Can Corporations Pray?

The Affordable Care Act, the Contraception Mandate, and the Free Exercise Rights of For-Profit Corporations

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Introduction

One of the biggest stories of the Supreme Court's 2012 Term was the success of Big Business. In a host of 5-4 rulings, the conservative Justices, time and again, moved the law to favor the claims of corporations over workers, consumers, mom and pop shops, and other individual Americans asserting their legal rights. The Supreme Court already has a number of business cases on the docket for its October 2013 Term. But even bigger cases are on the doorstep. Recently, petitions in *Sebelius v. Hobby Lobby Stores, Inc., Conestoga Wood Specialities Corp. v. Sebelius*, and *Autocam Corp. v. Sebelius* have been filed in the Court, seeking review of challenges by business corporations to the Affordable Care Act's mandate that employers' group-based health insurance plans cover FDA-approved contraceptives for women. These cases, which will almost certainly be accepted for review, tee up a huge sequel to *Citizens United v. FEC* on the question of corporate personhood and the rights of business corporations.

In *Hobby Lobby*, *Conestoga Wood*, and *Autocam,* secular, for-profit business corporations and their owners have challenged a key provision of the Affordable Care Act ("ACA") and its implementing regulations, which require that large employers (*i.e.,* those with fifty or more employees) provide their female employees with health insurance that covers preventive care and screening, including all FDA-approved contraceptives.[1] The Act, which imposes this obligation directly on the corporation and provides for civil penalties to be paid by the corporation in the event of non-compliance, exempts from the contraception coverage requirement "religious employers," such as churches and their affiliates.[2]

Hobby Lobby, Conestoga Wood, and Autocam are not religious organizations. Hobby Lobby is a chain of more than 500 arts and crafts stores employing approximately 13,000 full time employees across the country; Conestoga Wood manufactures wood products, and employs approximately 950 persons; Autocam is an auto manufacturer, which employs 1,500 employees in fourteen facilities worldwide. Each was organized to serve secular, not religious, purposes, and hire employees and serve customers of many different faiths. Nevertheless, claiming a right to religious freedom no different than that of an incorporated church, Hobby

[1] 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 12, 2012); Women's Preventative Services: Required Health Plan Coverage Guidelines (available at www.hrsa.gov/womensguidelines).

[2] 45 C.F.R. § 147.131.

Lobby, Conestoga Wood, and Autocam argue that they, too, must be exempt from the requirement to provide contraceptive coverage, invoking the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act ("RFRA"), a federal statute that provides protections against neutral laws that nonetheless impose a substantial burden on "a person's exercise of religion."[3] The businesses claim that the contraceptive coverage requirement violates their religious beliefs because they believe that some FDA-approved forms of contraception prevent implantation of a fertilized egg, and therefore, in their view, result in an abortion. Although the individual owners are not subject to any obligations under the Act – those, as noted above, flow solely to the corporation – they have sued as well, seeking to invoke their own personal rights to the free exercise of religion.

A critical, threshold question in these cases is whether the guarantee of the free exercise of religion applies to secular, for-profit, business corporations such as these. In the more than two centuries since the ratification of the First Amendment, the Supreme Court has never held that secular, for-profit business corporations may assert rights under the Free Exercise Clause. RFRA, which was enacted in 1993 to enforce the First Amendment's Free Exercise guarantee, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[4] Under the Dictionary Act, for purposes of interpreting federal law, the word "person" "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" unless "the context indicates otherwise."[5] Both under the Constitution and RFRA, a key question is whether, because of the context, *i.e.,* the history, nature, and purpose of the free exercise guarantee, secular, for-profit, business corporations may invoke protections for the free exercise of religion.

The lower federal courts have sharply divided on the merits of these lawsuits. Earlier this year, in *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit, sitting *en banc*, ruled, by a 5-3 vote, that "corporations can be 'persons' exercising religion for purposes of [RFRA]" and that, "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations."[6] On the merits, the Tenth Circuit concluded that Hobby Lobby has a right to the free exercise of religion that is substantially burdened by the contraceptive care and screening coverage requirement and was thus likely to succeed in its RFRA challenge. Since then, the Third Circuit and Sixth Circuit have rejected the Tenth Circuit's analysis. In a 2-1 opinion in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dep't of Health and Human*

[3] 42 U.S.C. § 2000bb-1(a).

[4] 42 U.S.C. 2000bb-1(a). RFRA was enacted in 1993 to respond to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause does not require the government to exempt religious actors from a neutral, generally-applicable law. Aiming to restore pre-*Smith* Free Exercise law, RFRA demands that any substantial burden on a person's exercise of religion meet the test of strict scrutiny. RFRA was held unconstitutional as applied to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507 (1997), but continues to apply to the federal government.

[5] 1 U.S.C. § 1.

[6] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013) (en banc).

Services, authored by Judge Robert Cowen, a conservative jurist appointed by President Ronald Reagan, the Third Circuit held, by a 2-1 vote, that business corporations "cannot engage in religious exercise" and thus cannot invoke the protections of the Free Exercise Clause of the First Amendment or RFRA, the protections of which apply only to a "person's exercise of religion."[7] More recently, the Sixth Circuit, in an opinion written by Judge Julia Smith Gibbons, an appointee of President George W. Bush, agreed with the Third Circuit's view, holding that Autocam Corporation, an auto manufacturing business, was "not a 'person' capable of 'religious exercise' as intended by RFRA" and was not entitled to preliminary injunctive relief against the enforcement of the contraceptive coverage requirement.[8] Petitions for a writ of *certiorari* have been filed in *Conestoga Wood*, *Hobby Lobby*, and *Autocam*, while appeals in similar cases are currently pending in the Seventh, Eighth, Eleventh, and D.C. Circuits.[9] This brewing division in the lower courts over the validity of a federal law makes Supreme Court review a virtual certainty.

This Issue Brief demonstrates why courts should reject the claim that business corporations have the right to the free exercise of religion. The Constitution never mentions corporations, and the Supreme Court's cases recognize a basic, common-sense difference between living, breathing individuals – who think, possess a conscience, and a claim to human dignity – and artificial entities, which are created by the law for a specific purpose, such as to make running a business more efficient and lucrative. Because of these fundamental differences, there are certain contexts – principally those related to human dignity and autonomy – in which corporations do not possess the same rights as individuals.

The Free Exercise Clause is perhaps the quintessential example of a purely personal constitutional guarantee that does not extend to business corporations. Business corporations cannot pray, express devotion to a god, and do not have a religious conscience. Just as important, people do not exercise religion through business corporations. No decision of the Supreme Court, not even *Citizens United*, has ever invested business corporations with the basic rights of human dignity and conscience. To do so would be a mistake of huge proportions, deeply inconsistent with the text and history of the Constitution and the precedents of the Supreme Court.

Business owners, who have chosen to run their business through the corporate form to obtain special privileges, such as limited liability, cannot disclaim their corporate status and insist that they are simply individuals exercising their own private religious beliefs. Even in the case of a corporation owned by a single shareholder, "[i]ncorporation's basic purpose is to

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[7] *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dep't of Health & Human Servs.*, No. 13-1144, slip op. at 11, 28 (3rd Cir. July 26, 2013).

[8] *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 11 (6th Cir. Sept. 17, 2013).

[9] *Korte v. Sebelius*, No. 12-3841 (7th Cir.); *Grote Industries v. Sebelius*, No. 13-1077 (7th Cir.); *O'Brien v. United States Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir.); *Annex Medical, Inc. v. Sebelius*, No. 13-1118 (8th Cir.); Beckwith Elec. Co., Inc. v. Secretary of HHS, No. 13-13879 (11th Cir.); *Gilardi v. United States Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Circuit).

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."[10] Indeed, the "whole purpose" of corporate law is to ensure that "the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." [11] As the Supreme Court has recognized in holding that business corporations cannot invoke the Fifth Amendment privilege against self-incrimination, corporate owners do not act as individuals when acting on behalf of the corporation. That rule applies squarely in the ACA cases.

The implications of a ruling in favor of Hobby Lobby, Conestoga Wood, and Autocam would be breathtaking and harmful. Far from vindicating the Constitution's promise of religious liberty, a ruling holding that secular, for-profit business corporations have the right to the free exercise of religion and striking down the ACA's contraceptive coverage requirement would allow business owners to impose their personal religious beliefs on their employees, many of whom have a different set of religious views and want and need access to the full range of contraceptives. It would create a dangerous precedent, which would likely be invoked to justify firing employees (or not hiring people in the first place) for engaging in all manner of activities that do not conform to the religious code of the company's owners, including using contraceptives, becoming pregnant out of wedlock, or marrying a person of the same sex. Allowing corporate CEOs to foist their own religious beliefs on their employees would turn the First Amendment on its head, allowing secular, for-profit businesses to enforce a religious orthodoxy in the workplace. Individuals who take a job do not surrender their right to exercise the religion of their choice at their bosses' door.

I. Corporations and the Constitution

As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States." It never specifically mentions corporations or accords them any explicit legal protections. Shortly after ratification, the Framers added the Bill of Rights to the Constitution to protect the fundamental rights of the citizens of the new nation, reflecting the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness."[12] Again, the Framers of the Bill of Rights made no explicit mention of corporations.

[10] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).
[11] *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006).
[12] This and the paragraphs that follow draw heavily on David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law* (2010) (available at http://theusconstitution.org/think-tank/narrative/capitalist-joker-corporations-corporate-personhood-and-constitution).

The failure to mention corporations in the Constitution was a purposeful one. While the Constitution "declare[d] the great rights of mankind"[13] in the Bill of Rights, the one attempt to make a specific provision in the Constitution for corporations, a proposal to give Congress an enumerated power to charter corporations, was defeated. In voting down the proposed incorporation power, the Framers voiced worries that giving the federal government the power to create corporations, and conferring on them special privileges denied to the rest of the citizenry, would lead to excessive corporate power. Far from viewing corporations simply as a part of "We the People," the Framers worried about the vast powers that corporations might wield if a charter power were added to the Constitution.[14]

Indeed, at the Founding, corporations stood on an entirely different footing than living persons. A corporation, in the words of Chief Justice John Marshall, "is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the creature of the law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."[15] As early as the First Congress, James Madison summed up the founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed."[16] In short, corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity. To be sure, they had special privileges and protections that enabled them to succeed as economic enterprises, but such corporate attributes subjected them to greater government regulation, not less.

Debates about the rights of business corporations – which are never mentioned in our Constitution, yet play an ever-expanding role in American society – have raged since the Framing era. The Supreme Court's answer to this question has long been a nuanced one: corporations can sue and be sued in federal court and they can assert certain constitutional rights, chiefly related to their right to enter into contracts, own and possess property, and manage their affairs, but they have never been accorded all the rights that individuals possess.[17] Particularly over the last century, the Supreme Court has expanded the constitutional rights of corporations, often over dissents urging that "a corporation . . . is not

[13] Annals of Congress, 1st Cong., 1st Sess. 449 (1789).

[14] *See* Daniel Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 7-10 (2008).

[15] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

[16] Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791).

[17] *Compare Dartmouth College*, supra (protection under Contracts Clause); *Louisville, Cincinnati & Charleston R. Co. v. Letson*, 43 U.S. (2 How.) 397 (1844) (right to sue under Article III); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (protection under Dormant Commerce Clause); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (protection under Equal Protection Clause); *Hale v. Henkel*, 201 U.S. 43 (1906) (protection under Fourth Amendment) *with Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519 (1839) (no protection under Article IV's Privileges and Immunities Clause); *Hale*, *supra* (no protection under Fifth Amendment's Self-Incrimination Clause); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907) (no protection under Fourteenth Amendment's Privileges or Immunities Clause).

part of the 'people'"[18] and that "the Framers . . . took it as given that corporations could be comprehensively regulated in the service of the public welfare."[19] Yet, even today – certainly one of the high water marks in American history for the rights of business corporations – it is well settled that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination are unavailable to corporations . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[20]

Many of the constitutional rights possessed by business corporations are grounded in matters of property and commerce, reflecting the Supreme Court's view that "[c]orporations are a necessary feature of modern business activity" and that "[i]n organizing itself as a collective body, it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination."[21] Business corporations possess other constitutional rights, such as rights under the Free Speech Clause, but these rights do not vindicate a corporation's own claim to autonomy or dignity. Rather, the Court has concluded that the free speech guarantee is one of the "constitutional immunities appropriate" to corporations because of the role of free speech in a democracy. Under *Citizens United* and other modern First Amendment precedents, business corporations have a constitutional right to publish advertisements, films, and the like – whether the purpose of the ad is to sell the corporation's wares or to help elect the corporation's candidate of choice to office – because speech paid for by corporations helps to inform the general public and provide a robust debate for individual listeners. According to the Supreme Court in *Citizens United*, "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"[22]

Some constitutional guarantees – even ones whose wording protects all "persons" – do not apply to business corporations. For example, as Justice Kennedy, the author of *Citizens United*, has explained, the Self-Incrimination Clause does not protect business corporations because the Fifth Amendment right "is an explicit right of a natural person, protecting the realm of human thought and expression."[23] For more than a century, the Supreme Court has affirmed that the constitutional privilege against self-incrimination "grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him."[24] Accordingly, "there is a clear distinction . . . between an individual and a corporation . . . . While

[18] *Hale*, 201 U.S. at 78 (Harlan, J., concurring in part and dissenting in part).
[19] *Citizens United*, 558 U.S. at 949-50 (Stevens, J., concurring in part and dissenting in part).
[20] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).
[21] *Hale*, 201 U.S. at 76.
[22] *Citizens United*, 558 U.S. at 349 (quoting *Bellotti*, 435 U.S. at 777).
[23] *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting).
[24] *United States v. White*, 322 U.S. 694, 698 (1944).

an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."[25]

Indeed, even as the Supreme Court has expanded the constitutional rights of business corporations, it has reaffirmed that the privilege against self-incrimination is a purely personal constitutional right. In 1988, in *Braswell v. United States* – the most recent ruling on the rights of business corporations under the Self-Incrimination Clause – all of the Justices agreed that business corporations are not persons protected by the Fifth Amendment's privilege against self-incrimination. Braswell, the president and sole shareholder of a corporation, argued that he was entitled to resist a subpoena for corporate records because the act of producing those records would incriminate him. In rejecting his contention, the Court found dispositive the fact that the subpoena was directed to corporate records: "[P]etitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."[26] Hence, "the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating."[27] Even the dissent, which would found that Braswell had a valid Fifth Amendment claim because the act of production personally incriminated him, reaffirmed the "long standing rule" that corporations and other collective entities "have no Fifth Amendment self-incrimination privilege."[28]

These precedents inform whether the constitutional guarantee of the free exercise of religion extends to secular, for-profit business corporations. Ultimately, however, as the Supreme Court has instructed, each constitutional right must be considered on its own terms: "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."[29] The next section examines the text and history of the Free Exercise Clause with this in mind.

II. Business Corporations and the Free Exercise of Religion

Constitutional text and history strongly support the Third Circuit's holding in *Conestoga Wood* that the guarantee of the free exercise of religion contained in the First Amendment is a purely personal constitutional right that does not apply to secular, for-profit business

[25] *Hale*, 201 U.S. at 74, 75.
[26] *Braswell*, 487 U.S. at 104.
[27] *Id.* at 111-12.
[28] *Id.* at 120 (Kennedy, J., dissenting).
[29] *Bellotti*, 435 U.S. at 778 n.14.

corporations. A business corporation can pay to disseminate an advertisement,[30] or a newspaper, or a film, as in *Citizens United*, but it is simply incapable of religious exercise, and it certainly cannot claim to have a religious conscience. Much like the Self-Incrimination Clause, which protects a purely personal "realm of human thought and expression,"[31] and guarantees "dignity, humanity, and impartiality"[32] by preventing the government from compelling an individual's own testimony, the right to freely exercise religion simply cannot be exercised by a business corporation. A secular, for-profit business corporation cannot, in any meaningful sense, pray, express pious devotion, or act on the basis of a religious conscience. The fundamental values behind the Free Exercise Clause, like those that underlie the Fifth Amendment's constitutional privilege against self-incrimination, simply make no sense as applied to a secular, for-profit business corporation.

The Founding generation well understood that the First Amendment's guarantee of free exercise was an unalienable individual right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. While debates in the First Congress over the Free Exercise Clause were sparse, the Free Exercises Clauses contained in Founding-era State Constitutions – which served as templates for the First Amendment – provide powerful evidence that the free exercise guarantee was understood to be a purely personal right. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it meant in their states."[33]

New York's 1777 Constitution, for example, provided that "the free exercise of religion and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind."[34] Likewise, New Hampshire's Free Exercise Clause described religious liberty specifically as a right of individuals: "Every individual has a natural and inalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ."[35] The Virginia Declaration of Rights of 1776 provided that "religion . . . can be directed only by reason and conviction . . . ; therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."[36] Many other state constitutions used similar language, confirming that the right to the free exercise of religion was understood to be a purely personal, inalienable human right.[37] As Michael McConnell has explained, these provisions "defined the scope of the free exercise right in terms

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[30] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 632 (1990) (noting long history of businesses running advertisements).

[31] *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting).

[32] *White*, 322 U.S. at 698.

[33] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990); *see also Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting) ("These state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty.").

[34] N.Y. Const. of 1777, art. XXXVIII.

[35] N.H. Const. of 1784, pt. I, art. V.

[36] Va. Declaration of Rights of 1776, § 16.

[37] *See* McConnell, *supra*, at 1456-58 & nn. 239-42.

of the conscience of the individual believer and the actions that flow from that conscience," an affirmative understanding of free exercise "based on the scope of duties to God perceived by the believer."[38] The Founding generation would never have imagined that a business corporation could claim for itself such quintessentially personal rights.

Likewise, the Memorial and Remonstrance Against Religious Assessments, authored by James Madison, "'the leading architect of the religion clauses of the First Amendment,'"[39] viewed the guarantee of the free exercise of religion in similar, wholly personal terms. Invoking the "fundamental and undeniable truth" that "'Religion . . . can be directed only by reason and conviction,'" Madison explained that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[40] Noting that "equality . . . ought to be the basis of every law," Madison argued that "[w]hilst we assert for ourselves a freedom to embrace, to profess, or to observe the Religion which we believe to be divine in origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us."[41] For Madison, the free exercise of religion was fundamentally a personal right, closely linked to the human capacity of reason, conviction, and conscience. A business corporation simply lacks these basic human capacities.[42]

In addition to the claims made specifically on behalf of the corporations, the individual owners of Hobby Lobby, Conestoga Wood, and Autocam also complain that they personally are being forced to give up vital individual rights to practice their own religion. The Supreme Court, however, has long held that corporate owners do not act as individuals when acting on behalf of the business. As the Supreme Court's Self-Incrimination cases teach:

> individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather, they assume the rights, duties, privileges of

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[38] *Id.* at 1458-59, 1459.

[39] *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)).

[40] James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901) (quoting Va. Declaration of Rights of 1776, § 16).

[41] *Id.* at 186.

[42] Some conservative commentators have contested this point, arguing that a corporation engaged in selling kosher meat surely exercises religion and should have the right to challenge a state law prohibiting the sale of kosher products. *See* Will Baude, *Do Corporations Have a Right to Sell Kosher Meat*?, Volokh Conspiracy (Aug. 7, 2013) (available at http://www.volokh.com/2013/08/07/do-corporations-have-a-right-to-sell-kosher-meat/). But a kosher meat seller is not itself exercising religion; the business is enabling the free exercise of religion by individual customers. That clear and close nexus between buyer and seller is the reason that a business corporation would, under settled principles of third-party standing law, be entitled to invoke the constitutional rights of its customers to the free exercise of religion. *See, e.g. Craig v. Boren*, 429 U.S. 190 (1976) (beer seller entitled to raise constitutional objections of his customers subjected to a gender-based restriction on purchasing 3.2% beer); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (seller of contraceptive devices entitled to assert the constitutional rights of its potential customers). That sort of nexus is entirely absent in the ACA cases.

> the artificial entity . . . of which they are agents or officers and they are bound by its obligations. In their official capacity . . . they have no privilege against self-incrimination. . . . [T]he official records and documents of the organization that are held by them in a representative rather than personal capacity cannot be the subject of the personal privilege against self-incrimination.[43]

A similar logic underlies the Supreme Court's holding that business corporations cannot invoke the protections of citizens secured by the Privileges and Immunities Clause. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must alike take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. . . . Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter, and not the contract of the individual members."[44] The lesson of these cases is plain: business corporations such as Hobby Lobby and Conestoga Wood must prove that they are capable of invoking the guarantee of the free exercise of religion (they cannot); they may not rest on the personal rights of the corporate owners.

Indeed, "[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."[45] To obtain special privileges, business owners have made the choice to create a new entity and run their business through that entity rather than as individuals. For that reason, as the Supreme Court explained in *United States v. Lee*, "[w]hen 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 that are binding on others in that activity."[46] Having chosen to operate a business through the corporate form and to create a new and independent legal entity to obtain limited liability and other special privileges, individual owners cannot turn around and invoke their own private religious beliefs to justify overriding the ACA's requirement to provide contraceptive health care coverage to the women they employ. As the Third Circuit properly held, corporate owners "cannot 'move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'"[47]

Settled corporate law principles, too, prevent individual owners from repackaging the claims of the corporation as their own. As the Sixth Circuit explained in *Autocam*, it is a fundamental principle of corporate law that "shareholders of a corporation cannot bring claims intended to redress injuries to a corporation, even when the corporation is closely held."[48]

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[43] *Braswell*, 487 U.S. at 110 (quoting *White*, 322 U.S. at 699).
[44] *Bank of Augusta*, 38 U.S. at 586-87.
[45] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).
[46] *United States v. Lee*, 455 U.S. 252, 261 (1982).
[47] *Conestoga Wood*, slip op. at 29 (quoting *Potthoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001)).
[48] *Autocam*, slip op. at 6.

Having chosen to create a new legal entity to obtain the special privileges that go with corporate status, individual owners and shareholders of corporations cannot invoke their own rights to redress harms that allegedly fall on the corporation. To permit individual owners to assert their own free exercise rights to redress an injury to the corporation "abandon[s] corporate law doctrine at the point it matters most."[49] This is no technical detail, but goes to "the very nature of the corporate form."[50] The individual owners of corporations such as Conestoga Wood, Autocam, and others, are seeking to raise their own religious beliefs – which of course are protected by the Constitution – because the respective corporation's claim that it has free exercise rights is an insupportable one. There is no basis to permit these corporations to circumvent the very foundations of corporate law.

III. The Special Constitutional Status of Churches and Similar Religious Associations

The central argument in favor of full free exercise rights for secular, for-profit business corporations, pressed by the ACA's challengers and conservative commentators, is that churches have long been organized as corporations.[51] Under settled Supreme Court precedent, they argue, churches and similar religious associations plainly have the right to freely exercise religion.[52] Business corporations, so the argument goes, are really no different than churches. Both are collective entities that can exercise religion and both fall within the protection of the Free Exercise Clause as well as statutes such as RFRA. That view cannot be squared with the text and history of the First Amendment, "which gives special solicitude to the rights of religious organizations."[53] The long settled freedom of churches, synagogues and other religious entities reflects the basic fact that "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause."[54] Going all the way back to the writings of John Locke, a church was considered "a voluntary society of men, joining together of their own accord to the public worshipping of God in such manner as they judge acceptable to him and effectual to the salvation of their souls."[55]

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[49] *Id.* at 8.

[50] *Conestoga Wood*, slip op. at 26.

[51] *See, e.g. Hobby Lobby*, 723 F.3d at 1134 (stressing that "the Free Exercise Clause at least extends to associations like churches – including those that incorporate").

[52] *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hiahleah*, 508 U.S. 520 (1993).

[53] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012).

[54] Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981); *see also* McConnell, supra, at 1490 ("'Religion' connotes a community of believers.").

[55] JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (James H. Tully ed., 1983) [1689].

It would be farfetched to make a similar claim about Hobby Lobby, Conestoga Wood, or Autocam. People simply do not exercise religion through secular, for-profit business corporations. Not only are such business corporations founded to make running a business more lucrative by limiting the liability of individual owners, they employ people of all religious faiths. Churches and other religious bodies maintain their distinctive character as religious associations by hiring members of the faith; business corporations do not.[56] That fundamental difference makes it particularly inappropriate to treat a secular, for-profit business corporation such as Hobby Lobby as the equivalent of a church. Indeed, if a corporate CEO has a right to run a business on the basis of his or her own personal religious views – in the same way a church leader has the right to govern his or her congregation – employees of a different religious persuasion can exercise their own beliefs only at the sufferance of their boss. On every level, the analogy between a church and a business corporation breaks down. Secular, for-profit business corporations simply are not voluntary associations dedicated to communal religious belief.

Not surprisingly, given these fundamental differences, since the Founding, the law has sharply distinguished religious and business corporations, protecting the ability of individuals to band together to form churches and other religious institutions, to choose their leaders, define their doctrines, and run those institutions. A long list of federal laws reflects that difference, making special accommodations that permit religious organizations to carry out their religious mission. Far from violating fundamental constitutional principles, the ACA is very much in accord with our constitutional traditions in making accommodations for religious entities, but not business corporations.

Religious corporations were well known at the Founding. Early in our Nation's history, the Supreme Court recognized the power of state legislatures to "enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns."[57] Given "the difficulties which surround all voluntary associations," Justice Story remarked that the free exercise of religion "could be better secured and cherished by corporate powers."[58] Without the ability to incorporate, churches would have grave difficulty maintaining ownership of their own property.

The legal traditions that the Founders brought from England included a sharp distinction between religious and other private corporations. Blackstone observed the "division of corporations . . . into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons . . . These are erected for the furtherance of

[56] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 23-24 (2011) ("Organizations founded on shared religious principles cannot really exist unless they actually share religious principles . . . . Having to hire Protestants, the Catholic Church could not stay distinctively Catholic; having to hire Christians, Orthodox Judaism could not stay distinctively Jewish (let alone Orthodox).").

[57] *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815).

[58] *Id.*

religion, and perpetuating the rights of the church."[59] Founding-era treatises on corporate law, following Blackstone, explained that "[t]here is one *general* division of corporations into *ecclesiastical*, and *lay.* Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual . . . ."[60] The idea that the free exercise of religion "could be better secured and cherished by corporate powers" applied to religious corporations alone.[61]

Consistent with this history, the Supreme Court has many times recognized special constitutional protection for the free exercise of religion that applies to religious, but not other, corporations. The Supreme Court has held that "[f]reedom to select the clergy" has "federal constitutional protection as a part of the free exercise of religion against state interference," observing that the First Amendment specifically ensures "freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[62] Recently, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the Supreme Court reaffirmed these principles, holding that a religious employer could not be sued under Title VII of the Civil Rights Act of 1964 for firing a minister. "Requiring a church to accept or retain an unwanted minister . . . interferes with the internal governance of the church . . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[63] Under *Hosanna-Tabor*, incorporated churches and other religious employers are free from the strictures of federal anti-discrimination law in choosing their ministers, an exemption that does not extend to business corporations. No business corporation can claim a similar right to make employment decisions free from Title VII's mandate of equality of opportunity.

Congress, too, has provided legislative exemptions that apply to religious corporations, but not other kinds of corporations. For example, the prohibition contained in Title VII of the Civil Rights Act of 1964 on employment discrimination on the basis of religion does not apply to 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."[64] A Christian church, organized as a corporation, can insist that its employees be members of the church, but a business corporation, even one that claims to be run on the basis of religious values, cannot limit employment to members of a certain religion. The Supreme Court has upheld the constitutionality of this legislative accommodation of religion, finding it served the

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[59] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *470.

[60] STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 22 (1793).

[61] *See Hobby Lobby*, 723 F.3d at 1170 (Briscoe, C.J., concurring in part and dissenting in part) (making this point).

[62] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 154-55 (1952); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872).

[63] *Hosanna-Tabor*, 132 S. Ct. at 706; *see also id.* at 712 (Alito, J., concurring) ("[T]he Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.").

[64] 42 U.S.C. § 2000e-1.

permissible purpose of "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[65] The Court rejected the argument that Congress lacked the authority to "single[] out religious entities for a benefit," concluding that Congress could make special legislative accommodations for religious, but not other, corporations.[66] As Justice Brennan explained in an important concurring opinion, special religious accommodations given to churches and other religious entities reflect the twin facts that "religious activity derives meaning in large measure from participation in a larger religious community," and that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[67] Under the view of Conestoga and Hobby Lobby, however, this distinction between religious and business corporations would be unconstitutional.

Particularly important for *Hobby Lobby* and the other ACA cases, the two most important federal laws that protect the free exercise of religion – RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") – both manifest special concern with protecting the rights of churches and other religious institutions. Neither Act treats business corporations as religiously-motivated persons capable of exercising religion.

Congress enacted RFRA with the special status of churches in mind. To show the need to restore federal protections against neutral laws that substantially burden religious liberty, congressional proponents of the Act pointed to instances in which "municipalities are using zoning regulations to exclude houses of worship from certain areas,"[68] as well as cases in which local governments applied landmarking laws to church property.[69] The House and Senate Reports supporting RFRA mention numerous examples in which churches and other religious entities were denied the free exercise of religion, but none involving business corporations. In an extensive review, Douglas Laycock has summarized the RFRA record with respect to free exercise: "'Exercise of religion' . . . has two main components: the religiously motivated conduct of individuals and the operation of religious organizations."[70] As the dissent in *Hobby Lobby* observed, "[e]ntirely absent from the legislative history . . . is any reference to for-profit corporations. . . . [N]owhere is there any suggestion that Congress foresaw, let alone intended,

[65] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).
[66] *Id.*
[67] *Id.* at 342 (Brennan, J., concurring).
[68] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong., 2nd Sess. 122 (1992) (statement of Rep. Stephen Solarz); *see also Religious Freedom Restoration Act of 1993*, 103rd Cong., 1st Sess., S. Rep. 103-111, at 8 (1993) (citing testimony that "[c]hurches have been zoned even out of commercial areas").
[69] *Religious Freedom Restoration Act of 1993*, 103rd Cong., 1st Sess., H.R. Rep. 103-188, at 6 n.14 (1993).
[70] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 236 (1994).

that RFRA would cover for-profit corporations."[71] No one imagined that a business corporation could claim to exercise religion.

This is entirely consistent with the Supreme Court's pre-*Smith* case law, which RFRA sought to restore. As the Sixth Circuit explained in *Autocam*, "Congress's express purpose in enacting RFRA was to restore Free Exercise claims" against neutral laws that substantially burden a person's free exercise of religion – previously recognized by the Supreme Court but abrogated in *Smith* – "claims which were fundamentally personal."[72] Far from serving a restorative purpose, reading RFRA to protect free exercise rights for secular, for-profit business corporations "would lead to a significant expansion of the scope of the rights the Free Exercise Clause protect[s] . . . . 'During the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations.'"[73] This history and context demonstrate that RFRA does not grant rights to secular, for-profit business corporations, rights that have never been previously recognized by the Supreme Court.

What Congress left implicit in RFRA it made explicit in RLUIPA, enacted in 2000 to provide new federal protection against state actors in the wake of RFRA's partial invalidation. Responding to continuing concern that churches and other religious institutions were being denied the free exercise of religion by state and local governments, RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless it satisfies the test of strict scrutiny.[74] Other provisions of RLUIPA prohibit the government from enforcing a land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[75] Conspicuous in its absence is any textual suggestion that business corporations, as well as religious ones, should be protected by the guarantee of the free exercise of religion. As with RFRA, no one supposed that a business corporation could claim to exercise religion. It is a testament to the radical and aggressive push for corporate personhood that such claims are now being made – and, at least in the Tenth Circuit, accepted – in the courts.

IV. Conclusion

The conservative attack on the ACA's contraception coverage requirement proceeds from the premise that business corporations have the same rights to the free exercise of

[71] *Hobby Lobby*, 723 F.3d at 1169 (Briscoe, C.J., concurring in part and dissenting in part).
[72] *Autocam*, slip op. at 12.
[73] *Id.* at 13 (quoting *Hobby Lobby*, 723 F.3d at 1168 (Briscoe, C.J., concurring in part and dissenting in part).
[74] 42 U.S.C. § 2000cc(a)(1).
[75] 42 U.S.C. § 2000cc(b)(1), (3).

religion as individuals, churches, and other religious institutions. As this Issue Brief has demonstrated, that view is seriously flawed.

From the Founding until today, the Constitution's protection of religious liberty has been seen as a personal right, inextricably linked to the human capacity to express devotion to a God and act on the basis of reason and conscience. Business corporations, quite properly, have never shared in this fundamental aspect of our constitutional traditions for the obvious reason that a business corporation lacks the basic human capacities – reason, dignity, and conscience – at the core of the Free Exercise Clause. While religion in this country has always been a communal matter, people simply do not exercise religion through business corporations.

Far from treating business and religious corporations as one and the same, constitutional text and history, as well as settled law, all give a special status to churches and other religious institutions, in recognition of the fact that individuals often exercise religion as part of a community of believers. At the Founding, churches and business corporations were seen as fundamentally different, the former created for the purpose of ensuring the flourishing of communal religious exercise, the latter to make running a business more profitable. Consistent with this history, religious institutions receive many types of legal protections for religious exercise denied to business corporations. The arguments made by Hobby Lobby, Conestoga Wood, and Autocam, if accepted by the Supreme Court, would turn this fundamental aspect of First Amendment law on its head. There is no basis in the Constitution's text and history, the precedents of the Supreme Court, or the Religious Freedom Restoration Act, for treating a business corporation as a religious actor no different from a human being or a church or other religious entity. The flawed claims to the contrary made by Conestoga Wood, Hobby Lobby, Autocam and other secular, for-profit business corporations should be rejected.