AFTER *SMITH* FALLS: CORPORATE FREE EXERCISE LOCHNERISM

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While the Supreme Court has extended many constitutional privileges to business corporations, it has not held that they have a full constitutionally protected right to practice religion comparable to that of citizens. Employment Division v. Smith *long served as a barrier to Free Exercise claims for special exceptions to neutral and generally applicable laws. But as the Court moves away from* Smith*, the issue of corporate Free Exercise rights must be confronted.*

The freedom of religion is a critically important individual right in a free country. But individual rights often conflict with collective religious practice; religious freedom is the opposite of establishment of religion. We constrain governmental religious practices in order to maintain space for individual consciences. The issue raised by the collapse of Smith *is whether judicial protection of business corporations' religious practices creates new spaces for individual freedom, or is more like state establishment, imposing one group's religion on others regardless of their own traditions or views.*

The Preamble to the Constitution invokes "We the People," not "We the Persons." Neither the text, structure, nor function of the Constitution supports judicial protection of business corporations' religious practices. Corporate law is designed to allow corporate directors and managers to coordinate economic activity in changing markets. Accordingly, ordinary corporate boards operate the firm without the consent of shareholders or employees. If a corporation adopts a religious stance to determine a corporation's religion, they effectively impose an establishment on corporate participants. Granting such entities religious "freedom" could upend First Amendment jurisprudence and profoundly reduce freedom for the American people.

*Under American law, business corporations are directed and managed by fiduciaries required to act in the interests of the corporate entity itself, which is often interpreted to be pursuing profit. Unfortunately, sometimes externalizing costs, avoiding regulations, or other anti-social actions can be routes to profit. If the Supreme Court—post-*Smith*—grants special exemptions from generally applicable law, corporate fiduciaries will be under intense financial pressure to argue for religious exemptions to market regulations, including labor laws, consumer or environmental protection regulations, and anti-discrimination laws if an exemption*

might provide a competitive advantage. Indeed, officers may conclude fiduciary duties require these arguments, whether or not they reflect sincere personal religious beliefs. Conversely, corporate officers may feel religious obligations to violate their duties owed to the corporation, potentially imposing personal beliefs on employees, investors, and consumers to the detriment of economy and religion alike.

I. INTRODUCTION

Our First Amendment reflects long struggles to free individual conscience from collective control, epitomized in its ban on censorship and its separation between church and state. Today, developing Supreme Court religious freedom doctrines are on a collision course with fundamental principles of Equal Protection of the law in a democratic republic with a market economy.

Since the mid-twentieth century, the Court has sought to explicate the Establishment Clause[1] and the Free Exercise Clause[2] without defining religion, presumably because the range of American religious practices is so broad that any attempt necessarily would be both overinclusive and underinclusive.[3] Neither the distinction between religious and secular nor between religion and idolatry have agreed-upon meanings in contemporary America.[4] Accordingly, the Establishment Clause is broadly protective, limiting local or temporary majorities from imposing their religious practices on other Americans.[5]

Conversely, the Court has read the Free Exercise Clause in a limited fashion, reflecting its origins in struggles to end the pre-modern English bans on religious worship outside the established church, without extending it to a general antinomian principle.[6] This reading reached its apogee in *Employment*

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1. U.S. CONST. amend I, cl. 1.

2. U.S. CONST. amend I, cl. 2.

3. *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987). S*ee generally infra* Part III (discussing the subjective test of good faith used by the Supreme Court due to the difficulty inherent in defining religion).

4. This difficulty is visible in the "holiday display" cases. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (permitting a Christmas creche display because the "context of the Christmas season" secularized it, although Christmas is generally understood to be a Christian holiday); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 633 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (reasoning that Chanukah is a religious holiday, even though Jewish tradition, which clearly distinguishes religious from non-religious holidays, denies it that status). The cases are necessarily controversial, because different Americans give different meanings to the displays: views differ on whether they are exclusive or inclusive, religious or secular, childish or politically weighted.

5. *See* Lee v. Weisman, 505 U.S. 577, 620 (1992) (Souter, J., concurring).

6. The struggle between civil and religious law for hegemony begins in the earliest stages of recorded politics. *See, e.g.*, SOPHOCLES, ANTIGONE act 1, sc. 1. (describing Antigone's

Division, *Department of Human Resources of Oregon v. Smith*, which held that, absent animus, a generally applicable statute does not infringe the Clause even if it interferes with religious worship or related activities.[7]

Recently, the Court has questioned the doctrine set out in *Smith*.[8] For example, in the COVID-19 public health cases, the Supreme Court repeatedly held that religiously based claims for exemption must be granted if any "comparable" secular claim would, but it defined "comparable" to include startlingly different claims, such as requiring public health authorities to allow religious gatherings if they permitted grocery stores to open even where the authorities perceived different health risks.[9] Similarly, in *Fulton v. City of Philadelphia*, a religiously-affiliated foster care agency categorically refused to certify same-sex couples as foster parents. Philadelphia concluded that this violated its anti-discrimination laws and contract; accordingly, it refused to continue referring children to the agency. The Court held that this refusal violated the agency's Free Exercise rights, falling outside of *Smith*, because the City had a procedure for individualized exceptions to its rules—although there was no suggestion that the City had ever allowed such discrimination for secular reasons.[10] Several members of the Court recently have stated they are prepared to overturn *Smith* itself, with some justices and scholars suggesting a "most-favored nation" approach as an appropriate replacement.[11]

Additionally, the Court's recent decisions allowing closely-held, for-profit entities to assert First Amendment claims based on the business manager's or owner's religious views suggest that it may recognize corporate

struggle between her religious and legal obligations); 1 *Samuel* 8:7 (characterizing Israelites demand for civil law and government as a rejection of God and God's law).

7. 494 U.S. 872, 877–78 (1990).

8. *Smith* was controversial from its inception. *See infra* Part II.C.

9. *E.g.*, Tandon v. Newsom, 593 U.S. 61, 63 (2021) (upholding a First Amendment Free Exercise challenge to government's COVID-19 regulations because they treated "some comparable secular activities more favorably than at-home religious exercise"); *see* Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1184–86 (2023). Public health authorities had determined that the activities were not comparable: closely packed singers without commercial ventilation were more likely to spread respiratory virus than relatively brief and less concentrated contact in grocery stores. S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1144–45 (9th Cir. 2021), *vacated*, 141 S. Ct. 2563 (2021).

10. 593 U.S. 522, 531, 543 (2021).

11. *See infra* Part II.B–C; *see also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990)) (opinion for the denial of injunctive relief); Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2245 (2023) (discussing Laycock's "most-favored-nation rule" and collecting sources).

Free Exercise rights as well.[12] In *Masterpiece Cakeshop Limited v. Colorado Civil Rights Commission*, the Court held that the Colorado Civil Rights Commission had shown anti-religious animus, invalidating the Commission's determination that a baker, operating as a limited liability entity, had illegally discriminated when the baker refused to bake a wedding cake for a same-sex couple.[13] Then, in *303 Creative LLP v. Elenis*, the Court held that a limited liability company creating wedding websites had a constitutionally protected right to a preemptive exemption from anti-discrimination laws because its principal contended that providing service to same-sex couples, should any such customers appear in the future, would conflict with her personal religious views.[14]

In these cases, the Court did not discuss how corporate law and religious identity intersect and overlap, including whether the Constitution protects shareholders or other corporate participants who might disagree with incumbent management's views of the policy the corporation should adopt or have countervailing rights.[15] Moreover, in several cases, the Court appears to impute the religious views of the corporation's control party or principal investor to the entity, without a formal discussion of black-letter corporate law, even though prevailing doctrine ordinarily bars a corporate principal from treating the legal entity as the principal's alter-ego. Finally, the majority opinions, in contrast to the dissenters, did not discuss potential freedom of religion issues raised by granting corporate managers constitutionally protected legal authority to impose their religious views on other corporate participants.

In other contexts, the Court has not predicated corporate rights on the corporation acting as an alter-ego of a dominant shareholder, but, instead, has treated the corporation itself as the rights bearer as if it were a single individual or a citizen.[16] Thus, for example, a corporation may assert diversity jurisdiction based on its state of incorporation and the state where it is headquartered, without regard to the location of its shareholders or employees.[17] The same rule applies to constitutional protections against

12. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 602–03 (2023) (holding that Colorado could not bar graphic-design business from discriminating against same-sex couples, based on owner's religious beliefs); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 640 (2018) (holding that Colorado could not prevent business from refusing to sell cake to same-sex couple).

13. *Masterpiece Cakeshop*, 584 U.S. at 621–22, 625.

14. *303 Creative*, 600 U.S. at 580, 602–03.

15. *See infra* Part II (discussing instances where the Court did not address the interests of other corporate participants).

16. *See infra* notes 17-20 and accompanying text.

17. United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965); *see also* 28 U.S.C. § 1332(c)(1).

searches and seizures under the Fourth Amendment[18] and corporate electioneering rights under the First Amendment:[19] the right is held directly by the corporation, not its shareholders.[20] Similarly, dissenting shareholders and employees might want access to information management prefers to keep secret, or to have a say in how funds they have contributed to or created for the corporation are spent in political advocacy. The Court, however, did not consider whether the Constitution might protect those human interests when they conflict with the entity-level rights it has created.[21]

Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court treated a corporation as an alter-ego of its (indirect) controlling shareholder without considering whether creating corporate religious rights might infringe on employee rights or why Congress lacked authority to prefer employee claims.[22] While *Burwell* arose under a religious freedom statute, rather than the First Amendment, these precedents together suggest that the Court may extend Free Exercise rights to business entities without considering the likelihood of dissenting views within and outside the organization.[23]

Under current corporate law, if the Court grants Free Exercise rights to corporations or similar entities as entities, it will effectively constitutionalize the authority of those that set corporate policy to impose uniform religious beliefs and practices on corporate participants, even in the face of internal dissent.[24]

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18. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 321, 324–25 (1978).

19. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010).

20. *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 97–98 (2014) (listing cases involving corporate litigants asserting constitutional rights).

21. *But see* David Cieply, *The Corporation as a Chartered Government*, 51 HOFSTRA L. REV. 815, 870–71 (2023) (arguing that corporations become "private governments" when they obtain constitutional rights enabling them to deny the constitutional rights of its workers because the workplace is "the private property of the stockholders"); Daniel J.H. Greenwood, *Person, State, or Not: The Place of Business Corporations in Our Constitutional Order*, 87 U. COLO. L. REV. 351, 360–62 (2015) (contending that the Court's historical granting to corporations rights in the corporation's own name necessarily detracts from the rights of citizens).

22. *See* 573 U.S. 682, 689 (2014); *see also infra* Part II.C.1.

23. *See supra* notes 12-22 and accompanying text. The boundaries of a corporation, and therefore who should be considered inside or outside it, depends on context and is often disputable.

24. The underlying problem, as many scholars have noted, is that our business corporations lack basic "good government" protections: they have no protection for religious or other dissenters; no privacy protections to preserve individuality; no separation of powers, independent judiciary or civil service; no due process rules; not even a rule that officials must consider the interests of all participants in determining the collective interests. Moreover, they defy ordinary democratic norms: only shareholders vote, and they vote per share not per person; votes are freely bought and sold; elected officials may not defer to popular will or values. *See, e.g.*, Daniel J.H. Greenwood, *Corporations Are Organizations and Footnote 4, Too*, 54 NEW ENG. L. REV. 49, 56–58 (2019) (discussing the democratic deficit in corporate law).

In a church or a membership organization formed for religious practice, dissenters may not be a large concern, at least if participants are free to exit the institution without undue hardship.[25] Although leaders will never represent members perfectly,[26] those who strongly disagree with the leadership's practices can depart or press for reform. Accordingly, the Court has recognized that churches and religious non-profits may assert Free Exercise rights on behalf of their congregants.[27] In contrast, modern business corporations do not have congregants or members.[28] Unlike churches, business corporations are not associations—or legal entities coterminous with associations—based around a common religious practice or faith.[29] On the contrary, the most fundamental principle of corporate law is that a corporation is not a mere association of the people who make it up, fund it, work for it, or

25. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970) (discussing the availability of an "exit option" to organizational members as a technique of institutional control). Of course, corporate employees may feel unable to exit at a reasonable cost due to economic circumstances despite a fundamental disagreement with the corporation's religious beliefs.

26. *See generally* ROBERT MICHELS, POLITICAL PARTIES (1911) (explaining "iron law of oligarchy").

27. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 528 (1993) (allowing a church to file suit for infringement of its congregants' Free Exercise rights); Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378, 381–83 (1990) (allowing religious organization to assert First Amendment claims on behalf of its members); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (granting standing to religious organization for RFRA challenge to application of federal Controlled Substances Act to congregants who used hallucinogenic substances in religious practices).

28. *See infra* Part V; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 752 (2014) (Ginsburg, J., dissenting) (observing that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of the law") (citation omitted); Greenwood, *supra* note 21, at 395 n.99 (discussing differences between business corporations and membership organizations such as churches).

29. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (noting "that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires"). As a legal matter, many churches are organized as corporations with self-perpetuating boards or as subsidiaries of a larger church institution—not as membership corporations where congregants elect the corporation's trustees or directors. Further discussion of the difficult issues of representation in membership organizations is beyond the scope of this paper. *See generally* ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 377–92 (Eden Paul & Cedar Paul trans., 1915) (introducing "the iron law of oligarchy"). For present purposes, it is sufficient to note that as a sociological matter, churches have members or congregants with rights of exit if not voice. *See* Hirschman, *supra* note 25, at 4. Business corporations, in contrast, are not legal entities parallel to a membership organization: the sociological entity is a hierarchy defined by top-down command and control principal-agency relationships, which treats employees as subordinates—if not costs—rather than members whose welfare is the corporation's. For further discussion of the corporate form, see *infra* Part IV.

control it.[30] Instead, a corporation's rights, obligations, and property are separate from its managers, shareholders, and employees; that is indeed a key reason why entrepreneurs and control parties choose to do business as corporations.[31]

Unlike churches, business corporations are not expressive associations functioning to create religiously uniform communities. Instead, corporate law is designed to allow people with divergent commitments to cooperate to produce useful goods and services. Perhaps the key technique the law uses to achieve this goal is to limit the salience of inevitable disputes over fundamental goals and life choices among corporate participants.[32] Corporate officers are generally required by law to disregard the values of actual corporate participants and, instead, to operate the corporation in its own interest or the interests of purely fictional shareholders, viewed as undiversified investors with no other commitments or values.[33] In this way, the law of corporate governance excludes the actual varied concerns of the people who make up the firm, replacing them with a neutrality that most corporate participants can accept even if they disagree with it.[34] When a corporation adopts a religion, it abandons this neutrality and the limitations

30. *See infra* Part IV.

31. We do not mean to suggest that the "aggregate" vs. "entity" debate should be revived; as Felix Cohen noted long ago, those ontological theories of corporate "reality" do not decide cases. *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (discussing legal science and legal criticisms of the functional method). Our plea, instead, is to take seriously the reality that corporations are institutions—neither individuals nor crowds (aggregates). Doctrinally, we are pointing to a basic feature of corporate law, independent of any claim about the "true" nature of the firm: the purpose and function of corporate law is to create an entity separate from the people who invest in it, manage it and act for it, characterized by continuity of existence, separate assets and liabilities, and, importantly, the rule that it is not the agent of its shareholders or managers. *See* Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (1926) (stating that, if the shareholder treats the corporation as its agent or alter-ego, the law will disregard the separation between entity and shareholder); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000) (describing asset partitioning—separation of corporate assets—as the core of corporate form). *But see* Joseph R. Swee, *Free Exercise for All: The Contraception Mandate Cases and the Role of History in Extending Religious Protections to For-Profit Corporations*, 48 J. MARSHALL L. REV. 605, 621–25, 621 n.95 (2015) (collecting examples of scholars and judges applying an "aggregate" approach and summarizing the artificial and natural entity theories).

32. *See infra* Part V.

33. *See* Daniel J.H. Greenwood, *Fictional Shareholders: For Whom is the Corporation Managed, Revisited*, 69 S. CAL. L. REV. 1021, 1027–29 (1996).

34. The Peace of Westphalia consisted of two treaties: the Treaty of Peace Between France and the Empire, Oct. 24, 1648, 1 CONSOLIDATED TREATY SERIES 271 (C. Parry ed. 1969) [hereinafter "Treaty of Westphalia"], and the Treaty of Peace Between Sweden and the Roman Empire, Oct. 14, 1648, 1 CONSOLIDATED TREATY SERIES 119 (C. Parry ed. 1969). The former treaty is known as the Treaty of Westphalia (or the Treaty of Munster) and the latter, as the Treaty of Osnabruck.

which make corporate law's governance structures tolerable to those who do not share the religious or other commitments of its officers.

Thus, corporate religious exercise rights in heterogenous entities advance religious freedom only in the limited sense as did the Peace of Westphalia.[35] The two treaties that compose Westphalia ended the Thirty Years War by the various princes agreeing to respect each other's right to choose their principality's religion.[36] The result was religious freedom for leaders, but established churches for the population, albeit with limited forms of toleration for religious minorities.[37] Similarly, creating constitutional protections around the statutory authority of corporate leaders to cause the corporation to adopt a religion (even where other participants dissent) limits the freedom of employees, investors, and other corporate stakeholders to practice or not practice their own religions.[38] This is Westphalia on a smaller scale: it protects management's right to impose religious practices on other corporate participants.[39] But the freedom of religion should be a right of citizens to practice their own religions, not their employers' or shareholders': the same

35. Treaty of Westphalia, *supra* note 34, ¶ 1 (broadening the right of princes to establish churches in their own territories). The Peace is often considered the origin of the modern notion of the sovereign state with plenary authority over its inhabitants. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 740 (2006); *cf.* Gordon A. Christenson, *"Liberty of the Exercise of Religion" in the Peace of Westphalia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 721, 740 (2013) (observing that the Peace of Westphalia aimed to end religious fighting in Europe by requiring that states respect the established religions of other princes).

36. Treaty of Westphalia, *supra* note 34, ¶ 34 (broadening the right of princes to establish churches in their own territories).

37. *See* Treaty of Westphalia, *supra* note 34. Westphalia is sometimes seen as the beginning of tolerance even for non-established religions, because it placed some limits on establishments by guaranteeing dissenters private worship services, some basic civil rights, and a right to emigrate to more tolerant jurisdictions, each a substantial improvement over forced conformity in the tradition of the Inquisition. *Id.* ¶ 34. The Court's corporate religious freedom doctrine has not quite reached the level of Westphalia. While employees have a right to quit parallel to the right to emigrate, they have few if any rights to even private religious practice on the job.

38. Hobby Lobby, for example, denied its employees rights guaranteed under the ACA because corporate officers contended those rights conflicted with the corporation's religion—thus vitiating the employees' own religious autonomy. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 701–02 (2014).

39. *Cf.* Corey A. Ciocchetti*, Religious Freedom and Closely Held Corporations: The Hobby Lobby Case and Its Ethical Implications*, 93 OR. L. REV. 259*,* 339–340 (2014) (voicing a concern that "fraudsters" and "profiteers" may attempt to use religious freedom as a means to profit-oriented ends). Our concern, however, is not limited to fraud or improper profiteering. Whenever a corporate religion might give the corporation special profit opportunities, corporate managers seeking to fulfill their fiduciary duty to the corporation must consider whether it would be in the corporation's financial interests to adopt a particular religion. Imposing such a requirement on corporate managers serves neither religious nor secular interests of the population—or, in most cases, of corporation participants.

principles which underpin the Establishment Clause should extend to protecting individuals from corporate establishments as well as national ones.[40]

These doctrines together—religious exemptions from otherwise applicable law, the broad definition of religion, and disregarding corporate managers' power to impose their will on other participants or dependents—could potentially undermine both democratic principles and disrupt economic markets.[41]

Competitive financial and product markets generally encourage corporate managers to seek profit.[42] So does corporate law, which gives the stock market ultimate power over corporate directors.[43] Indeed, many writers[44] and some courts[45] maintain that corporate officers' legally imposed fiduciary duties require them to place profit ahead of other goals. Ideally, corporate managers would seek higher profits by producing useful products while using the least

40. *See* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 654 (2019) (contending that the Establishment Clause's central function would be furthered by prohibiting "corporate imposition of religion").

41. *See id.* at 653–54; *see also* Catherine A. Hardee, *Schrödinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C. L. REV. 1763, 1765–66 (2020) (contending that a "control test" for evaluating religious sincerity "will inevitably lead to the monetization of religious sincerity, which is detrimental to third parties and diminishes the value of religious liberty both in the doctrine and public perception"); Elizabeth Brown et al., *R Corps: When Should Corporate Values Receive Religious Protection?*, 17 BERKELEY BUS. L.J. 91, 130 (2020) (proposing that courts examine sincerity of a corporation's asserted religion while ignoring the collective, bureaucratic nature of a firm by referring to a corporation's "life" and "belief system"); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 66 (2014) ("[Evaluating corporate sincerity] involves risks that courts will improperly slip into questions of verity or centrality, but this path offers the best chance at shielding the religious principles Congress intended to protect while blocking fraudulent claims by for-profit corporations seeking to evade generally applicable laws.").

42. *See* James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 480 (2022).

43. A falling stock price threatens incumbent board members: aside from the direct effect on their own wealth, shareholders may oust them or sell to an outsider that will do so in a hostile takeover. *See* Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 37 (2005).

44. *Id.* at 32 ("In the corporate law academy today in the United States, the dominant view is that corporate law requires managers to pursue a single aim: the maximization of stockholder profits."). Lee, like many others, ultimately argues that ethical considerations should also factor into corporate decision making. *See id.* at 31–33; *see also* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH (2013), https://scholarship.law.cornell.edu/facpub/771/ [https://perma.cc/N5KW-YVH9]; Daniel J.H. Greenwood, *Fictional Shareholders,* supra note 33, at 1031, (arguing that corporate managers need not serve solely profit maximization goal of fictional shareholders).

45. *See, e.g.*, Dodge v. Ford Motor Co., 204 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

possible resources. In recent decades, this has proven true to some extent as technological, medical, and societal achievements generated by private corporations and public-private partnerships have created the highest standards of life in human history.

Unfortunately, some managers may place such a high value on profit that short-sighted business plans may lead to failure or scandal. For example, it is often profitable to be free of socially valuable constraints that bind others: royalties, pollution control, safety devices, union wages, pension obligations, or tort liability can increase a company's private costs even if they are socially efficient. For instance, the Triangle Shirtwaist Factory fire killed many employees after managers violated basic health and safety protocols.[46] The horrific conditions in the Chicago stockyards and the meatpacking industry, as chronicled by Upton Sinclair,[47] prompted Congress to create the Food and Drug Administration.[48] Some evidence suggests that some tobacco and opioid producers knew of and concealed the danger of their products—even in the face of potential liability.[49] In short, markets require appropriate rules and regulations for the profit motive to incentivize producing useful goods and services while avoiding adverse impacts on employees, investors, or the ecosystem as a whole.[50] Absent appropriate market rules, the easiest routes to

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46. *See* Howard Markel, *How the Triangle Shirtwaist Factory Fire Transformed Labor Laws and Protected Workers' Health*, PBS NATION (Mar. 31, 2021, 8:50 PM EDT), https://www.pbs.org/newshour/nation/how-the-triangle-shirtwaist-factory-fire-transformed-labor-laws-and-protected-workers-health [https://perma.cc/MWN5-ZFUA].

47. Christopher Klein, *How Upton Sinclair's 'The Jungle' Led to US Food Safety Reforms*, HISTORY (May 10, 2023), https://www.history.com/news/upton-sinclair-the-jungle-us-food-safety-reforms [https://perma.cc/BZF6-E3VB].

48. *Part I: The 1906 Food and Drugs Act and Its Enforcement*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/changes-science-law-and-regulatory-authorities/part-i-1906-food-and-drugs-act-and-its-enforcement.

49. While the companies generally deny wrongdoing, journalists suggest otherwise. *See, e.g.*, CLAUDE E. TEAGUE, JR., SURVEY OF CANCER RESEARCH WITH EMPHASIS ON POSSIBLE CARCINOGENS FROM TOBACCO (1953), https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=ymch0045 [perma.cc/SF32-6LUG] (document prepared for RJ Reynolds produced in tobacco litigation). For discussion of Purdue's attempts to use bankruptcy to avoid tort liability, see Abbe R. Gluck et al., *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. F. 525, 544–48 (2024); *see also* Nicholas Tramposch, *Not So Fast: The Third Circuit Throws Out Johnson & Johnson Subsidiary's Chapter 11 Suit*, PERRY WEITZ MASS TORT INST. (Feb. 17, 2023), https://weitzinstitute.hofstra.edu/not-so-fast-the-third-circuit-throws-out-johnson-johnson-subsidiarys-chapter-11-suit [perma.cc/UFV9-RSGW]. Post-*Smith*, some also might seek to claim religious exemptions from the underlying liability rules.

50. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, at ch. ix (Seltzer Books 2018) (1776) (ebook) (emphasizing that when people engage in a "few simple operations[]" in their occupation, they have "no occasion to exert [their] understanding"; since division of labor can render people engaged in repetitive standardized

profit often are anti-social or destructive. But given any regulatory system, the easiest route to profit is to have lower costs than the competition—and a special exemption from otherwise applicable rules will nearly always be a competitive advantage. Consequently, corporate managers will feel intense pressure to adopt any religion that teaches that profit is a sign of heavenly favor, that avoiding climate change violates religious law or that avoiding externalizing costs by following expensive regulations violates its beliefs—or in any other way promises to give them a competitive advantage. For example, a religious exemption from pollution regulation would lower the firm's (private) costs by shifting them to others, and, at least in the short run, allow it to reduce its prices or increase profits.[51]

As Justice Sotomayor has noted, other issues may have less to do with profit. Historically, for example, many American employers have

work "as stupid and ignorant as it is possible for a human creature to become" countermeasures, such as education, are essential). A dramatic example of anti-social market incentives in modern America is our system of granting monopoly rights to pharmaceutical manufacturers of life-saving drugs, thereby vastly increasing the price of medical care beyond the cost of developing and producing drugs and creating incentives for concealing side effects and promoting over-use. *Cf.* DEAN BAKER, RIGGED 9 (2016) (discussing many ways in which we have created market rules that redistribute income and wealth upward). But every aspect of our market economy is affected by law. For example, Californian farming depends heavily on free or low-cost water, which we pay for by taxes to build water infrastructure; in part due to the subsidy, farmers' water use exceeds the capacity of natural systems. If we required farmers to pay for the water they use, they would use less, either by planting less thirsty crops or by increasing efficiency, thus easing the problems of dropping water tables and reduced river flows. *See* Coral Davenport, *Strawberry Case Study: What if Farmers Had to Pay for Water?*, N.Y. TIMES (Dec. 29, 2023), https://www.nytimes.com/interactive/2023/12/29/climate/california-farmers-water-tax.html. [perma.cc/JDE7-5ZQK].

In general, firms can realize greater profits if permitted to avoid costly cleanups or pay for safety devices, or can exercise monopoly or monopsony over other firms. For examples of misconduct or behavior involving Enron, Volkswagen, and others, see Brian O' Connell, *9 of the Biggest Financial Fraud Cases in History*, U.S. NEWS (May 21, 2024), https://money.usnews.com/investing/articles/biggest-corporate-frauds-in-history [https://perma.cc/5T99-GWA9]. Beyond misbehavior, the very existence of the stock market demonstrates the importance of legal regulation: in a theoretical fully competitive market, any company that declared a dividend would be driven out of business by a similar company that chose to use the same money to cut its prices. Since rational investors would recognize that they had no reasonable expectation of a long-term return, they'd refuse to invest. For further discussion, see Daniel Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 123–24 (2006).

51. *See infra* Part VI. We do not mean to opine that certain corporations will or will not adopt these religions or to suggest that those who do hold such beliefs do so in bad faith. Citizens and corporate managers alike may believe sincerely that what is best for themselves is also best for the world and sometimes they will also be correct.

discriminated against women,[52] members of minority groups,[53] and fought labor organizers.[54] Some managers may choose to discriminate even if it costs the corporation potential profit, as the baker in *Masterpiece Cakeshop* did by refusing potential customers.[55] Indeed, evidence suggests that more businesses are refusing service to same-sex couples in the wake of *Masterpiece Cakeshop*.[56] We depend on a comprehensive system of regulatory rules to prevent these ills, structuring our markets to ensure they promote the general welfare.[57]

The fall of *Smith* may lead to novel claims for religious exemptions.[58] Most managers will be reluctant to seek religious exemptions from popular laws, for fear of boycotts by the public or other businesses.[59] Others may seek to avoid negative reactions from current or prospective employees. However, not all laws are popular—or popular with their relevant consumers. Relatedly, some companies serve niche markets or other businesses, or do not fear competition. Managers of such firms may conclude that the financial benefits of a religious exemption outweigh any potential costs.[60] Thus, they may seek

52. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN L. REV. 1161, 1164 (1995) (arguing that Title VII worked to address "deliberate discrimination prevalent in an earlier age[]" but not "subtle" bias towards certain groups, including women).

53. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–66 (2001) (describing the forms of blatant discrimination that led to the enactment of Title VII).

54. *See* Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 172 (2021) (observing that modern corporations have not generally taken measures to benefit their stakeholders, such as supporting unions or increased minimum wage).

55. *But see* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 495–97 (1992) (arguing that market pressures eliminate discrimination without legal intervention). Casual empiricism suggests that Epstein was wrong.

56. *See* Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. 315, 344–47 (2021) (surveying businesses to see whether they would refuse to serve same-sex couples).

57. *See* Masterpiece Cakeshop v. Colorado C.R. Comm'n, 584 U.S. 617, 631 (2018) ("[I]t is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

58. Note, *supra* note 9, at 1193.

59. *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 419 (2016) (noting that businesses are unlikely to seek the legal right to discriminate against certain groups because it would be "a sure ticket to financial ruin"). Lederman was focused upon RFRA exemptions and believed at the time that courts would not entertain generalized religious exemption claims. *See id.*

60. Examples of these corporations include Hobby Lobby Corp. and Masterpiece Cakeshop, Ltd. which arguably fall into this category. *See supra* notes 13, 22 and accompanying text.

judicial permission to impose their religion on employees, use corporate funds for charity or proselytizing, or discriminate in hiring or providing service.[61]

The Article proceeds as follows. Part II provides a primer on *Employment Division, Department of Human Resources of Oregon v. Smith*,[62] which introduced the two-tiered structure that, for the past three decades, dominated Free Exercise jurisprudence.[63] This Part further analyzes post-*Smith* legislation and case law that has limited the *Smith* holding and, in more recent years, made clear that it will be overturned.[64] Part III concludes the Article's discussion of Free Exercise Clause jurisprudence by interpreting cases in which the Supreme Court refrained from defining religion.[65] Part IV addresses the flexibility of the corporate form.[66] Part V observes that corporations can rewrite themselves to advance any purpose, so long as its board decides that it is in "the best interests of the corporation" to do so.[67] Part VI argues that the combined result—economic enterprise *ultra legem*—is constitutionally unsupportable for various textual, historical, pragmatic, and policy-oriented reasons. Part VII concludes this Article.[68]

II. MODERN FREE EXERCISE JURISPRUDENCE AND THE *SMITH* REGIME

For the moment, Free Exercise Clause doctrine remains under the framework set out in *Smith*, under which courts should reject claims for religiously-based exemptions from neutral laws of general applicability, provided that the statutes were passed without specific religious animus, because legislatures are normally the correct fora for creating such

61. For historical examples of these practices, see generally *infra* Part II.C and Part VI.B.2.

62. 494 U.S. 872 (1990).

63. *See infra* Part II.

64. *See infra* Part II.C.

65. *See infra* Part III.

66. *See infra* Part IV.

67. *See infra* Part V.

68. *See infra* Part VI.

exceptions.[69] *Smith*'s deference has been controversial since its inception.[70] Its collapse will foreground issues of whether business corporations are the right type of entity to practice religion, and indeed whether the Constitution requires that some corporate participants have the right to impose a religion on others without their consent. This Part analyzes the underpinnings of the *Smith* doctrine,[71] the state of the doctrine,[72] and judicial and legislative attempts to limit or overturn *Smith*.[73]

A. The Underpinnings of Smith

The First Amendment's Religion and Speech clauses[74] represent our commitment to living together in mutual respect, acknowledging the inevitability of disagreement and pledging to limit the stakes of politics by limiting its scope.[75]

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69. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990) (holding that the First amendment is not offended when a law burdens a particular religion if that burden is an "incidental effect of a generally applicable and otherwise valid provision"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (internal citations omitted). Congress immediately rejected *Smith*, requiring by statute that accommodations be made for religious practice where practical. *See infra* Part II.C. Our discussion is focused on cases arising directly under the Constitution such as *Smith* and its progeny.

70. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110–11, 1115 (1990) (criticizing Justice Scalia's majority opinion in *Smith* for, *inter alia,* abandoning substantive discussion of early Free Exercise rights); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990); Branton J. Nestor, *Revisiting Smith: Stare Decisis and Free Exercise Doctrine*, 44 HARV. J.L. & PUB. POL'Y 403, 452 (2021) (arguing against the approach used in *Smith*). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (arguing that religious exemptions from civil laws under the First Amendment were not contemplated by early Americans); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 UNIV. PA. J. CONST. L. 850, 884 (2001) (concluding that "reports of the death of free exercise in the wake of *Smith* were more than premature, they were seriously mistaken"); Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2119 (2023) (touting *Smith* as "robustly protecting key forms of religious exercise"). McConnell and Hamburger were later cited in *City of Boerne*. City of Boerne v. Flores, 521 U.S. 507, 537–38 (1997) (Scalia, J., concurring).

71. *See infra* Part II.A.

72. *See infra* Part II.B.

73. *See infra* Part II.C

74. U.S. CONST. amend I.

75. *See* Daniel J. H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 664 (1999); Michael Walzer, *Leary Lecture - Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619 (arguing that separationism is a critical part of the democratic commitment to avoiding final victories).

On the one hand, limited government: when issues may be left to individual consciences without a collective decision, as in religion, aesthetics and speech, the First Amendment prohibits the government from imposing one side's view on the whole. By separating politics from religion and other fundamental issues, we make politics less important and avoid unnecessary culture wars. In Hobbes' evocative phrase, the laws should be "as hedges are set, not to stop travellers [sic], but to keep them in the way." In the classic claim of liberal political theory, a limited government does not seek to force us to live according to someone else's notion of the good life or according to someone else's notion of God's will, but instead to allow each citizen to live according to their own conscience without unduly interfering with others.[76]

On the other hand, rotation in office: regardless of who wins the next election, we commit through the First Amendment to have another one after it, with free debate, room for disagreement, and spaces for citizens to live their private lives without undue interference.[77] On the view of free, liberal democracy enshrined in the First Amendment, the primary role of the state should be to assure that leaders, whether governmental, organizational, or communal, do not use the powers granted to them to empower some citizens and control others or to entrench themselves.

Basic liberal principles demand that the government not impose religious orthodoxy, precisely because religion is critically important to many Americans.[78] Religious freedom is a paradigm of the liberal solution to living together: unity without uniformity, maintained by agreeing to disagree. Americans radically differ in in our religious commitments, beliefs, and practices. We live much of our lives in communities which create internal norms and internal leadership independent of national, state, or local government.[79] Some of us shift from one community to another over the

76. THOMAS HOBBES, LEVIATHAN 213 (Oxford Univ. Press, 2008) (1651).

77. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

78. *See* United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state."); *see also* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion[] . . . .").

79. *See* Aaron Wachhaus, *Governance Beyond Government*, 46 ADMIN. & SOC'Y 573, 579 (2014). *See generally* Robert Cover, Foreword: *Nomos and Narrative*, 97 HARV. L. REV. 4, 7–9 (1983) (describing communal norm creation).

course of our lives, while others proudly decline adherence to any organized religion or spiritual practice.[80] For many people these commitments—or refusals to commit—are central to their identity. By removing religion from politics, we make space for different private lives, while reducing the stakes of elections. Since the religiously committed can maintain their commitments and the irreligious can live according to their consciences, regardless of who wins the election, they need not regard politics as a zero-sum game in which losing might be fatal to all that is important. Absent this liberal abstention, too many, far too often, will see difficult elections as far too important to leave to a majority vote.

Moreover, state-imposed religious orthodoxy devalues orthodox beliefs, by proclaiming that those doctrines require coercion to persuade. Simultaneously, it corrupts them, by subjecting religious doctrine to the vagaries of electoral politics.[81] Conversely, keeping the inevitable internal conflict over religious leadership and norms internal to religious sects—out of state politics and litigation—reduces corruption of politics and religion alike. Most importantly, imposed religion rejects the claims to equal respect of all Americans, including those who question or reject the orthodoxies of the day.[82]

On the other hand, religious freedom, like any freedom, is not simply a license for anarchy or coercion of others. Any legitimate freedom must be limited by the corresponding freedoms of others. Most religions have expectations about how their members live their lives; sometimes, those religious expectations violate or challenge ordinary social norms (as expressed in generally applicable laws). As many before us have observed, some American religions supported racial segregation or even slavery.[83] Others have endorsed or required many behaviors that the state may have legitimate reasons to bar, including polygamy,[84] drug use,[85] discrimination

80. *See Faith in Flux: Changes in Religious Affiliation in the U.S.*, PEW RSCH. CTR. (Apr. 27, 2009), https://www.pewresearch.org/religion/2009/04/27/faith-in-flux/ [https://perma.cc/733N-RPBF].

81. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).

82. *See id*.

83. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 620–21 (2023) (Sotomayor, J., dissenting) (collecting cases); William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 669–72 (2011) (collecting examples of religion justifying segregation and anti-miscegenation statutes). A full discussion is beyond the scope of this Article.

84. Reynolds v. United States, 98 U.S. 145, 166 (1878) (disparaging polygamy as a practice of "Asiatic" races).

85. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

against same-sex couples,[86] witch trials,[87] and seeking to control the most intimate parts of others' private lives.[88] In a democracy, society must be able to decide to regulate those behaviors, even if some citizens contend that they have a religious reason to perform them.[89]

The line between permitted private behavior and regulated public-regarding actions is always controversial and only partially congruent with lines between religious and secular.[90] Thus, holding that the public interest outweighed any religious claims, the Supreme Court has rejected religious demands for exemptions from federal and state laws that ban polygamy,[91] bar working on the Christian sabbath, Sunday,[92] restrict the religious garb of non-Protestant Air Force chaplains,[93] or require sending younger children to school.[94] In some Establishment Clause jurisprudence, the Court has rejected any religious claim at all. For example, it has classified celebrations of Christmas—a religious holiday—as secular, provided that the most overtly religious aspects were downplayed,[95] and it even proclaimed that no religious issue was involved in using a large Christian cross as a memorial to fallen soldiers.[96]

Similarly, in *United States v. Lee*, the Supreme Court upheld Congress's decision to mandate taxes in support of the Social Security Act, despite Amish

86. *303 Creative LLC*, 600 U.S. at 581–82; Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 621 (2018).

87. Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43, 50–51 (2001).

88. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–90 (2014) (contraception); Fulton v. City of Philadelphia, 593 U.S. 522, 530 (2021) (adoption).

89. Of course, democracies might decide not to legislate, or to grant religious exemptions to otherwise applicable laws. Abstract religious freedom cannot resolve the balance among individual conscience, communal religious norms, and society's secular needs. That requires actual politics.

90. *See, e.g.*, *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 625 (stating that to decide when an exercise of religion "must yield to an otherwise valid exercise of state power" is a "delicate question").

91. Reynolds v. United States, 98 U.S. 145, 166–67 (1878). The *Reynolds* court justified its decision, in part, by noting that a state could also ban religiously motivated suicide. *Id.* at 167–68.

92. McGowan v. Maryland., 366 U.S. 420, 452–53 (1961) (upholding a blue law proscribing work on Sundays against an Establishment Clause claim). For further discussion of the blue law cases, see generally Neil J. Dilloff, *Never on Sunday: The Blue Laws Controversy*, 39 MD. L. REV. 679 (1980).

93. *See* Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (holding that the policy, which distinguished between visible and non-visible religious dress, "reasonably and evenhandedly regulate[s] dress in the interest of the military's perceived need for uniformity[]").

94. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

95. *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

96. Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 63 (2019).

teachings otherwise.[97] It reasoned that "[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 which are binding on others in that activity."[98] Noting that one person's religious freedom may become another's religious oppression, especially in contexts of unequal power, the Court added that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[99]

Until recently, the Court routinely upheld public health requirements, such as vaccines or quarantines, despite religious skepticism.[100] As the Court said in 1944, citing a vaccine case from 1905, "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[101] Similarly, although most states have respected adult religiously-based decisions to forgo standard medical treatments, including Christian Scientists rejecting standard medical care or Jehovah's Witnesses refusing blood transfusions, the Court has allowed states to require that children receive mainstream medical treatment, even when a parent's religion demands otherwise.[102] Similarly, the Second Circuit has allowed public schools to refuse to accommodate individual parents' desires to include or exclude curriculum for religious

97. United States v. Lee, 455 U.S. 252, 261 (1982) (upholding social security taxes against a Free Exercise claim brought by an Amish employer).

98. *Id.*

99. *Id.* The *Lee* case involved a sole proprietorship. *See id.* at 254. Corporate attempts to assert rights to exercise religion raise similar, if not more extreme, concerns. *See* Nelson, *supra* note 40, at 652–53.

100. *Compare* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding vaccination requirements), *and* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (rejecting religious claim for exemption from child labor laws, treated as a health regulation), *with* Tandon v. Newsom, 593 U.S. 61, 62, 64 (2021) (granting an injunction against a California COVID-19 restriction), *and* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15, 21 (2020) (granting an injunction against New York's policy of limiting religious services to ten persons in pandemic "red zones").

101. *Prince*, 321 U.S. at 166–67. While *Prince* was not a vaccine case, it relied substantially on the seminal Supreme Court vaccine case, which upheld a smallpox vaccine mandate. *Id.* at 166 n.12 (citing Jacobson v. Massachusetts, 197 U.S. 11, 29–30 (1905) for the proposition that religious convictions could not justify invalidating vaccine mandates).

102. *See* Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 503–05 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598, 598 (1968) (affirming injunction pursuant to state law requiring a child to submit to blood transfusion, against parent's religious objections); Robert J. Murphy, *Protecting Children: The Lifeblood of Permissible Intrusion—Balancing State Interests and Individual Religious Rights*, 25 NEW ENG. L. REV. 1211, 1212 (1991).

reasons,[103] even as the Supreme Court has required public schools to avoid imposing unduly religious practices.[104]

The protection of religion remains a paramount concern for the body politic. Many of us are religious,[105] and religious groups are often well-organized and have learned to work together, giving them more political clout than mere numbers would suggest. Predictably, religions reflect varying positions on controversial issues of living together, including our views on the degree of mutual responsibility and care.

Tension between religious freedom and appropriate business regulation to protect human dignity is inevitable.[106] Accordingly, legislatures routinely create religious exemptions to otherwise applicable rules.[107] *Smith*'s deference, then, in part reflected judicial abstention in a country in which legislatures are routinely amenable to religious requests for accommodation,[108] even if politics is messy and often imperfectly fair. The political reality of general American respect for the principal of religious accommodation means that even small religious sects are, in practice, rarely "discrete and insular minorities" in need of special judicial protection from ordinary political processes.[109] Indeed, Congress responded to *Smith* itself by

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103. Leebaert v. Harrington, 332 F.3d 134, 137, 139, 145 (2d Cir. 2003). *But see* Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (upholding the right of Amish parents to decline to send their children to public school after the eighth grade).

104. Which religious practices are unduly burdensome has not been free of controversy. Engel v. Vitale, 370 U.S. 421, 424 (1962) (recognizing that encouraging recitation of the Regents' prayer at a public school violated the Establishment Clause); *see also* Sch. Dist. of Abington Twp., Pa. v. Schmepp, 374 U.S. 203, 223 (1963) (holding that requiring recitation of Protestant version of the Lord's Prayer and daily readings from a Protestant bible by a public school violated the Establishment Clause); Lee v. Weisman, 505 U.S. 577, 581, 599 (1992) (holding that "non-denominational" benediction at middle school graduation violated the Establishment Clause). *But see* Kennedy v. Bremerton School District, 597 U.S. 507 (2022) (holding that football coach has constitutional right to lead students in prayer on football field).

105. President Eisenhower's famous claim that "[o]ur [form of] government makes no sense unless it is founded in a deeply felt religious faith—and I don't care what it is[]" continues to reflect the views of an important part of the American populace. Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1, 3 (1967).

106. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 623–24 (2018) ("The case presents difficult questions as to the proper reconciliation of at least two principles[:]. . . to protect the rights and dignity of gay persons . . . [and] the right of all persons to exercise fundamental freedoms under the First Amendment[.]").

107. *But see* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 177 (2019) (contending that legislative exemptions are more readily obtained by the well-connected). Tightly-organized sectarian religious groups, of course, often can exert political influence beyond their raw numbers.

108. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (holding that Oregon's prohibition on the use of peyote was valid notwithstanding Respondents religious convictions); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 881 (2019).

109. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

immediately creating new and broad regimes of special religious exemptions to otherwise applicable law in the form of the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[110]

Lukumi's exception for animus reflects the Court's role in protecting minorities against majoritarian oppression.[111] This is particularly true at local levels, where a majority faction may be willing to ignore the general alliance of religious groups that is so effective at the national level.[112] Courts could appropriately use the Establishment Clause to prevent local majorities from using electoral victory as a tool to end the toleration of religious minorities.

Perhaps less attractively, *Smith* reflected the Court's relatively modern reluctance to protect members of minority groups, including "discrete and insular" ones, from facially neutral actions with disparate impact, absent proof of actual bad intent.[113] In Equal Protection cases, the Court has recently rejected attempts to ameliorate the effects of systemic racism, where inherited systems produce unfair results even without conscious racism.[114] *Smith* analogously denies judicial protection to religious minorities which suffer from malign neglect (or unprovable prejudice), rather than open discrimination. With this backdrop, we next discuss the state of *Smith* doctrine.

B. The Current State of the Smith *Doctrine*

At its heart, *Smith* was an unemployment insurance dispute.[115] Alfred Smith and Galen Black, members of the Native American Church, were fired and denied unemployment compensation for violating a state law criminalizing peyote use.[116] In the Supreme Court, the issue was whether the Free Exercise Clause protected them from being denied unemployment benefits on the basis of using an illegal drug despite their use being

110. *See* Whitney K. Novak, Cong. Rsch. Serv., IF11490, The Religious Freedom Restoration Act: A Primer (2020); *infra* Part II.C.

111. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); *see also infra* Part II.B (discussing *Lukumi*).

112. *See* THE FEDERALIST NO. 10 (James Madison) (arguing a strong national government protects liberty as it guards against the dangers of control by a faction with narrow interests).

113. *See Smith*, 494 U.S. at 890; *infra* Part VI.B.

114. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 213 (2023) (rejecting affirmative action in university admissions as a partial remedy for effects of discrimination); Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (holding that judicial desegregation orders generally must respect school district lines even when those lines result from and lead to segregation).

115. *Smith*, 494 U.S. at 876.

116. *Id.* at 874.

"religiously inspired."[117] The Court upheld the denial of unemployment insurance benefits, holding that generally applicable laws are presumptively valid.[118]

In the wake of *Smith*, the Supreme Court granted certiorari to several cases where it found evidence of discriminatory intent. The fractured opinions reflect the Court's internal disagreement over whether it should consider claims under the Free Exercise Clause with the same deference to other branches as it has in the Equal Protection context.[119]

In *Lukumi*, the Church of the Lukumi Babalu Aye, Inc. brought suit against the City of Hialeah after the latter passed a resolution, then an emergency ordinance, and finally three substantive ordinances, criminally proscribing animal sacrifice.[120] The congregants of the church practiced Santeria, which teaches that animal sacrifices nurture the believer's relationship with powerful spirits known as orishas.[121]

The *Lukumi* Court held that the Hialeah ordinances were aimed directly at the Santeria practices, without the broader context that saved the statute in *Smith*, and that the City intended to discriminate against Santeria.[122] Even though the Hialeah ordinances were facially neutral, lacking any reference "to a religious practice without a secular meaning discernable from the language

117. *Id.* In *Sherbert v. Verner*, the Court held that an employee fired for religiously-motivated actions or inactions, the Free Exercise clause requires the state to grant unemployment benefits absent the showing of a compelling state interest and narrow tailoring of the state's remedy to that interest. *See* 374 U.S. 398, 406, 409 (1963). When *Smith* was decided, this doctrine had not been extended much beyond the unemployment context. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (holding that Amish parents had a Free Exercise right to keep their children out of high school in violation of state law). *But see* Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (favoring military's goal of uniformity in uniforms over Petitioner's desire to wear customary religious symbol).

118. *See Smith*, 494 U.S. at 878. *Smith* fits with the Court's long-standing rejection of disparate impact claims in constitutional race discrimination cases. *See* Washington v. Davis, 426 U.S. 229, 249–52 (1976) (denying claim of discrimination on basis of disparate impact following from police using a test to screen in qualified applicants due to a lack of evidence showing that race motivated implementation of the test). *But see* Yick Wo v. Hopkins, 118 U.S. 356, 374–75 (1886). As in *Davis*, *Lukumi* held that to prove discrimination under the Free Exercise Clause, a plaintiff must prove facial discrimination or—where laws are facially neutral—legislative animus, rather than mere disregard for the interests of the victims of discrimination. *Compare Davis*, 426 U.S. at 241 ("This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute[] . . . ."), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.") The effect, of course, is to deny equal citizenship to groups the Court fails to protect. *See* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1552 (2023).

119. *See supra* notes 106-118 and accompanying text.

120. *Lukumi,* 508 U.S. at 526.

121. *Id.* at 524–25.

122. *See id.* at 533–35.

or context,"[123] they enacted a "covert suppression of particular religious beliefs."[124] *Smith*'s deference, it held, did not apply absent two distinct prerequisites: the legislation had to be both generally applicable and "neutral" as between religions.[125]

Writing for the majority, Justice Kennedy argued that where a law is a religious gerrymander designed to target a disfavored religion while avoiding comparable practices of favored ones,[126] the underlying legislative intent needs to be analyzed under an Equal Protection mode of analysis.[127] This approach looks beyond the text of the statute to three categories of evidence: "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[128] The majority concluded that the purported public health rationales for the ordinances were pretextual.[129] Because the laws were neither neutral in intent nor generally applicable,[130] they were subject to strict scrutiny, which they failed because they were not motivated by sufficiently compelling interests.[131]

Fifteen years after *Lukumi*, the Supreme Court addressed another case interpreting *Smith*, *Masterpiece Cakeshop, Limited. v. Colorado Civil Rights Commission*.[132] There, a same-sex couple sought to order a cake for their wedding reception, but the store's owner and baker, Jack Phillips, refused, citing his religious opposition to their marriage.[133] The Colorado Civil Rights Commission held that the refusal violated the Colorado Anti-Discrimination Act, which bans discrimination on the basis of sexual orientation in provision of services for sale.[134] The baker and his company appealed to the Supreme

123. *See id.* at 533.

124. *Id.* at 535 (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986)).

125. *See Lukumi*, 508 U.S. at 531.

126. *Id.* at 535. The ordinances did not bar ritual sacrifices of similar symbolic value, such as communion, or killing of animals for sport or consumption, even when done in a manner dictated by religious law and with religious content, such as kosher or halal slaughter. *Id.* at 535–37.

127. *Id.* at 538 (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

128. *Lukumi*, 508 U.S. at 540 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977)).

129. *Lukumi,* 508 U.S. at 546–47.

130. *Id.* at 542–43.

131. *Id.* at 546.

132. 584 U.S. 617 (2018).

133. *Id*. at 626. The parties did not contest the sincerity of Philips' claimed religious motivation. *See id*.

134. *Id.* at 622–23; *see also* COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2024) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold

Court, arguing that requiring the company to bake a cake for a same-sex wedding would violate his rights under the First[135] and Fourteenth Amendments.[136]

The Supreme Court first upheld the statute's facial constitutionality: "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[137] Then, following *Smith*, it noted that "the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."[138]

However, it then held that the Commission's decision was unconstitutional, because the Commission's proceedings had "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[139] Justice Kennedy based this holding principally upon the transcripts from the Colorado Civil Rights Commission's two public hearings in the case, which, he contended, showed that the Commission believed that "religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[140]

In the first, one commissioner stated that while the baker's religious beliefs are protected, he had no right to act on them contrary to law "if he

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from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .").

135. *Masterpiece Cakeshop*, 584 U.S. at 630–31. Although the opinion conflates the rights of the individual and firm, the holding only makes sense if it concerns putative rights of the company. Nothing in the Colorado act would require Masterpiece to assign baking to any particular employee. Conversely, standard agency law clearly would entitle the entity to fire and replace an employee who refused an assignment to bake the cake. Moreover, it would be an obvious violation of fiduciary duty for a company official to place personal religious beliefs, however discriminatory, above the interests of the firm. Accordingly, Colorado's requirement that Masterpiece serve its customers without discriminating on the basis of sexual orientation has no necessary connection to any individual baker's claimed religious obligation to refrain from participating, even indirectly, in ceremonies of which the baker disapproves.

136. The First Amendment restricts states only due to incorporation under the Fourteenth Amendment. While the Court has consistently extended Fourteenth Amendment protections to corporations and similar entities such as the LLC at issue here, the text, structure and history of the Amendment suggest otherwise. *See infra* Part VI. In any event, the ideal of republican self-government itself bars setting our creations above ourselves by treating their charters as feudal grants of vested rights forever binding on the people and their representatives. *See* Greenwood, *supra* note 21.

137. *Masterpiece Cakeshop*, 584 U.S. at 632.

138. *Id.* at 625.

139. *Id.* at 628.

140. *Id.* at 634.

decides to do business in the state."[141] This statement, Justice Kennedy wrote, does not obviously indicate hostility to religion in the public sphere. The second, he thought, was more clearly hostile:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[142]

According to Kennedy, by pointing out that religions have been used to justify discrimination, slavery and the Holocaust, the Commission had treated the baker's religion as "insubstantial and even insincere."[143] Moreover, he stated, comparing religiously-justified anti-gay discrimination to religious defenses of slavery is "inappropriate" for a Commission charged with enforcing an anti-discrimination law that also bars religious animus.[144] Additionally, the Commission had treated other bakers differently, upholding as non-discriminatory their refusal to bake cakes with derogatory messages denigrating protected classes.[145] By accepting those bakers' refusal to offend, but not Masterpiece Cakeshop's refusal to serve members of a protected class, Kennedy reasoned, the Commission had shown "hostility" towards the baker's religion, and the Commission's enforcement action therefore fell within the *Lukumi* exception to *Smith.*[146]

Justice Kennedy portrays the Commission's holding in *Masterpiece Cakeshop* as an example of animus: a ruling motivated by explicit anti-religious discrimination.[147] The comments which offend Justice Kennedy are more naturally read as imprecise restatements of the belief-action distinction of *Reynolds*,[148] the *Lee* holding that religious believers who enter into

141. *Id.* (quoting C.R. Comm'n Hearing Transcript (May 30, 2014)).

142. *Id.* at 635 (quoting C.R. Comm'n Hearing Transcript (July 25, 2014)).

143. *Id.*

144. *Id.* at 635–36. Justice Kennedy's logic is obscure. Religious defenses of discrimination, slavery, pogroms, and even the Holocaust are not hard to find. *See, e.g.*, STEPHEN JAY GOULD, MISMEASURE OF MAN, NORTON 77–78 (1980) (describing the creationist-geologist Louis Agassiz's contention that the Genesis account of a single common ancestor for all mankind, created in the image of God, applied only to white people). Justice Kennedy's opinion can be read to say that either Commission was required to ignore this fact, or that the First Amendment requires "respectful consideration" of a claim to religious liberty, even when the liberty sought includes disrespect of others to the extent of refusing to serve them.

145. *Masterpiece Cakeshop*, 584 U.S. at 636.

146. *See id.* at 638.

147. *See id.* at 639.

148. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878).

commerce must obey statutory schemes which bind their competitors, or *Smith*'s rule that even sincere religious beliefs are insufficient to justify violating generally applicable law.[149] These comments are a far cry from the specific evidence of legislative hostility in *Lukumi*.

Had Masterpiece Cakeshop asserted a right to violate the Anti-Discrimination Act based on a baker's legal or political *belief*, Justice Kennedy would not have been shocked by a commissioner stating that a baker's beliefs, even if "despicable pieces of rhetoric,"[150] are protected, but nonetheless a bakery open to the public may not discriminate based on protected categories. Discriminatory beliefs are beyond the scope of legislation; actions are not. Some commentators and lower courts, accordingly, have seen *Masterpiece Cakeshop* as a significant modification of *Lukumi*, requiring state actors to give special consideration and "respect" for religious claims that they would never give to their secular equivalents.[151]

During the COVID-19 pandemic, the Court received dozens of petitions for certiorari and requests for emergency stays of quarantine procedures, mask mandates, and other pandemic-oriented prophylactics, citing Free Exercise grounds.[152] A simple application of *Smith*, *Lukumi*, and *Jacobson*[153] would suggest that these claims were meritless: the challenged public health regulations were both generally applicable and clearly intended to protect the public against highly contagious and, at least at the beginning, poorly understood disease, using a traditional technique against plague spreading.

In the cases we reviewed, no courts pointed to evidence that legislators or public health officials instituted quarantines or shut-down orders out of hostility to particular religions or religious people generally. Most of the statutes included exceptions where public health authorities saw countervailing values, such as economically or biologically essential

149. *See* United States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

150. *Masterpiece Cakeshop*, 584 U.S. at 636.

151. *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) ("The case presented a legal conflict between LGBT rights and religious liberty. But the Court ducked central questions raised by that conflict. Rather than sorting out the principles for determining whether religious liberty authorizes discrimination against gays and lesbians in the marketplace, the Court focused on whether state officials treated religious objections with the proper respect and consideration."). It is hard to see why a Civil Rights Commission would be expected to be "neutral" between a viewpoint that conforms with the anti-discrimination act and one that demands the right to discriminate.

152. Ryan Houser & Andrés Constantin, *COVID-19, Religious Freedom and the Law: The United States' Case*, 49 AM. J.L. & MED. 24, 32–35 (2023) (gathering cases and evaluating them as evidence of the change in the police power of the states).

153. *See supra* notes 100-101 and accompanying text.

activities,[154] or where public health considerations counselled against shut-downs. Again, no case turned on evidence that these difficult judgment calls had been made with animus to religion, as in *Lukumi*. Nonetheless, the Court ruled that individuals and groups should be granted religious exemptions, even when public health authorities found the religiously motivated activity dangerous to participants or others.[155]

For example, in *Tandon v. Newsom* the Court struck down a California policy that treated "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" differently than at-home religious services, by permitting gatherings of more than three households in the former, but not the latter.[156] It rebuked the Ninth Circuit for failing to articulate a meaningful distinction between the two groups, although the lower court had noted that public health authorities feared that precautions used in commercial sites would not "translate readily into the home."[157] In these cases,[158] it announced a new rule limiting *Smith*: "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[159]

As Professor Rothschild recently pointed out, this "most favored nation" rule is the opposite of the "neutrality" that *Masterpiece Cakeshop* called for, as it gives religiously motivated behavior protection not offered to any other group or activity.[160]

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154. *See generally* CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, *Identifying Critical Infrastructure During COVID-19*, CISA, https://www.cisa.gov/topics/risk-management/coronavirus/identifying-critical-infrastructure-during-covid-19 [https://perma.cc/H954-G7AA] (Aug. 13, 2024) (summarizing the Cybersecurity and Infrastructure Security Agency's designation of sixteen critical work sectors that "are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof").

155. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 21 (2020) (per curiam) (issuing injunction against enforcement of Governor Cuomo's Executive Order in order to allow religious services).

156. Tandon v. Newsom, 563 U.S. 61, 63 (2021).

157. *Id.* at 63–64.

158. *Roman Cath. Diocese of Brooklyn* was decided on similar grounds. *See id.* at 62; *Roman Cath. Diocese,* 592 U.S. at 16–17.

159. *Tandon*, 593 U.S. at 62 (emphasis in original). The "most favored nation" theory is generally associated with Professor Laycock. However, he was not entirely sanguine about the Court's use of it. *See* Laycock, *supra* note 107, at 173, 177 ("But think about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are.").

160. *See* Zalman Rothschild, *The Impossibility of Religious Equality*, COLUM. L. REV. (forthcoming 2024–2025) (manuscript at 57) (on file with author); *accord* Koppelman, *supra* note 11, at 2295.

C. Legislative and Judicial Efforts to Weaken or Overturn Smith

Three years after *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), seeking by statute to restore the pre-*Smith* legal landscape.[161] Additionally, by our count, at least twenty-six states have enacted RFRA analogs by statute or constitutional amendment,[162] and the Supreme Courts of at least nine more have incorporated RFRA-style balancing, albeit sometimes watered down, into their state constitutions.[163]

In *City of Boerne v. Flores*, the United States Supreme Court held the original iteration of RFRA unconstitutional as applied to a decision by local zoning authorities to deny a church building permit, on the ground that Congress's enforcement powers against the states under Section Five of the Fourteenth Amendment did not extend to "Legislation that alters the meaning" of the clause.[164] Congress responded by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA), which amended RFRA to make clear that it requires religious accommodation even where pre-*Smith* law arguably did not, and grants similar exemption privileges to prisoners

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161. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb(a)(4), (b)(1) (partially overturned by City of Boerne v. Flores, 521 U.S. 507 (1997)); *see also* WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

162. *See, e.g.*, ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02 (2024); ARK. CODE ANN. §§ 16-123-401 to 16-123-407 (2016); CONN. GEN. STAT. § 52-571b (2023); FLA. STAT. §§ 761.01-.05 (2024); IDAHO CODE §§ 73-401 to 73-404 (2017); 775 ILL. COMP. STAT. ANN. 35/1 to 35/99 (West 2021); IND. CODE § 34-13-9-8 (2024); KAN. STAT. ANN. §§ 60-5301 to 60-5305 (Supp. 2023); KY. REV. STAT. ANN. § 446.350 (LexisNexis 2021); LA. STAT. ANN. §§ 13:5231-5242 (2012); MISS. CODE ANN. § 11-61-1 (2019); MO. REV. STAT. § 1.302 (2016); MONT. CODE ANN. §§ 27-33-101 to 27-33-105 (2023); N.D. CENT. CODE § 14-02.4 to 14-08.1 (LEXIS through 68th Leg. Assemb.); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (2012); OKLA. STAT. tit. 51, §§ 251-258 (Westlaw through 2d Reg. Sess. of 2024); 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401-2408 (West 2021); 42 R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2006); 42 R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2006); S.D. CODIFIED LAWS § 1-1A-4 (West, Westlaw through 2024 Reg. Sess.); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2005); TENN. CODE ANN. § 4-1-407 (2021); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2019 & Supp. 2024); UTAH CODE ANN. §§ 63G-33-101 to 63G-33-201 (LEXIS through 2024 3d Spec. Sess.); VA. CODE ANN. § 57-2.02 (2019); Act of Mar. 9, 2023, ch. 295, 2023 W. Va. Acts 2195 (to be codified at W. VA. CODE §§ 35-1A-1 to 35-1A-3).

163. *See, e.g.*, Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274, 281 (Alaska 1994) (rejecting *Smith* under the state's constitution); Rupert v. City of Portland, 605 A.2d 63, 65–66 (Me. 1992); Att'y Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000); Champion v. Sec'y of State, 761 N.W.2d 747, 753 (Mich. 2008); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (en banc); James v. Heinrich, 960 N.W.2d 350, ¶ 39 (Wis. 2021); State v. Adler, 118 P.3d 652, 660 (Haw. 2005) (endorsing a multifactor analysis that included elements of *Smith* and strict scrutiny).

164. *See* 521 U.S. 507, 511, 519, 536 (1997).

incarcerated in state facilities and to religious institutions seeking to avoid state law zoning restrictions.[165]

Smith initially appeared to endorse the ability of legislative majorities to impose controversial moral or moralistic views—like the ban on peyote consumption at issue there—on dissenting citizens. Similarly, it seemed to reflect the Court's general hostility toward discrimination claims that do not involve direct proof of animus. Since then, however, the Court has reversed course. *City of Boerne* appears to be the high-water mark of the Court's subordination of individual religious claims for special treatment to generally applicable legislation. Subsequently, the Court began expanding the *Lukumi* exception for intentional or unequal treatment, musing about overturning *Smith*, and permitting for-profit corporate entities to assert RFRA claims and religiously motivated compelled speech claims.[166] Increasingly, the Court uses the Free Exercise Clause (or RFRA) as a tool to give religious individuals special treatment that it would deny to others.[167] At the same time that it reduces the standard of proof required to show religious animus, it insists on increasingly stringent proof of conscious animus in other areas of discrimination law.[168]

The following three subsections analyze the weakness of *Smith* from different angles—cases arising under RFRA and the First Amendment.

1. RFRA and Burwell v. Hobby Lobby Stores

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court upheld a RFRA challenge to regulations that limited corporate officers' ability to impose their religious views on employees.[169] Three closely-held corporations brought suit against the United States Department of Health and Human Services (HHS), arguing that its mandate that employee health insurance include contraception coverage violated the "sincerely held religious beliefs of the companies' owners."[170] The challenged regulation was generally applicable and the

165. *See* 42 U.S.C. §§ 2000cc to cc-5.

166. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (upholding RFRA's constitutionality with respect to federal actions, and then applying a compelling interest standard under RFRA to require an exception to the Controlled Substance Act for sacramental use of hoasca); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91, 715–16 (2014).

167. *See* Rothschild, *supra* note 160, at 56.

168. *See* Tandon v. Newsom, 593 U.S. 61, 62 (2021); Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV. 725, 748–49 (2023) (arguing that the Court has been "highly sympathetic" to claims of religious animus, while "overt statements" by the President "expressing animus toward Muslims became non-issues").

169. *See Hobby Lobby*, 573 U.S. 682, 697, 736.

170. *Id.* at 689–90.

evidence showed no animus; if anything, the government had gone to some length to accommodate religious groups.[171]

RFRA prohibits the "Government . . . [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability[]" unless the Government "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."[172] Amending RFRA, the RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[173]

First, the Court affirmatively held that the RFRA granted corporations standing to enforce their shareholder's beliefs.[174] RFRA refers to "persons," which are defined by the Dictionary Act to include corporations unless the context requires otherwise.[175] The majority held that this context did not.[176] According to the Court, Congress might have meant to allow business organizers to choose to organize their businesses based on other considerations—such as avoiding personal responsibility for business activities, ease of attracting outside financing or tax subsidies—without limiting their ability to cause the business to follow the religious edicts of the controlling party ("owner").[177]

Second, it analyzed the sincerity of the beliefs of the direct or indirect shareholders of the three businesses, concluding that each business was closely held by a family deeply committed to particular sects of the Christian

171. *See id.* at 696–98.

172. 42 U.S.C. §§ 2000bb-1(a), (b).

173. § 2000cc-5(7)(a).

174. *See Hobby Lobby*, 573 U.S. at 706–07.

175. *Id.* at 707–08; 1 U.S.C. § 1.

176. *Hobby Lobby*, 573 U.S. at 708.

177. *See id.* at 706, 713–14. Although the Court refers to the control parties of these corporations as "owners," standard American corporate law denies even controlling shareholders of corporations most of the ordinary rights of ownership. Indeed, it is blackletter corporate law that a shareholder may not treat a corporation as the shareholder's agent, alter-ego, or property but must, instead, allow directors to exercise their business judgment to act in the interests of the corporation—not according to the will of the shareholders. When corporate control parties treat the corporation as their property, courts routinely refuse to grant them the usual immunity from liability for corporate liabilities. *See, e.g.*, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985) (holding directors personally liable for damages resulting from treating shareholders as owners by delegating to shareholders decision whether to sell control of company); Walkovszky v. Carlton, 18 N.Y.2d 414, 418 (1966) (disregarding corporate form where "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities"); McQuade v. Stoneham, 189 N.E. 234, 240 (N.Y. Ct. App. 1934) (holding shareholder agreement purporting to bind directors unenforceable because it limited director discretion); Berkey v. Third Ave. R'y Co., 144 N.Y. 84, 95 (1926) (holding that where shareholder treats corporation as its agent, law will disregard corporate separation and hold shareholder liable for corporate debts).

faith.[178] Similarly, each company reflected its shareholders' religious identity through statements of purpose, among other things.[179]

The Court did not discuss why RFRA should be interpreted to require that ultimate authority over the corporation's "religion" belong to its managers, instead of leaving managerial authority to ordinary law. Managers never have unfettered discretion to impose their will on the firms they manage.[180] Thus, both federal securities and state corporate law require that specific types of corporate decisions be subject to public disclosure or shareholder ratification.[181] Externally, corporations are subject to regulations requiring businesses to offer employees minimum working conditions, safety, pay or benefits, and virtually every industry is subject to numerous substantive restrictions on potential business decisions ranging from tort and contract law to environmental protection and consumer protection rules.[182] Accordingly, the Court easily could have classified the Affordable Care Act and HHS's insurance mandate as just another routine example of law determining who makes corporate decisions—in this case, that decisions about contraceptive use belong to employees, not corporate officers.

No provision of RFRA places the rights of controlling shareholders or managers to impose a religion on the firm above the rights of employees, as individual citizens, to practice their religions as they see fit. While individual employee decisions might be a derogation of managerial power, decentralization is supported by principles of small government, individual freedom, and religious liberty alike: HHS's mandate is a judgment that individuals should determine for themselves whether their religious

178. *See Hobby Lobby*, 573 U.S. at 700–04, 717–18. In Hobby Lobby's case, the family members were the beneficiaries of a trust, which held the shares of the corporation. *Id.* at 702 & n.15. Whether a trust can have sincere (or any) religious beliefs is an ontological mystery the Court does not acknowledge, let alone discuss.

179. *Id.* at 701.

180. *See infra* notes 181-182 and accompanying text.

181. *See, e.g.*, Edward F. Greene et. al., *The Need for a Comprehensive Approach to Capital Markets Regulation*, 2021 COLUM. BUS. L. REV. 714, 720 (2021) (discussing public disclosure and shareholder ratification requirements of the Securities Acts of 1933 and 1934); DEL. CODE ANN. tit. 8, § 251(c) (2020) (mandating shareholder ratification of mergers).

182. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (mandating non-discriminatory public accommodations); Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a) (setting minimum wage requirements for covered employers); Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a) (requiring employers to maintain minimum workplace safety requirements); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112, 12182 (prohibiting discrimination on the basis of disability by covered employers and by private entities operating places of public accommodation, respectively). *See generally* Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1248 (2014) (describing private actors as a "regulatory target" of environmental laws, including statutes such as the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act). A more comprehensive review of the various schema regulating the private sector is beyond the scope of this article.

commitments allow, or require, the use of contraceptives in their personal circumstances.[183] The First Amendment bars making a top-down decision imposing a state religion on citizens;[184] similarly, Congress might have decided that corporate managers should not impose a corporate religion on employees or other corporate participants.

The *Hobby Lobby* Court does not explain why it reads RFRA to mandate hierarchal, collective, coerced religion over the individual Free Exercise vindicated by HHS. Instead, it assumes that the only person whose religious rights matter is the "owner."[185] Far from a defense of religious freedom, *Hobby Lobby* holds that corporate officers have pseudo-Westphalian rights to impose their religion on other corporate participants, at least when shareholders are aligned.[186] Liberty, in Orwellian fashion, is invoked to justify its opposite.[187]

Since the parties did not contest the sincerity of the corporate control parties' religious beliefs,[188] and in conformity with its long-standing refusal to distinguish between reasonable and unreasonable religious beliefs,[189] the Court then applied RFRA's strict scrutiny test,[190] concluding that the "least restrictive means" prong was not met, because there are other means to ensure

183. *See HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (July 28, 2022), https://www.hhs.gov/about/news/2022/07/28/hhs-dol-treasury-issue-guidance-regarding-birth-control-coverage.html [https://perma.cc/Y8E2-PPBX].

184. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

185. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014). Corporations, being groups of people, cannot have owners in a free society; shareholders—even sole shareholders, like the trust that owned Hobby Lobby's shares—lack most of the characteristic rights of owners. *See supra* note 182.

186. Here we refer to "participants" liberally to include various entities within and beyond the corporation, such as employees, shareholders, suppliers, tenants, and other stakeholders. Each of these individuals, like the corporate officers, is entitled to practice or not practice religion without state imposition.

187. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 140, 270 (Secker & Warburg 1949) ("Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.").

188. *Hobby Lobby*, 573 U.S. at 717. If the issue been contested, there might have been some question whether the owners' beliefs were motivated by political opposition to the ACA as opposed to a deeply founded religious commitment. There was evidence that Hobby Lobby, at least, had provided contraceptive coverage in the past, prior to the widely publicized partisan opposition to the ACA. Tim Rutten, *Hobby Lobby Case Could Cause Huge Legal, Social Disruption*, L.A. DAILY NEWS, https://www.dailynews.com/2014/03/28/hobby-lobby-case-could-cause-huge-legal-social-disruption-tim-rutten [https://perma.cc/HQ96-NPU6] (Aug. 28, 2017).

189. *See infra* Part III.

190. *Hobby Lobby*, 573 U.S. at 726.

that women have access to cost-free contraceptives, and indeed HHS had made such arrangements with respect to church-related enterprises.[191]

2. Fulton v. City of Philadelphia

In *Fulton*, Catholic Social Services (CSS), a foster care agency, refused to certify same-sex couples as foster parents, notwithstanding a statute barring such discrimination.[192] The City stopped referring children to the agency and refused to renew its contract unless it agreed to comply with the law.[193]

Chief Justice Roberts began the majority opinion by stating, "[a]s an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."[194] That is, the Court assumes (rather than establishing) that CSS is a unitary First Amendment actor entitled to freedom of religion. Given the close connection of CSS to the Catholic Church,[195] the conclusion is not entirely unwarranted. Nonetheless, it is unlikely that every individual Catholic subscribes to the specific view of same-sex relationships that the opinion imputes to CSS. The majority did not consider the possibility of internal dissent (including among religious officials, CSS employees, or clients), or that dissenters might have Free Exercise rights of their own--similarly to the cases discussed above in which it has used constitutional rights to empower incumbent corporate officers over other corporate participants.[196]

The majority next characterized the City's decision to cease doing business with CSS as discretionary and therefore not generally applicable.[197] Accordingly, the Court applied strict scrutiny, concluding that the City's interests, *inter alia*, in ensuring equal treatment of prospective foster parents and children were insufficiently compelling to justify barring CSS from the program due to its discriminatory policy.[198] The Free Exercise rights of

191. *Id.* at 728–31. A less restrictive means was clearly available, because contraception is quite a bit safer and cheaper than pregnancy, so insurance which covers contraception ordinarily is cheaper than the more restrictive insurance the plaintiffs sought to provide. Thus, HHS could arrange for insurance companies to offer contraceptive coverage in a formally separate policy not requiring corporate management's involvement in the purportedly sinful behavior. *See id.* at 730–31.

192. Fulton v. City of Philadelphia, 593 U.S. 522, 531 (2021).

193. *Id.*

194. *Id.* at 532.

195. *Id.* at 528–29.

196. *See supra* Parts II.A., II.B., II.C.1.

197. *See Fulton*, 593 U.S. at 534.

198. *Id.* at 541–42.

prospective parents and the wellbeing of the children involved vanish from sight.[199]

Justice Barrett's concurrence, joined by Justice Kavanaugh, suggests that they will vote to overturn *Smith*, if and when they are satisfied with a replacement test that will mitigate some of the issues of extending Free Exercise to entities which, unlike CSS, may have been founded largely for the secular purpose of making money.[200] In contrast, three other justices (Alito, joined by Thomas and Gorsuch) make clear that they were ready to overturn *Smith* even in *Fulton*, stating that *Smith*'s "severe holding is ripe for reexamination."[201] Justice Alito's opinion continues the Court's pattern of obfuscating the distinction between individuals and the organizations with which they affiliate, providing examples of individualized traditions but referring to them as belonging to the Catholic Church.[202]

Fulton's implication that a statute providing for discretion, as nearly every regulatory law must, is not "generally applicable" is quite broad, even if some have read the decision as narrow.[203] In any event, the opinions show that five justices disapprove of *Smith.* It will fall. The real question is what will follow.

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199. *See generally* Kharis Lund, *Wolves in Sheep's Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families*, 54 FAM. L.Q. 67 (2020) (describing the plight of LGBTQ+ couples seeking to adopt children).

200. *See Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring) ("Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical . . . . There would be a number of issues to work through if *Smith* were overruled. To name a few: *Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals?*" (emphasis added) (citations omitted)).

201. *Id.* at 545 (Alito, J., concurring in the judgment); *see also id.* at 618–19 (Gorsuch, J., concurring in the judgment) (stating even more bluntly than the other Justices that the time had come to overrule *Smith*).

202. *See id.* at 547 (Alito, J., concurring in the judgment).

203. Grant P. Patterson, *Constitutional Law—The Supreme Court Declines to Revisit the* Smith *Test for Violations of Free Exercise—*Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)*, 45 AM. J. TRIAL ADVOC. 245, 247 (2021) (contending the decision is narrow). Others feel that *Fulton* provides a roadmap for overturning *Smith*. Chris Gottlieb, *Remembering Who Foster Care Is for: Public Accommodation and Other Misconceptions and Missed Opportunities in* Fulton v. City of Philadelphia, 44 CARDOZO L. REV. 1, 8–10 (2022); Bradley J. Lingo & Michael G. Schietzelt, *A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise After* Fulton, 57 WAKE FOREST L. REV. 711, 775 (2022); Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court's Covid-Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 572 (2021) ("Under *Fulton*, a religious litigant challenging . . . [quarantine] laws could potentially argue that the mere existence of discretion and the possibility (in some cases) of an individualized analysis demands strict scrutiny.").

3. 303 Creative LLC v. Elenis

Last year, in *303 Creative*, the Court created a constitutional exemption from civil rights law for a business which sought to discriminate, based on its owner/operator's religious views, by refusing to provide a service that could be construed as "speech."[204] Lorie Smith, the sole member of 303 Creative LLC, a website and graphic design business, planned to expand the business by providing couples with "'original,' 'customized,' and 'tailored' creations" for their weddings.[205] Concerned that "Colorado would force her [sic – the statute regulated the company, not Smith] to express views with which she disagrees," 303 Creative LLC sued to enjoin Colorado from enforcing its anti-discrimination statute, should a future customer request services in connection with a gay wedding.[206]

The Supreme Court granted certiorari on the question of, "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[207] The question frames the case as one involving (1) compelled speech of (2) artists, as balanced against (3) the state's interest in ensuring that business be open to the public.[208]

The majority first pronounced the state law's requirement that 303 Creative serve clients without discrimination a matter of "pure speech."[209] Moreover, "the wedding websites Ms. Smith seeks to create involve *her* speech,"[210] and by requiring that 303 Creative accept customers, the state was compelling Smith's "speech," as if it were compelling a Muslim movie director to make a Zionist film or an atheistic muralist to celebrate religion.[211]

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204. 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023).

205. *Id.* at 579.

206. *Id.* at 580–81.

207. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (granting certiorari).

208. *See id.*; *see also 303 Creative*, 600 U.S. at 583–84 (observing that the Tenth Circuit endorsed "ensuring 'equal access to publicly available goods and services[]'" as a compelling government interest) (citation omitted).

209. *303 Creative*, 600 U.S. at 587 (citing cases involving flags, videogames, parades, music, and movies as speech). Whether the company's sale of services instead should have been classified as commercial speech, or pure commercial enterprise, is beyond our scope. First Amendment imperialism continues to revive *Lochner's* judicial protection of business under a different name. *See supra* Part II.B.

210. *303 Creative*, 600 U.S. at 588 (emphasis in original); *cf.* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) (protecting corporate speech on basis of a societal interest in the "free flow of information[,]" apparently meaning a right of listeners to receive advertising, without considering rights, if any, of employees or contractors who actually created the advertising).

211. *303 Creative*, 600 U.S. at 589. The examples are strange, as surely some Muslims may be not opposed to the Jewish people having the right of national self-determination; likewise, some atheists may celebrate religious art.

The opinion does not explain why the proper analogy is to artists rather than company spokespeople, lobbyists, lawyers, or copywriters, who are not generally viewed as speaking in their own voice. Even state employees generally have no First Amendment right to retain their jobs while refusing to promote the state's message.[212] Thus, it isn't obvious why compelling the company to serve customers implicates Smith's speech rights at all—even in the event that a customer insisted on 303 Creative providing a customized website for a same-sex marriage, Smith, as the company's control party, would be able to ask someone else to create it.

Even "pure speech," of course, is not absolutely protected.[213] The Court acknowledged that the government has a compelling interest in eliminating discrimination in public accommodations.[214] But even these compelling interests, it concluded, are not sufficient to compel speech, even when the individual is "speaking" through their company.[215] Neglecting the legal separation between the LLC and its member, the Court did not consider the option of 303 Creative LLC hiring a different artist for customers Smith did not wish to serve. Similarly, it does not question how to determine the sincerity, or even reality, of the religious beliefs of a legal entity; it simply assumes, contrary to corporate law, that Smith and the LLC are the same.[216]

In dissent, Justice Sotomayor focused on the conflict between the Court's speech claim and the Fourteenth Amendment equality values on which it was purportedly based, characterizing the business as the "speaker": "the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[217] Justice Sotomayor also highlighted instances where corporate owners cited religion as a basis to discriminate against others based on race, sexual orientation, or religion.[218]

Analytically, *303 Creative* involved religiously motivated "speech" asserted by a for-profit entity.[219] The Court did not evaluate this case within *Smith*'s framework, because it focused on "speech" rather than "conduct," which would have triggered the Free Exercise Clause.[220] Earlier compelled

212. *See* Garcetti v. Ceballos, 547 U.S. 410, 413–15, 426 (2006).

213. *What Does Free Speech Mean?*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does [https://perma.cc/ENT5-AT7V] (summarizing exceptions to free speech).

214. *303 Creative*, 600 U.S. at 590.

215. *See id.* at 592.

216. *See id.*; *see also supra* note 177.

217. *303 Creative*, 600 U.S. at 603 (Sotomayor, J., dissenting).

218. *See id.* at 607–23 (Sotomayor, J., dissenting).

219. *See id.* at 577–79.

220. *See id.* at 597; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (noting that the law aimed to denigrate "conduct motivated by religious beliefs").

speech cases involved similarly religiously motivated speech;[221] *303 Creative* suggests that the Court is prepared to extend these cases—and the Free Exercise cases as well[222]—to public-facing business corporations without considering the differences between people and entities.

Little is left of the *Smith* era but its formal demise. This, coupled with the Court's rhetorical assimilation of the rights of entities into the rights of individual citizens, places various doctrines into a collision course with one another and the rule of law.

III. THE IMPOSSIBILITY OF CABINING RELIGION

In the last century, the Court has generally attempted to avoid defining religion itself.[223] This is probably inevitable in a diverse society committed to full citizenship for people from a wide variety of backgrounds and with a wide variety of beliefs and practices.[224] Religions come with an extraordinary range of practices and beliefs, and America has been quite fecund in developing new ones.[225] A definition focusing on faith, for example, would exclude religions that focus primarily on ritual and those that have little required theology or are not theocentric at all; definitions focusing on practice would ignore important American sects that have little or no required ritual; definitions focusing on institutions such as a priesthood or hierarchy would exclude the many Americans who identify as spiritual but not members of an organized church; definitions focusing on a final judgment or an afterlife would exclude

221. *E.g.*, Wooley v. Maynard, 430 U.S. 705, 706–07 (1977) (moral objections to NH state slogan on license plates); W. Va. Bd. of Ed. v. Barnette, 319 U. S. 624, 642 (1943) (religious objection to flag pledge); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 561 (1995) (religious objection to participants in parade); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969) (quasi-religious student protests against Vietnam War).

222. *E.g.*, *W. Va. Bd. of Ed.*, 319 U.S. at 642 (holding compulsory flag salutes and pledges violate constitutional limits); *Lukumi*, 508 U.S. at 524; Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

223. Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 532 (1989). In a more exclusionary past, the Court often assumed that protected "religion" only extended to faith rather than works, rituals or texts. *See, e.g.*, Davis v. Beason, 133 U.S. 333, 342 (1890) (describing religion as "views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will").

224. *See* Clements, *supra* note 223, at 534–35.

225. PEW RESEARCH CENTER, *U.S. Religious Landscape Survey: Religious Beliefs and Practices* (June 1, 2008), https://www.pewresearch.org/religion/2008/06/01/chapter-1-religious-beliefs-and-practices/ [https://perma.cc/9ZZ4-4GKE]; GALE, *Religions of America*, https://www.gale.com/c/religions-of-america [https://perma.cc/SXU9-6A3X].

important religions that reject or ignore such concepts.[226] As the Court wrote in 1981:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task …. However, … religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[227]

Moreover, were the Court to attempt to define religion, to specify which groups count as religious, or to determine whether a particular individual's claimed religious motivation is genuine, it would immediately be plunged into internal church disputes.[228] Every religious act or claim is some other religion's heresy; every claim to authority is a challenge to some other claimed authority.[229] To determine whether specific views are "genuine" or "central"[230] to a religion—for example, that a religious tradition bars certain forms of birth control, prescribes a particular form of marriage, bars participation in a census, or proscribes vaccination—the Court would either need to determine to which religious authorities to defer,[231] or engage in its own theology. Either alternative defeats the goals of the First Amendment to remove inevitable religious disputes from the realm of governmental politics and the "violence of the law,"[232] thereby reducing the likelihood that believers

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226. For example, Unitarianism (the direct descendant of New England Puritanism), has little required theology or ritual and no clear teachings about the afterlife or a final judgment; many varieties of Judaism, Shintoism and other religions emphasize communal uniformity in ritual and practice rather than theology.

227. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

228. *Cf.* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 181, 187–88 (2012) (holding that constitution generally bars government interference in "quintessentially religious controversies" or internal church governance, such as appointment of minister).

229. *See, e.g.*, *id.* at 189 (discussing importance of governmental abstention to allow churches to self-govern on issues such as appointment of female priests).

230. The Court has long refused to entertain arguments of exemptions that depend on the relative "centrality" of a particular belief in religion. Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

231. *But see, e.g.*, *Hosanna-Tabor*, 565 U.S. at 200–01 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."). Alito eludes the reality that collective voice is always contested. It is secular law which makes a gang into an "association" and designates how it determines who may speak for it and when. Otherwise, the putative speaker no more speaks for the group than does the loudest speaker in a mob.

232. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (arguing that legal interpretation is always violent); *see also* Cover, *supra* note 79, at 18, 48–53 (arguing that legal meaning, which is best created in small groups, is always in tension with law as power; differing legal interpretations stem from and give rise to violence).

will face irresolvable conflicts between state and religious commands[233] or abandon the basic democratic commitment to accept the possibility of a lost election.

Absent a definition of religion, the Court has usually relied on a test of subjective good faith.[234] At times, it has effectively made religion entirely subjective: any individual, with or without a community, may contend that their actions are religious simply by so believing.[235] This, of course, creates a problem for the rule of law in a judicially enforced religious exemption system—if the test of religion is purely subjective structure, any individual may avoid any legal requirement simply by sincerely believing that God has told them or their religion compels them otherwise. *Smith*, then, stood as a practical solution to an intractable problem: it leaves religious exemptions to the political process, absent proof of malice.[236]

In the corporate context, absent *Smith*, the subjective test is even more problematic. If permitted, many businesses will have an economic incentive to seek religious exemptions.[237] The first issue will be whether the business in fact is motivated by religion, or, instead, is just pursuing secular profit.

Were the courts to import the sincerity test to determine if a corporation is acting religiously, they would need to decide what it means for an institution to "sincerely believe."[238] Corporate law provides a starting point for this inquiry. Under ordinary agency law, the knowledge and beliefs of most

233. *See* Cover, *Violence and the Word*, *supra* note 232, at 1605 (describing martyrdom as conflict between competing laws and material reality).

234. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) (setting out "honest conviction" test); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144 (1987) (inquiring into good faith); United States v. Seeger, 380 U.S. 163, 165–66 (1965) (stating that the "test of belief . . . is whether a given belief . . . is sincere and meaningfully occupies a place in the life of its possessor").

235. *See Seeger*, 380 U.S. at 165–66.

236. *See supra* note 118 and accompanying text.

237. Brown et al., *supra* note 41, at 122 ("[C]orporations may have an incentive after *Hobby Lobby* to claim religious exemptions to laws, and some of these claims may be insincere."); Ciocchetti, *supra* note 39, at 339.

238. Brown et al., *supra* note 41, at 123, 130. Brown et al. ultimately conclude that a corporation's shareholders should be able to impose their views on other corporate participants. *Id.* In closely held corporations, this may reflect the real-politic of corporate law (only shareholders have standing to enforce the board's fiduciary duties, and shareholders acting by unanimous consent may remove board members at any time, so a unanimous shareholder body can disregard fiduciary law). With a wider shareholder base, it clearly violates fundamental corporate law principles (directors must act in the corporate interest even if shareholders disagree). But in either case, it avoids the Westphalia issue: granting corporate officers the right to impose their religion on corporate employees, investors, or customers is a form of establishment, exactly contrary to the Free Exercise rights of those participants.

corporate agents are routinely imputed to the corporation.[239] In this context, that ordinary law would lead to almost any corporation having many conflicting beliefs. When it is important for a corporation to take a single, unified stance, the usual way is for its directors or officers to create a corporate policy. Presumably, then, the corporate board would adopt its religion by voting on a board resolution. If the courts looked to the institutional actions rather than the actors, sincerity would likely rest on the corporation's paper trail.

Since American courts typically refuse to require that a religion include a community of fellow-believers or have an internally consistent theology, it is hard to see how a court could find a firm to be "insincere" in its religious views. It need only declare that its religion requires whatever action it wishes to take and bars whichever ones it does not. Courts will not question the internal consistency of a belief system that requires the firm to accept subsidies while barring it from paying damages, any more than they question Masterpiece Cakeshop's claims regarding same-sex marriage, a position other followers of Biblical teachings might reject.[240] Moreover, most religions have plenty of sincere believers who, like Augustine, struggle to conform their actions with their faith.[241] If individual standards apply, a corporation could sincerely believe, for example, that certain forms of contraception are religiously forbidden abortion—even if it has a history of providing insurance coverage for them.[242]

As the Supreme Court has observed, in any event, sincerity alone is an insufficient shield against abuse. People may believe with perfect sincerity that they are entitled to special privileges or that they need not consider the

239. *See* Marin R. Scordato, *Evidentiary Surrogacy and Risk Allocation: Understanding Imputed Knowledge and Notice in Modern Agency Law*, 10 FORDHAM J. CORP. & FIN. L. 129, 130–31 (2004).

240. *See, e.g.*, *Genesis* 1:27 (King James Version) ("So God created man in his own image, in the image of God he created him; male and female he created them"); *Genesis* 2:18 (author's translation) ("It is not good for the human (*adam*) to be alone"); *Leviticus* 19:34 (author's translation) ("[T]he stranger who resides with you shall be to you as a citizen among you"); 1 *Samuel* 18:1 (King James Version) ("And it came to pass, when he had made an end of speaking unto Saul, that the soul of Jonathan was knit with the soul of David, and Jonathan loved him as his own soul"); *cf.* BERESHIT RABBAH 8:1 (~500 C.E.) (recounting interpretations of *Genesis* 1:27 as meaning that the first human was "androgynous" or alternatively two-faced, back-to-back, later to be split), echoing a similar myth in Plato's SYMPOSIUM which explicitly explains coupling, including homosexual coupling, as a consequence; MISHNAH SANHEDRIN 4:5 (~200 C.E.) (interpreting the Genesis account of the creation of Adam as a rejection of all systems of caste and hierarchy, since no one may say "my blood is purer than yours").

241. AUGUSTINE OF HIPPO, VIII CONFESSIONS, at ch. 7 (Logos Virtual Libr., J. G. Pilkington, trans., n.d.) https://www.logoslibrary.org/augustine/confessions/0807.html [https://perma.cc/3ALG-2PLQ] ("Grant me chastity and continency, but not yet.").

242. *See* Rutten, *supra* note 188.

claims of others.[243] Less hypothetically, when the leaders of Bob Jones University insisted that their religion required racially segregated dating, the problem was racism, not sincerity. Sincere discrimination is discrimination nonetheless.[244]

To address this issue, Professor Bainbridge suggests reducing corporate religious claims to shareholder claims via the corporate law doctrine of veil piercing.[245] In standard corporate law, corporations are separate from their shareholders; when shareholders violate this principle by treating the corporation as a personal instrumentality or agent, the courts ignore the separate existence of the corporation as well, "piercing the veil" to hold shareholders personally liable for corporate liabilities.[246]

Corporate law grants investors the right to create and control an entity for which they are not responsible because of the social benefits of the corporate form: it increases investor bargaining power by allowing multiple investors to bargain as a single entity, subsidizes investors profiting from enterprises by freeing them from the contract, tort, or tax obligations of the corporation, and formalizes bureaucratic hierarchy. Of course, these benefits must be balanced against the economic and moral harms of inappropriately subsidizing activities that would not be profitable otherwise. Accordingly, courts ordinarily treat corporate separation as a privilege that will be lost unless control parties respect the separate existence of the firm. Thus, holding that a corporation is its shareholder's alter-ego is a holding that the corporation does not have a separate legal existence; its obligations are the personal obligations of the shareholder, or, in the words of the legal metaphor, the corporate veil (separating corporate from personal assets) is pierced.

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243. The view that religious organizations and individuals should receive exemptions from otherwise applicable regulations is widely held, and legislatures have enacted scores of religious exceptions. *See* Brown et al., *supra* note 41, at 122; Diana B. Henriques, *In God's Name: As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), https://www.nytimes.com/2006/10/08/business/08religious.html [https://perma.cc/Y93T-6TEC] (finding over 200 religious exemptions or special privileges in Federal statutes between 1996-2006).

244. *See infra* Section VII (discussing Bob Jones Univ. v. United States, 461 U.S. 574 (1983)). Religious beliefs can be found to justify almost any moral, or immoral, position. On racism and segregation, compare Alfred L. Brophy, *Book Review*, 20 J.L. & RELIGION. 567, 569 (2005) (reviewing JAMES B. BENNET, RELIGION AND THE RISE OF JIM CROW IN NEW ORLEANS (2005)) (providing examples of uses of Christianity in the integration debate), with Eskridge, *supra* note 83, at 665 (explaining how Christianity was used to justify segregation).

245. *See* Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235, 245 (2013).

246. *See* Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94–95 (1926) (holding that piercing corporate veil is appropriate when shareholder treats corporation as its agent); Walkovsky v. Carlton, 18 N.Y.2d 414, 418 (1966) (stating that veil piecing is appropriate when "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities," that is, when shareholder fails to take seriously corporation's separate existence).

Bainbridge suggests that corporate claims to reflect shareholder religious beliefs should be analyzed by "reverse veil piercing." That is, the court would interpret the claim as a control party seeking to have the court disregard corporate status (even though the same control parties chose not to exercise their power to dissolve dissolved the corporation or reorganize it in a non-corporate form). Bainbridge suggests a court should accept this claim if the corporation is the shareholder's alter-ego and the shareholder's religion is deeply embedded in the corporation (including, oddly, in ways designed to assure continuation after the shareholder's demise or retirement).[247]

Bainbridge's proposal would allow a dominant shareholder to voluntarily accept the private benefits of corporate separation, while simultaneously claiming that the corporation is the shareholder's mere alter-ego (and thus not entitled to separation).[248] Usually, as Bainbridge's examples show, courts use reverse veil piercing to protect poorly advised small business owners who realize too late that they inadvertently sacrificed important rights by incorporating, such as the homestead exemption in insolvency.[249] That logic should seldom apply in the religious context: barring the eschaton, it's never too late for a controlling shareholder to reorganize out of corporate form.

In any event, a veil-piercing analysis inevitably implies that religious freedom rights must be asserted by the actual human beings who make up the corporation. Given that corporations ordinarily are made up of those who operate them as well as those who receive their dividends, only in the rarest cases will Americans of diverse backgrounds, united only by the "*doux commerce*" desire to make a living, agree on collective religious practice.[250] Thus, even were veil-piercing appropriate, it would be not be appropriate to allow the shareholder (of a non-corporation) to bind the other corporate participants instead of allowing each citizen to choose his or her own religious practices.

If the Court overturns *Smith*, as it seems poised to do, the implication will be far-reaching exemptions from laws of general applicability. Presumably, the Court will have to quickly reach a new limiting principle to maintain the

247. Bainbridge, *supra* note 245, at 246–47.

248. *See id.* at 246.

249. *See id.* at 245–46.

250. "*Doux commerce*" refers to Montesquieu's notion, widely adopted by others, that commerce reduces the tensions present in any large democratic society. *See, e.g.*, Paul Horowitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 177 (2014) (explicating Montesquieu as contending that commercial activity fosters tolerance in a diverse society, because business "interactions should be thin, broad and placid"). Similarly, Hobbes proposed that subjects focused on commerce would ignore politics, making them more amenable to peaceful coexistence. HOBBES, *supra* note 76, at 79 (noting that "desire of such things as are necessary to commodious living" makes men more peaceful).

rule of law.[251] The workability of any approach will undoubtedly be tested by the flexibility of corporate entities.

IV. THE CORPORATE FORM AND ITS SEPARATION

A corporation's basic policies are set by its board; and its board members are fiduciaries, required by law to set aside their interests and commitments to promote the best interest of the corporation itself.[252] Those fiduciaries, in turn, must change the corporation's goals or policies, however fundamental, whenever they conclude that its interests demand they do so. Thus, unlike people, business corporations are designed to reject the possibility of religious or other fundamental conscientious commitments. Humans may say, "here I stand, I can do no other."[253] By contrast, corporations cannot.[254]

Business corporations' interests are secular and usually profit-oriented. Corporate law rarely requires corporations to consider the interests, desires, or morals of the people affiliated with the firm, other than the fictional interests of fictional shareholders, imagined as investors with no interests other than maximizing the value of their undiversified shareholdings in the firm).[255] At least outside of insolvency, directors' and officers' fiduciary

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251. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878) ("To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."). Maintaining the belief/action distinction has proven difficult. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (protecting religious solicitation); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (extending First Amendment protection to plaintiff's refusal to work on Sabbath).

252. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88–89 (2019).

253. Martin Luther, Speech at the Diet of Worms (Apr. 18, 1521), *in* ROLAND H. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER, 185 (1950).

254. *See* George Shepherd, *Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders*, 23 U. PA. J. BUS. L. 823, 824–25 (2021) ("[C]urrent legal doctrine suggests that the corporation's leaders should comply with existing substantive laws and contractual obligations, such as environmental laws, laws designed to protect worker's health, and labor contracts.").

255. *See* McRitchie v. Zukerberg, 315 A.3d 518, 537 (Del. Ch. 2024) (holding that directors fiduciary duties run to corporation and its shareholders, with shareholders taken as undiversified investors regardless of factual reality); Greenwood, *supra* note 33 (pointing out that Delaware law constructs a fictional shareholder that, unlike real investors, is undiversified, lacking all other human roles or commitments, and fundamentally inhuman); Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 345 (2007) (observing that directors generally do not owe fiduciary duties to creditors or bondholders). There are exceptions. One is in the mergers and acquisition context, where most states permit a board to consider the interests of people and groups likely to be affected by the transaction, see, e.g., N.Y. BUS. CORP. LAW. § 717(b); 15 PA. CONS. STAT §§ 515(a)(1), 1715(a)(1) (2023) (allowing consideration of broad range of interests, generally),

duties of loyalty and care generally are owed to the legal entity itself, not its employees, customers, neighbors, creditors, or even the people or entities which hold its shares.[256] The following subparts address specific reasons as to why business corporations cannot be viewed as holding religious beliefs.

A. The Corporate Form Has "No Soul to Damn"

First, a corporation—whether the legal entity or the sociological business enterprise—cannot practice religion in the classic sense. The law imputes knowledge and beliefs of key agents to corporations, but it would be strange to assert that a legal entity forms or holds beliefs of its own, independent of those of its agents or directors.[257]

To the extent that religion concerns eternal life, we have not found one claiming that corporations have souls or the potential for eternal life or damnation.[258] Moreover, under our law corporations have no mouth to take communion, keep kosher, or say prayers; no hands to light candles or offer sacrifices; and no parents to honor (although again, they can employ agents to

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and at least one state previously required that they do so. 2010 CONN. ACTS 10-35 (Reg. Sess.) (substituting "may" for "shall") (codified as amended at CONN. GEN. STAT. § 33-756 (2023)). Another, according to some courts, is in the vicinity of insolvency. *E.g.*, Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers but owes its duty to the corporate enterprise."). Notwithstanding the language of *Credit Lynonnais*, the mainstream view is that directors are not agents of anyone, but rather act *as* the corporation, as set out in Del. G. Corp. L. 141(a). Moreover, their fiduciary duty always is "to the corporate enterprise," even in the vicinity of insolvency. *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.").

256. Monique D. Hayes, *When the Tides Turn: Fiduciary Duties of Directors and Officers of Distressed Companies*, A.B.A.: BUS. L. TODAY (July 16, 2015), https://www.americanbar.org/groups/business law/resources/business-law-today/2015-july/when-the-tides-turn/ [https://perma.cc/2U5K-6AE3].

257. *See* Thomas E. Rutledge, *A Corporation Has No Soul — The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 24–27 (2014); *supra* note 239 and accompanying text.

258. John C. Coffee Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) ("Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?") (italics in original) (quoting M. KING, PUBLIC POLICY AND THE CORPORATION 1 (1977)); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 477, at 298 (George Sharswood ed. 1893) (eBook) ("Neither can a corporation be excommunicated: for it has no soul."); Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 253 (1911). Still if the financial gains are high enough, religious innovation probably will follow.

do at least some of those activities).[259] While a corporation can cease to exist, it is not "alive" and cannot die.[260] Under modern law, corporate Articles do not expire and so a corporation could theoretically exist forever—it need not concern itself with the afterlife, even if such concerns were infra vires.

Most importantly, American law does not recognize a corporation as an end-in-itself or a moral being, at least leaving aside the treatment of our legal creations as citizens for diversity and jurisdictional purposes.[261] Thus, a corporation's leaders are permitted to decide that its "best interests" are best served by causing it to cease to exist by merger or liquidation.[262] Yet no one thinks of this as the moral equivalent of suicide.[263] A corporation is, instead, a bureaucratic governance organization designed and intended to direct people in a joint project.[264] Like any form of government, it is a tool we have created to make our lives better.[265] If corporate management imposes its religious beliefs on employees, shareholders, other investors or anyone else, that is closer to an establishment of religion than the free exercise of one.

B. Business Corporations Are Separate from Their Participants

Second, we cannot simply impute the views of corporate participants to the legal entity. Corporate law separates the legal entity from its participants, including both investors and employees. Shareholders may not act as or for the corporation;[266] employees may do so only as agents subject to its control

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259. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires"). In contrast, the corporation's agents, employees, and other corporate participants do have these abilities.

260. Delaware provides for voluntary dissolution. DEL. CODE ANN. tit. 8, § 275(a) (West, Westlaw through 152nd Gen. Assemb.). Creditors may force an insolvent corporation to reorganize or, sometimes, liquidate. 11 U.S.C. §§ 725, 1103.

261. One of the authors comes from a religious tradition which holds that elevating a human governance institution such as a business corporation to be an end-in-itself is a form of forbidden idolatry, placing our own creations as a master above us. *See Exodus* 20:2 ("Thou shalt have no other gods before me.").

262. DEL. CODE ANN. tit. 8, § 271 (2023).

263. Some early twentieth century corporate theorists asserted that corporations should be taken to be moral beings. After Felix Cohen, continuing that debate seems pointless. *See* Cohen, *supra* note 31, at 820. In any event, any republican or liberal political understanding must reject the idea that a legal entity has value independent of its usefulness to actual people.

264. *See* Ciepley, *supra* note 21, at 817–18.

265. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("That to secure these rights, Governments are instituted among Men[.]").

266. *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232, 238 (Del. 2008) (declaring illegal shareholders' proposed by-law mandating reimbursement of dissident directors' proxy solicitation expenses under certain circumstances because "stockholders . . . may not directly manage the business and affairs of the corporation" or require directors to act in violation of their fiduciary duty).

and acting in its interests.[267] Neither shareholders nor employees are legally responsible for the corporation's action.[268] Even the board of directors is not free to impose its values on the corporation: directors are fiduciaries, who must set aside their interests and values to act in the interest of the corporation based on their independent business judgment.[269]

Corporate agents are required to *act* under the direction of the corporate board, who, as fiduciaries, must act in the corporate interest (which the board has broad discretion to define).[270] However, it would be incompatible with the most elementary understandings of freedom to demand that agents also *believe* under the board's direction. In any event, a corporation can control its employees' actions, to some degree, by supervision and the threat of discharge. Of course, it has no means to control their thoughts or beliefs.

For the last several decades, the conventional view has held that corporate interests are, in large part, shareholder interests.[271] But these are only the hypothetical interests of an imaginary, fictional, undiversified shareholder with no other moral, political, or social commitments or financial interests.[272] Corporate directors owe no duty to consider the *actual* interests of their shareholders, the majority of which are often institutional funds, pension

267. *See* Greenwood, *supra* note 21, at 427.

268. *See* Model Bus. Corp. Act § 6.22 (Am. Bar Ass'n 2023).

269. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). To be sure, this fiduciary duty is often unenforceable or unenforced. *Cf.* Megan W. Shaner, *The (Un)enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 274 (2014). So long as a corporation remains solvent, a sole shareholder may attempt to impose its own views on the firm—to treat it as an alter-ego—almost without repercussion: A sole shareholder may replace directors and managers at will if they do not follow her or his instructions and no one has standing to invoke the judicial system. Similarly, even when there are multiple shareholders, courts use doctrines such as the business judgment rule to protect all but the most egregious violations of fiduciary duty from judicial review. Nonetheless, it is hard to argue that the First Amendment, or religious freedom more generally, ought to be understood to include a control party's right to violate corporate law by imposing religious views on a corporation in violation of the party's fiduciary duties. Bad faith is bad faith even if there is no legal remedy in this world.

270. *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1989) (accepting directors' decision that corporate interests included preserving *Time Magazine*'s editorial integrity); *see* Shaner, *supra* note 269, at 282.

271. *See* Yong-Shik Lee, *Reconciling Corporate Interests with Broader Social Interests - Pursuit of Corporate Interests Beyond Shareholder Primacy*, 14 WM. & MARY BUS. L. REV. 1, 4–5 (2022) (discussing the idea of "shareholder primacy").

272. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (in sale of corporation, requiring directors to maximize share price at expense of bond value, despite prior transaction history which made clear that most shareholders were also bondholders); Stephen M. Bainbridge, *The Geography of Revlon-Land*, 81 FORDHAM L. REV. 3277, 3284 (2013); Greenwood, *supra* note 33, at 1026–29.

funds, or foreign national wealth funds.[273] Indeed, directors generally lack real-time information about who those shareholders are (or represent), let alone the actual interests of the people behind them.

Moreover, directors may not defer to shareholder will, presumably the best indicator of shareholder interests and values.[274] In fact, allowing shareholders to run the corporation is potentially a breach of corporate law so serious that courts deny corporate existence altogether, holding the shareholders liable for corporate obligations.[275]

Similarly, corporate employees are no more likely to agree than people at large.[276] If Hobby Lobby were made up of human beings who agreed with its CEO's view that certain forms of birth control violate God's law, no one would have challenged its attempt to impose management's view on

273. According to a 2020 study, roughly 40% of U.S. equities are held by foreigners, 30% by pensions and retirement accounts representing future and current employees as well as retirees, and 5% are held by non-profit endowment funds representing projects rather than any human being at all. Steve Rosenthal & Livia Mucciolo, *Who's Left to Tax? US Taxation of Corporations and Their Shareholders*, TAXNOTES (Apr. 1, 2024), https://www.taxnotes.com/featured-analysis/whos-left-tax-grappling-dwindling-shareholder-tax-base/2024/03/29/7j9cr [https://perma.cc/5ES9-HRXC]. Whatever the interests and values are of this diverse group of people, future people and projects, they necessarily extend well beyond the entirely fictional notion that all shareholders want is higher dividends and/or stock price.

Moreover, some institutional shareholders are required by law to act as if they represent only shares, not people. Defined benefit pension plans, which hold investments on behalf of future retirees as well as current ones, still account for 8% of shareholdings, despite their rapid decline in recent decades. *Id.* at 4. ERISA, which regulates many of those plans, bars plan fiduciaries from taking into account the actual financial interests (and possible class solidarity, patriotism or fellow feeling) of employees. Instead, fund managers must pretend that current employees all would prefer to have higher stock returns in their pension plan, rather than (for example) have the plan support better working conditions for employees or a more sustainable future. *Proskauer Hedge Start: Accepting Investments from Benefit Plan Investors Subject to ERISA*, PROSKAUER (July 11, 2024), https://www.proskauer.com/pub/proskauer-hedge-start-accepting-investments-from-benefit-plan-investors-subject-to-erisa [https://perma.cc/7BVQ-RG32] (advising that ERISA fund managers are subject to fiduciary duties and must "diversify investments so as to minimize the risk of large losses"). Others may be under intense market pressure to act in this way even if they are not required to do so: limited information and cognitive capacity mean that most financial professionals are ranked based on their portfolio returns alone.

274. *See, e.g.*, McQuade v. Stoneham, 263 N.Y. 323, 328–29 (N.Y. 1934) (stating that directors may not defer to shareholders but must exercise independent business judgment); Smith v. Van Gorkum, 488 A.2d 858, 873 (Del. 1985) (stating that directors may not defer to shareholders in determining whether to sell company but must exercise independent business judgment).

275. *See* Walkovszky v. Carlton, 18 N.Y.2d 414, 418 (1966) (holding that piercing the veil is appropriate when stockholders do not treat it as a separate entity).

276. *See* YingFei Héliot et. al., *Religious Identity in the Workplace: A Systematic Review, Research Agenda, and Practical Implications*, 59 HUM. RES. MGMT. 153, 167 (2019) (observing an increase in the number of religious discrimination cases, and attributing rise to increased religious diversity in the United States).

employees.[277] But it is not. Hobby Lobby's 46,000 employees are likely too numerous to all agree on anything, let alone Mr. Green's particular theology.

Corporate law vests corporate directors with enormous discretion to use corporate funds according to their judgments of corporate interest.[278] Broad as it is, that discretion is not complete. It is always constrained by the many legal restrictions under which corporations operate, the market pressures that legally defined markets and property rights create, and the managers' and directors' fiduciary duties of loyalty and care.[279] Most importantly, it is constrained by American notions of freedom and individual autonomy. The state action doctrine holds that we have no federal constitutional rights against corporations.[280] Still, we retain our political rights. And we retain the basic liberal understanding that government, and rights against the government, are for people, to ensure that the government pursues both the "general Welfare" and protects the private space individuals need to pursue their own notions of welfare and personal commitments, even when they differ from others.[281]

C. Corporate Fiduciaries Owe a Duty to the Corporation

Corporate employees, managers, and directors each owe the corporation a duty of loyalty.[282] The precise contours of this duty are controversial, and its impact is limited by the rule that only shareholders have standing to bring

277. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 702–03, 736 (2014) (barring HHS from requiring a for-profit corporation to comply with regulation requiring that employee group health plans furnish preventive care, when beneficiaries of trust holding corporate shares asserted such insurance would violate their religious beliefs).

278. *See* Shaner, *supra* note 269, at 296 ("Like directors, officers are also given wide latitude under corporate law norms to carry out their role in running the corporation. … the delegation of authority coupled with the enormous discretion and deference afforded to officers has led to these individuals wielding incredible power in controlling the corporate enterprise.").

279. *See id.* (noting that the primary restraints on officers' power are the board of directors, the corporation's governing documents, and state law fiduciary duties). *See generally* Greene et al., *supra* note 181, at 720–48 (providing an overview of U.S. securities law regulation).

280. *See* U.S. v. Stanley, 109 U.S. 3, 11 (1883) (stating that the Fourteenth Amendment applies to states, not the "[i]ndividual invasion of individual rights"). Although every corporation is constituted, empowered and governed by state law, the Court does not consider that state action. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1003–04 (1982) (holding that a heavily regulated nursing home in New York which relied substantially on state funding was not a state actor); Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982) (holding that a nonprofit private school was not a state actor).

281. *See supra*, section II.A; U.S. CONST. pmbl.; *see also* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

282. William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN ST. L. REV. 837, 844–45 (2012) (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

suit and by the business judgment rule.[283] Nonetheless, the core of the duty is clear: a corporate fiduciary must place the corporation's interest above their own.[284] Fiduciaries, that is, must work for the corporation, and if working for the corporation conflicts with what they might prefer to do for themselves, fiduciaries must set aside their preferences and instead act in the corporation's interest.[285]

This means that two otherwise sacred principles are simply unavailable without breaching the norms of the role. First, no corporate fiduciary may avail themselves of the classic call to conscience, refusing to act because a corporate action runs afoul of their religious beliefs.[286] Corporate law, thus, rejects the classic defense of freedom of religion, that a person should not be forced to choose between the laws of man and the commands of their religion.[287] Or more precisely, a fiduciary has already agreed that in the event of conflict, they will resign or set aside personal commitments.[288] In other words, the fiduciary position will be occupied by those who either see no conflict between the corporate interest and their consciences (or religious duties)—or are willing to act inconsistently with their fiduciary duty. As a matter of logic, then, if the people acting for the corporation ought to resign in the event of a conflict, the corporation itself can never have a conscientious position.

Second, the most popular guidepost of the corporate world often seems to resemble the worship of Mammon.[289] Friedman's claim that the social purpose of corporations is to generate profits has many followers.[290] But corporate fiduciaries are barred from that pursuit on their own, at least if it

283. *See* Bainbridge, *supra* note 252, at 83–84, 88–90 (discussing various formulations of the business judgment rule).

284. Lafferty et al., *supra* note 282, at 845.

285. *See id*.

286. *See supra* notes 282-285 and accompanying text.

287. *See, e.g.*, U.S. v. Seeger, 380 U.S. 163 (1965) (protecting conscientious objection to draft); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

288. *See* Lafferty et al., *supra* note 282, at 845.

289. *See Matthew* 6:24 (King James) ("Ye cannot serve God and mammon."); *Luke* 16:13 (King James) (same). Mammon appears to be a transliteration of the Aramaic *mamona*, meaning money or riches. Mammon is sometimes personified as an avaricious fallen angel, e.g., JOHN MILTON, PARADISE LOST i. 678.

290. *See* Milton Friedman, *A Friedman Doctrine — The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html; Taylor Tepper, *Milton Friedman On The Social Responsibility of Business, 50 Years Later*, FORBES, https://www.forbes.com/advisor/investing/milton-friedman-social-responsibility-of-business/ [https://perma.cc/Y4ZF-5FQU]; *supra* notes 42-45 and accompanying text.

conflicts with the corporation's best interests.[291] Historically, the East India Company's officers became wealthy by impoverishing the population it ruled—and, more scandalously at home, then keeping the proceeds instead of turning them over to investors.[292] The latter is now clearly barred by corporate law: officers may not treat their offices as opportunities for self-enrichment at the expense of the firm.[293]

The same rule should apply to officers' private religious beliefs or practices. The fiduciary duty of loyalty and care means that executives and directors may not pursue their spiritual health or success at the expense of the corporation's (this worldly) interests.

V. FLEXIBLE CORPORATE PURPOSE IN A COMPETITIVE ECONOMY

Corporations are designed to behave opportunistically. Indeed, a major advantage of corporate law over contract is that the latter is inherently rigid, binding parties to past decisions even as the world changes. Corporate law, in contrast, merely specifies a decision structure for managing change.[294]

Unlike citizens, corporations are creatures of state law, created, governed, and destroyed by way of statute.[295] State law determines who has the power

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291. For example, if the hypothetical "best interest" of a corporation were to engage in an unprofitable short-term decision, like building a factory to develop widgets that will soon be in demand, and one particular director sought to increase profits for one quarter by denying the project, then this would violate the "best interest" principle.

292. *See* Dave Roos, *How the East India Company Became the World's Most Powerful Monopoly*, HISTORY (June 29, 2023), https://www.history.com/news/east-india-company-england-trade [https://perma.cc/4DJD-DGEF]; *see also* Edmond Burke, Member of Parliament, Speech to the English Parliament Concerning the East India Bill 78, at 77–78 (Dec. 1, 1783) (available at https://perma.cc/AZ4D-KJCG) (protesting the larceny of Company officials–both from the Indians they treated as subjects and from the Company itself).

293. RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency"); *see* Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1205, 1207 (10th Cir. 2007) (interpreting Texas agency law, which had adopted the Restatement, to hold that an employee owed a fiduciary duty to his employer to disclose that he was doing business against his employer). However, Delaware courts are remarkably willing to uphold high executive pay, provided an independent board negotiated it as payment for services rendered. *See In re* Walt Disney Derivative Litigation, 907 A.2d 693, 757–58 (2005) (upholding $140 million departure payment to fired Disney CEO). *But see* Tornetta v. Musk, 310 A.3d 430, 445, 546–47, (Del. Ch. 2024) (invalidating $56 billion pay package, on ground that it was not negotiated at arms' length).

294. *See* JOHN ARMOUR ET AL., HARV. JOHN M. OLIN DISCUSSION PAPER SERIES NO. 643, THE ESSENTIAL ELEMENTS OF CORPORATE LAW: WHAT IS CORPORATE LAW? 2 (2009).

295. Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 812 (2018); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 644 (2016).

to act for or as the corporation and who is responsible for its obligations;[296] these rules, in large part, are designed to remove both responsibility and ordinary rights of self-governance from corporate employees, investors, and customers.[297] The entity's views, thus, need have no connection to the views of those who provide its labor or capital, those who depend on it to make a living or for its products, or those who profit from it. This separation makes business corporations more like governments than citizens, and suggests, in turn, that, like governments, their exercise of religion is likely to be coercive establishment. Religious freedom requires that corporate participants and citizens generally have Free Exercise and anti-establishment rights against corporations, rather than the opposite.

Under typical state law, a corporation may exist for any "lawful purpose."[298] Corporate planners may embed a specific corporate purpose in the corporate Articles of Incorporation.[299] Few do. Instead, the norm is for articles of incorporation to set out as broad a corporate purpose as the statutory language permits: "for any lawful business or purpose."[300] This allows the

296. *See* Chatman, *supra* note 295. For example, agency law ascribes the actions of the corporation's agents, when acting within the scope of their employment, to the corporation itself as its principal. Stewart v. Wilmington Trust SP Servs., Inc., 112 A.3d 271, 302–03 (Del. Ch. 2015) ("A basic tenet of [Delaware] corporate law, derived from principles of agency law, is that the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are imputed to the corporation itself.").

297. *See Stewart*, 112 A.3d at 303 ("[I]t may appear harsh to hold an 'innocent' corporation (and, ultimately, its stockholders) to answer for the bad acts of its agents, such 'corporate liability is essential to the continued tolerance of the corporate form, as any other result would lack integrity[.]'") (citation omitted); *see also* Hecksher v. Fairwinds Baptist Church, Inc., 115 A.3d 1187, 1205 (Del. Ch. 2015) ("[A] primary justification for the imputation doctrine, according to the Restatement (Third) of Agency, which states that imputing an employee's knowledge to her employer, creates 'strong incentives for principals to design and implement effective systems through which agents handle and report information.'") (quoting RESTATEMENT (THIRD) OF AGENCY § 5.03, cmt. b (AM. L. INST. 2006)). More realistically, corporations act through their agents. In the ordinary course, the actions of a corporate employee are the actions of the corporation (and corporations—like all principals—routinely claim the product of their agents' actions as their own). It would be entirely anomalous to give the principal the right to claim agents' actions as its own when they are profitable, but also the right to deny any responsibility for them when they are loss-making.

298. *See, e.g.*, MODEL BUS. CORP. ACT § 3.01 (AM. BAR ASS'N 2023) ("any lawful business"); DEL. CODE ANN., tit. 8 § 101(b) (2024) ("any lawful business or purposes").

299. One famous example of a corporation that embedded additional goals in its articles and governance structure is Ben & Jerry's. Some of those structures and purposes continued even after Unilever purchased the company. *See* Effi Benmelech, *Ben & Jerry's Social Responsibility: ESG Without The G*, FORBES (Aug. 1, 2021), https://www.forbes.com /sites/effibenmelech/2021/08/01/ben--jerrys-social-responsibility-esg-without-the-g/ [https:/ /perma.cc/CTJ5-3YTQ] (advocating that Unilever eliminate its subsidiary's separate board and operate the company solely in the interests of shareholder returns).

300. *See*, *e.g.*, DEL. CODE ANN., tit. 8 § 101(b) (2024); *see also* MODEL BUS. CORP. ACT § 3.01 (AM. BAR ASS'N 2023).

board and managers to shift the company's business and practice as market conditions, judgment, or whim suggest, without risking shareholder lawsuits or the enforceability of corporate contracts.[301]

Most courts have recognized that boards are almost entirely free to determine the corporate purpose and, therefore, its interests, so long as they stick to legal goals, do not seek to entrench themselves in corporate incumbency, and do not confuse their personal interests with the entity's by appropriating corporate opportunities or otherwise stealing from the firm.[302] Thus, for example, Time Inc. famously defended itself against a hostile takeover by proclaiming its allegiance to editorial independence at *Time Magazine*, which it claimed would be endangered by the proposed merger.[303] When Time's board found a merger it preferred, this allegiance vanished.[304] The Delaware courts deferred to the board's dedication to editorial independence at the cost of immediate shareholder returns—and were equally deferential to its reversal of that commitment. Boards, not courts or shareholders, set the corporate purpose and many change it as they deem appropriate.

Despite the flexibility of the statutes and case law, for the last several decades most observers have assumed that every business corporation's purpose is or should be some version of profit-seeking.[305] Corporate articles committing business corporations to a particular religious sect or practice are rare and probably non-existent in publicly traded corporations. In any event, such a limited purpose would not be binding: the corporation's board may always amend its articles, subject only to ratification by a majority vote of shares.[306] In other words, business corporations, by design, are fundamentally uncommitted and unconscientious.

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301. Occasionally, corporations have used limitations on corporate activities as an anti-takeover device. Frequently, such limits are placed in bond covenants, which will bind the firm even after a change in control so long as the bonds remain outstanding. *See, e.g.*, GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1018 (S.D.N.Y. 1985) (upholding a board's decision to defensively issue bond covenants which tied up company assets, with goal of preventing a hostile takeover). In contrast, a restriction in the articles would be less likely to inhibit a hostile acquiror: articles may be amended at any time by vote of the board followed by shareholder ratification, neither of which would be problematic post-acquisition since typically the acquiror would then control a majority of votes at both levels.

302. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (heightening review of board's discretion in takeover context due to the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders"); Tornetta v. Musk, 310 A.3d 430, 507–08 (Del. Ch. 2024); *supra* notes 298-300 and accompanying text.

303. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1148 (Del. 1989).

304. *See id.* at 1148–49, 1152.

305. *See supra* notes 43-45.

306. DEL. CODE ANN. tit. 8, § 242 (2024).

Since corporations lack both commitment and conscience, there is no reason why we should be concerned about placing them in untenable situations where they must choose between complying with the law of the state or practicing their "religion."[307] Corporations can and will adjust to whatever constraints the law puts on them. Even when a corporation takes upon itself a constraint, corporate law allows it to reject its self-imposed rules: Google abandoned "do no evil,"[308] Ben & Jerry's did the same for some of its social positions,[309] and Hobby Lobby decided that it was conscientiously opposed to permitting its employees to obtain insurance coverage for some forms of birth control after previously having provided that coverage.[310]

As these examples suggest, business corporations will generally adapt their purposes when market forces encourage it. To survive, any firm—even if organized as a not-for-profit—must pursue profit in the minimal sense that it must be able to sell its goods and services to consumers (or, in the case of non-profits, attract donor funds) for enough to cover its expenses in purchasing supplies, hiring employees, paying for capital, and other costs of doing business. The more competitive those markets are, the less discretion corporate officers have.[311] At the limit, in the imaginary fully competitive markets of introductory economics courses, they can charge no more (quality-adjusted) than the cheapest producer if they are to stay in business—so only the most efficient producer can earn any profits (or pay a dividend) at all.[312]

For publicly traded corporations, the financial markets provide an additional and more immediate constraint. Shareholders have little ability to run corporations, but they do elect the directors, by default on a one share, one

307. Human beings with actual commitments have a far more powerful claim to governmental deference. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."). The gravamen of this Article is that corporations, as governance structures, do not have this "choice;" the corporation itself is designed to be incapable of such commitments, and a manager acting as a fiduciary of the corporation has no legal or moral right to impose his or her own personal commitments on others while acting as a fiduciary. For individuals to be free, the institutions in which they are embedded, whether state or private, must be barred from coercing them to follow managers' preferred religious practices.

308. Lauren Feiner, *Google Sacrificed Its 'Don't Be Evil' Mantra to Grow Bigger, Former Exec Says*, CNBC (Jan. 2, 2020, 9:53 AM), https://www.cnbc.com/2020/01/02/google-abandoned-its-dont-be-evil-mantra-former-exec-says.html [perma.cc/SY8F-6QTF].

309. *See* Anthony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 212–13, 217 (2010).

310. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–90 (2014).

311. *See* Julia Chou et al., *Product Market Competition and Corporate Governance*, 1 REV. DEV. FIN. 114, 115 (2011).

312. *See generally* Greenwood, *supra* note 50; *see also* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (setting out marginal cost framework for considering corporate structure).

vote basis.[313] In turn, shares are freely and anonymously bought and sold on the stock market. If the market concludes that a corporation's officers are not managing it for the benefit of the stock market, traders are likely to sell the stock or refuse to buy it except at lower prices, causing its price to drop. Since most top managers are paid in large part in stock or stock options, corporate officers have a direct, private incentive to cater to the fashions and desires of the stock market. Moreover, if the stock price drops materially below what it is likely it could be under more finance-oriented management, stock market professionals can make money by buying stock with the goal of voting (or threatening) to replace directors with a more stock-market friendly board.[314]

Market pressures, then, make it highly unlikely that a corporation, especially if it is publicly traded, will adopt a religion that conflicts with its pursuit of profit. Indeed, even closely-held companies are likely to be responsive to stock market pressures.[315] First, they may plan to raise capital by selling stock at some future date or wish to keep that option open. Moreover, at retirement, if not before, insiders may wish to cash out their stock holdings. Shares will sell for far more if they are willing to sell to a buyer planning to operate the company according to stock market conventions.[316] Even if they limit the pool of buyers to those willing to commit to continue costly religious practices, the commitment is largely unenforceable: new directors and shareholders can always change the corporation's operations and articles.[317] If corporations are entitled to special exemptions from otherwise applicable law, such claims are likely to multiply, slowly at first and then rapidly as an expanding number of exemptions places pressure on other companies that would prefer to do business differently, but cannot compete with firms that externalize their costs.

313. Manning Gilbert Warren III, *One Share, One Vote: A Perception of Legitimacy*, 14 J. CORP. L. 89, 91 (1988).

314. *See* Akhilesh Ganti, *Hostile Takeover Explained: What It Is, How It Works, and Examples,* INVESTOPEDIA, https://www.investopedia.com/terms/h/hostiletakeover.asp [https://perma.cc/T6XK-4ZTF] (June 27, 2024).

315. Itay Goldstein, *How Stock Price Volatility in Closely Held Firms Distorts Capital Allocation*, KNOWLEDGE AT WHARTON (Apr. 9, 2024) https://knowledge.wharton.upenn.edu/article/how-stock-price-volatility-in-closely-held-firms-distorts-capital-allocation/ [https://perma.cc/6FDD-JQTU] (noting that "[c]losely held companies worry about volatility in their share prices, . . . because they are apprehensive . . . [about] 'stock price fragility,' or volatility of their share prices, [which] could hinder their ability to raise fresh capital in public markets[]").

316. *See* Adam Hayes, *Rule 10b5-1 Definition, How It Works, SEC Requirements*, INVESTOPEDIA (Aug. 8, 2024), https://www.investopedia.com/terms/r/rule-10b5-1.asp [https://perma.cc/TXQ8-MMVL].

317. *See supra* note 305-306 and accompanying text.

VI. BUSINESS CORPORATION FREE EXERCISE CONTRAVENES THE FIRST AMENDMENT AND ITS FUNCTION IN A FREE SOCIETY

The First Amendment applies to the states by way of the Fourteenth Amendment's Due Process Clause.[318] Extending Free Exercise rights to business corporations conflicts with the Fourteenth Amendment's basic commitment to equal citizenship and due process. Business corporations are governance organizations, analogous to governments in that they control material aspects of people's lives. As we have seen, they are designed to be flexible, not committed, and to respond to economic circumstances, not to provide existential succor.[319] If the Supreme Court declares that business corporations may obtain constitutional rights to exemptions from generally applicable law, some corporate officers may take advantage of this privilege to avoid costs, increase profits, or satisfy religiously motivated, personal opposition to civil rights or other generally applicable laws. These uses of corporate religion present issues from the standpoint of evaluating free exercise at the individual, rather than the institutional level.

First, a corporate religion necessarily means that corporate participants lose their opportunity to determine their own religious practices. Corporate Free Exercise, that is, is the same as corporate establishment. It limits, rather than expanding, religious freedom insomuch as it allows those at the top of the corporate hierarchy to impose their views on others.

Second, corporate religion could provide a rationale for discrimination, as in *Bob Jones*, turning the Fourteenth Amendment's guarantee of citizenship and Equal Protection on its head. Business corporations have already argued for a religious exemptions allowing them to refuse to serve persons of another race,[320] to promote, hire, or retain employees with different religions than the company's owner,[321] and to provide wedding services to same-sex couples.[322]

Third, it may threaten the stability of the law that makes our market-based economy work, in explicit violation of the Fourteenth Amendment's Due Process Clause. Corporate religion will provide reasons to justify corporate freeloading, placing short term profits over the long-term health of our

318. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

319. *See supra* Part V.

320. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

321. State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 846–47 (Minn. 1985).

322. 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023).

economic, political and ecological systems.[323] If a religious firm—but not its competitors—could avoid the payment of minimum wages, maintenance of safety standards, the use of expensive anti-pollution measures, or the provision of employee health or retirement coverage, it places pressure on its officers to cause the corporations they run to have religious rebirths.[324] Once some firms take advantage of the new loopholes, the competitors will have little choice but to do so as well. The Court's aggressive intervention into political economy in the *Lochner* era was a practical and democratic disaster.[325] A rapidly changing economy cannot be managed appropriately by judges looking backwards to pre-modern texts.[326]

Long ago, the Court rejected religious claims for exemption from the Federal Insurance Contribution Act and Federal Unemployment taxes.[327] Soon, it may have to adjudicate innumerable variants of these claims in a *Lochner*-redux.[328] Business corporations, newly finding religion, may argue that they have duties to externalize their costs by avoiding pollution control, safety expenses, or other obligations. In the next sections, we address and reject several rationales for granting this right.

A. The Constitutional Justifications: Text, History, Structure, and Purpose

1. Text of the First and Fourteenth Amendments

The Constitution's text does not grant Free Exercise rights to business corporations. The First Amendment bars Congress from "prohibiting the free exercise" of religion.[329] It does not specify whose religious exercise.[330] The

323. *Cf.* Brown et al., *supra* note 41, at 122 ("[C]orporations may have an incentive after *Hobby Lobby* to claim religious exemptions to laws, and some of these laws may be insincere.").

324. *See id*.

325. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1383 (2001) ("For nearly a century, the conventional wisdom has been that during the *Lochner* era, Supreme Court Justices failed to adhere to constitutional norms requiring deference to majoritarian decisions and inappropriately struck down laws by substituting their own views for those of legislative bodies.").

326. *See* Lochner v. New York, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting) (objecting that the majority had caused the judicial branch to "enter the domains of legislation"); *id*. at 75 (Holmes, J., dissenting) (objecting that the majority had read into the Constitution "an economic theory which a large part of the country does not entertain").

327. United States v. Lee, 455 U.S. 252, 260–61 (1982).

328. *See* Note, *supra* note 9, at 1178, 1191.

329. U.S. CONST. amend. I, cl. 1.

330. *See id*.

natural reading, however, is that the protected class is Americans—the "We the People" for whose welfare our Constitution was created.[331]

Corporations are not members of "We the People": they are tools for human purposes, not ends in themselves or creations endowed by their creators with unalienable rights. Granting such a tool a fundamental right against its users makes little sense. Here, it would be particularly peculiar, because the freedom of a governance entity to "exercise" a religion is an establishment of religion. Giving officials a right to impose their religious views on others is precisely what the Free Exercise Clause was meant to prevent.[332] Corporate officers should have no more ability to coerce corporate participants' religious exercise than government officials have to coerce citizens' religious practices. Rather, corporate employees should be free as are government employees to live and practice their religion as they see fit.

More generally, the Constitution does not textually grant corporations any *constitutional* right. Indeed, the word "corporation" does not appear in the Constitution's text—not even in its authorization of diversity jurisdiction to the federal courts, where it most obviously might have been included.[333] This is not surprising, since the modern business corporation was yet to be invented, and eighteenth century corporations typically were vehicles for royal grants of special privileges—trading monopolies, for example—to

331. *See* U.S. CONST. pmbl.

332. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.' The government may not compel affirmation of religious belief . . . .") (internal citations omitted). When the government gives corporate managers the coercive power to require employees to profess a particular set of religious beliefs, it has done indirectly what it may not do directly. While the Supreme Court imposes a sharp distinction between state action and what it considers private action, the values implicated by public or corporate authorities imposing religion on those they govern are the same. *Compare* U.S. v. Stanley, 109 U.S. 3 (1883) (Civil Rights Cases) (holding that Fourteenth Amendment offers no protection against private discrimination) *with* Shelley v. Kraemer, 334 U.S. 1 (1948) (noting that discriminatory private covenants require state power to be effective). *See generally* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

333. *See* U.S. CONST. art. III, § 2. The Supreme Court filled this lacuna from the beginning, granting corporations access to the federal courts despite the text, although it wavered between various legal justifications. *See generally* Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 569–93 (1987) (exploring how Supreme Court has engaged in various fictions in its corporate jurisprudence to allow corporations the right to sue and be sued); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (describing history of Supreme Court's creation of constitutional rights for corporations); Greenwood, *supra* note 24.

provide public goods such as education, transit, or exploitation of distant peoples.[334]

The First Amendment applies to the states only by virtue of the Fourteenth Amendment, which, in turn, by its text protects people, not business entities.[335] To be sure, in legal parlance, "persons" commonly includes corporations,[336] and the Fourteenth Amendment refers to "persons" in its Due Process Clause and Equal Protection Clause.[337] However, the specific language of the Fourteenth Amendment makes clear that in this context, "persons" only includes human beings, as corporations are not "born or naturalized," nor is it contended that they are citizens (sec. 1, overturning *Dred Scott*), that they should be counted in apportionment (sec. 2, repealing the Three-Fifth's Clause), or that a corporation would be able to serve as President even if it did not engage in insurrection (sec. 3).[338] Instead, the most likely explanation of why the Amendment uses the term "persons" is to reflect the language of the Three-Fifths Clause, which it repealed, and of the Fifth Amendment's Due Process Clause, which it extended, while also explicitly

334. *See generally* Joseph S. Davis, *Charters for American Business Corporations in the Eighteenth Century*, 15 AM. STAT. ASS'N 426 (1916) (discussing the state of corporations in the time surrounding the adoption of the Constitution).

335. The Supreme Court has long and consistently held to the contrary. *See* Santa Clara Ctny. v. S. Pac. R.R. Co., 118 U.S. 394, 412 (1886). *See generally* Schane, *supra* note 333 (exploring the various methods through the years by which the Supreme Court has ensured corporate personhood). It has never attempted to justify this result on textual grounds. *Santa Clara* itself is entirely unreasoned. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783–84 (1975) (Rehnquist, J., dissenting) (noting that *Santa Clara* was decided "with neither argument nor discussion"). Later cases extending the Fourteenth Amendment and incorporating Bill of Rights protections to corporations mainly rely on the analogy of businesses to individuals. *See* Schane, *supra* note 333, at 587–89 (discussing how the Supreme Court decided the issue of "the applicability to corporations of these provisions of the Fourteenth Amendment"). Indeed, the closest these decisions come to the actual text of the Constitution is in *First National Bank of Boston v. Bellotti*, which grants business corporations a speech right to finance referenda electioneering based on a purported rights of listeners to receive the corporate advertising: citizens are "entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments" and have an interest in the "free flow of commercial information." *See First Nat'l Bank of Bos.*, 435 U.S. at 783–84, 791 (majority opinion).

336. *E.g.*, 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

337. U.S. CONST. amend. XIV, § 1. A legal person need not be a moral person or a moral agent; legal personhood merely means that the person may sue or be sued in its own name. *See* Schane, *supra* note 333, at 569. For example, boats are legal persons for some purposes under maritime tort law. Douglas Lind, *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*, 22 UNIV. S.F. MAR. L.J. 39, 70 (2009). Conversely, a moral person may not be a legal person: teenagers under the age of majority generally are not recognized as legal persons by contract law (i.e., they may not make legally binding contracts).

338. *See* U.S. CONST. amend. XIV, §§ 1-3.

including the many human residents of the United States who are not citizens.[339]

In any event, the modern business corporation form did not exist when the Civil War Amendments were passed; the early twentieth-century reforms radically transformed the entity.[340] LLCs and similar corporate-like entities are even newer.[341]

2. Religious Freedom

In the pre-revolutionary period, England and most of the American colonies had established churches, supported by and supportive of the government.[342] Members of other churches or no church at all were subject to various disabilities, sometimes extreme.[343] At best, dissidents could expect toleration: that they would be taxed to support an established church, excluded from some aspects of political participation, required to obey Sunday blue laws, and almost certainly excluded from public funding for non-Protestant schools, but otherwise left relatively free to live their private lives.[344]

Centuries of European religious war—and the failure of the Puritan project in New England—led some to seek a route to coexistence without enforced uniformity.[345] The United States attempted to "establish domestic tranquility" in part by avoiding collective decisions about (some of) its most painful conflicts.[346] Instead, the new nation's state would be a kind of limited empire, keeping the peace while allowing citizens to pursue their interests, salvation, or happiness as they please, individually or collectively, without trying to impose a common culture.[347]

The religion clauses express this commitment to unity through diversity by a dual mandate: the national government (and by virtue of incorporation,

339. *See* U.S. CONST. art. I, § 2; *id.* amend. V; HORWITZ, *supra* note 339.

340. *See* Keller, *supra* note 335, at 64–65.

341. *See The History of LLCs*, INCNOW (Jan. 18, 2018), https://www.incnow.com/blog/2018/01/18/llc-history/ [https://perma.cc/6FTE-JUMT].

342. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9, 11 (1947).

343. *Id.* at 9–12 (collecting examples of instances where individuals were persecuted for their religious beliefs in England and the colonies).

344. *See id.* at 10–11.

345. *See* Zelman v. Simmons–Harris, 536 U.S. 639, 717–18 (2002) (Breyer, J., dissenting).

346. *See* McCreary Cnty. v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 860 (2005) ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . .'") (citation omitted). The Constitution took a different, ultimately unsuccessful, approach to removing our most traumatic conflict, slavery, from politics. On other issues, the Court has attempted to privatize issues to remove them from political debate. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973).

347. *See* U.S. CONST. amend. I (providing for freedom of speech, assembly and religion).

the states) may neither establish nor prohibit the free exercise of religion.[348] Corporate Free Exercise rights threaten to undermine this system if they permit employers to impose religious practices on employees.

3. Structure

Corporations, even religious corporations, exist only under state law and have only the rights and powers that the state grants them.[349] State law determines who may speak or act for corporations or when the worship or practices of people affiliated with the corporation will be deemed to be the corporation's actions.[350] Like municipal corporations (i.e., cities), which are barred by the Establishment Clause from exercising religion,[351] business and non-profit corporations are governance institutions, designed to help people live and work together.

"We the People" need corporations for our purposes, not the opposite; while they do not fit neatly into a public/private or state/individual dichotomy, they clearly should not have unalienable rights under our Constitution.[352] First, they are creations of the states, not (in general) the Federal government; it is state law that determines that corporate boards, not employees or shareholders, control the firm, that shareholders vote on a plutocratic per-share basis while other participants are disenfranchised, and that corporate directors must act to promote the interests of the firm regardless of religious, moral or political views of corporate employees or investors.[353] Until Congress decides to create national corporate law, it is a breach of both federalist and separationist principles for the Supreme Court to arrogate to itself fundamental questions of corporate governance.

Second, courts, which must interpret existing law rather than create new rules to fit new exigencies, are poorly equipped to regulate our most important economic actors. Even if the Constitution's text supported judicial fossilization of corporate law, ordinary prudence would recommend that the courts defer to the forward-looking legislative and executive branches. Regulating business by backward-looking interpretation of a pre-modern

348. *Id*.

349. Chatman, *supra* note 295.

350. *See supra* Parts IV-V.

351. *See* U.S. CONST. amend. I (preventing government establishment of a religion); *id.* amend. XIV; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (providing that a state cannot deprive a person of their First Amendment rights in light of the Fourteenth amendment (due to a process called incorporation where the Fourteenth Amendment was used to force states to comply with all other constitutional guarantees)).

352. *See* Greenwood, *supra* note 21, at 362.

353. *See supra* notes 252, 282-285, 313 and accompanying text.

Constitution is bound to fail. So *Lochner* proved.[354] The new First Amendment based *Lochner*-ism will fare no better.

4. Intent of the Founders

In recent years, some Justices have relied on selected writings from the founding generation in analyzing modern First Amendment issues.[355] Without discussing the limits of this historiography, it seems clear that mainstream elite views of corporations in 1789 were more critical than today: corporations were more likely to be feared than protected.[356]

For example, in 1776, Adam Smith famously wrote: "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[357] The main function of incorporation, in his view, was to institutionalize such conspiracies[358] Thomas Jefferson and James Madison shared Smith's views.[359] Thus, in a letter to George Logan, Jefferson remarked, "I hope we shall take warning from the example and crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of

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354. *See supra* notes 325-326 and accompanying text.

355. *E.g.*, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 585 U.S. 878, 905 & n.8 (2018) (citing to the works of Jefferson, Ellsworth, and Webster).

356. For example, the Second Bank of the United States was the subject of fierce debate. *See* McCulloch v. Maryland, 17 U.S. 316, 427, 436–37 (1819) (holding that Congress has the power to create the Second Bank of the United States); President Andrew Jackson, *Veto Message from the President of the United States, Returning the Bank Bill, with his Objections, &c.*, LIB. OF CONG. (July 10, 1832), https://www.loc.gov/resource/rbpe.19403000/?st=text [https://lccn.loc.gov/2020776381] (rejecting the Court's finding of constitutionality). In England, where most business corporations were outlawed after the South Sea Bubble by the 1720 Bubble Act, see Terry Stewart, *The South Sea Bubble*, HISTORIC UK, https://www.historic-uk.com/HistoryUK/HistoryofEngland/South-Sea-Bubble/ [https://perma.cc/3MAF-K5HC], the controversies over the East India Company led to Edmund Burke's efforts to impeach Governor-General Warren Hastings beginning in 1788. UK Parliament, *The East India Company and Public Opinion*, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/the-east-india-company-and-public-opinion/ [https://perma.cc/NM8G-AZ38].

357. SMITH, *supra* note 50, at ch. x.

358. Smith also argued that corporations would have difficulty competing because corporate agents would inevitably be less assiduous in managing the business than principals. *See id.* This claim failed the test of experience.

359. As the Court has remarked, James Madison and Thomas Jefferson are considered the fathers of the First Amendment because of their contributions toward preventing the establishment of religion in Virginia and the passing of the Virginia Bill for Religious Liberty. *See, e.g.*, Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring) (referring to Jefferson and Madison as "architects" of the Free Exercise Clause); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 184 (2012).

our country."[360] Madison agreed: "Incorporated Companies, with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only."[361]

B. The Pragmatic Concerns: Sincerity and Lack of Necessity

1. Corporate Sincerity

Religious sincerity is difficult to determine in the case of individuals. In the case of an enterprise, made up of many people (and different people for different purposes) who disagree, the concept is almost incoherent.

In tort and contract law, we typically impute the knowledge and intentions of relevant corporate agents to the corporation.[362] An employee's knowledge and torts are the corporation's.[363] If the same test were applied in determining religious sincerity, then the subjective beliefs of each employee would be the beliefs of the corporation. Few of us have coherent or consistent belief systems as individuals. Combined with the beliefs and practices of our co-workers, our individually confused beliefs would give most corporations a belief set as diverse as America's (or perhaps more; most major American corporations have large numbers of foreign employees too).

Corporate shareholders vote for corporate directors;[364] in bankruptcy, corporate bondholders and creditors may have rights to vote on reorganization plans.[365] Would the beliefs of these persons be imputed to the firm as well? In most firms, most creditors and investors (especially if measured by dollar value) are institutions, which, in turn, represent Americans, foreigners, other institutions, and people not yet born.[366] What rule should determine what those financial or business institutions believe and whether their beliefs are held in good faith?[367]

Corporate law is subject to change. If state legislation changes who may act for the firm, or whether agents are firm employees or outside independent contractors, would constitutional law regarding the firm's beliefs change as well? These problems seem intractable if the Court confronts the institutional

360. Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), *in* 12 THE WORKS OF THOMAS JEFFERSON 30, 30 (Paul L. Ford ed., G.P. Putnam's Sons 1905).

361. Letter from James Madison to J.K. Paulding (Mar. 10, 1827), *in* 9 THE WRITINGS OF JAMES MADISON 174, 174 (Gaillard Hunt ed., G.P. Putnam's Sons 1910).

362. *See, e.g.*, Prime Eagle Grp. Ltd. v. Steel Dynamics, Inc., 614 F.3d 375, 378 (7th Cir. 2010); Beck v. Deloitte & Touche, 144 F.3d 732, 736 (11th Cir. 1998).

363. *See* RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (AM. L. INST. (2006)) (contract via an apparent authority theory); *id.* § 7.03 (tort).

364. *E.g.*, DEL. CODE ANN. tit. 8, § 211(b) (2019).

365. *See* 11 U.S.C. § 1126.

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

367. *See supra* Part IV.

nature of corporations and nonetheless treats them as entitled to religious rights against the state and their own participants.

2. Corporations Do Not Need Paternalistic Judicial Protection

Judicial intervention is most appropriate when the political process fails to protect discrete and insular minorities unable to protect themselves through ordinary political processes.[368] Business corporations need no such counter-majoritarian protection.

In principle, this follows from the basic republican right of self-government. If the people or their elected representatives conclude that a particular manner of organization no longer serves our collective purposes, it is the core of the state's police power to change the laws that authorize, sanction or limit the corporation. The Supreme Court's attempt in *Lochner* to read into the Constitution "an economic theory which a large part of the country does not entertain"[369] was a dismal failure, long since repudiated.

In practice, legislatures routinely have been open to requests by religious groups, small and large, for special accommodation.[370] Historically, Quakers and other conscientious objectors were granted special privileges whenever the country had a draft,[371] and Prohibition had a special exemption for communion wine.[372] When the Court refused to accommodate a Jewish military psychologist who sought to wear a yarmulke, as required by his (mainstream) understanding of his religion,[373] Congress overturned the decision,[374] much as it had accommodated Jewish army chaplains who did not wish to wear a cross, then the standard insignia for a chaplain, as early as 1918.[375] More recently, Congress immediately rejected *Smith* itself by passing the RFRA, attempting to restore the law to the pre-*Smith* equilibrium, and the

368. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135, 139 (2011); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716 (1985).

369. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *supra* note 325 and accompanying text.

370. *See* Laycock, *supra* note 107, at 173.

371. *See* Kali Martin, *Alternative Service: Conscientious Objectors and Civilian Public Service in World War II*, NAT'L WWII MUSEUM (Oct. 16, 2020), https://www.nationalww2museum.org/war/articles/conscientious-objectors-civilian-public-service [perma.cc/9QBX-G993].

372. National Prohibition Act, ch. 85, § 6, 41 Stat. 310, *repealed by* U.S. CONST. amend. XXI.

373. Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

374. Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125, 147 (1988).

375. David Mislin, *One Nation, Three Faiths: World War I and the Shaping of "Protestant-Catholic-Jewish" America*, 84 CHURCH HIST. 828, 842 & n. 26 (2015).

RLUIPA, which extended religious exemptions further.[376] Many states also followed suit.[377]

Recent history also shows ordinary politics suffices to protect corporations that publicly express religious values. One recent example is illustrative. Chick-fil-A operates several lucrative concessions at New York State thruway rest stops, some of which have space for only one restaurant.[378] Chick-fil-A proudly markets itself for closing on Sunday, instead of rotating employees or allowing them to choose which days they take off. [379] Recently, a New York state legislator proposed to protect travelers by contractually requiring New York Thruway rest stop concessionaires to serve the public seven days a week.[380] The backlash was loud and instantaneous: Lindsay Graham, a senator from South Carolina with no connection to the New York State Thruway or its users, proposed to protect the company by cutting off all federal funding to New York State if the bill passed.[381]

The example shows the political process functioning properly. The New York State legislature is entirely capable of balancing the interests of citizens who wish to drive and eat on Sunday against the interests of corporate officers who prefer to close down a corporation they manage on the founder's religious holidays. Both Sunday Sabbath observers and Sunday drivers are capable of organizing and building coalitions; Chick-fil-A management, which has access to the corporations' treasury for funding and its bureaucracy and 140,000 employees for organizing,[382] is neither discrete nor insular relative to

376. *Supra* notes 161, 165 and accompanying text.

377. *Supra* note 162 and accompanying text.

378. *See* Andrew Keh, *Chick-fil-A's Closed-on-Sunday Policy Prompts a Highway Rest Stop Revolt*, N.Y. TIMES (Dec. 30, 2023), https://www.nytimes.com/2023/12/30/nyregion/chick-fil-a-thruway-rest-stop-sundays.html [perma.cc/VKM7-DW75].

379. *See About: It's Our Pleasure to Serve You*, CHICK-FIL-A, https://www.chick-fil-a.com/about/who-we-are [perma.cc/9BQC-TPNE].

380. Keh, *supra* note 378.

381. Graham referred to the proposal as "a blatant violation of the *company's* constitutional rights[.]" Kate Gibson, *Chick-fil-A Rest Stop Locations Should Stay Open on Sundays, Some New York Lawmakers Argue*, CBS NEWS (Dec. 28, 2023, 12:14 PM), https://www.cbsnews.com/news/chick-fil-a-sunday-rest-stop-new-york-bill [perma.cc/4N6K-C5GX] (emphasis added); Jon Levine, *Lindsey Graham Promises 'War' on NY Over Proposed Chick-fil-A Bill*, N.Y. POST (Dec. 23, 2023, 1:45PM), https://nypost.com/2023/12/23/news/lindsey-graham-vows-war-on-ny-over-proposed-chick-fil-a-bill [perma.cc/5CCR-66RX].

382. *Taking Care of Restaurant Team Members*, CHICK-FIL-A, https://www.chick-fil-a.com/our-standards/taking-care-of-restaurant-team-members [perma.cc/8K7E-MKQC].

its unorganized potential customers.[383] There is no need for special judicial intervention to further enhance the power of corporate management.[384]

The issue is not a legislator's judgment that a corporation's Sunday Sabbath observance is less important than ensuring that Sunday travelers can access food at Thruway rest stops. Reasonable minds will differ on that. Rather, the point is that the corporation can avail itself of ordinary political processes.[385] In the decade since *Citizens United*, many commentators have remarked that corporate spending has substantially impacted the decisions of elected officials.[386] The success of this corporate influence vitiates any argument that business corporations are a discrete or insular minority in need of counter-majoritarian protection.

Consider these related hypotheticals. Suppose that two separate corporations each adopt Genesis 1:26 as a core statement of principles for their religion.[387] One follows traditions interpreting "dominion" as permission for humans to exploit the earth's non-human inhabitants. The second understands "dominion" to mean "take responsibility for," in the sense of "take care of the Earth; there is no other."[388] Both companies bring suit, contending that a particular provision of the Clean Water Act[389] requires either too much or not enough regulation of their relationship with the environment

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383. *See generally* Elmer Eric Schattschneider, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960) (discussing disproportionate power of organized groups—such as business corporations).

384. *But see* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. UNIV. L. REV. 589, 634 (2014) (arguing that for-profit corporations like Chick-Fil-A should be able to assert constitutional Free Exercise claims under *Bellotti*); Swee, *supra* note 31, at 650.

385. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371–72 (2010) (holding that corporations have a First Amendment right to participate in elections by means of campaign donations).

386. *See, e.g.*, Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 565 (2014) (presenting evidence that politicians are responsive only to the affluent); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 781 (2024) ("[The Supreme Court's] decision striking down longstanding limits on corporate spending in federal elections fundamentally transformed the campaign finance landscape."); Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV. (Jan.–Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [perma.cc/87G7-86H7].

387. *Genesis* 1:26 (King James) ("Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.").

388. *See, e.g.*, *Midrash Ecclesiastes Rabbah* 7:13 (redacted ~500–700 C.E.) ("When God created the first human beings, God led them around all the trees of the Garden of Eden and said: 'Look at my works! See how beautiful they are--how excellent! For your sake I created them all. See to it that you do not spoil and destroy My world; for if you do, there will be no one else to repair it.'").

389. Clean Water Act, 33 U.S.C. §§ 1251-1387.

and, thereby, requires the company to violate its religious obligations.[390] No law can pass through this Scylla and Charybdis.[391] The result is untenable: if corporations can avoid generally applicable laws on this basis, then every corporation can become a "law unto [it]self."[392]

The issue is universal. Bob Jones University argued that it was entitled to tax-exempt status as a charity—a subsidy—not withstanding its formal policy of racial discrimination, because it, or its leaders "genuinely believed" that the Bible forbids interracial dating and marriage.[393] In 1983, prior to *Smith*, the Supreme Court rejected their claim.[394] Presumably, the precedent stands even if *Smith* falls. Yet absent the special circumstances of *Bob Jones*—explicit, intentional racial discrimination—decisions are likely to be inconsistent and unpredictable, leaving inconsistencies and lacunae in the regulatory frameworks within which businesses plan and operate.

VII. CONCLUSION

First Amendment doctrine, descended from a Protestant understanding of religion as a matter of belief or conscience, allows each claimant discretion to determine what constitutes religion.[395] A limited understanding of Free Exercise, as in *Smith*, therefore, stood as a bulwark against anarchy.[396] Absent that bulwark, the Free Exercise Clause invites unlimited special exemptions to otherwise applicable law.[397] Planners may use religion to legalize otherwise illegal actions. If need be, they will write exercising religion into charters,

390. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988) (striking down a challenge brought by Native Americans and Native American organizations arguing that a road-building and timber-harvesting scheme under federal environmental laws violated their constitutional Free Exercise rights).

391. *See* Rothschild, *supra* note 160.

392. Reynolds v. United States, 98 U.S. 145, 167 (1878). *Reynolds* is referencing *Judges* 21:25 ("[I]n those days there was no king in Israel; each did what was right in his own eyes."). In the biblical myth, the people demanded a king to protect them from this disaster: in their view even arbitrary power was better than no law at all (Samuel and perhaps the narrator disagree). *See Judges* 21:25; 1 *Samuel* 8:4–20; *see also* HOBBES, *supra* note 76, at 213–14 (arguing that any rational person would prefer an arbitrary, tyrannical monarchy to a lawless state of nature).

393. Bob Jones Univ. v. United States, 461 U.S. 574, 580–82 (1983). The Bible, like Walt Whitman, contains multitudes, but this reading takes some creativity. Lack of a clear textual basis, of course, is no bar to genuine belief.

394. *Id.* at 605.

395. *See infra* Part III. The *Reynolds* belief/action distinction closely parallels the older faith/works debate.

396. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) (Scalia, J.) ("Any society adopting [a compelling interest test for religious exemptions] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

397. *See, e.g.*, Note, *supra* note 9, at 1192.

bylaws, handbooks, and memoranda, or even create special purpose corporations and LLCs solely to evade regulatory law.[398]

Testing the bounds of law, religions may arise to demand that the corporation be exempt from zoning, taxation, safety, environmental, antitrust, consumer protection, or employee wage and working condition rules.[399] Some, like Samuel or later radical antinomians, may even question the legitimacy of government itself.[400] Under the new regime, every business-related statute will be subject to constitutional challenge, with nothing but the judiciary's common sense or prejudices to predict success. This untenable proposition cannot, and should not, stand.

398. *See supra* Part VI.

399. *See* Jennifer Jorczak, *"Not Like You and Me" Hobby Lobby, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights*, 80 BROOK. L. REV. 285, 288–89 (2014); *see also* Note, *supra* note 9, at 1193.

400. *See* Note, *supra* note 9, at 1178.

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