not simply add up the individual preferences of those human beings involved in the organization; we look to the defining rules of the organization to ask what its purposes are, and who has the authority to define them.”).

75. *Id.* at 801.

76. *Id.* at 808.

77. McDonnell’s approach is likely a reflection of current corporate law doctrine, as he has previously and powerfully advocated for greater employee inclusion in corporate governance. *See* Brett McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 335 (2008) (arguing for employee primacy in corporate decision-making); Brett McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429 (2011) (evaluating possible strategies for creating a role for employees in corporate governance).

78. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

commitments of one group over another, and does damage to the implicit expectations of the participants within the firm.

Of course, the stronger the institutional commitment to religion, the more pressure will be put on individual employees to adhere to that commitment in their work lives. What is the role of the individual employee's personal religious identity within an overtly religious corporation? And what is the power of the firm to demand that the employee professionally, or even personally, share in the business's religious commitments? These questions are taken up below.

## II. EMPLOYEE RELIGIOUS IDENTITY WITHIN THE (RELIGIOUS) FIRM

In a nonreligious for-profit company, the issue of an employee's religion is traditionally deemed to be irrelevant to the performance of their job duties. Like other personal characteristics, beliefs, or memberships, religion is protected by federal statute against employer discrimination.<sup>79</sup> A company is even required to accommodate the employee's religion if it can be done without undue hardship.<sup>80</sup> However, Title VII specifically excludes an employer that is "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<sup>81</sup> Entities that do not meet the religious entity requirement can use religion to discriminate only if they can show that religion is a bona fide occupational qualification (BFOQ).<sup>82</sup>

Title VII's treatment of an employee's religion dovetails with our discussion above in Part I about corporate religious identity. Under Title VII, the corporation is only entitled to exercise its religious beliefs to discriminate against employees when it is "a religious corporation, association, educational institution, or society," and when that employee is asked to "perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<sup>83</sup> In determining whether a particular business entity is sufficiently religious, courts have looked to the entity's

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79. 42 U.S.C. § 2000e-2 (2012) (making it unlawful to discriminate in employment based on religion or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of religion).

80. Title VII states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

81. *Id.* § 2000e-1.

82. *See, e.g.,* *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 353–54 (7th Cir. 1986).

83. *Id.* § 2000e-1.

underlying business.<sup>84</sup> In *EEOC v. Townley Engineering & Manufacturing Co.*,<sup>85</sup> a closely-held mining equipment manufacturer sought to be covered under the “religious corporation” exemption when it was sued by an employee who was fired after claiming to be an atheist.<sup>86</sup> The company’s founders (and ninety-four percent share owners) intended their business to be “a Christian, faith-operated business” and reflected that faith in numerous ways, such as printing Biblical verses on invoices and requiring employees to attend a devotional service.<sup>87</sup> But the company was otherwise a straightforward mining equipment manufacturer. The court stated:

When viewed together, we have no difficulty in holding that these characteristics indicate that Townley is primarily secular. We do not question the sincerity of the religious beliefs of the owners of Townley. Nor do we question that they regard the conduct of their company as subject to a compact with God. We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation “religious” within the meaning of section 702.<sup>88</sup>

The court went on to hold that the company’s refusal to excuse the employee from religious services was unlawful discrimination under Title VII.<sup>89</sup> Similarly, in *Fike v. United Methodist Children’s Home*,<sup>90</sup> a home for orphans and abandoned children was held not to be religious, even though it was founded and controlled by the Methodist Church.

While the original mission of the United Methodist Children’s Home may have been to provide a Christian home for orphans and other children, that mission has not remained unchanged. The facts show that as far as the direction given the day-to-day life for the children at the Home is concerned, it is practically devoid of religious content or training, as such. While the

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84. See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (“Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.”).

85. 859 F.2d 610 (9th Cir. 1988).

86. *Id.* at 611–12.

87. *Id.*

88. *Id.* at 619. *But see id.* at 625 (Noonan, J., dissenting) (arguing that the court’s characterization of the corporation’s purpose as secular is itself an improper theological judgment).

89. *Id.* at 616.

90. 547 F. Supp. 286 (E.D. Va. 1982), *aff’d*, 709 F.2d 284 (4th Cir. 1983).

purpose of caring for and providing guidance for troubled youths is no doubt an admirable and charitable one, it is not necessarily a religious one. For an organization to be considered “religious” requires something more than a board of trustees who are members of a church.<sup>91</sup>

At the same time, it has been relatively uncontroversial when a truly religiously-oriented institution, like a church or religious school, seeks to fill its employee ranks with those who adhere to the same faith.<sup>92</sup> The difference is that the activity or “business” of the institution for which the employee was hired must be religious in nature.

Courts have gone on to grant religious organizations even broader employment freedoms from federal antidiscrimination protections. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>93</sup> the Supreme Court provided a defense for religious groups against employment discrimination claims brought by ministers. The Court acknowledged a protected zone around a religious group’s ministerial decisions out of a concern with “government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>94</sup> A ministerial exception seemed inapposite, in some respects, in the case at hand, because the plaintiff claimed she was fired because of her narcolepsy and subsequent disability leave—not for any religiously-oriented reason.<sup>95</sup> But the Court stated: “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.”<sup>96</sup> Within the Court’s unanimous decision, the primary ground for controversy seemed to be

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91. *Id.* at 290.

92. *Townley*, 859 F.2d at 618 (citing the following examples in which the institution was found to be religious under § 702: “*EEOC v. Fremont Christian School*, 781 F.2d 1362, 1364 (9th Cir. 1986) (defendant was ‘private educational institution . . . wholly owned and operated by the Assembly of God church’); *EEOC v. Pacific Press Publishing Ass’n*, 676 F.2d 1272, 1274 (9th Cir. 1982) (defendant was ‘nonprofit corporation . . . affiliated with the Seventh-Day Adventist Church’ engaged in publishing ‘religiously oriented material’); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1164–65 (4th Cir. 1985) (defendant was church); *EEOC v. Mississippi College*, 626 F.2d 477, 478 (5th Cir. 1980) (defendant was college owned and operated by convention of Southern Baptist churches”); *see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 231 (3d Cir. 2007) (finding a Jewish community center to be a § 702 religious organization because its main purpose was “to enhance and promote Jewish life, identity, and continuity, not to teach calculus or chemistry”).

93. 132 S. Ct. 694 (2012).

94. *Id.* at 707.

95. *Id.* at 700.

96. *Id.* at 709 (citation and quotations omitted).

the definition of minister, as two concurrences offered alternatives at either ends of the spectrum.<sup>97</sup>

These examples demonstrate that within a broad commitment to defend against religious discrimination, courts and legislatures are willing to provide employers with a fair amount of flexibility in circumstances where the organization has a religious identity and the employee is important to that identity. This perspective has applications to corporations beyond just religion. The more important a particular cultural component is to the overall business, the more employees can be expected to participate in that component. This is, in many ways, common sense. But if for-profit corporations begin to take on deeper religious, political, or other cultural identities, then this may unsettle the existing assumption that employees are largely free to make their own choices on such matters.

Larry Sager has defended this freedom over employment or membership choices, both within religious contexts as well as political or social groups, on associational grounds.<sup>98</sup> Arguing against special solicitude toward religion, Sager contends that the ministerial exception is justified by the application of a right to close associations that consists of two parts: a dyadic relationship between a religious leader and his or her congregants, and a broader relationship between all the members of a particular church or group in choosing a leader.<sup>99</sup> These broader associational rights are critical to all groups (including the titular fishing club), based on the associational needs of people to form groups without government interference.<sup>100</sup> Of course, Sager does not argue for such rights to be generally applied to employers. But it is not a

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97. Justice Thomas would require courts to defer to a religious organization's good-faith understanding of who qualifies as a minister. *Id.* at 710 (Thomas, J., concurring). Justice Alito, on the other hand, in a concurring opinion joined by Justice Kagan, would limit the exception only to an employee who "leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* at 712 (Alito, J., concurring).

98. Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 9, at 77.

99. *Id.* at 86–87.

100. *See id.* at 88 (arguing that close association groups are "entitled to be free from antidiscrimination laws with regard to their choice of members" and "entitled to discriminate in the choice of their leaders").

Although critical of the ministerial exemption, Caroline Mala Corbin acknowledged the potential that such an exception may be justified on expressive-association grounds. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2029 (2007). However, she contended that it would only be justified to the extent that the alleged discrimination was required by the religion. *Id.* ("[T]his right will not exempt all religious organizations from Title VII, only those that espouse discrimination."). She also noted that the right could be overcome by "a compelling state interest in eliminating sex and race discrimination in paid employment." *Id.*

stretch to argue that the stronger a corporation's internal commitment to a religious, philosophical, political, or cultural mission, the more such a corporation is differentiating itself based on that mission from the general norms of commerce. And such a corporation could ask more of its employees, both in terms of a commitment to that mission as well as exceptions to certain generally applicable employment regulations.

To take an example outside of the religious context, consider the case of the Feminist Women's Health Center.<sup>101</sup> In that case, an employee was fired for refusing to perform a cervical self-examination in front of a small group of women as part of a Center self-help group.<sup>102</sup> The employee claimed that requiring her to disrobe and perform such a procedure in front of others violated her rights to privacy under the California Constitution.<sup>103</sup> Noting the seriousness of the privacy invasion, the court nevertheless found the self-examination procedure to be a reasonable job requirement based on the mission of the Center. The Center's leaders believed that "cervical self-examination is important in advancing the Center's fundamental goal of educating women about the function and health of their reproductive systems."<sup>104</sup> Upon hiring, the employee was informed of the procedure and signed a form indicating a willingness to perform it.<sup>105</sup> As the court recognized, the self-examination very likely conflicted with the employee's own individual religious and cultural background and perspective.<sup>106</sup> Nevertheless, because of the Center's commitment to its interpretation of a feminist approach to women's health,<sup>107</sup> it was entitled to demand an incredibly intrusive invasion of privacy of its employees.

How far can organizations push this? For-profit corporations already have strong pressures to promote their brands through their employees, particularly in the service and retail sectors.<sup>108</sup> When corporations include the fire of

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101. See *Feminist Women's Health Ctr. v. Superior Court*, 52 Cal. App. 4th 1234 (1997).

102. *Id.* at 1238.

103. *Id.* at 1244–45.

104. *Id.* at 1248.

105. *Id.* at 1249.

106. *Feminist Women's Health Ctr.*, 52 Cal. App. 4th at 1249.

107. *Id.* at 1239. The Center's executive director provided a declaration regarding the Center's policies and practices which included the following: "The goal of self-help is to demystify and redefine the normal functions of a woman's body. Our unique and effective, although not strictly necessary tool to accomplish this is for women to visualize their own cervixes and vaginas, which are not usually seen with the naked eye without the use of a vaginal speculum." *Id.*

108. See Dallon F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 701 (2015) ("There exists an inherent tension in the law—played out daily in workplaces across the United States—between an employee's right to religious expression and an employer's countervailing right to cultivate the corporate image of its choosing.").

religious zeal to their corporate mission or purpose, they are bound to seek to conform to God's laws, not man's. Under the ministerial exemption, religious groups may seek broader exemptions from general societal responsibilities beyond antidiscrimination statutes. The Supreme Court explicitly left this open in *Hosanna-Tabor*.<sup>109</sup> But the logic behind the ministerial exemption will lead to pressure to expand it to religiously-oriented institutions, including for-profit corporations.<sup>110</sup> Given the recent expansion of constitutional and statutory protections for sexual orientation, there are bound to be more conflicts when such societal protections conflict with many mainstream religious groups.<sup>111</sup>

Of course, none of this is to say that most employers now have open season to declare a particular religious, political, or cultural commitment and thereby dodge societal responsibilities that are placed on employers. The Restatement of Employment Law recently acknowledged a default presumption that employees should not be fired based on their personal autonomy interests, such as religion, politics, and recreational activities, so long as these do not interfere with the employer's legitimate business interests.<sup>112</sup> And individual managers and supervisors should not be allowed to leverage their power over employees to advance their personal religious commitments.<sup>113</sup> But *Hobby Lobby* has opened up a new perspective on the religious identities of for-profit corporations. And such identities, if evidenced in the nature of the business itself, do provide a justification for a stronger commitment from the employees who conduct that business.<sup>114</sup> Justice Ginsburg's dissent in *Hobby Lobby* expressed concern that the RFRA could be

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109. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

110. See, e.g., *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 291 P.3d 1231, 1234 (Mont. 2012) (Hutterische Church community argued that it should be exempt from workers' compensation requirements because of church requirements that the church take care of its own and provide health care to all members). For a discussion of this case and others, see Zoë Robinson, *Hosanna-Tabor after Hobby Lobby*, in *CORPORATE RELIGIOUS LIBERTY*, *supra* note 9, at 173, 187–90.

111. See Douglas Laycock, *The Campaign Against Religious Liberty*, in *CORPORATE RELIGIOUS LIBERTY*, *supra* note 9, at 231, 242–44 (discussing the potential for conflict over the issue).

112. RESTATEMENT OF EMPLOYMENT LAW § 7.08 (2015).

113. See, e.g., *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1166 (9th Cir. 2007) (allowing Title VII claim to proceed on the theory that employee was denied a promotion because her supervisor chose another employee who shared his religion).

114. Cf. Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 5 (2012) (proposing that corporations with specific communities and cultures akin to de Tocqueville's "associations" should receive greater protections in terms of political speech than other types of corporations).

interpreted to protect employers in discriminating against employees based on religion, sexual orientation, or even race.<sup>115</sup> Controversies such as these loom on the horizon of our new, post-*Hobby Lobby* world.

#### CONCLUSION

Tectonic societal shifts have led to new conflicts over ideological and religious principles. Many of these conflicts can play out in workplace disputes. The *Hobby Lobby* decision opened up the potential for corporate entities to form a religious identity and exercise religious rights that may impact employees and third parties. This essay counsels that this religious identity should be based on corporate culture, including employees and the business they conduct, rather than the private religious beliefs of some portion of the company's shareholders. Allowing for a corporate religious identity can create "legal, practical, and ideological space" for corporations to "pursue a variety of social values while still looking to make some money."<sup>116</sup> However, we must be careful that such identities do not become tools for the legal owners of the corporation to impose their personal beliefs in the absence of a concomitant organizational commitment to those beliefs.

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115. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804–05 (2014) (Ginsburg, J., dissenting). The majority rejected this interpretation of its opinion as to racial discrimination. *Id.* at 2783 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). Commentators disagree over the extent to which the post-*Hobby Lobby* RFRA trumps Title VII's antidiscrimination provisions. Compare Hanna Martin, Note, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc.* in *Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 3 (2016) ("This Note argues that an employer who wishes to discriminate in hiring based on race—despite contrary federal law—can easily state a claim under the federal or a state RFRA."), with Cristina Squiers, Comment, *Employment Law—Hobby Lobby's Narrow Holding Guards Against Discrimination*, 68 SMU L. REV. 307 (2015) ("While the dissent believes the majority's decision will result in employers cloaking their discriminatory practices under the façade of religious exercise, this fear is unfounded because it is based on a misunderstanding of the Court's narrow holding."). One federal district court recently held that RFRA does in fact exempt an employer from Title VII's prohibitions based on the employer's religious beliefs. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083, at \*22 (E.D. Mich. Aug. 18, 2016) ("[T]he Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.").

116. McDonnell, *supra* note 7, at 822.

