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WAIT, WHO ARE WE TALKING ABOUT HERE? SEARCHING FOR A CONSISTENT APPROACH TO APPLYING RFRA TO CORPORATIONS

STEVEN J. HARRISON*

INTRODUCTION

There is perhaps no idea in contemporary American law that is more publicly contentious than that of “corporate personhood.”¹ Of all of the Supreme Court cases dealing with corporations and the corporate entity, few probably thought that a decision could surpass *Citizens United*² in public controversy and divisiveness produced by the decision,³ which brought the legal fiction of the “corporate person” to the forefront of popular debate and discussion.⁴ Then came *Burwell v. Hobby Lobby Stores, Inc.*,⁵ which not only addressed whether corporations could “act” in a manner that seemed only a possibility for “real” or “natural” persons, which recalled the contentious question in *Citizens United*, but did so in the context of religious liberty and women’s repro-

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1. See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785 (2013). As Blair notes, the thorny issue of how to understand the corporation, if anything more than the sum of its parts, is by no means a purely modern question or purely modern phenomenon.

2. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

3. See, e.g., Kyle Langvardt, *Imagining Change Before and After Citizens United*, 3 ALA. C.R. & C.L. L. REV. 227 (2012); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125 (2013); Ganesh Sitaraman, Essay, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755 (2014); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013).

4. See, e.g., Nina Totenberg, *When Did Corporations Become People? Excavating the Legal Evolution*, NPR (July 28, 2014), <http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution>; Kent Greenfield, *If Corporations Are People, They Should Act like It*, THE ATLANTIC (Feb. 1, 2015), <http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/>; Adam Winkler, *Corporations Are People, and They Have More Rights Than You*, HUFFPOST POLITICS, THE HUFFINGTON POST (Aug. 20, 2014), http://www.huffingtonpost.com/adam-winkler/corporations-are-people-a_b_5543833.html; Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASH. MONTHLY (Jan./Feb. 2015), http://www.washingtonmonthly.com/magazine/januaryfebruary_2015/features/let_us_now_praise_corporate_pe053466.php?page=sll.

5. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

ductive rights, both of which tend toward controversy.⁶ What could possibly go wrong? Unsurprisingly, the case is generally reviled by those who can be overly generalized as “the Left”⁷ and praised by those who can likewise be overly generalized as “the Right.”⁸ The *Hobby Lobby* case was so contentious precisely because it was reflective of a number of larger concerns in the popular American psyche—fear of corporate personhood,⁹ the impact of religious freedom claims in an era of expanding reproductive rights for women¹⁰ (and the impact of the latter, and other progressive social movements, on the former),¹¹ and the ability of religiously affiliated individuals and institutions to exist and navigate within a cultural atmosphere, which is progressively more hostile to the views of conservative and traditional institutions.¹²

In addition to frustration over the ultimate outcome reached by the Court, there has been much commentary on the reasoning underlying the *Hobby Lobby* decision and its future implications.¹³ The line of reasoning that the Court took in *Hobby Lobby* is the concern of this Note. The general outline of the majority’s argument in *Hobby Lobby* follows several steps: first, based on principles of interpretation, RFRA applies to the closely held corporations that were before the Court.¹⁴ Therefore, the religious burdens claimed by the plaintiffs must survive the “compelling government interest” and “least restrictive means” test re-instated by RFRA, if in fact the burden was determined to be substan-

6. See, e.g., Robin Abcarian, *Supreme Court’s Hobby Lobby Decision is a Slap in the Face to Women*, L.A. TIMES (June 30, 2014), <http://www.latimes.com/nation/la-me-ra-hobby-lobby-scotus-20140630-column.html>; Carey Lodge, *Hobby Lobby President: ‘Christians Must Fight for Religious Freedom in America,’* CHRISTIAN TODAY (Sept. 16, 2014), <http://www.christiantoday.com/article/hobby.lobby.president.christians.must.fight.for.religious.freedom.in.america/40675.htm>. I cite these articles more for the headlines as they exemplify the intensity with which people attack and defend either side of the debate. They illustrate the “us-versus-them,” binary, zero-sum thinking that is often employed in this conversation.

7. See, e.g., Leah Rutman, *The Hobby Lobby Decision: Imposing Religious Beliefs on Employees*, AM. C.L. UNION (Aug. 11, 2014), <https://aclu-wa.org/blog/hobby-lobby-decision-imposing-religious-beliefs-employees>.

8. See, e.g., Jennifer A. Marshall & Sarah Torre, *RFRA Worked the Way it was Supposed to in Hobby Lobby*, THE HERITAGE FOUNDATION (July 8, 2014), <http://www.heritage.org/research/commentary/2014/7/rfra-worked-the-way-it-was-supposed-to-in-hobby-lobby>. I could hang a long list of sources in this and the above footnote, but I believe everyone has already experienced the truth of the proposition without an excess of citations.

9. See generally Winkler, *supra* note 4.

10. See, e.g., Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U.J. GENDER SOC. POL’Y & L. 303 (2013–14).

11. See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014–15).

12. *Id.*

13. See, e.g., Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2014–15); Elizabeth Sepper, *Reports of Accommodation’s Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24 (2014–2015); Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV.L. & POL’Y REV. 63 (2015); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN’S L.J. 35 (2015); Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. WOMEN’S L.J. 153 (2015).

14. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

tial, as it was.¹⁵ This line of reasoning, however, raises several questions. The first of which is, if we begin with the proposition that the corporation, for purposes of the law, is, in fact, a person, how can we coherently talk about the “corporate person” exercising religion? And, supposing that we can, how are courts supposed to determine whether such “religious exercise” has in fact been burdened? Corporations cannot visit houses of worship, confess common creeds, or practice religious rites, all of which come to mind when we consider the phrase “exercise of religion.” What precisely does it mean when a court proclaims that a burden has been imposed on a corporation vis-à-vis its exercise of religion? And if, somehow, the corporation can meaningfully exercise religion, what standard is used to determine the substantiality of the claimed burden? Against what baseline is the “heaviness” of the purported burden to be measured? Or is the “religious burden” that we are considering simply that which is imposed on the individual? To sum these questions into a single difficulty, how are burdens on the “religious exercise” of a corporation to be conceptualized and measured? This is the question to which this Note is devoted to answering.

In this Note, I will argue that a new approach is needed for analyzing RFRA claims involving corporate persons. In order to make this argument, I will first detail the history leading up to the *Hobby Lobby* decision, including both the *Smith* case and the passage of RFRA. Then I will analyze the *Hobby Lobby* case itself, and thereafter present my argument that the majority’s analysis of religious burdens of “corporate persons” does not adequately distinguish whose religious exercise is in question and who exactly is the person burdened. I will then give a quick overview of the history of the corporation in the United States, and show how this history provides us with an understanding of the proper background against which to measure the substantiality of burdens imposed on corporations. Finally, with this understanding, I will outline a three-part test for determining if a substantial burden has been imposed upon a “corporate person.” By making the test for “corporate persons” analytically distinct from that which is utilized in RFRA claims for natural persons, I believe my test will protect the religious rights of individuals as contemplated by the RFRA statute and provide an analysis rigorous enough to ensure both that the state will not have its ability to pass public welfare legislation hamstrung, and that corporations will not be able to escape the effects of legislation which their board of directors, or other controlling group, would simply rather avoid.

I. THE PATH TO *Hobby Lobby: Employment Division v. Smith* and RFRA

In order to understand the current questions surrounding *Hobby Lobby*, it is necessary to first turn back to the Supreme Court’s decision in *Employment Division v. Smith*.¹⁶ While the history of the *Smith* case is

15. *Id.* at 2780–82.

16. *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

well known, and has been written about extensively,¹⁷ a brief outline of the case will be helpful in understanding the background against which it was decided. In order to provide this background, I will briefly describe both the *Smith* case and Congress's response to that decision: The Religious Freedom Restoration Act.¹⁸ This quick background of the well-known development in the law of religious exemptions will be helpful in understanding the context of the *Hobby Lobby* case, particularly the back-and-forth between the Supreme Court and Congress over the issue of the proper role of the religious exemption.

A. Employment Division v. Smith and Its Impact

The first major development that concerns us is the Court's decision in *Employment Division v. Smith*.¹⁹ Prior to the decision, the Court had long held that religious exemptions could be judicially imposed in cases where generally applicable laws imposed religious burdens on plaintiffs that were not "justified by a compelling state interest."²⁰ This regime, however, was altered by *Smith*; the *Smith* case involved the religious use of peyote, a hallucinogenic drug, which was proscribed by Oregon's controlled substances statute.²¹ After two individuals were denied unemployment benefits on the grounds they had been fired for ingesting the drug, they brought suit, claiming the denial of unemployment benefits was in violation of the Free Exercise Clause.²² The plaintiffs relied on *Sherbert* and its "compelling government interest" test.²³ In considering whether the *Sherbert* test ought to be applied in the case, the Court came to the following conclusion:

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"-permitting him, by virtue of his

17. See, e.g., Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259 (1993); Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2010–11).

18. 42 U.S.C. § 2000bb (2012).

19. 494 U.S. 872.

20. *Sherbert v. Verner*, 374 U.S. 400, 403 (1963); See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

21. *Smith*, 494 U.S. at 874.

22. *Id.* at 874–75.

23. *Id.* at 876, 883 (citing *Sherbert*, 374 U.S. at 403).

beliefs, “to become a law unto himself,”—contradicts both constitutional tradition and common sense.²⁴

The Court feared that a contrary position would deprive the government of its ability to engage in any number of different types of social welfare legislation, as many of the regulatory schemes set up to achieve social goods inevitably end up conflicting with the conscience claims of those on whom the regulatory scheme imposes burdens or obligations.²⁵ Consequently, the *Smith* Court reasoned that a position contrary to the one it had taken would risk that these essential pieces of social welfare legislation and regulatory schemes could die the death of a thousand qualifications as a result:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.²⁶

Having utilized this parade of horrors to emphasize the risks the majority’s conclusion avoids, the *Smith* Court announced the death of the *Sherbert* test. This meant that plaintiffs could no longer have a potential refuge in court-created religious exemptions to generally applicable laws, as the handling of accommodations were being left “to the political process.”²⁷

Central to the *Smith* decision—and to the Court’s understanding of the implications of the plaintiffs’ position in the case—is the fear that granting individuals the ability to escape many of the necessary and everyday actions taken by the government would undercut the government’s ability to engage in any type of public welfare legislation, by shredding the legislative program with religious exemption claims; and with the religious pluralism of modern (or even 1990) America. There were simply too many different types of objections that could be made. The Court, with *Smith*, therefore, announced the new rule for religious exemptions: plaintiffs would no longer have recourse to judicially-created religious exemptions stemming from the Free Exercise Clause. Against the background of *Sherbert* and *Yoder*, the *Smith* decision came as quite a shock.²⁸ While some argued *Smith* was a disaster for religious

24. *Id.* at 885 (quoting *Lying v. Nw. Indian Cemetery Protective Ass’n*, 108 S. Ct. 1319 (1988)).

25. Which, in a nice bit of foreshadowing, was again the concern voiced by the dissenters in the *Hobby Lobby* decision twenty-four years later.

26. *Id.* at 888 (internal citations omitted).

27. *Id.* at 890.

28. See David B. Frohnmayer, *Employment Division v. Smith*: “*The Sky that Didn’t Fall*,” 32 *CARDOZO L. REV.* 1655, 1655–56 (2010–11) (describing *Employment Division v. Smith* as “a landmark case which resulted in a completely unexpected decision by the

liberty,²⁹ and others attempted to rebut that claim,³⁰ what was indisputable was that the era of judicially-granted religious exemptions was over.

B. *Congress Strikes Back: The Passage of RFRA and the Re-Birth of Sherbert*

In the aftermath of *Smith*, just three years after the *Smith* decision, Congress passed the Religious Freedom Restoration Act of 1993,³¹ which was explicitly written to nullify the *Smith* decision³² and force a return to the “compelling interest test” employed in *Sherbert* and *Yoder*.³³ RFRA made the return to the *Sherbert* standard explicit: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of *general applicability*.”³⁴ With explicit reference to the *Smith* language utilized by Justice Scalia, Congress announced that it was not persuaded by the parade of horrors and that the government would be just fine navigating the *Sherbert* test once again. In eliminating the *Smith* non-standard, Congress reinstated the *Sherbert* balancing test: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁵ And with RFRA, Congress made it clear that there was, once again, a regime of religious exemptions from laws which, while not targeting any religious belief or activity, nevertheless did not pass the strict test originally contemplated by *Sherbert*.³⁶ Congress signaled to potential plaintiffs that they would once again be able to appeal to the judicial branch for relief from laws which, while facially religion-neutral, nevertheless imposed burdens on the plaintiffs’ personal religious beliefs. With religious exemptions back on the table, as it were, it was only a matter of time before tensions between religious claims and progressive social cases came to a head,

United States Supreme Court . . . The . . . *Smith* [case] at [its] inception seemed to be straightforward unemployment compensation claims with *Sherbert v. Verner* overtones.”)

29. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); in a particularly memorable critique, former New York Congressman Stephen Solarz attacked the *Smith* decision as a “dastardly and unprovoked attack on our first freedom.” 137 Cong. Rec. 17,023, 17,035–36 (1991) (statement of Rep. Solarz).

30. See Garnett, *supra* note 17.

31. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

32. *Id.* at (a) (4).

33. *Id.* at (a) (5).

34. *Id.* at § 2000bb-1(a) (emphasis added).

35. *Id.* at § 2000bb-1(b) (1)–(2).

36. It is also interesting to note that the passage of RFRA approached unanimity and was without any meaningful resistance: it passed the House unanimously through a voice vote and passed the Senate in a resounding 97-3 vote; in addition, the House bill had 170 cosponsors, which, excluding one non-voting cosponsor (the Representative from the District of Columbia), constituted nearly 40 percent of the House (approximately 38.9 percent). *H.R. 1308 - Religious Freedom Restoration Act of 1993*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/1308>.

and this was realized by the Affordable Care Act and the contraception mandate.

II. *BURWELL V. HOBBY LOBBY STORES, INC.*

The facts of the *Hobby Lobby* case are well known, so I will only provide a brief sketch of the case. The lead-up and background to the case, as everyone no doubt remembers, is set against the background of the passage of the Affordable Care Act.³⁷ At issue in *Hobby Lobby* was the employer mandate, one of the key components of the Act. The case centered around two families, the Hahns and the Greens, which each controlled closely-held corporations: the Hahns controlling Conestoga Wood Specialties and the Greens controlling the Hobby Lobby chain of stores.³⁸ Both families were devout Christians and both strove to operate their businesses in accordance with those beliefs.³⁹ Both of these families challenged the Affordable Care Act's contraceptive mandate, as they believed that the tenets of Christianity teach that "human life begins at conception" and that it is therefore, profoundly immoral to provide for contraceptives which operate after conception.⁴⁰ For both families, certain drugs mandated by the ACA and the Department of Health and Human Services were abortifacients: the functional equivalent of abortion and, therefore, a profound sin according to their religion.⁴¹ The cases were consolidated and brought before the Court in 2014, garnering much attention from the media⁴² and from citizens⁴³ who, quite naturally, viewed themselves as intensely invested in the outcome of what was certain to become, in one way or another, an infamous case.

What concerns us the most, at present, with the reasoning in *Hobby Lobby* is the Court's discussion of the burden imposed on the corporation and, by extension, the plaintiffs. The Court stated that "[b]y requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs."⁴⁴ The Court dispensed

37. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

38. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2764–65 (2014).

39. *Id.*

40. *Id.* at 2764.

41. To be more specific, under the Affordable Care Act, employers with at least 50 employees must offer health coverage providing "minimum essential coverage" or pay a fine. 26 U.S.C. §§ 4980D(a)-(b), 5000A(f)(2). The statute mandated that such health care coverage must include "preventative care and screenings," but did not specify what types of care fell under that category, instead opting to leave the Health Resources and Services Administration (HRSA), a subcomponent of the HHS, to define that category. 42 U.S.C. § 300gg-13(a)(4). The HRSA then published "Women's Preventative Services Guidelines" which provided that employers were to provide coverage for all contraceptive methods approved by the FDA. 77 Fed. Reg. 8725.

42. See, e.g., Jaime Fuller, *Here's What You Need to Know about the Hobby Lobby Case*, WASH. POST (Mar. 24, 2014); Adam Liptak, *Court Confronts Religious Rights of Corporations*, N.Y. TIMES (Nov. 24, 2013).

43. See Lawrence Hurley, *U.S. Justices Uphold Firms' Religious Objections to Contraception*, REUTERS (June 30, 2014).

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

with the argument that the corporations at issue were not “persons” within the meaning of RFRA, saying “[t]he term ‘person’ sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons,” and because it was admitted that RFRA covered nonprofit corporations, it could not be argued that the corporations in this case did not fit the definition.⁴⁵ From that point, the Court quickly moves to an analysis of the religious burden imposed on the plaintiffs:

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. We have little trouble concluding that it does. As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.⁴⁶

From this point, it was not difficult for the Court to reach its conclusion, as the Court noted that the sums the corporations would have to pay were indeed substantial;⁴⁷ the Court then applied the pre-*Smith* standard that RFRA reinstated to find that, regardless of whether the contraceptive mandate furthered a compelling governmental interest, the mandate was not the least restrictive means of securing “public health,” “gender equality,” or “access to all FDA-approved contraceptives without cost sharing.”⁴⁸ Having failed the pre-*Smith*, *Sherbert* test, the contraceptive mandate was struck down as applied to the plaintiffs.

A. Hobby Lobby’s *Aftermath*

As I noted above, the *Hobby Lobby* decision did little to quell the concerns presented by the case,⁴⁹ and its contentiousness remains. And it is not the case that the controversies at issue in *Hobby Lobby* will only be fought with ink and paper on the law-review article battlefield: earlier last year, the Court granted certiorari to hear the case of *Little Sisters of the Poor Home for the Aged v. Burwell*.⁵⁰ The case has weighty

45. *Id.* at 2769. Also, while there was a back-and-forth between the majority and dissenting opinions on the extent to which RFRA, as modified by RLUIPA, incorporated and/or expanded pre-*Smith* free exercise jurisprudence, that discussion is ancillary to the purposes of this Note, and, therefore, is not addressed. *See id.* at 2760–62, 2792–93.

46. *Id.* at 2775.

47. The sums included \$475 million per year for Hobby Lobby and \$33 million for Conestoga. *Id.* at 2775–76.

48. *Id.* at 2779–84. The analysis of how the mandate failed the least-restrictive means test, while of both practical and academic interest and importance, is not of great significance to furthering the argument presented in this Note.

49. *Supra* note 13.

50. *See* 136 S. Ct. 446 (Mem.) (2015). This case, unsurprisingly, has garnered similar interest to the *Hobby Lobby* case. *See, e.g.,* Emma Green, *The Little Sisters of the Poor are Headed to the Supreme Court*, THE ATLANTIC (Nov. 6, 2015) <http://www.theatlantic.com/>

implications for a number of other religiously affiliated institutions which have also challenged the contraceptive mandate.⁵¹ Needless to say, the controversy will not be limited to academia, but is already still active in the lower courts and circuit courts around the nation, with the Supreme Court again set to give new definition to what constitutes a “substantial” burden in these scenarios. With that in mind, I will now attempt to contribute to the conversation by suggesting a new way to look at the meaning of a burden imposed on a corporation.

B. *Analyzing Religious Burdens on Corporations:
Is There a Double Standard?*

Returning to the reasoning of the majority in *Hobby Lobby*, what might strike readers of the opinion as odd is the fact that while the “persons” in question are the corporations controlled by the Hahns and the Greens, and not the Hahns and Greens themselves, the Court, when analyzing the burden imposed by the ACA on these “persons,” references the Hahns and Greens individually, and not the corporate entities. This reasoning was not lost on Justice Ginsburg who, in her dissent, articulated the difficulty:

[T]he Court questions why, if “a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can’t . . . do the same?” But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court’s conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.⁵²

As I will describe in greater detail below, the plaintiffs in *Hobby Lobby*, at least at first, seem to be having their cake and eating it too: they are able to legally separate themselves from the corporation and therefore protect their assets (in addition to gaining other benefits). However, the plaintiffs seem to breach this bargain in the *Hobby Lobby* case because they object, on *personal* grounds, to activities the government is

politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729/.

51. Examples of such institutions include the University of Notre Dame and Wheaton College. Notre Dame, in May of last year, lost its case in the Seventh Circuit after the Supreme Court remanded the case in light of the *Hobby Lobby* decision. Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015). Wheaton College, after the Supreme Court granted a temporary injunction to the college, had a lower court’s denial of the college’s preliminary injunction affirmed by the Seventh Circuit. Wheaton Coll. v. Burwell, 792 F.3d 792 (7th Cir. 2015). The case, currently back in the District Court for the Northern District of Illinois, was stayed pending the ruling from the *Little Sisters of the Poor* case. Joint Motion to Stay the Case, Wheaton College v. Burwell, 1:13-cv-08910 (N. Dist. Ill. 2014).

52. *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (internal citations omitted).

compelling the *corporation* to undertake. But have not the plaintiffs arranged for a legal separation between themselves and their businesses via the corporate structure, regardless if the corporation is closely-held? After all, is not the legal separation between the individual and the corporation the *raison d'être* of the corporate entity? How then can they object in this way? It does seem, *prima facie*, that Justice Ginsburg's dissent exposes a serious gap in the reasoning of the majority: in the Court's opinion, after holding that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA,"⁵³ Justice Alito poses the question of "whether the HHS contraceptive mandate 'substantially burden[s]' *the* exercise of religion"⁵⁴ (emphasis added). Notice *whose* exercise is not specified. Then, in the next paragraph, the Court states "[a]s we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. *They* therefore object on religious grounds to providing health insurance By requiring the Hahns and Greens *and their companies* to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs."⁵⁵ We can see that the Court's opinion seems to make an unjustified leap from the rights of the corporations in question to the beliefs of the flesh and blood persons in the case. The use of the pronoun "they" in the above section from the Court's opinion illustrates the apparent blending of identity: exactly *whose* religious exercise are we talking about here? And who is the "person" whose burden we are analyzing: the families' or the corporations'? In the above section, the Court seems to give one answer, then the other, and then both. This issue becomes especially pronounced as the Court is set to hear another case addressing the same issue of religious burdens in the corporate context. Is there a way to solve this confusion of identities?

III. A MODEST PROPOSAL: A NEW APPROACH TO ANALYZING BURDENS ON CORPORATIONS' "RELIGIOUS EXERCISE"

I believe that there is a solution to the apparent inconsistency and confusion of persons by the *Hobby Lobby* Court. In order to present my solution, I will very briefly give a history of the development of the corporation's relationship to the state, and compare that understanding to the relationship between the individual and the state. From there, I will use that understanding to outline my approach for analyzing such cases, which culminates in a three-part test that, in addition to producing just outcomes by both distinguishing between "natural" and "corporate" persons and protecting the rights of religious individuals, will be administrable by lower courts.

53. *Id.* at 2775 (majority opinion).

54. *Id.* (emphasis added).

55. *Id.* (emphasis added).

A. *The Corporation and the State in the Late Nineteenth and Early Twentieth Centuries*

In order to justify the test I am about to present, it is necessary for me to outline the fundamental difference between “corporate persons” and “natural persons,” vis-à-vis their relationship with the state, in order to determine whether a claimed burden on religious exercise is substantial in the case of the corporation. In order to do this, I will quickly outline the history of the ways in which the state has regulated and controlled the corporate entity. I will then argue that this establishes a very different baseline against which to measure the substantiality of burdens imposed on corporations, as opposed to “natural persons.”

The relationship between the corporation and the state has undergone remarkable change in the last century.⁵⁶ Indeed, early examples of corporations in earlier American history are hardly recognizable. Consider, as an example, the 1837 case of *Proprietors of Charles River Bridge v. Proprietors of Warren*:⁵⁷ the case involved two corporations, each created for the purpose of constructing bridges and collecting tolls.⁵⁸ The process by which these corporations came about, however, likely strikes the modern reader as wildly burdensome, if not downright Byzantine. In order for the companies to incorporate, the state legislature had to act through a legislative grant to bring the corporation into being;⁵⁹ not only that, but the grant incorporating the company was specific and narrow in scope, outlining explicitly the activities in which the corporation was to engage, which in this case was the specific purpose of constructing bridges over two rivers.⁶⁰ Such procedures were the norm in the earlier history of the corporate entity; consider, for example, the language from *Dartmouth College v. Woodward*:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its 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. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of

56. For a discussion of the history of the development of the corporation, see Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); see also Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945).

57. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

58. *Id.* at 420.

59. *Id.*

60. *Id.*

transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.⁶¹

So then, we can see that the corporation in the United States of the nineteenth and early twentieth centuries⁶² was a much more restricted entity, which required public action to bring about its existence, and had a much narrower area within which to act; this illustrates the heavy-handedness with which the state dealt with the corporate entity and the great extent to which it regulated its existence.⁶³

B. *The Liberalization of the Corporation in the Twentieth Century*

This rigorous creation and oversight regime, however, has largely been replaced with a much more liberalized and accessible corporate form; for instance, the Delaware General Corporation law states that “[a]ny person, partnership, association or corporation . . . without regard to such person’s or entity’s residence . . . may incorporate or organize a corporation under this chapter by filing with . . . the Department of State a certificate of incorporation”⁶⁴ and “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purpose[s].”⁶⁵ The Delaware Code illustrates the ease of access to the corporate entity and the breadth this access allows, which is a far cry from both the burdensome legislative process which the state required and the limited scope this process allowed in *Charles River Bridge*. While the “cost of admission,” as it were, is wildly lower than that which existed early in the history of the corporate entity, elaborate restrictions still mandate how the corporation must be organized and the procedures it must follow in order to take certain action. For example, elaborate guidelines specify how the cor-

61. *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

62. The language of *Dartmouth College* defined the understanding of the corporation until the twentieth century. Mark, *supra* note 56, at 1441 (“The *Dartmouth College* decision defined the corporation for the American bar for much of the nineteenth century”).

63. It is also interesting to note that, as originally conceived, the corporation was envisioned as a vehicle to secure public goods, as opposed to merely private goods; so, it is not merely the relationship between the state and the corporation that has changed, but the end that the corporation is supposed to serve has also changed markedly by becoming more privatized. *Dartmouth College*, 17 U.S. at 637–38 (“The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant . . . Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to affect their design securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created.”).

64. DEL. CODE ANN. tit.8, § 101(a) (West 2016). The following ways in which the state regulates the corporation’s actions I reference below are also reflected, in large part, by the Model Business Corporation Act.

65. § 101(b).

poration shall be managed,⁶⁶ set parameters for what can constitute actions of the board,⁶⁷ determine the circumstances under which corporations may issue stock⁶⁸ and dividends,⁶⁹ and set parameters on the operation of shareholder voting,⁷⁰ to name a few instances. The language used to describe the corporate entity still reflects this reality that the corporation does not exist *a priori* or pre-politically, but emerges only *a posteriori* by operation of state power.⁷¹ From this, we can see that while the restrictions imposed on corporations have indeed loosened, the corporation is still, by virtue of being a statutory creation, a derivative entity whose existence is marked at every step by limitations imposed by the state.⁷²

While this shift has eliminated, to a large extent, the premise that the corporation is a unique construction that, because of the unique advantages given to it and those running it, necessitates particularly close government involvement in its continued operation, both the history of the corporation and the current state of the corporate regulation illustrate that the corporation exists against a background of pervasive regulation by the state, both of its existence and the actions it takes, both internal and external.

66. § 141(a) (stating a board of directors shall manage the corporation); § 141(b) (stating, among other provisions, that a) “[e]ach director shall hold office until such director’s successor is elected and qualified or until such director’s earlier resignation or removal,” b) requiring that a quorum of the Board require at least “1/3 . . . of the total number of directors,” and c) requiring at least a vote of the majority of present Board members constituting the quorum in order to constitute Board action).

67. *See, e.g.*, § 141(b) (stating, among other provisions, that a) “[e]ach director shall hold office until such director’s successor is elected and qualified or until such director’s earlier resignation or removal,” b) requiring that a quorum of the Board require at least “1/3 . . . of the total number of directors,” and c) requiring at least a vote of the majority of present Board members constituting the quorum in order to constitute Board action).

68. *See, e.g.*, § 151(a) (stating the ways in which corporations may issue stock and how different types of stock may operate); § 153(a) (requiring stock be “issued for such consideration having a value not less than the par value thereof” or not less than the set value of no par stock).

69. *See, e.g.*, § 170(a) (limiting the instances where dividends can be issued to “either (1) out of [the corporation’s] surplus . . . or (2) in the case there shall be no surplus, out of [the corporation’s] net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year”); § 154 (defining the term “surplus” for purposes of the issuance of dividends); § 173 (outlining the ways in which dividends may be paid, and the procedure for issuing a stock dividend).

70. *See, e.g.*, § 212(e) (detailing the proxy process for shareholder voting); § 213 (outlining procedures for setting dates to determine the shareholders of record); § 216 (requiring at least 1/3 of the shares entitled to vote to constitute a quorum).

71. For example, consider the language of *CTS Corp. v. Dynamics Corp. of America*: “We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.” 461 U.S. 69, 89 (1987).

72. In fact, most law students spend at least an entire semester agonizing over the ways in which a corporation may legally come into being and the ways in which it must take certain actions.

C. "Natural Persons," the State, and Imposing Burdens

That the relationship between the citizen and the state is markedly different than that between the corporation and the state may seem like a fact so obvious that it does not merit stating. However, in determining how best to analyze the *Hobby Lobby*-type cases, it is helpful to note this obvious distinction between these two relationships and how the disposition of prior cases reflects this reality. This will be helpful in illustrating the need for a different baseline against which to measure burdens in the corporate context.

The fundamental baseline against which the individual operates is markedly different than that against which the corporation operates. With the individual, the baseline assumption is one of autonomy, and, generally speaking, freedom from interference from that autonomy. Instead of referencing founding-era political discourse or political philosophy, this can be illustrated simply by cases which utilize language that indicates how this understanding underlies the reasoning used to adjudicate similar controversies brought before the Court. For example, in the *Sherbert* case, the Court held that by denying the appellant unemployment benefits based on her refusal to work on Saturdays, the government had imposed a substantial burden, "even though the burden may [have been] characterized as being only indirect."⁷³ Here, we can see the baseline in operation: because the plaintiff had to violate her religious belief in order to receive the unemployment benefits, the Court determined this to be "pressure upon her" equivalent to a "fine imposed against appellant for her . . . worship."⁷⁴ What is most telling is that the Court did not engage in any analysis of whether the pressure or burden was sufficiently high; instead, once the burden was identified, the Court moved directly to the question of whether the state could put forth a "compelling state interest."⁷⁵ This, I think, is intuitive, as our consciences collectively are unnerved by fines imposed on religious worship, no matter how de minimis the sum of the fine may be. Additionally, consider *Fraternal Order of Police v. City of Newark*.⁷⁶ *City of Newark* was a post-*Smith* Free Exercise case (as RFRA had let to be passed) involving a city police department order which banned the growing of beards; two Muslim police officers challenged the rule as a violation of their Free Exercise rights.⁷⁷ The Court distinguished the case from *Smith*,⁷⁸ and, applying "intermediate scrutiny,"⁷⁹ held the

73. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

74. *Id.*

75. *Id.* at 403–07. The Court only paused to consider, and refute, South Carolina's claim that the case was distinguishable from prior precedent because the appellant was only denied a privilege and not a right.

76. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). The *City of Newark* opinion was written by then-Circuit Judge Samuel Alito.

77. Plaintiffs asserted that their religious beliefs (specifically the teachings of the Sunni branch of Islam) required them to grow out their beards. *Id.* at 360–61.

78. The Court distinguished the case on the grounds that the fact that the police department provided medical exemptions to the order (here medical exemptions) but not religious exemptions, was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* at 365.

order to be unconstitutional.⁸⁰ Tellingly, whether or not the burden imposed on the officers was substantial or not was not discussed by the court and was not challenged by the police department.⁸¹ This, again, I think is intuitive, and our collective understanding of religious freedom does not need a justification for the substantiality of the burden. While the argument could have been made that the officers could simply have chosen another profession, to deny access to a public career, especially one which is both a service and a profession, on the basis of religion is intuitively objectionable, regardless of whether other jobs or professions were accessible to the officers. Any argument that the officers could have simply worked in another field is a non-starter. These intuitions are understandable as logical conclusions of the proposition that the relationship between the individual and the state, in particular in matters of religion and religious practice, is one of non-interference, and to deny access to any good which is otherwise publically available on the basis of religion is an unjust imposition on the individual. This baseline against which the burdens asserted by plaintiffs does not strike one as exceptionally high,⁸² especially in light of both the majority and dissenting opinions in *Hobby Lobby*.⁸³

Based on this, it is simply nonsensical to use the same baseline analysis for burdens, because the individual and the corporation, in philosophical, historical, and practical legal terms, exist against completely different backgrounds vis-à-vis the government. Therefore, a separate analysis for burdens is necessary for corporations. But how is this to be done?

D. *Analyzing Religious Burdens in the Corporate Context*

I should begin by noting that I will not be considering the implication of my test in the case of for-profit corporations. As Justice Alito noted, “it seems unlikely that the sort of corporate giants . . . will often

79. The Court explained its rationale for applying intermediate, as opposed to strict, scrutiny as follows: “[w]hile *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department’s actions cannot survive even that level of scrutiny” (citations omitted). *Id.* at 366, n.7.

80. *Id.* at 364–367.

81. After determining that heightened scrutiny applied, the Court moved directly to the question of whether the police department could offer any justification to survive that standard. *Id.* at 366.

82. For other examples of post-*Smith* Free Exercise cases with similar outcomes, see *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

83. For example, consider that the majority listed the total sums involved for the corporations before deeming the burden to be substantial. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2775–76 (2014); likewise, the dissenting opinion stated that the “families’ religious objections and the contraceptive coverage requirement is too attenuated” to support the RFRA claim. *Id.* at 2799 (Ginsburg, J. dissenting). This is indicative of the fact that, while the Court did not articulate upon the distinctions between the burden analyses for corporations and “natural persons,” there was at least an acknowledgment that a greater, or at least different, justification was needed.

assert RFRA claims.”⁸⁴ This is intuitively true: it would simply not work out in practice that a large, publicly traded corporation would be either willing or able to assert a RFRA claim, for obvious reasons. For example, it is hard to imagine that a publicly traded corporation would ever have any kind of statement like the Hahns’ “Vision and Values Statements”⁸⁵ in the *Hobby Lobby* case or that a group in control of such a company would choose a publicly-traded company if the maintenance of such a credo was of such importance to them. Finally, it just seems implausible that a large corporation, with a board of directors from various backgrounds and shareholders of varying power with differing views, would ever be able to bring a RFRA claim, even if somehow the above conditions were met, because the likelihood of the board members and relevant shareholders all supporting such a decision seems incredibly unlikely, if not flatly impossible.⁸⁶

The test for whether a corporation’s “religious exercise” has been burdened requires a more nuanced approach, for, as I outlined above, the baseline against which the corporation exists vis-à-vis the government, with regards to regulatory activity, is simply incongruous with that of the natural person. Because the corporation, albeit to a lesser extent than in the 19th and early 20th centuries, is still a product of the state via legislative act and comes into existence against the background of extensive regulation, it does not make sense to treat burdens placed on corporations as analytically the same as burdens placed on “natural persons.” Therefore, any test used to address this question must both reflect the reality of the corporate entity and provide this analytic clarity. Because of the reality of intense regulation against which the corporation comes into being, it simply cannot be the case that the analysis turns on pure economic burden, as the baseline of corporate activity is one of an imposition of burdens, generally speaking—i.e., the corporation, by its very nature, has limits on how it can be structured.⁸⁷

For example, the state collects fees when the corporation is registered, taxes it in a unique way, and has a myriad of law mandating how it can and can’t act. As I mentioned above, there are limitations on how the corporation is to be managed and how that management is to be structured, how stock may be issued and dividends paid out, and how voting procedures are to operate.⁸⁸ Therefore, when the persons in control of the corporation claim that there is a burden being imposed on them via a fine to the corporation, this should not be a sufficient condition for such plaintiffs to proceed with a RFRA claim, even if the fine is substantial in the aggregate, because the state makes

84. *Id.* at 2774.

85. *Id.* at 2764.

86. Not to mention, the public opinion backlash that the corporation would have to handle. For an interesting discussion on the intersection between *Hobby Lobby*, shareholder activism, and social causes, see Michele Benedetto Neitz, *Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 S.M.U. L. REV. 243 (2015).

87. *See supra* notes 66–70.

88. *See supra* notes 65–71.

all sorts of fundamental action more difficult for the corporation, and the fundamental relationship of the state vis-à-vis the corporation is one of imposing burdens on its activity. All of these burdens imposed are tradeoffs for the protection of personal assets that the corporation allows people to achieve. The *Hobby Lobby* Court seems to have had an intuition about this reality, as the majority opinion noted that the fines imposed on the corporations totaled in the millions.⁸⁹ Compare this to *Sherbert*, where the total amount of the burden (which the Court noted functioned as a fine) was not mentioned; it was sufficient that the state had imposed a fine on the plaintiff's religious activity, irrespective of the amount of the fine.⁹⁰ With this in mind, it becomes clear that the burden imposed on the corporation must be analyzed against this understanding of an increased baseline for government interference and direction. Instead of simple economic analysis, which is ultimately unhelpful in determining whether any burden imposed can truly be deemed *substantial* (since a larger corporation will always equal a bigger imposition in terms of the total cash sum), the emphasis should instead be on the burden (still in terms of the economic cost, i.e. the fines associated with non-compliance) *viewed in relation to* the other burdens that are placed on the corporation.

But what does this mean, precisely? In other words, because the basic relationship between the state and the corporation is one of imposing burdens (as the “payoff” for individuals utilizing the advantages of the corporate structure), a *substantial* burden is one which so increases the costs of utilizing the corporate structure such that either (a) it is cost prohibitive for the persons controlling the corporation to continue to use the corporate structure or (b) to continue to operate as a corporation, the firm would have to undergo a fundamental transformation or reorganization in order to remain a viable firm. Simply put, this aspect of the test serves to ensure that people are not excluded from a valuable public good—*viz.* the corporate structure—simply because they hold religious beliefs that do not align with popular orthodoxy and go against the current cultural and political *zeitgeist*. Because corporate rights exist to protect individual rights, a religious burden should become substantial under RFRA if it excludes the individual for utilizing a publicly-created good: the corporate entity. The advantage of this approach is that it prevents potential obfuscation by giving substance to the substantiality requirement that the plaintiff asserts.

Some might object that the approach I have so far laid out above appears to be nothing more than “[p]ure applesauce”⁹¹ or, worse yet, “legalistic argle-bargle.”⁹² However, I hope that, by outlining a three-

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

90. *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963).

91. *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

92. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting). I, along with many other current and future members of the legal profession, am eternally indebted to the late Justice Scalia. His towering intellect, humor, and exceptional rhetorical flair both fueled my desire to engage with the most difficult of legal issues and challenged the way I understood the role of the judiciary in the United States.

part test, the approach for which I am advocating will not only be reflective of the reality of the corporate entity, but also be administrable for lower courts hearing the vast majority of these cases, so that they will not be left to flounder with an un-administrable test, but will instead be able to present conclusions both consistent with precedent and possessing an analytic clarity that is becoming of a federal court of law. In addition to ensuring that cases are rightfully decided, it is also important, especially because of the divisive nature of these cases, to ensure that the reasoning underlying the decisions is seen as legitimate and not seen as simply the product of judicial discretion or disguised political preferences. In order to determine whether the government has in fact imposed a substantial burden on the person in question in *Hobby Lobby*-like cases, namely the “corporate person,” I propose the following three-part test.

First, there must be an assertion of a burden on the corporation asserted by plaintiffs. This means, quite simply, that the plaintiffs make an assertion of a religious belief involved. In the context of the closely-held corporation, this means (a) identifying a religious belief held by the plaintiffs bringing the claim and (b) articulating how the regulation in question compels the violation of that belief. This, admittedly, is not a factor of any significant weight. It will not function, in any real way, to limit the number of claimants who would be able to press such a claim under RFRA, excepting only the most extreme circumstances where a plaintiff would simply be unable to articulate the claimed burden at all. However, it is the necessary first step to establish the rest of the analysis.

Second, the court must determine whether the corporation is being forced to act in a way inconsistent with the belief asserted in the first part of the test. Here, the court must determine if the religious belief identified in the first part of the test impacts the operations of the corporation. In other words, the court must determine if the corporation is, in fact, being forced to act in a way inconsistent with the asserted belief, as opposed to the individual plaintiffs. This, again, is not a rigorous test to pass, and a simple showing that the corporation’s activities do facilitate the objected activity at issue will suffice. The function of this part of the test is to move the religious beliefs of the individual plaintiffs to the “person” to which the plaintiffs are seeking to apply the RFRA protection: the corporation. In making this move, the subsequent analysis will be freed from the confusion between persons I previously outlined. It addresses, to an extent, the concerns raised by Justice Ginsburg in her *Hobby Lobby* dissent about the causal link between the belief claimed by the plaintiffs and the actions taken by the corporation⁹³ by ensuring that there is a connection between the belief asserted and the actions of the corporation. By taking such an approach, this test avoids the dual pitfalls of forsaking any causal analysis at all, while simultaneously not getting into the business of determin-

93. *Hobby Lobby*, 134 S. Ct., at 2799 (Ginsburg, J., dissenting).

ing “whether the religious belief asserted . . . is reasonable,”⁹⁴ which is an issue that “the federal courts have no business addressing.”⁹⁵

Now that the beliefs asserted have been properly “shifted” to the corporation, we can move to the final part of the test: most importantly, the court must determine if the burden imposed is substantial. This is the central aspect of the test, which, as I conceive it operating, will be the dispositive question in determining the outcomes of cases. The substantiality of the burden imposed on the corporation is analyzed by looking at the cost imposed relative to other impositions on the corporation—both qualitatively and quantitatively; this mode of analysis follows from the above discussion on the differences between corporations and individuals vis-à-vis the state: because the baseline against which government interference is far higher in the case of corporations, it simply does not make sense to measure religious burdens the same way as they are measured in the individual context, where the baseline for government interference with religious practice was effectively zero. Therefore, a burden becomes substantial in this context when it does not simply interfere with the corporation’s belief, but only when that interference threatens the integrity of the corporation. In order to measure this, the first step for the court would be to simply compare the total amount the burden would cost the corporation against the corporation’s revenue for the previous year. This approach has the benefit of simplicity, and it would allow the court to determine if the imposed burden threatens the integrity of the corporation to the extent that the plaintiffs are threatened with an alteration of their business as a result, or worse, with the prospect of having to abandon their enterprises altogether. A second step to further clarify the substantiality of a burden would be to compare the burden imposed against other burdens that the state imposes, such as taxes on taxable income. Such an analysis would illustrate the extent to which the state is imposing not merely an additional requirement similar to those it imposes on all corporations, but is imposing an entirely new burden on religiously motivated corporations, specifically. For example, imagine a corporation is being effectively taxed at 33% of taxable income, and the state imposes a burden that accounts for 11% of revenue as a result of the owners of the corporation objecting on religious grounds to some obligation imposed on the corporation. Such a burden would effectively be the equivalent of a 33% tax increase, as the revenues of the corporation are reduced by an additional one-third of what it already has taken away through taxation.⁹⁶ Such a burden would obviously be substantial, as the state has effectively placed religiously motivated corporations into a higher tax bracket than similarly situated corporations. Ultimately, the question that is asked by the court at this stage of the analysis is the following: Is the burden being imposed on the corporation such that it forces the plaintiffs to choose between either, on the one hand, capitu-

94. *Id.* at 2778.

95. *Id.*

96. (Eleven percent of total revenue divided by 33% taxation on taxable income).

lating to the demands of the state, against their consciences, or, on the other, abandoning the corporate structure altogether (as the burden imposed on the business threatens the corporation's financial integrity and presents the possibility of plaintiffs having to abandon their enterprise altogether)? If the answer to that question is yes, then the burden being imposed on the corporation is a substantial burden.

E. *Application of the Test*

Applying this test to the *Hobby Lobby* decision (and other scenarios that will soon be before the court) will allow us to answer the all-important question: Is there anything to be gained by utilizing this test in these cases? In the case of *Hobby Lobby*, the first and second aspects of the test would be easily met: the Hahns and Greens each articulated religious beliefs about conception, life, and abortion; furthermore, they illustrated how the activity demanded of their corporation infringed on those beliefs by the provision of certain drugs through the mandated health care coverage, which they viewed as enabling abortion.⁹⁷ With respect to the substantiality of the burden, the claim would also succeed: using the first approach, the fines imposed on Hobby Lobby would have constituted nearly 13% of total revenues for 2014.⁹⁸ The second approach would emphasize the substantiality of the burden: while the financials for Hobby Lobby are not available, assuming that it is taxed at 35% on taxable income, such a burden would be the practical equivalent of a roughly 37% tax increase.⁹⁹ The application of the test produces an intuitively just result: 13% of total revenue is a substantially large sum that effectively puts it in a higher tax bracket and would certainly force Hobby Lobby to restructure itself in order to offset those losses.¹⁰⁰

As I believe I have shown above, this approach would be superior to what I've called the "simple economic approach," because such an approach obfuscates the simple reality that the most ordinary demands the state places on the corporation command the corporation to hand over fantastic sums to the state. For this reason, we cannot simply look at the naked burden being imposed on corporations in RFRA cases, because any monthly or yearly quantity will look massive if the corporation is large enough. By looking at the burden in terms of raw aggregations of cash, *Hobby Lobby* seems to ensure that large enough corporations will always have burdens imposed upon them if the persons in control simply claim an objection on religious grounds. The

97. *Hobby Lobby*, 134 S. Ct. at 2764–66.

98. (Four hundred seventy-five million dollars per year divided by \$3.7 billion in total revenue for 2014). See *id.*, at 2775–76; *America's Largest Private Companies: #118 Hobby Lobby Stores*, FORBES (2014), <http://www.forbes.com/companies/hobby-lobby-stores/>.

99. Thirteen percent of total revenue divided by 35% taxation on taxable income.

100. Furthermore, even if these costs were offset by Hobby Lobby foregoing insurance altogether, such a position would seriously hamstring the corporation's ability to hire and maintain employees, which, obviously, would put the corporation at a serious competitive disadvantage, resulting in the same dilemma. See *Hobby Lobby*, 134 S. Ct. at 2776–77.

approach I advocate avoids this by requiring not merely that the sums imposed on the corporation are large, but are large *with respect to* the burdens the state already imposes on its operation. Utilizing this approach, I believe future cases of the *Hobby Lobby*-type will not only be more just by reflecting the reality of the corporate entity, but will also garner more legitimacy as precedent by eliminating the analytical gap in the *Hobby Lobby* opinion, thus foreclosing the “have your cake and eat it too” argument against the type of burden analysis used in *Hobby Lobby*.

CONCLUSION

This test will likely not do much to reduce the fervor which accompanies the *Hobby Lobby* case and other potential and pending cases, such as the upcoming *Little Sisters of the Poor* case or the case involving Wheaton College, currently in the lower courts.¹⁰¹ However, I believe that it would have the effect of providing analytical clarity to such cases by distinguishing between the protections afforded to “natural persons” and those afforded to “corporate persons,” which serve the function of protecting real people. This, I hope, will quell some of the frustration over the *Hobby Lobby* case—namely, that the plaintiffs in that case are having it both ways by taking advantage of the separation afforded to them by the corporate entity, yet then leveraging their own *personal* religious objections through that same form in order to avoid the provisions of the ACA which were offensive to their religious sensibilities.¹⁰² This test was constructed, in large part, to solve this analytic inconsistency in a way that both protects the rights of real people, while also preventing the kinds of abuses foreseen by those who have challenged the *Hobby Lobby* decision on these grounds. As I outlined above, I do not see this test, as I envision it, as altering the ultimate outcome of the *Hobby Lobby* decision. What I hope to achieve is not a method which will produce a different result, but one that not only applies RFRA to the “corporate person” with analytic consistency and reflects the history of the corporate entity and its relationship to the state, but also provides an analytic framework with which lower courts can adjudicate cases. The latter end at which this test aims is important in securing two related benefits: first, by giving lower courts the clarity that accompanies a consistent logic, decisions by lower courts will be more easily made by judges striving to dispose of cases in a manner faithful to both law and precedent,¹⁰³ and second, both corporations subject to regula-

101. *Supra* note 51.

102. While the situation of the closely-held corporation is admittedly much different than that of the run-of-the-mill publicly-traded corporation, the objection still, in my view, holds water, as the effect of the corporate structure is still to create legal division between the persons controlling the corporation and the corporation (especially in the case of assets). This essential division is operating the same way in the closely-held scenario as it is in the publicly-traded context.

103. I also hope that this test, by producing decisions that possess a more consistent internal logic, will engender a greater respect for the rule of law and also temper the inclination to see the results in such cases as the mere operation of ideological struggle, although I fear that the latter goal might be permanently out of reach.

tory schemes that could potentially conflict with the protections afforded by RFRA and regulatory agencies who promulgate and administer such regulatory schemes will gain much needed clarity about what protections are afforded to them, in the case of the corporation, and how far any regulatory scheme can go before it runs afoul of the protections afforded to regulated parties, in the case of the regulatory agencies. The attainment of these two ends will, I hope, both engender a greater respect for the rule of law generally speaking and also reduce the need to litigate that arises from uncertainty.

Inevitably, there will be those who simply refuse to accept the objections of the type made by the Hahns and the Greens in the *Hobby Lobby* case and will view legal stances, and even, I fear, people themselves, sympathetic to such objections as anachronistic at best and positively oppressive at worse. Some have argued that it is RFRA itself that is the problem.¹⁰⁴ Perhaps it is the case that we as a society will in the future decide that we ought not to extend the type of protection afforded by RFRA and similar state statutes. However, if one has a serious commitment to religious liberty and to constitutional protections generally, this necessitates, at the very least, tolerating the fact that people who hold views we despise are not prohibited from engaging meaningfully in society, and to refuse those people with whom we disagree access to the goods made publicly available is to betray the commitment to meaningful and robust pluralism that embodies the foundations of our society and that of Western liberal democratic society generally.

104. See Louise Melling, Opinion, *ACLU: Why We can no Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ac6ab94b5_story.html.