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FREE EXERCISE FOR ALL: THE CONTRACEPTION MANDATE CASES AND THE ROLE OF HISTORY IN EXTENDING RELIGIOUS PROTECTIONS TO FOR-PROFIT CORPORATIONS

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I. INTRODUCTION

"Hobby Lobby remains a Christian company in every sense"[1] and "should never be put in the position of choosing its faith over its business."[2]

Hobby Lobby, a national crafts and arts retail chain, employs 22,000 people and annually earns more than three billion dollars in revenue.[3] The corporation's business practices[4] reflect the deep religious commitment articulated in its corporate statement of purpose.[5] Hobby Lobby's founder and CEO, David Green, also strongly emphasizes treating employees well,[6] and the corporation

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1. Brian Soloman, *David Green: The Biblical Billionaire Backing the Evangelical Movement*, FORBES (Sept. 18, 2012), http://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the evangelical-movement.

2. Steve Olafson, *Hobby Lobby Sues Government Over Healthcare Mandate*, REUTERS (Sept. 12, 2012), http://www.reuters.com/article/2012/09/12/us-usa-health-hobby-lobby-idUSBRE88B1OI20120912 (quoting Kyle Duncan, general counsel for the Becket Fund, a nonprofit public interest law firm involved in the litigation).

3. Soloman, *supra* note 1.

4. Hobby Lobby's faith "guide[s] business decisions." Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013). For instance, the corporation purchases full-page newspaper ads with religious messages, plays Christian music in its stores, and does not stock risqué greeting cards. *Id.*; Verified Complaint at 43–44, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE), *rev'd*, 723 F.3d 1114 (10th Cir. 2013) [hereinafter *Hobby Lobby* Verif. Comp.]. Also, Hobby Lobby refuses to "facilitate or promote alcohol use" through its business dealings. *Hobby Lobby*, 723 F.3d at 1122; *Hobby Lobby* Verif. Comp., at 43–44. In fact, the corporation does not use its trucks to haul beer shipments and even refused to enter into a profitable real estate transaction with a liquor store. *Hobby Lobby* Verif. Comp., at 43–44. Finally, Hobby Lobby closes its stores on Sundays and employs four chaplains. Soloman, *supra* note 1.

5. Hobby Lobby's statement of purpose says that "the Board of Directors is committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Statement of Purpose*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/purpose.cfm (last visited Sept. 24, 2013). *See also Hobby Lobby*, 723 F.3d at 1122 (describing how the management trust that operates Hobby Lobby "exists 'to honor God'" and how trustees are required to sign a Trust Commitment affirming a statement of faith and to "regularly seek and maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer").

6. Green has said, "[A]s a family-owned business, we want our employees to feel like they are part of a family . . . . This is one way we can show our appreciation for their work and make them feel like part of a team." Leonardo Blair, *Hobby Lobby Raises Minimum Wage to $14 for Full-Time Employees*, THE CHRISTIAN POST (Apr. 18, 2013), http://www.christianpost.com/news/hob

lives up to Mr. Green's rhetoric. For example, Hobby Lobby pays its employees significantly more than minimum wage[7] and offers a free full-service medical facility for employees at its headquarters.[8]

When the Department of Health and Human Services ("HHS") enacted the Contraception Mandate ("Mandate"), it put Hobby Lobby between a rock and a hard place. The corporation either had to violate its religious commitment or drop its employees' health insurance.[9] Mr. Green determined that Hobby Lobby could not "simply abandon [its] religious beliefs to comply with [the] [M]andate."[10] Therefore, the corporation sued, seeking a preliminary injunction to enjoin enforcement of the Mandate.[11] Hobby Lobby was not alone, as over 300 plaintiffs filed ninety-one lawsuits claiming the Mandate violated their religious freedom.[12] In particular, for-profit corporations filed forty suits[13] based on the

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by-lobby-raises-minimum-wage-to-14-for-full-time-employees-94233 (internal quotation marks omitted). *See also* Soloman, *supra* note 1 (quoting Green as saying that God does not want employers to "skim from [their] employees" to finance religious endeavors).

7. Hobby Lobby pays a minimum wage of $14 per hour for full-time hourly employees, 93% above the national minimum wage, and a minimum wage of $9.50 for part-time employees. Press Release, *Hobby Lobby Increases Full-Time Hourly Employee Minimum Wage to $14 Per Hour*, The PRNewswire (Apr. 15, 2013), http://www.prnewswire.com/news-releases/hobby-lobby-increases-full-time-hourly-employee-minimum-wage-to-14-per-hour-203012021.html.

8. The clinic provides procedures ranging from acute to chronic care free of charge to over 3,000 full-time employees and their dependents enrolled in the Hobby Lobby group health plan. *Hobby Lobby Opens Health Care Clinic for Employees, Dependents*, CONCENTRA (Dec. 21, 2010), http://www.concentra.com/newsroom/press-releases/hobby-lobby-opens-health-care-clinic-for-employees-dependents.

9. *See* Olafson, *supra* note 2 (explaining that Hobby Lobby objected to providing drugs that "prevent a fertilized human egg from implantation"). Hobby Lobby is not an isolated example of a corporation dedicated to both its employees and its faith. Autocam, another for-profit corporate plaintiff, is owned and operated by a family that follows the teachings of the Catholic Church. Verified Complaint, App. at 65, 67, Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013), *vacated*, 134 S. Ct. 2901 (2014). Autocam, on average, pays hourly workers $53,000 a year and provides $1,500 toward health savings accounts. *Id.* at 68–69. Autocam also covers 100% of employees' preventive care, including gynecological exams and prenatal care. *Id.* However, Autocam does not cover contraception, sterilization, and abortion-causing drugs because doing so would violate the Catholic principles that guide Autocam's operations. *Id.* at 80–81.

10. Olafson, *supra* note 2.

11. *See Hobby Lobby*, 870 F. Supp. 2d at 1296 (denying Hobby Lobby's motion for a preliminary injunction).

12. *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral (last visited Jan. 12, 2013) [hereinafter *Mandate Central*]; Adelaide Mena, *Catholic Company Temporarily Forced to Comply with HHS Mandate*, NAT'L CATHOLIC REGISTER (July 18, 2013), http://www.ncregister.com/daily-news/catholic-company-temporarily-forced-to-comply-with-hhs-mandate.

13. *Mandate Central*, *supra* note 12. When this comment was written,

protections of the First Amendment's Free Exercise Clause[14] and the Religious Freedom Restoration Act of 1993 ("RFRA").[15] The plaintiffs in these cases argued that, though they are for-profit[16] corporations,[17] they can in fact exercise religion.[18] For-profit

thirty-nine rulings on the merits had been issued in cases involving for-profit corporate plaintiffs. *Id.* Plaintiffs had secured injunctive relief in thirty-three cases and been denied such relief in six cases. *Id.*

14. "*Congress shall make no law* respecting an establishment of religion, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

15. 42 U.S.C. § 2000bb, *et seq*.

16. Numerous courts have recognized that for-profit status alone should not be dispositive. *See*, *e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) (declaring for-profit activities could be religious); Braunfield v. Brown, 366 U.S. 599 (1961) (noting the Supreme Court has protected individual Free Exercise rights connected to the operation of for-profit businesses); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1214 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (declining to give credence to the for-profit/nonprofit distinction); *Conestoga Wood*, 724 F.3d at 403 (Jordan, J., dissenting) (explaining the blurry line between nonprofit and profit-motivated entities is not a relevant distinction in First Amendment cases); *Hobby Lobby*, 723 F. 3d at 1134 (citing United States v. Lee, 455 U.S. 252 (1982)); E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting) (asserting the First Amendment does not allow Congress to restrict its protections to not-for-profit or religious corporations); *see also* Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59, 74–80 (2013) (describing the religious teachings of Christianity, Judaism, and Islam that apply to profit-making activities and how three for-profit businesses—Hobby Lobby (Christianity), Rio Gas Station and Heimeshe Coffee Shop (Judaism), and Afrik Grocery and Halal Meat (Islam)—operate in accordance with their respective faith's teachings); Jonathan T. Tan, Comment, *Nonprofit Organizations, for-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RRFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1307–08 (2013) (arguing the distinction between nonprofit and for-profit corporations cannot justify disparate free exercise rights).

17. Courts have also found that a plaintiff's corporate status does not bar all free exercise claims. *See Hobby Lobby*, 134 S. Ct. at 2772–73 (explaining why the corporate status does not bar all religious protections); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (finding a seizure of a sacramental tea from a religious, nonprofit corporation violated the Free Exercise Clause); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding city ordinances restricting the ritual slaughter of animals violated a religious, nonprofit corporation's Free Exercise rights); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49 (1815) (recognizing that religions could use the corporate form to manage property and regulate temporal and spiritual concerns); *Hobby Lobby*, 723 F. 3d at 1148–50 (Hartz, J., concurring) (explaining why the corporate form should not be dispositive of Free Exercise claims).

18. *See*, *e.g.*, Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328, 1331 (M.D. Fla. 2013) (claiming to exercise religion by funding corporate chaplains who visit the premises weekly to counsel employees and by donating

corporate plaintiffs remained resolutely opposed to the Mandate, with two corporations refusing to comply even in the absence of judicial relief.[19] This class of plaintiffs, which includes Hobby Lobby, raised a unique issue: whether for-profit corporations have religious protections, including free exercise rights.[20] The Third, Sixth, Seventh, Tenth, and D.C. circuit courts split over this question.[21]

On June 30, 2014, the Supreme Court of the United States ruled that the Mandate violated RFRA.[22] In so doing, the Court

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to religious charities); Monaghan v. Sebelius, 916 F. Supp. 2d 794, 801 (E.D. Mich. 2013) (claiming to exercise religion by providing a Catholic chapel with daily Mass, a Catholic bookstore, a Catholic credit union, Catholic menu options, and funds to Catholic organizations); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012), *appeal dismissed*, 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (internal quotation marks omitted) (claiming to exercise religion by holding weekly chapel services for employees, requiring members of its board of directors to sign a statement of faith espousing certain religious beliefs, and declaring in its articles of incorporation that "its Corporate purpose is to minister to the spiritual needs of people, primarily through literature consistent with biblical principles").

19. *See* Tom Howell Jr., *Businesses Struggle with 'Contraception Mandate' as Lawsuits Play Out*, THE WASH. TIMES (Aug. 8, 2013), http://www.washingtontimes.com/news/2013/aug/8/businesses-struggle-contraception-mandate-lawsuits/?page=all (describing how Mersino Management, a self-insured company, refused to comply with the Mandate and Eden Foods refused to sign any insurance agreement covering contraceptives).

20. Multiple courts have mentioned the pass-through instrumentality theory in Mandate cases involving a for-profit corporation. *Gilardi*, 733 F.3d at 1214–15; *Autocam*, 730 F.3d at 624; Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013); *Beckwith*, 960 F. Supp. 2d at 1335–36; *Monaghan*, 931 F. Supp. 2d at 800; Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 n.10 (E.D. Pa. 2013), *rev'd on other grounds*, 134 S. Ct. 2751; Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012). This theory was developed by the Ninth Circuit in *Townley*, 859 F.2d 610, and Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009). In those cases, the Ninth Circuit determined that a closely held corporation can assert the free exercise right of its owners. *Stormans*, 586 F.3d at 1120 (quoting *Townley*, 859 F.2d at 619). This comment will not discuss the pass-through theory. Rather, it will analyze whether corporations have their own free exercise rights distinct from the free exercise rights of any owner or employee.

21. *Compare Gilardi*, 733 F.3d at 1216 (finding there is no basis for concluding that for-profit secular corporations can engage in constitutionally protected exercises of religion); *Autocam*, 730 F.3d at 628 (holding a secular, for-profit corporation cannot assert a RFRA claim and noting that "[n]o . . . body of precedent exists with regard to the rights of secular, for-profit corporations under the Free Exercise Clause" that extends free exercise rights to such corporations); *Conestoga Wood*, 724 F.3d at 385, 388 (holding a secular, for-profit corporation neither is protected by the Free Exercise Clause nor can assert a RFRA claim) *with Hobby Lobby*, 723 F.3d at 1133–36 (holding a secular, for-profit corporation can assert a RFRA claim and noting that it has free exercise rights). *See also* Korte v. Sebelius, 528 F. App'x 583, 588 (7th Cir. 2012) (finding closely held for-profit corporations can assert a RFRA claim).

22. *Hobby Lobby*, 134 S. Ct. at 2785.

found that RFRA protected "for-profit closely held corporations."[23] Justices Breyer and Kagan wrote that it was unnecessary to "decide whether either for-profit corporations or their owners may bring claims under [RFRA.]"[24] Only Justices Ginsberg and Sotomayor found that RFRA does not protect secular, for-profit corporations.[25] Given its holding with respect to RFRA, the majority found "it unnecessary to reach the First Amendment claim[.]"[26] The four dissenters all agreed that a First Amendment claim would fail even if one could be brought.[27] However, none of the opinions analyzed whether secular, for-profit corporations have free exercise rights. This crucial question remains unanswered.

This comment will demonstrate why and how history must play a crucial role in deciding this issue. Part II of this comment begins by explaining the creation of the Mandate, and the Free Exercise Clause and RFRA's protections of religious freedom. Part II then discusses the basics of corporate theory, the Supreme Court's early corporate rights cases, and the Court's shifting approach to such cases. Part III describes the Court's articulation of its new approach in *First National Bank of Boston v. Bellotti*,[28] and shows that the *Bellotti* analysis is the dominant test applied by courts in Mandate cases. Part III then details how the courts have applied the history prong of the *Bellotti* test and notes the insufficiency of their historical focus and their deficient use of primary and secondary historical sources. Part IV describes how the historical analysis should be conducted, and proposes two arguments showing for-profit corporations likely have free exercise rights.

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23. *Id.* at 2775. The Court did not state whether RFRA also protects for-profit corporations that are not closely held. Thus, it is unclear whether "closely held" is descriptive or prescriptive. *See* Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Questions: What Does 'Closely Held' Mean?*, WALL ST. J. (June 30, 2014), http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577 (explaining that the meaning of "closely held" may require more litigation). Even if the "closely held" designation is prescriptive, "the universe of these firms could potentially be pretty large," employing up to half of the country's workforce. Jason Millman, *The Ongoing Hobby Lobby Battle: Who Else Can Get an Exemption?*, WASH. POST (Oct. 22, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/22/the-ongoing-hobby-lobby-battle-who-else-can-get-an-exemption/.

24. *Hobby Lobby*, 134 S. Ct. at 2806 (Breyer, J., and Kagan, J., dissenting).

25. *Id.* at 2805 (Ginsberg, J., dissenting).

26. *Id.* at 2785 (majority opinion).

27. *Id.* at 2790–91 (Ginsberg, J., dissenting).

28. 435 U.S. 765 (1978).

II. BACKGROUND

A. The Creation of the Mandate

The Patient Protection and Affordable Care Act requires employment-based group health plans, which are covered by the Employee Retirement Income Security Act (ERISA), to offer certain preventive health services.[29] The coverage must include—free of charge—preventive care and screenings for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA],"[30] an agency of HHS.[31] The Institute of Medicine ("IOM"), at the request of HHS, developed a report providing recommendations for the guidelines.[32] The IOM recommended[33] that HHS require coverage for all FDA-approved "'contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,'[34] as prescribed by the provider."[35]

29. 42 U.S.C. § 300gg-13; 29 U.S.C. § 1185d.

30. 42 U.S.C. § 300gg-13(a)(4).

31. Congress determined that the Mandate would both improve the social and economic status of women and have medical benefits for women. 77 Fed. Reg. 8725-01, 8727–28 (Feb 15, 2012).

32. The Institute of Medicine is an independent, nonprofit organization established under the National Academy of Sciences to develop recommendations for the HRSA guidelines. *About the IOM*, INST. OF MED., http://www.iom.edu/About-IOM.aspx (last updated Jan. 18, 2012).

33. The IOM committee's report, *Clinical Preventive Services for Women: Closing the Gaps*, is available at http://www.iom.edu/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf.

34. The FDA has approved 20 forms of birth control. *Birth Control: Medicines to Help You*, FDA, http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last visited Oct. 13, 2013). These methods include (1) barrier methods that block the sperm from reaching the egg, such as condoms; (2) hormonal methods that interfere with ovulation and possibly fertilization of the egg, such as the pill; (3) emergency contraception, such as Plan B and Ella; (4) implanted devices, such as intrauterine devices ("IUDs"); and (5) permanent methods, such as surgical sterilization. *Id.* Most of the approved birth control methods prevent fertilization. *Hobby Lobby*, 723 F.3d at 1123. But four methods—Plan B, Ella, and two types of IUDs—"can function by preventing the implantation of a fertilized egg." *Id.* This distinction may be relevant depending on the religious beliefs of the plaintiffs challenging the Mandate. *Compare id.* at 1181 n.3 (noting Hobby Lobby only objects to contraception that prevents uterine implantation, not contraception that prevents conception) *with* Br. for Appellants at 4–5, *Grote*, 708 F.3d 850 (No. 13-1077), 2013 WL 816519 at *4–5 (asserting plaintiffs follow the teachings of the Catholic Church and cannot "intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization"); Eugene R. Milhizer, *The Morality and Legality of the HHS Mandate and the "Accommodations*," 11 AVE MARIA L. REV. 211, 217 (2013) (explaining the Mandate violates the moral teaching of Catholicism and other religions).

35. 77 Fed. Reg. 8725, 8725 (Feb 15, 2012).

HRSA adopted the Institute's recommendation in full,[36] and HHS promulgated the Mandate.[37]

B. The Free Exercise Clause

Opponents of the Mandate claimed that the Mandate violated the Constitution's free exercise clause. The First Amendment states, "Congress shall make no law . . . prohibiting the free exercise [of religion.]"[38] The religious liberty protected by the Free Exercise Clause is the most essential liberty "to the continued vitality of the free society which our Constitution guarantees."[39] The First Amendment guarantee "secure[s] religious liberty in the individual by prohibiting any invasions thereof by civil authority."[40] Although the free exercise clause is focused on *individual* liberty, the First Amendment secures collective exercises of protected individual rights.[41]

The level of protection guaranteed by the Free Exercise Clause varies depending on the type of religious exercise at issue.[42] Freedom of belief is absolute and beyond any reach of the government; however, the government can regulate religious exercises involving conduct.[43] This distinction between belief and

36. *See Women's Preventive Services Guidelines*, HRSA, http://www.hrsa.gov/womensguidelines (last visited Sept. 24, 2013) (adopting the IOM developed health plan coverage guidelines and the IOM's recommendations on preventive services).

37. 45 C.F.R. §147.130.

38. U.S. CONST. amend. I.

39. Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring). *See also Bellotti*, 435 U.S. at 780 (explaining free exercise and the other freedoms protected by the First Amendment have always been considered fundamental component of liberty).

40. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 223 (1963).

41. *See*, *e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 392 (2010) (holding an individual's freedom of speech right protects one's speech in association with other persons); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (noting that many rights granted in the Bill of Rights could not be protected unless group efforts to assert the rights were also protected); *see also Conestoga Wood*, 724 F.3d at 400 (Jordan, J., dissenting) (explaining many religious beliefs and observances have a collective character even though religious convocations are individual).

42. "Exercises of religion" covers more than simple belief or even worship and profession. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990). The free exercise right is absolute with respect to belief and lesser with respect to actions. Reynolds v. United States, 98 U.S. 145, 166 (1878).

43. Bowen v. Roy, 476 U.S. 693, 699 (1986) (noting that freedom of belief is absolute but freedom of individual conduct is not); *Sherbert*, 374 U.S. at 402–03 (holding that individuals cannot be compelled to affirm or deny a religious belief but may be regulated when acting, even if guided by religious beliefs, when their actions threaten the public safety, peace, or order); Braunfeld v. Brown, 366 U.S. 599, 604 (1961) (holding that legislative power cannot be exercised over opinion but may cover actions that violate important social duties or subvert good order even if the conduct is required by the individual's

conduct, although questioned by the Supreme Court in recent decades,[44] remains in force.

Regardless of whether the exercise involves belief or conduct, free exercise protections are only extended to exercises rooted in religious beliefs.[45] The exercise need only be motivated, not compelled, by one's religion to be protected,[46] and courts do not challenge the veracity of a religious belief.[47] Further, perfect adherence to a religious belief is not required for an individual to claim the protection of the Free Exercise Clause.[48] But the

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religion).

44. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (noting belief and action cannot be "confined in logic-tight compartments" that remain always clearly distinct); *Smith*, 494 U.S. at 893 (O'Connor, J., concurring) (claiming religious conduct and belief are not distinguished under the First Amendment and arguing conduct motivated by sincere religious belief should be presumptively protected). *See also* OFF. OF LEGAL POLICY, DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 31 (1986) [HEREINAFTER REPORT TO ATT'Y GEN.] (arguing the belief/action dichotomy should be abandoned because it is inconsistent with the language of the free exercise clause and would make free exercise rights second-class rights).

45. *Yoder*, 406 U.S. at 215; *Reynolds*, 98 U.S. at 215–16.

The Constitution does not define religion, *Reynolds*, 98 U.S. at 162, and the Supreme Court has not given clear guidance on exactly what constitutes religion. Brian M. Murray, *The Elephant in Hossanna-Tabor*, 10 GEO. J.L. & PUB. POL'Y 493, 520 (2012). *Compare Yoder*, 406 U.S. at 216 (explaining Thoreau's social values were based on philosophical and personal, not religious beliefs, and, therefore, were not protected under the Religion Clauses) *with* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (asserting Buddhism, Taoism, Ethical Culture, and Secular Humanism are all religions despite not teaching a belief in God). *See also* REPORT TO ATT'Y GEN., *supra* note 44, at 26 (claiming materialism, narcissism, or even nudism could be considered religion under the Supreme Court's approach in *Seeger*); Edward J. Murphy, *Conflicting Ultimates: Jurisprudence as Religious Controversy*, 35 AM. J. JURIS. 129, 129–30 (1990) (claiming the state, a political party, race, economic class, or the stars could fill the role of religion as an individual's ultimate guiding authority).

46. *See*, *e.g.*, *Smith*, 494 U.S. at 877, 881 (asserting the Free Exercise Clause protects actions or omissions engaged in for (1) religious reasons, (2) their display of religious belief, and (3) religious motivations); *Braunfeld*, 366 U.S. at 603 (using the phrase "action . . . in accord with one's religious convictions").

47. *See* Steven D. Smith & Caroline Mala Corbin, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 263–65 (2013) (explaining a sincerely held belief, even if contrary to the teachings of religious authorities or the beliefs of a majority of believers, is still protected under the Free Exercise Clause). *See also* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981) (determining courts should not be "arbiters of scriptural interpretation" or "dissect religious beliefs"); United States v. Ballard, 322 U.S. 78, 86 (1944) (explaining the truth and veracity of religious doctrines or beliefs, even if they seem incredible or preposterous, should not be decided by juries because "[m]en may believe what they cannot prove").

48. *See*, *e.g.*, Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) (stating "a sincere religious believer doesn't forfeit his religious rights merely because

sincerity of a believer's commitment to the asserted belief remains an issue for the court.[49]

C. Competing Judicial Approaches to Free Exercise Claims

The Supreme Court has largely used two approaches to Free Exercise Clause cases: (1) articulating categorical absolutes; and (2) balancing the burden on religious exercise with the state's interest.[50] In the late 1800s, the Supreme Court specifically applied a categorical approach. In *Reynolds v. United States*,[51] the Court distinguished between laws interfering with religious belief, which were always unconstitutional, and laws governing action, which were constitutional if otherwise valid.[52] The Court in *Reynolds* reasoned each citizen would "become a law unto himself" if his actions could escape the law based on his religious beliefs.[53] The categorical approach—exemplified in *Reynolds*—essentially tries to draw a bright line between illegitimate state action and legitimate state action.[54] Following *Reynolds*, the Supreme Court decided very few other free exercise cases before the right's incorporation in 1940.[55]

Following incorporation and the arrival of many more free exercise cases at the Court,[56] balancing became a more widely used interpretive method.[57] Balancing, which unlike the

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he is not scrupulous in his observance"); Moussazadeh v. Texas Dep't of Criminal Justice, 703 F.3d 781, 791 (5th Cir. 2012), as corrected (Feb. 20, 2013) (stating "[a] finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time").

49. United States v. Seeger, 380 U.S. 163, 185 (1965) (conceding a belief's truth is "not open to question," but also asserting sincerity—whether the belief is truly held—is a threshold question).

50. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 69–76 (1996) (describing the two different methods of deciding Free Exercise cases). The categorical approach provides protection against only facially discriminatory laws, but the balancing approach provides protection from all laws that burden religion, regardless of form or purpose. *Id.* at 75.

51. 98 U.S. 145 (1878).

52. *Id.* at 166–67.

53. *Id.*

54. Gressman & Carmell, *supra* note 50, at 76.

55. *See* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 570–71 (2006) (noting the court heard only two free exercise cases prior to 1940); REPORT TO ATT'Y GEN., *supra* note 44, at iii (noting there were "virtually no judicial references to the religion clauses" during the eighty years after adoption and no "major cases" besides *Reynolds* until the 1940s).

56. *See* Hall, *supra* note 55, at 570–71 (showing the court heard sixteen free exercise cases in the 1940s alone).

57. Gressman & Carmell, *supra* note 50, at 73.

categorical approach considers both the claimant's burden and the government's interest, brings all laws, including religiously neutral ones, within the reach of the Free Exercise Clause.[58] *Sherbert v. Verner*[59] and *Wisconsin v. Yoder*[60] are the two most important cases to apply the balancing test.

In *Sherbert*, a member of the Seventh-day Adventist Church was denied unemployment benefits because she refused to work on Saturdays.[61] Justice Brennan, writing for the majority, recognized that limitations of free exercise rights are only permissible when they involve "the gravest abuses, endangering paramount interest."[62] The Court then balanced South Carolina's alleged interest in avoiding fraud in the unemployment benefits program with the importance of religious liberty and the plaintiff's interests in her unemployment benefit.[63] The Court concluded that South Carolina's interest was not compelling enough to justify the restriction which the state sought to impose.[64]

In *Yoder*, Amish parents refused to comply with Wisconsin's compulsory-school attendance law.[65] Describing the balancing approach, the Court noted "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[66] The Court conceded the state had a strong interest in compulsory education, but found Wisconsin had failed to show how granting an exemption to the Amish would sufficiently harm this government interest.[67]

Shortly after establishing and refining the balancing approach, the Supreme Court returned to a categorical approach for neutral and generally applicable laws in *Employment Division v. Smith*.[68] In *Smith*, members of the Native American Church ingested peyote during a religious ceremony.[69] They were subsequently fired from their jobs at a drug rehabilitation organization and denied unemployment benefits.[70] Justice Scalia, writing for the majority, found generally applicable laws did not violate the First Amendment if the resulting prohibition of or burden on religion was "merely the incidental effect" of the legislation.[71] Therefore, an individual must still comply with

58. *Id.* at 77.
59. 374 U.S. 398 (1963).
60. 406 U.S. 205 (1972).
61. *Sherbert*, 374 U.S. at 399–401.
62. *Id.* at 406–07 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).
63. *Id.* at 403.
64. *Id.*
65. *Yoder*, 406 U.S. at 207.
66. *Id.* at 215.
67. *Id.* at 236.
68. 494 U.S. 872 (1990).
69. *Id.* at 874.
70. *Id.*
71. *Id.* at 878.

neutral and generally applicable laws, even if "the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[72]

Smith essentially reduced[73] the protections of the Free Exercise Clause, when standing alone,[74] to religiously discriminatory laws.[75] Indeed, after *Smith*, no law that is neutral and generally applicable would ever be subject to *Sherbert*'s or *Yoder*'s balancing tests. Rather, only those laws that were facially discriminatory would receive any significant scrutiny. Therefore, if plaintiffs in Mandate cases relied on the Free Exercise Clause alone, they might have little hope of prevailing because the Mandate applies uniformly to and among religious and non-religious persons.[76]

D. RFRA and the Reemergence of Balancing

The Court's decision in *Smith* caused an outcry among politicians. They quickly responded by enacting RFRA, with the express purpose of overturning *Smith* and reestablishing the balancing approach.[77] In passing RFRA, Congress established that (1) neutral laws may burden religious exercise; (2) substantial

72. *Id.* at 879 (Stevens, J., concurring) (quoting *Lee*, 455 U.S. at 263 n.3) (internal quotation marks omitted).

73. *Smith* clearly conflicted with *Yoder* which stated "[a] regulation neutral on its face may . . . offend the constitutional requirement . . . if it unduly burdens the free exercise of religion," and "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Yoder*, 406 U.S. at 220.

74. In *Smith*, the Court distinguished its past cases holding neutral and generally applicable laws violated free exercise rights by noting those cases involved "the Free Exercise Clause in conjunction with other constitutional protections[.]" *Smith*, 494 U.S. at 881. This language seems to preserve the balancing test for "hybrid" rights cases. *See* Gressman & Carmell, *supra* note 50, at 89–90 (discussing the concept of a hybrid rights claim). *See also* Kyle J. Weber, *Corporate Personhood and the First Amendment: A Business Perspective on an Eroding Free Exercise Clause*, 14 RUTGERS J. L. & RELIGION 217, 224, 236–37 (2012) (discussing the need for a hybrid claim to defeat the application of neutral, generally applicable law and describing negative judicial treatment of the "hybrid" rights theory).

75. Gressman & Carmell, *supra* note 50, at 87.

76. The four dissenting Supreme Court justices advanced this argument. *Burwell,* 134 S. Ct. at 2790–91 (Ginsberg, J., dissenting).

77. President Clinton said RFRA "reverses the Supreme Court's decision [in] Employment Division against Smith, and reestablishes a standard that better protects all American of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision." Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993). The Senate Judiciary Committee's report also said the purpose of the act was to overturn *Smith*. S. REP. NO. 103-111, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98.

burdens on religious exercise should not be imposed without "compelling justification"; and (3) *Smith* eliminated the government's need to justify a neutral law's burden on religious exercise.[78] RFRA's explicit purpose was "to restore the compelling interest test" of *Sherbert* and *Yoder*.[79] While RFRA was later declared unconstitutional as applied to the states,[80] the statute still limits the federal government.[81]

RFRA essentially established a strict scrutiny standard, where the government cannot "substantially burden[82] a person's exercise of religion even if the burden results from a rule of general applicability" unless the "application of the burden to the person"[83] (1) furthers "a compelling governmental interest"[84] and (2) "is the least restrictive means"[85] of furthering that interest.[86]

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78. 42 USC § 2000bb(a).

79. 42 USC § 2000bb(b). *See also* Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011); *Gonzales*, 546 U.S. at 420 (explaining RFRA expressly adopted the compelling interest test from *Sherbert* and *Yoder*).

80. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). Congress responded to the Court's decision in *Flores* by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2), under its Spending and Commerce Clause powers. Cutter v. Wilkinson 544 U.S. 709, 715 (2005). Section 2 of RLUIPA prohibited the implementation of a land use regulation that imposed a substantial burden on religious exercise unless the government showed the burden furthered a compelling interest by the least restrictive means. 42 U.S.C. § 2000cc(a)(1)-(2). Section 3 of RLUIPA prohibited the imposition of a substantial burden on the religious exercise of an institutionalized person unless the government again showed the burden furthered a compelling interest by the least restrictive means. 42 U.S.C. § 2000cc-1(a)(1)-(2); *Cutter*, 554 U.S. at 715.

81. *Sossamon*, 131 S. Ct. at 1656.

82. A substantial burden includes "putting substantial pressure on an adherent to modify his behavior to violate his beliefs," *Thomas,* 450 U.S. at 718, and substantial pressure to "perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. The pressure is "unmistakable" when an individual is forced "to choose between following the precepts of her religion and forfeiting [government] benefits" and, the governmental imposition of a fine for religious exercise can impose "the same kind of burden." *Sherbert*, 374 U.S. at 404. *See also Smith*, 494 U.S. at 897 (O'Connor, J., concurring) (claiming a burden can violate the Free Exercise Clause even if imposed indirectly through a law that effectively makes "abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community").

83. Strict scrutiny requires a case-by-case analysis. *Cutter*, 544 U.S. at 714–15. The government cannot "rely on mere speculation about potential harms; rather, there must be "evidentiary support for a refusal to allow a religious exception." *Smith*, 494 U.S. at 911 (Blackmun, J., dissenting).

84. A compelling interest has been variously formulated as: an interest "of the highest order," *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; "an overriding governmental interest," *Lee*, 455 U.S. at 258; and "only those interests of the highest order and those not otherwise served," *Yoder*, 406 U.S. at 215.

85. The government bears the burden of proving it has used the least restrictive means of furthering the compelling interest. 42 U.S.C. § 20000bb-1(b)(2). The government must show the means are neither "overbroad" nor

In the Mandate cases, plaintiffs can claim the Mandate's fines[87] burden their religious exercise by forcing them to choose between economic survival and their religious beliefs.[88] In response, the government has generally asserted two compelling interests: furthering gender equality; and promoting the public health.[89] It is unclear whether these interests are indeed compelling.[90] Regardless, the Supreme Court found in *Hobby*

"underinclusive." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546.

86. 42 USC §§ 2000bb-1(a), (b); *Cutter*, 544 U.S. at 715 (quoting *Flores*, 521 U.S. at 515–16).

87. *See*, *e.g.*, 26 U.S.C. § 4980(D)(a), (b) (establishing a penalty of $100 per day per employee for noncompliance with coverage provisions of ACA); 26 U.S.C. § 4980H (creating an annual tax assessment of $2,000 per an employee for noncompliance with requirement to provide health insurance); 29 U.S.C. § 1132(a) (permitting civil enforcement actions by DOL and insurance plan participants). *See also* Edward A. Morse, *Lifting the Fog: Navigating Penalties in the Affordable Care Act*, 46 CREIGHTON L. REV. 207, 220–21 (2013) (discussing the penalties employers face for not providing the "minimum essential coverage" under the ACA); Tan, *supra* note 16, at 1307–08 (discussing the penalties employers face for not complying with the Mandate).

88. Courts have split over whether the Mandate actually imposes a substantial burden. *Compare* Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2903 (2014) (noting the federal government "has placed enormous pressure on the plaintiffs to violate their religious beliefs" and that the fines force the plaintiffs to choose between their companies and their faiths' moral teachings); *Hobby Lobby*, 723 F.3d at 1140–41 (holding Hobby Lobby suffered a substantial burden by being required to either (1) compromising their religious beliefs, (2) pay about $475 million in taxes annually, or (3) pay about $26 million in taxes annually and not provide health-insurance for employees); *Conestoga Wood*, 724 F.3d at 410–12 (Jordan, J., dissenting) (explaining that the Mandate imposes a substantial burden through direct legal requirements and indirect pressure) *with Conestoga Wood*, 917 F. Supp. 2d at 413 (finding no substantial burden); *O'Brien*, 894 F. Supp. 2d at 1159 (determining no substantial burden existed based on the financial demands of the Mandate).

89. *Korte*, 735 F.3d at 686; *Beckwith*, 960 F. Supp. 2d at 1347–48; *Monaghan*, 931 F. Supp. 2d at 806; Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *4 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers*, 904 F. Supp. 2d at 125; *Newland*, 881 F. Supp. 2d at 1297.

90. *See Gilardi*, 733 F.3d at 1219 (noting that compelling interests cannot be "broadly formulated" and criticizing the government for relying on just such formulations); *Hobby Lobby*, 723 F.3d at 1143 (holding the government's asserted interests were not compelling because they were too broadly formulated and tens of millions of people are already exempted from the Mandate); *Conestoga Wood*, 724 F.3d at 412, 414 (Jordan, J., dissenting) (conceding the government's goals are "of tremendous societal significance" but finding they are not compelling because the government has already exempted grandfather plans as well as small and religious employers.
The Supreme Court's majority in *Hobby Lobby* did not address whether these interests are compelling. Laurence H. Tribe, *Is the Hobby Lobby Decision Narrow or of "Startling Breadth"?*, SLATE (June 30, 2014), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_hobby_lobby_decision_how_big_is_its_scope.html.

Regardless of whether the interests are compelling, others have also

Lobby that the Mandate, as originally formulated, was not the least restrictive means of furthering them.[91] It remains to be seen whether the new Mandate rules satisfy the least restrictive means requirement.[92]

E. The Predicate Question

Whether for-profit corporations can even bring a free exercise claim, much less win on the merits, depends on the meaning of the Free Exercise Clause and, more specifically, if such plaintiffs have

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argued the Mandate fails to *further* the claimed interests. *See*, *e.g.*, Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 431–35 (2013) (arguing the government has failed to prove access to free contraception improves women's health); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2187 (2012) (claiming marginally increasing access to contraceptives does not further a compelling interest because nine-in-ten employer-based insurance plans cover prescription contraceptives, and contraceptive services are often available at community centers, public clinics, and hospitals with income-based support).

91. *Hobby Lobby*, 134 S. Ct. at 2780. *See also Korte*, 735 F.3d at 685–87 (stating the governmental interests are so broadly formulated as to make it impossible to show the Mandate is the least restrictive means and suggesting alternatives including public provision of contraception, tax incentives for suppliers, and tax incentives for consumers); *Gilardi*, 733 F.3d at 1222–24 (holding the Mandate is not the least restrictive means of furthering any compelling governmental interests); *Hobby Lobby*, 723 F.3d at 1144 (holding the government failed to prove a compelling interest would be frustrated by exempting Hobby Lobby); *Conestoga Wood*, 724 F.3d at 415 (Jordan, J., dissenting) (finding the government has failed to prove alternatives, such as simply increasing its supplies of free contraceptives, would be unworkable). *See also* Whelan, *supra* note 90, at 2186 (proposing the government could directly compensate providers for birth control coverage, provide birth control itself, impose a mandate on contraceptive providers, or offer tax credits for contraceptive purchases); Katherine Lepard, Comment *Standing Their Ground: Corporations' Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH L. REV. 1041, 1066–70 (2013) (describing alternatives to the Mandate, including (1) expanding the religious exemption or (2) increasing existing governmental programs that provide free birth control); Michael Barone, Jr., Comment, *Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate*, 29 TOURO L. REV. 795, 836–37 (2013) (discussing the possibility of using state programs such as Medicaid and COBRA to provide contraceptive services); Tan, *supra* note 16, at 1368 (noting over nine million women already receive publically-funded contraceptive coverage from $2.37 billion in public expenditures, eighty-eight percent of which the federal government funds).

92. *See* Lyle Denniston, *New Birth-Control Rules Found Too Demanding*, SCOTUSBLOG (Oct. 28, 2014), http://www.scotusblog.com/2014/10/new-birth-control-rules-found-too-demanding/ (explaining a Florida court's decision to block enforcement of the new rules); Lyle Denniston, *New Contraceptive Mandate Rules*, SCOTUSBLOG (Feb. 1, 2013), http://www.scotusblog.com/2013/02/new-contraceptive-mandate-rules/ (describing the new rules and predicting that this issue will likely reach the Supreme Court in the near future).

free exercise rights.[93] The Supreme Court has not previously addressed this issue.[94]

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93. Kathryn S. Benedict, *When Might Does Not Create Religious Rights: For-Profit Corporations' Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 84 (2013).

In the RFRA context, various courts formulate the inquiry differently—some asking if for-profit corporations are "persons" and others asking if they can "exercise religion." Regardless of the formulation, the underlying question regarding Congress's intent turns largely on the meaning of the Free Exercise Clause. *See* Gressman & Carmell, *supra* note 50, at 106–09 (explaining RFRA creates no new substantive rights or causes of action, and RFRA claims relate only to exercises of religion under the First Amendment). Even the Supreme Court majority and dissent agreed that Free Exercise jurisprudence plays some role in the interpretation of RFRA. *Burwell,* 134 S. Ct. at 2772–74 (majority opinion), 2791 (Ginsberg, J., dissenting). *See also Korte*, 735 F.3d at 679 (noting RFRA codifies pre-*Smith* free exercise jurisprudence); *Gilardi*, 733 F.3d at 1232 (saying the court must turn to free exercise jurisprudence to determine if a corporation can exercise religion under RFRA); *Autocam*, 730 F.3d at 623, 626 (citing Jackson v. District of Columbia, 254 F3d 262, 266–67 (D.C. Cir. 2001)) (finding Congress intended RFRA to reinforce the status quo for standing in the Free Exercise Clause and noting free exercise case law is relevant to interpreting RFRA); *Hobby Lobby*, 723 F.3d at 133–34 (noting "Congress's understanding of the First Amendment informed its drafting of RFRA" and finding Congress did not intend RFRA to alter pre-*Smith* jurisprudence regarding who can bring a claim); Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 62 (D.C. Cir. 2006) (citing S. REP. NO. 103-111, at 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902) (determining RFRA did not expand, contract, or alter pre-*Smith* jurisprudence concerning who can obtain relief under the Free Exercise Clause); *Tyndale House Publishers*, 904 F. Supp. 2d at 114 n.9 (explaining Free Exercise jurisprudence may govern RFRA standing).

94. *See* Hobby Lobby Stores, Inc. v. Sebelius*,* 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012) (stating "[the Supreme Court] has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders"); *Korte*, 735 F.3d at 679 (recognizing whether a for-profit corporation can assert a free exercise claim is a novel question); *Beckwith*, 960 F. Supp. 2d at 1335–36 (declaring no court has held a secular, for-profit corporation has a right to exercise religion); *Monaghan*, 931 F. Supp. 2d at 800 (declaring neither the Supreme Court nor the Sixth Circuit has answered the question of whether secular, for-profit corporations have free exercise rights); *Tyndale House Publishers*, 904 F. Supp. 2d at 114 (declining, "like others before [it]," to address the issue of whether for profit-corporations can exercise religion under RFRA and the Free Exercise Clause); *see also Bellotti*, 435 U.S. at 777–78 (declining to address whether corporations have the same rights as individuals under the First Amendment).

While the Supreme Court has not decided whether a for-profit corporation can exercise religion, it has ruled in favor of nonprofit corporations' free exercise claims. *See*, *e.g.*, *Gonzales*, 546 U.S. at 439 (finding a seizure of a sacramental tea from a religious, nonprofit corporation violated the Free Exercise Clause); *Church of the Lukumi Babalu Aye*, 508 U.S. at 525 (awarding relief to Florida nonprofit corporation under the Free Exercise Clause).

F. Corporate Theories and the Supreme Court's Shifting Approach to Constitutional Corporate Rights

Two of the three major corporate theories[95]—artificial entity theory and natural entity theory—were at the center of early disputes over corporate constitutional rights.[96] Artificial entity theory perceives corporations as owing their existence to the state, which can impose limitations through charters of incorporation.[97] Therefore, the theory emphasizes the power of the state to regulate corporations and, generally, grants no constitutional rights to corporations.[98] Natural entity theory, on the other hand, views individuals, not the state, as the creators of corporate entities.[99] According to this theory, individuals create corporations through association, but corporations still have distinct, real existences.[100] Consequently, corporations receive the same, or at least similar, constitutional protections as natural persons.[101]

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95. A third theory—aggregate entity theory or contractarian theory—views corporations as an association of persons. Darrell A.H. Miller, *Guns, Inc.: Citizens United, Mcdonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 944 (2011). Because individuals create and operate corporations by contracts, there is no separate corporate entity. Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious speech*, 83 NOTRE DAME L. REV. 1713, 1728–29 (2008). Under the aggregate entity theory, corporate members retain their own natural rights, but the corporation has no rights of its own. *Id.* Justice Field used the aggregate entity theory in Pembina Consol. Silver Mining & Milling Co. v. Com. of Pa., 125 U.S. 181, 189 (1888). Fields recognized corporations are persons under the Fourteenth Amendment and are "merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution." *Id.*

96. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580–81 (1990) (asserting these two theories influenced decisions during the nineteenth century and still have some influence in modern opinions). *See also* Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1456–63 (1992) (discussing the three major corporate theories and their contrary implications for corporate rights).

97. Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 535 (2010).

98. *See* Mayer, *supra* note 96, at 580–81 (noting corporations cannot assert constitutional rights against the state under the artificial entity theory); Weber, *supra* note 74, at 221 (describing how corporations have "limited power subject to the authority" of the State under the artificial entity theory); *see also* Baworowsky, *supra* note 95, at 1724 (explaining only the natural entity theory allows protection of a corporation's religious speech).

99. Baworowsky, *supra* note 95, at 1738.

100. *Id.* at 1736–38; Rubin, *supra* note 97, at 533.

101. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 213 (1990) (depicting how natural entity theory "tended to assimilate corporate persons to the statue of natural persons"). *See also* Mayer, *supra*

Artificial entity theory was the dominant framework for corporate personhood in the early 1800s.[102] At that time, corporations were considered mere legal fictions tolerated by the state and reliant on their charters for all power[103] and rights.[104] States considered a grant of incorporation a special privilege normally reserved for entities executing a public function or satisfying a social need.[105]

An example of the artificial entity theory is *Trustees of Dartmouth College v. Woodward*.[106] In that case, the New Hampshire legislature attempted to alter the charter of Dartmouth College.[107] The Court found the Constitution protected the charter only as a contract between the trustees and King George III of Great Britain.[108] In deciding the case, Chief Justice John Marshall clearly articulated the artificial entity theory. His majority opinion described a corporation as "an artificial being,

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note 96, at 580–81 (explaining natural entity theory is used to grant rights to corporations); Miller, *supra* note 95, at 923 (stating natural entity theory "offers corporations the fullest protection under the Constitution").

102. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 434 (1989); Atiba R. Ellis, *Citizens United and Tired Personhood*, 44 J. MARSHALL L. REV. 717, 738 (2011); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1065 (1994).

103. *See* Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 546 (1837) (quoting Beaty v. Lessee of Knowler, 29 U.S. 152, 168 (1830)) (internal quotation marks omitted) (stating "[t]he exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation"); Rubin, *supra* note 97, at 540 (describing how courts would void transactions which extended beyond corporate charters under the ultra vires doctrine). *See also* THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 263 (2012) (noting the corporate form required a special legislative charter).

104. Baworowsky, *supra* note 95, at 1726. *See also* MICHAEL I. MEYERSON, ENDOWED BY OUR CREATOR: THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 99–102 (2012) (describing how many were uneasy when the Episcopal Church filed a petition to incorporate in Virginia because the Church would be subjected to many detailed regulations of policy and practices).

105. Mayer, *supra* note 96, at 580–81; Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 218 (2011). *See also* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 545, 549 (1933) (describing how the corporate privilege "was granted only sparingly" by the state and only to serve a recognized public interest).

Only eight for-profit corporations were chartered in the colonies during the entire colonial period. MCCRAW, *supra* note 103, at 131. During the 1790s, 311 corporations were chartered. *Id.* at 131, 263. However, almost all were chartered by states for public purposes, such as turnpikes, bridges, canals, banks, waterworks, and fire and marine insurance companies. *Id.*

106. 17 U.S. 518 (1819).

107. *Id.* at 518.

108. *Id.* at 650.

invisible, intangible, and existing only in contemplation of law."[109] Because the corporation is a "mere creature of law," the charter defines completely its "properties."[110]

In the mid-nineteenth century, citizens became distrustful of states' control over charters.[111] They believed bribery and favoritism strongly influenced the granting of charters.[112] In response, New York enacted the first general incorporation law in 1811. However, the law only covered certain corporations and subsequent charters often contained restrictive clauses.[113] In 1875, New Jersey enacted the first true free incorporation statute, and New York, Delaware, and West Virginia quickly followed.[114] Under these rapidly spreading general incorporation schemes, corporations could obtain charters by application, without a special legislative act.[115] This growth of the free incorporation movement occurred concurrently with a shift toward the natural entity approach among legal theorists and the Court.[116] But the changing landscape of corporate theory did not bring a new era of consistency to the Supreme Court's opinions.

In *Santa Clara County v. South Pacific Railroad Co.*,[117] the Supreme Court first recognized corporations as persons under the Constitution.[118] However, it did so without any oral or written

109. *Id.* at 636.

110. *Id.*

111. Ripken, *supra* note 105, at 208. *See also* Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 646–51 (2011) (discussing the potential risks of treating corporations as completely subservient to the states).

112. Ripken, *supra* note 105, at 208; Millon, *supra* note 101, at 206 (noting there was "persistent public suspicion about favoritism and corruption in the granting of corporate charters").

113. Rubin, *supra* note 97, at 537 (detailing how charters were often limited in duration and permissible activities).

114. *Id.* at 538.

115. Millon, *supra* note 101, at 206.

116. *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 179–83 (1985) (recounting the writings on corporate theory in Germany, France, England, and America, the rise American corporations at the turn of the twentieth century, and America's legal response); Ellis, *supra* note 102, at 738–39 (describing the transition away from artificial entity theory during the Lochner era and the eventual shift to the natural entity theory at the turn of the twentieth century); *see also* Mayer, *supra* note 96, at 580–81 (discussing the turn toward "'group' or 'corporate' personality" among theorists trying to come to terms with the realities of modern society); Weber, *supra* note 75, at 223 (mentioning the rise of natural entity theory during the twentieth century); Baworowsky, *supra* note 95, at 1737 (describing the growth of natural entity theory as a response to the "collectivist and individualist tendencies of the artificial entity and contractarian theories").

117. 118 U.S. 394 (1886).

118. Mayer, *supra* note 96, at 621. *See also id.* at 664–65 (describing which provisions of the bill of rights have been found applicable to corporations).

argument on the issue.[119] Rather, Chief Justice White simply declared during oral argument that the Court was "all of the opinion" that the Fourteenth Amendment applied to corporations.[120] The Court failed to address either this issue or corporate theory in its opinion.[121]

Subsequently, in *Hale v. Hankel*,[122] the Court simultaneously employed both the artificial entity and natural entity theories.[123] When denying corporations the Fifth Amendment right against self-incrimination,[124] the Court described the corporation as an artificial entity. The Court characterized a corporation as "a creature of the state" that "is presumed to be incorporated for the benefit of the public" and has "powers limited by law."[125] However, the Court also relied on natural entity theory to extend Fourth Amendment protections against search and seizure to corporations.[126] The Court noted a corporation is "but an association of individuals under an assumed name and with a distinct legal entity" that "waives no constitutional immunities appropriate to such body."[127]

The concurrences and dissents in *Hale* further muddied the waters of corporate theory. Justice Harlan's concurrence argued corporations should not have Fourth Amendment protection.[128] He repeated Chief Justice Marshall's description of corporations in *Woodward* as artificial beings existing only in law.[129] Justice Brewer's dissent, on the other hand, asserted corporations should have both Fourth *and* Fifth Amendment protections.[130] Justice Brewer conceived of corporations as "an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title."[131] Corporations, in Justice Brewer's opinion, were merely instrumentalities exercising the powers granted by the associated individuals.[132]

These seemingly impenetrable debates over corporate theory are now largely, and fortunately, confined to dissents.[133] In the

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119. *S. Pac. R. Co.*, 118 U.S. at 396.

120. *Id.*

121. Mayer, *supra* note 96, at 581 n.26.

122. 201 U.S. 43 (1906).

123. Mayer, *supra* note 96, at 621–22.

124. *Hale*, 201 U.S. at 75.

125. *Id.* at 74–75 (the Court also stated "we are of the opinion that there is a clear distinction . . . between an individual and a corporation"). *Id.* at 74. *See also* Braswell v. United States, 487 U.S. 99, 105 (1988) (recapping *Hale*'s discussion of the artificiality of corporations).

126. Horwitz, *supra* note 116, at 182.

127. *Hale*, 201 U.S. at 76.

128. *Id.* at 78 (Harlan, J., concurring).

129. *Id.* (internal quotation marks omitted).

130. *Id.* at 85 (Brewer, J., dissenting).

131. *Id.*

132. *Id.*

133. *See, e.g.*, *Pac. Gas & Elec. Co.*, 475 U.S. at 33 (Rehnquist, J.,

1960s, corporations began arguing much more often that federal regulations violated the protections of the Bill of Rights.[134] As more of these cases reached the Supreme Court, the Court's majority abandoned the unwieldy and distracting analyses of corporate personhood.[135] Instead, the Court sought to reach more substantively fair and logically straightforward results by focusing on the history, nature, and purpose of the constitutional amendment at issue.[136]

III. ANALYSIS

The Supreme Court most clearly[137] articulated its new

dissenting) (referring to corporations as "artificial entities," and claiming the extension of freedom of conscience to corporations "strains the rationale of [precedent] beyond the breaking point" and is "to confuse metaphor with reality"); *Bellotti*, 435 U.S. at 822–24 (Rehnquist, J., dissenting) (quoting Chief Justice Marshall's language from *Dartmouth College* that characterizes corporations as "artificial" beings and "mere creature[s] of the law," asserting corporations do not enjoy all the liberties of natural persons, and using the phrases "artificial persons" and "when a State creates a corporation").

134. This abandonment of corporate personhood has occurred concurrently with an increased corporate interest in the Bill of Rights. In 1893, the Court first granted corporations protection under the Bill of Rights, *Noble*, 147 U.S. at 176 (granting Fifth Amendment due process protections), but, corporations rarely invoked the Bill of Rights before 1960. Mayer, *supra* note 96, at 621.

135. *See* Mayer, *supra* note 96, at 621–29 (describing the period from *Hale* to the 1950s when corporate Bill of Rights cases were decided "exclusively in terms of personhood theory" and the post-1960s approach beginning with See v. City of Seattle, 387 U.S. 41 (1967) when the Court "frequently" looked to the history of the amendment, "occasionally" to the underlying purpose of the amendment, and "sometimes" ruled without explanation); *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1020 (1998) (describing how the Court tried to avoid corporate theory in *Bellotti*); Miller, *supra* note 95, at 915 (noting the Supreme Court has more recently avoided corporate personality theory); Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 867 (2007) (explaining corporate personhood "was not central" to the Court's First Amendment jurisprudence); Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 702 (2011) (arguing the question of whether a corporation is a person is constitutionally irrelevant).

136. *See* Miller, *supra* note 95, at 927 (asserting the Court's "modern tendency" involves focusing on the constitutional right, not corporate personality); *see also Bellotti*, 435 U.S. at 775–76 (noting that it is wrong to ask whether corporations have First Amendment rights coterminous with natural persons because the Constitution "protects interests broader than those of the party seeking their vindication"); Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 123–24 (1992) (asserting that the policies underlying constitutional protection determine the extent of corporate protections).

137. Miller, *supra* note 95, at 911 (explaining the *Bellotti* test is the closest to a standard test). *See also Korte*, 735 F.3d at 682 (noting there is not a unified theory of corporate constitutional rights but *Bellotti*'s language suggests a "general decisional approach").

approach to constitutional corporate rights in *First National Bank of Boston v. Bellotti*.[138] In ruling on the constitutional corporate right's issue raised by for-profit corporate plaintiffs in Mandate cases, the lower courts have almost exclusively relied on *Bellotti*'s analytical framework.[139] However, in applying the *Bellotti* analysis, most courts have ignored the historical prong, focusing only on the nature and purpose of the Free Exercise Clause.[140]

A. Bellotti *and the New Focus in Corporate Rights Cases*

In *Bellotti*, two national banking associations and three business corporations challenged the constitutionality of a Massachusetts law regulating speech.[141] The corporations claimed the prohibition on speech violated their First Amendment rights.[142] The Court conceded "[c]ertain '*purely personal*' guarantees . . . are unavailable to corporations and other organizations because the '*historic function*' of the particular guarantee has been limited to the protection of individuals."[143] The Court then described the relevant test by stating: "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reasons *depends on the nature, history and purpose of the particular constitutional provision*."[144]

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138. 435 U.S. 765 (1978).

139. *Infra*, Part III, Section B.

140. *Infra*, Part III, Section C.

141. *Bellotti*, 435 U.S. at 767–68. The law prohibited the corporations from making contributions or expenditures to influence voters on a wide range of issues, including individual income, property, and transaction taxes. *Id.* at 768.

142. *Id.* at 770.

143. *Id.* at 778 n.14 (citing United States v. White, 322 U.S. 694, 698–701 (1944)) (emphasis added).

144. *Id.* (emphasis added). This test looks to "what is being done," not "who is speaking or exercising religion." *Conestoga Wood*, 724 F.3d at 403 (Jordan, J., dissenting).

Corporations were clearly disfavored at the time of the founding. *Citizens United*, 558 U.S. at 426–32 (Stevens, J., concurring in part and dissenting in part); David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 647–53 (2011); Rubin, *supra* note 97, at 525–34. However, it is evident simply from the Court's extensive jurisprudence recognizing corporate constitutional rights that our Founding Fathers' skepticism of corporations is not dispositive. In fact, under *Bellotti* their generalized skepticism is not even relevant to a constitutional corporate right's inquiry. Rather, *Bellotti* instructs the Court to look at "the nature, history and purpose of *the particular constitutional provision*." *Bellotti*, 435 U.S. at 778 n.14. *See also Citizens United*, 558 U.S. at 386 (Scalia, J., Alito, J., concurring, Thomas, J., concurring in part) (criticizing the dissent's historical analysis of the Framers' views concerning corporations and explaining the Framer's' disaffection is relevant only as "reflected in the understood meaning

In accordance with this analytical framework, the Court began its discussion of the corporate rights issue by noting the purpose of Free Speech protections.[145] The Court then described the historical treatment of the First Amendment as a fundamental liberty.[146] Lastly, the Court described the development of various categories of speech and its relevance.[147] After engaging in this analysis, the Court concluded corporations have free speech rights and declared the Massachusetts law unconstitutional.[148]

B. The Only Game in Town: The Bellotti *Analysis and Mandate Cases*

According to The Becket Fund for Religious Liberty,[149] six circuit courts and twenty-eight district courts have issued injunction orders in the forty-six Mandate cases filed by for-profit plaintiffs.[150] The Third,[151] the Tenth,[152] and the D.C.[153] circuits have all explicitly applied the *Bellotti* analysis in ruling on the plaintiffs' free exercise or RFRA rights. The Supreme Court did not address the free exercise issue and, thus, had no cause to use the *Bellotti* analysis.[154] Likewise, of the three circuit court majorities that did not apply the *Bellotti* analysis, all failed to thoroughly address the constitutional aspect of the corporate right's issue.[155] Many district courts have issued brief orders

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of the text they enacted," not as a "freestanding substitute for that text").

145. *Id.* at 776.

146. *Id.* at 780.

147. *Id.* at 781–83.

148. *Id.* at 795.

149. The Becket Fund is a nonprofit, public interest organization. *Our Mission*, THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/our-mission (last visited Jan. 12, 2013).

150. *Mandate Central*, *supra* note 12.

151. *Conestoga Wood*, 724 F.3d at 383–84 (quoting *Bellotti*, 435 U.S. at 778 n.14) (internal quotation marks omitted) ("we must consider . . . whether the guarantee is purely personal or is unavailable to corporations based on the 'nature, history, and purpose of [this] particular constitutional provision").

152. *Hobby Lobby*, 723 F.3d at 1133–34 (quoting *Bellotti*, 435 U.S. at 778 n.14) ("the Free Exercise Clause is *not* a '"purely personal' guarantee[] . . . unavailable to corporations and other organizations because the 'historic function' of the particular [constitutional] guarantee has been limited to the protection of individuals").

153. *Gilardi*, 733 F.3d at 1212 (quoting *Bellotti*, 435 U.S. at 778 n.14) (declaring "[w]e turn to the 'nature, history, and purpose of" the Free Exercise Clause to determine if its historic function shows free exercise rights are purely personal).

154. *Infra*, Part I.

155. The *Bellotti* language was not referenced by the Sixth and Eighth circuit majorities and there was no dissent in either case. The Sixth Circuit resolved the case largely by noting the Supreme Court did not recognize for-profit corporate free exercise rights before *Smith*. *Autocam*, 730 F.3d at 625–27. *See also* Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 632 (6th Cir. 2013),

without thorough analysis,[156] and others have explicitly skirted the corporate right's issue.[157] Courts that have actually reached the merits of the corporate right's issue have applied the *Bellotti*

vacated, 134 S. Ct. 2902 (2014) (applying *Autocam*'s holding without engaging in "an extensive discussion of the pros and cons of the [corporate right's issue]"). The Eighth Circuit did not address the issue in its one sentence *O'Brien* order, *O'Brien*, slip op. at 1, or in *Annex*, which merely interpreted the *O'Brien* order, 2013 WL 1276025, at *3.

The Seventh Circuit majority quoted the *Bellotti* text extensively. *Korte*, 735 F.3d at 682. However, the majority explicitly said that "we don't need to parse the cases on corporate constitutional rights too finely." *Id.* Rather, the Seventh Circuit treated the question as one of statutory interpretation and ruled based on the Supreme Court's pre-*Smith* jurisprudence, not an analysis of the Free Exercise Clause itself. *Id.* However, Judge Rovner's dissent in the Seventh Circuit did apply the *Bellotti* analysis. *Id.* at 694–705 (Rovner, J., dissenting).

156. *See*, *e.g.*, Doboszenski & Sons, Inc. v. Sebelius, Civil No. 13-3148 (JNE/FLN), slip op. at 1–3 (D. Minn. filed Nov. 27, 2013); Feltl and Co., Inc. v. Sebelius, Civil No. 13-2635 (DWF/JJK), slip op. at 1–3 (D. Minn. filed Nov. 5, 2013); Infrastructure Alternativs, Inc. v. Sevelius, Case No. 1:13cv31, slip op. at 1–2 (W.D. Mich. filed Sept. 30, 2013); Midwest Fastener Corp. v. Sebelius, Civil Action No. 13-1337 (ESH), slip op. at 1–2 (D.D.C. filed Oct. 16, 2013); Barron Industries, Inc. v. Sebelius, Civil Action No. 13-CV-1330 (KBJ), slip op. at 1–2 (D.D.C. filed Sept. 25, 2013); The QC Group v. Sebelius, Civil No. 13-1726 (JRT/SER), slip op. at 1–3 (D. Minn. filed Sept. 11, 2013); Willis Law v. Sebelius, Civil Action No. 13-01124 (CKK), slip op. at 1–2 (D.D.C. filed Aug. 23, 2013); Tonn and Black Const., LLC v. Sebelius, 968 F. Supp. 2d 990, 9900–96 (N.D. Ind. 2013); Bindon v. Sebelius, No. 1:13-cv-1207-EGS, slip op. at 1 (D.D.C. filed Aug. 14, 2013); Ozinga v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-3292-TMD, slip op. at 1–2 (N.D. Ill. filed July 16, 2013); SMA, LLC v. Sebelius, No. 13-CV-01375-ADM-LIB, slip op. at 1–3 (D. Minn. filed July 8, 2013); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-CV-92-DDN, 2013 WL 6858588, at *1–3 (E.D. Mo. June 28, 2013); Hartenbower v. U.S. Dep't of Health & Human Servs., No. 1:13-CV-02253, slip op. at 1–2 (N.D. Ill. filed April 18, 2013); Hall v. Sebelius, Civil No. 13-0295 (JRT/LIB), slip op. at 1–3 (D. Minn. filed April 2, 2013); Bick Holding, Inc. v. Sebelius, No. 4:13-cv-00462-AGF, slip op. at 1 (E.D. Mo. Filed April 1, 2013); Lindsay v. U.S. Dep't of Health & Human Servs., No. 13 C 1210, slip op. at 1–2 (N.D. Ill. filed March 20, 2013); Sioux Chief MFG. Co. Inc. v. Sebelius, No. 13-0036-CV-W-ODS, slip op. at 1 (W.D. Mo. Filed February 28, 2013); Triune Health Group, Inc. v. HHS, No. 1:12-cv-06756, order form at 1–2 (N.D. Ill. filed Jan. 3, 2013).

157. *See*, *e.g.*, Mersino Management Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702, at *10 (E.D. Mich. July 11, 2013) (claiming the court "need not decide" the corporate right's issue); *Monaghan*, 931 F. Supp. 2d at 802 (taking no position as to whether a corporation has independent free exercise rights); American Pulverizer Co. v. U.S. Dep't. of Health & Human Servs., No. 12-3459-CV-S-RED, slip op. at 6 (saying only that the corporate right's issue deserves "deliberate investigation"); *Legatus*, 901 F. Supp. 2d at 988 (claiming the court "need not" and will not decide whether corporations have independent free exercise rights); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (declining to "reach the question" of whether corporations have independent free exercise rights); *Tyndale House Publishers*, 904 F. Supp. 2d at 114 (declining, "like others before [it]," to address the issue of whether for profit-corporations can exercise religion under RFRA and the Free Exercise Clause).

analysis.[158] Based on the uniformity of the circuit and district courts' approaches in the Mandate cases, the *Bellotti* analysis is clearly the most relevant method to address the corporate right's issue.

C. The Why, How, and What of the Historical Analysis

To properly apply *Bellotti*'s history prong, a court should first understand: why the requirement exists, how the analysis must be conducted, and what sources should be examined.

1. The Why: The Requirement for a Historical Analysis

Bellotti requires a thorough historical analysis in any corporate right's case.[159] Further, such an analysis is particularly apt in Mandate cases that involve the Free Exercise Clause because "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."[160] Admittedly, the historical record of the Free Exercise Clause is not always clear and incontrovertible.[161] However, these potential difficulties do not

158. *See*, *e.g.*, MK Chambers Company v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 1340719, at *5 (E.D. Mich. Sept. 13, 2013) (citing Eden Foods, Inc. v. Sebelius, Civil Action No. 13-11229, 2013 WL 1190001, at * 4 (E.D. Mich. Mar. 22, 2013)) (stating, "Courts have held that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the 'purely personal' rights and as such, is unavailable to a secular, for-profit corporation"); *Beckwith*, 960 F. Supp. 2d at 1338 (quoting *Bellotti*, 435 U.S. at 778 n.14) (internal quotation marks omitted) (stating, "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reasons depends on the nature, history, and purpose of the particular constitutional provision"); *Conestoga Wood*, 917 F. Supp. 2d at 408 (stating, "[W]e conclude that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the 'purely personal' rights referred to in *Bellotti,* and as such, is unavailable to a secular, for-profit corporation"); *Eden Foods*, 2013 WL 1190001, at *4 (citing *Conestoga Wood*, 917 F. Supp. 2d at 408) (stating, "Courts have held that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the 'purely personal' rights and as such, is unavailable to a secular, for-profit corporation").

159. *Infra* Part III, Section A.

160. Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 33–34 (1947) (Rutledge, J., dissenting) (internal citations omitted). Justice Rutledge further noted that the First Amendment religious clause is "at once the refined product and the terse summation of that history," and that "the documents of the times" provide "irrefutable confirmation of the Amendment's sweeping content." *Id.*

161. *See* MARCO O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 154 (2013) (asserting there is "deep uncertainty" about the understanding of the Free Exercise Clause at the founding); DENNIS J. GOLDFORD, THE CONSTITUTION OF RELIGIOUS FREEDOM: GOD, POLITICS AND THE FIRST AMENDMENT 37–42 (2012) (noting the Founders may have had different

alter the required analysis, and the Supreme Court has continued to rely on history in religion clause cases.[162]

2. The How (Not): Reliance Solely on Case Law

The Supreme Court has failed to thoroughly analyze the history of the Free Exercise Clause ("free exercise history").[163] Free exercise history is "less than abundant" in comparison to the history of the Establishment Clause;[164] and, while the Court has used history in all religion clause cases, its historical appeals are overwhelmingly focused on the Establishment Clause.[165] Justice Souter even explicitly admitted to a "curious absence of history from [the Court's] free-exercise decisions."[166] While Justices Scalia and O'Connor discussed free exercise history in *City of Boerne v. Flores*,[167] their opinions failed to remedy a century of neglect.[168] Therefore, it is necessary to look beyond case law or jurisprudential history—that is, free exercise history as discussed solely in case law—to conduct the required historical analysis.

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understandings of the Free Exercise Clause and, therefore, historians can often "cherry-pick" the evidence that supports their opinion); MEYERSON, *supra* note 104, at 236–37 (arguing the historical record does not reveal the definitive original understanding of the Free Exercise Clause because (1) our Founder's intellectual conception of religious freedom was revolutionary and, consequently, not as thoroughly or clearly articulated or understood, and (2) there was no single majority view regarding religious freedom among the Founders or the nation); REPORT TO ATT'Y GEN, *supra* note 44, at 12 (stating the historical record is "relatively sparse" and "may be susceptible to manipulation and selective citation).

162. In religion clause cases, the Supreme Court as a whole appeals to history 6.8 times per case and more than 2.2 times per opinion. Hall, *supra* note 55, at 570. This reliance holds true at the individual level as 76% of justices who have written at least one religion clause opinion have appealed to history. *Id.* at 576. Among the twenty-three justices who authored more than four religion clause cases, every single one has appealed to history. *Id.*

163. It is likely, though, that the Court will increase its focus on the history of the Free Exercise Clause. *Id.* at 581.

164. REPORT TO ATT'Y GEN., *supra* note 44, at 2.

165. *Id.* at 569.

166. *Church of the Lukumi Babalu Aye*, 508 U.S. at 575 (Souter, J., concurring in part).

167. *Flores*, 521 U.S. at 537–44 (Scalia, J., concurring in part); *id.* at 544–66 (O'Connor, J., dissenting).

Justice Scalia's and Justice O'Connor's opinions in *Flores* account for fifty-nine of the seventy historical Free Exercise Clause references in the 1990s and more than 40% of all historical Free Exercise Clause references ever made by the Court. Hall, *supra* note 55, at 570.

168. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 575 (Souter, J., concurring in part) (noting the Court has "overlooked" Free Exercise history for "a century").

3. The What: Expansive Selection of Sources

In analyzing the religion clause, the justices have explicitly endorsed the use of a wide variety of historical sources. Relevant sources include those detailing the history of religious persecution and intolerance in England and the colonies.[169] Also, the struggle for religious freedom in America[170] and the religious protections of colonial charters and state constitutions[171] are highly probative. In fact, Justice O'Connor asserted that the religious protections in state constitutions "are perhaps the best evidence of the original understanding" of the religion clause.[172] Finally, no analysis would be complete without examining the history surrounding the writing, adoption, and ratification of the First Amendment itself.[173] As these few examples reveal, a court must, as the Supreme Court has done,[174] examine an extensive set of historical sources.

While the Court has endorsed this comprehensive historical approach, many oft-cited sources are of disputed value. For example, Justice Rehnquist has questioned how probative the Virginia religion statues when interpreting the First Amendment;[175] his words of caution have not been headed by the rest of the Court.[176] Likewise, although some have questioned the importance of James Madison's[177] and Thomas Jefferson's[178] views

169. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532; David v. Beason, 133 U.S. 333, 342 (1890) *abrogated by* Romer v. Evans, 517 U.S. 620 (1996).

170. *See Everson*, 330 U.S. at 33–34 (Rutledge, J., dissenting).

171. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 575–76 (Souter, J., concurring in part).

172. *Flores*, 521 U.S. at 553 (O'Connor, J., dissenting).

173. *See Everson*, 330 U.S. at 33–34 (Rutledge, J., dissenting).

174. *See* Hall, *supra* note 55, at 567, 570 (discussing how the Court has appealed to the history of the writing of the First Amendment, the Founders generally, and specific Founders, and has particularly favored general appeals to the Founders or the historical context).

175. Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (asserting Madison did not advocate incorporating the Virginia Statute of Religious Liberty into the Constitution). *See also* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 208–09 (5th ed. 2008) (explaining several other states established religious liberty before Virginia, and its statute did not serve as a model for the country or for the First Amendment).

176. *See*, *e.g.*, McGowan v. State of Md., 366 U.S. 420, 437 (1961) (noting the Court has considered the history of Virginia's "An act for establishing religious freedom" particularly relevant to the First Amendment); *Everson*, 330 U.S. at 13 (describing how the Court has looked to a Virginia statute to determine the purpose and protections of the religion clause and stating "[a]ll the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition").

177. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 853–56 (1995) (Thomas, J., concurring) (criticizing an overreliance on Madison and stating "the views of one man do not establish the original understanding

regarding the Free Exercise Clause, the Court has continued to rely heavily on[179] both Madison's and Jefferson's writings and actions. The Justices have described the former as "the leading architect of the religion clauses"[180] and "undoubtedly the most important architect" of the Bill of Rights in the House of Representatives.[181] And the latter was not only a leading theorist in matters of religious liberty and a prominent supporter of the Virginia religious statutes, he was also in constant communication with the drafters of the First Amendment, including Madison.[182] Finally, the Court has considered the proceedings in the First Congress and the ratification conventions, but many historians claim they are nearly useless because no real debate either occurred or was recorded.[183] The Court has clearly recognized that

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of the First Amendment"); Barton, *supra* note 175, at 210 (describing how forty-one of Madison's seventy-one proposals during the convention failed). Even Madison thought the Constitution "ought to be regarded as the work of many heads and hands." James Madison, Letter from James Madison to William Cogswell (March 10, 1834), *as reprinted in* Barton, *supra* note 175, at 210. Further, Madison only proposed the religion clause in his campaign against Monroe to win Baptist support. RICHARD E. LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 159–60 (2006); MEYERSON, *supra* note 104, at 161; STEVEN WALDMAN, FOUNDING FAITH: HOW OUR FOUNDING FATHERS FORGED A RADICAL NEW APPROACH TO RELIGIOUS LIBERTY 143 (Random House Trade Paperbacks ed. 2009). In fact, Madison's notes for his speech to introduce the Bill of Rights on the floor of the House of Representatives said: "Bill of Rights—useful—not essential." MEYERSON, *supra* note 104, at 161. Madison did eventually come to personally support Constitutional protections of religious liberty. Labunski, *supra*, at 160–61.

178. Jefferson's influence on the religion clause has been questioned because he was not a Framer, did not participate in the Constitutional Convention, and was not involved with the First Congress that adopted the First Amendment. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1584–85 (1989). *See also* Thomas Jefferson, Letter from Thomas Jefferson to Dr. Joseph Priestly (June 19, 1802), *as reprinted in* Barton, *supra* note 175, at 210 (admitting "I was in Europe when the Constitution was planned and never saw it till after it was established").

179. Hall, *supra* note 55, at 569, 580 (noting the Court cites Madison and Jefferson more than the other thirty-one Founders by a ratio of almost four-to-one and explaining that liberal justices, in particular, rely on them); REPORT TO ATT'Y GEN., *supra* note 44, at 2 (noting the Court has relied primarily on Madison and Jefferson in religion clause cases).

180. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 703 (2012) (quoting Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 143, 1446 (2011)).

181. *Wallace*, 472 U.S. at 97–98 (Rehnquist, J., dissenting).

182. MEYERSON, *supra* note 104, at 210.

183. **First Congress:** The First Amendment was initially proposed in the House of Representatives, but only one day of substantive debate about the religion clause in the House was recorded. MEYERSON, *supra* note 104, at 166. Also, the debate that did occur was "centered on establishment" issues, nor the Free Exercise Clause. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409, 1481

the above sources have some historical value, though, the ongoing disputes over their probity must inform any reliance placed on them.

D. The Application of the Bellotti Analysis in Mandate Cases

While all the courts referenced above[184] have applied the *Bellotti* analysis, their opinions have largely failed to thoroughly apply the historical prong of the analysis.[185]

1. The Third Circuit Majority's Narrow Focus on Jurisprudential History

Both the Third Circuit Court of Appeals' majority[186] and the dissent[187] applied the *Bellotti* analysis, but their applications of the analysis differed because the majority relied almost

(1990). The limited House report that exists is "incomplete and sometimes inaccurate." MEYERSON, *supra* note 104, at 166. Further, the House made its key changes to the wording of the Free Exercise Clause after debate ended and approved the new wording without any record of additional debate. McConnell, *supra*, at 1481. After the House passed a proposal, the Amendment was then debated in secret in the Senate. *Id.* at 1483. Therefore, the resulting Senate record is also "fragmentary." Adams & Emmerich, *supra* note 178, at 1580. The only information available about the Senate proceedings is what motions were passed and defeated. STEPHEN MANSFIELD, TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA AND WHAT'S HAPPENED SINCE 22 (2007). Even when the joint committee considered the Amendment, none of the debate was recorded. MEYERSON, *supra* note 104, at 166. *See also* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 376 (1996) (characterizing the records of debate in the First Congress as "cryptic" and "incomplete").

Ratification: The ratification proceedings provide "only limited evidence" about the religion clause. Adams & Emmerich, *supra* note 178, at 1581. The proceedings were "unilluminating" because most were quick, with little debate. McConnell, *supra*, at 1485. In fact, only Virginia produced a record of opposition. *Id.*

Both: *Flores*, 521 U.S. at 550 (O'Connor, J., dissenting) (noting "[n]either the First Congress nor the ratifying state legislatures debated the question of religious liberty in much detail"); *Korte*, 735 F.3d at 699 (Rovner, J., dissenting) (claiming the proceedings in the First Congress and the state legislatures provide no insight into the meaning of "religion" or "free exercise thereof").

184. *Infra*, Section III, Part B.

185. *Bellotti* directed courts to consider the "nature, *history* and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778 n.14 (emphasis added).

186. *Conestoga Wood*, 724 F.3d at 385 (quoting *Bellotti*, 435 U.S. at 778 n.14).

187. *Id.* at 400 (Jordan, J., dissenting) (quoting *Bellotti*, 435 U.S. at 778 n.14).

exclusively on jurisprudential history. In applying the *Bellotti* analysis, the Third Circuit majority explicitly framed the relevant inquiry as a consideration of *jurisprudential* history, rather than an analysis of free exercise history.[188] The court noted the Supreme Court's determination that the purpose of the Free Exercise Clause was to "secure religious liberty in the individual."[189] The court also claimed the free exercise right is, by its nature, "one of the more uniquely 'human' rights provided by the Constitution"[190] which cannot be exercised by a corporation.[191] Finally, the court noted for-profit corporate free exercise rights have not yet been recognized[192] and declined to extend the principle of *Citizens United*.[193]

In determining that the Free Exercise Clause did not cover for-profit corporations,[194] the Third Circuit cited seventeen cases, one appellant's brief, and no other sources.[195] The court failed to cite a single primary or secondary historical source to support its determination. This dearth of true historical scrutiny ignores the second prong of *Bellotti*'s nature, history, and purpose analysis.

188. *Id.* at 384 (majority opinion) (asserting that the court must examine "the history of the Free Exercise Clause" to "determine whether there is a . . . history of courts providing free exercise protection to corporations").

189. *Id.* at 385 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1962)) (internal quotation marks omitted).

190. *Id.* (quoting *Conestoga Wood*, 917 F. Supp. 2d at 408) (internal quotation marks omitted).

191. *Id.* (quoting *Hobby Lobby*, 870 F. Supp. 2d at 1291) (internal quotation marks omitted) (asserting corporations cannot "pray, worship, observe sacraments or take other religiously-motivated actions").

192. *Id.* at 384.

193. *Id.*

194. *Id.* at 385 (citing *Bellotti*, 435 U.S. at 778 n.14) (stating, "we are unable to determine that the 'nature, history, and purpose' of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under [the Free Exercise Clause]").

195. This section of the opinion starts at 383 with a quote from *Bellotti* and ends on 386 with the shift to the pass-through theory. *Id.* at 383–86.

2. The Tenth Circuit Majority's[196] *and the Third Circuit Dissent's Slightly More Historical Approaches*

Although the Tenth Circuit Court of Appeals' majority and the Third Circuit Court of Appeals' dissent engaged in a more thorough analysis of free exercise history—rather than a consideration of only jurisprudential history—their historical approaches were still deficient.

Judge Tymkovich's majority opinion for the Tenth Circuit began its historical analysis of the Free Exercise Clause by examining the Congressional debates regarding its adoption.[197] With the free exercise clause, Congress rejected narrow formulations limiting religious protections to "rights of conscience" in favor of the broad phrase "free exercise of religion."[198] By doing so, Congress clearly intended to extend the clause's protections to religiously motivated conduct outside houses of worship.[199] Only after this historical examination, Judge Tymkovich determined the Supreme Court's free exercise precedent was consistent with the historical inquiry.[200] Based on its *Bellotti* analysis, the court

196. There were five concurrences and dissents in *Hobby Lobby*. While none merit extensive discussion because they did not thoroughly address the constitutional issue, their basic points are discussed below.

Judge Hartz agreed that all corporations are protected by the Free Exercise Clause. *Hobby Lobby*, 723 F. 3d at 1147 (Hartz, J., concurring). Judge Hartz focused his corporate right's analysis on debunking the credibility of three propose distinctions—for-profit status, corporate form, and group nature. *Id.*

Judge Gorsuch agreed with the majority's corporate right's analysis and wrote only to address the claims brought by the Greens as individuals. *Id.* at 1152 (Gorsuch, J., concurring).

Judge Bacharach also agreed Hobby Lobby was a "person" under RFRA and wrote only to address the need for remand and the Green's claims as individuals. *Id.* at 1159 (Bacharach, J., concurring).

Judge Matheson resolved the case more on a burden of proof issue, asserting neither the majority nor the plaintiffs "marshaled the evidence or fully canvassed the scholarship" to make a convincing historical case. *Id.* at 1184 (Matheson, J., concurring in part and dissenting in part). Faced with insufficient evidence, Judge Matheson did not conduct his own *Bellotti* analysis or assert for-profit corporations were not protected by the Free Exercise Clause. Rather, he said he was "reluctant to hold" at this preliminary stage "that all, some, or no for-profit corporations are entitled to RFRA or Free Exercise Clause protection." *Id.*

Finally, Judge Briscoe did not address the corporate rights question as a matter of constitutional law. Rather, he used statutory interpretation to conclude Congress did not intend to cover for-profit corporations under RFRA. *Id.* at 1167–70 (Briscoe, C.J., concurring in part and dissenting in part).

197. *Id.* at 1134.

198. *Id.* (citing McConnell, *supra* note 183, at 1488).

199. *Id.* This distinction is key because for-profit corporations, while unable to worship, undoubtedly can engage in religious expressions. *Id.*

200. *Id.* at 1135.

then concluded for-profit corporations have free exercise rights.[201]

Similarly, Judge Jordan's dissent in the Third Circuit conceded there was no case law upholding corporate free exercise rights. However, he did not view this fact as dispositive.[202] Judge Jordan articulated the central purpose of the First Amendment as the complete separation of religion and government.[203] He then recognized that "believers have from time immemorial sought strength in numbers."[204] In fact, he even quoted the Bible as a long-standing example of theological teachings regarding group exercises of religion.[205] Finally, he noted the Free Exercise Clause, by its nature, is due equal or greater deference than other First Amendment rights because our Founders enumerated it as a special type of expression in the Constitution.[206] Through this more extensive analysis which was less reliant on case law, Judge Jordan also determined that for-profit corporations have free exercise rights.[207]

While the Tenth Circuit majority and Third Circuit dissent engaged in a more comprehensive analysis of history than the Third Circuit majority, their applications of *Bellotti* are still deficient. The Tenth Circuit majority[208] included several citations to two law review articles that analyzed the history of the Free Exercise Clause.[209] But outside of those two sources, the court only cited nine cases and the appellee's brief. Similarly, in applying the *Bellotti* analysis,[210] the Third Circuit dissent cited one historical source, the Bible.[211] However, the court failed to cite another primary or secondary historical source, instead relying on seven

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201. *Id.* at 1134 (quoting *Bellotti*, 435 U.S. at 778 n.14) (internal quotation marks omitted) ("the Free Exercise Clause is *not* a 'purely personal' guarantee[ ] . . . unavailable to corporations").

202. *Conestoga Wood*, 724 F.3d at 399 (Jordan, J., dissenting). Rather, Judge Jordan noted there was also no case law holding for-profit corporations did *not* have exercise free exercise rights. *Id.*

203. *Id.* at 401.

204. *Id.* at 400.

205. *Id.* at 401 (quoting *Matt.* 18:20) ("where two or three are gathered together in my name, there am I in the midst of them").

206. *Id.* at 401–02.

207. *Id.* at 400 (stating that "there is nothing about the 'nature, history, and purpose' of religious exercise that limits it to individuals").

208. The section applying *Bellotti*'s history-based analysis starts on 1133 with Part 2, Section b and ends on 1135 with the shift to discussing the Supreme Court's free exercise precedent. *Hobby Lobby*, 723 F. 3d at 1133–35.

209. The court cited McConnell, *supra* note 183, at 1488–90, several times and Lee Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 234 (2002), once. *Hobby Lobby*, 723 F. 3d at 1134.

210. This section of the opinion starts on 400 with a quote from *Bellotti* and ends on 402 with the shift to rebutting majority's arguments and discussing Supreme Court case law. *Conestoga Wood*, 724 F.3d at 400–02. (Jordan, J., dissenting).

211. *Id.* at 401 (quoting *Matthew* 18:20).

cases, the appellee's brief, the majority opinion, and statutes.[212] While the discussion of the Tenth Circuit majority and Third Circuit dissent more closely followed the dictates of *Bellotti*, their use of historical sources adheres to *Bellotti*'s framework more in form than substance.

3. The D.C. Circuit Majority's[213] *and Seventh Circuit Dissent's Comprehensive, but Potentially Irrelevant, Historical Analyses*

Judge Brown's majority opinion for the D.C. Circuit engaged in a more thorough historical analysis of the Free Exercise Clause than the Tenth Circuit majority and Third Circuit dissent. However, the D.C. Circuit majority also mirrored the Third Circuit majority because it treated jurisprudential history as dispositive.

Judge Brown first discussed the debate surrounding the adoption of the Free Exercise Clause and the various drafts circulated in and between the House of Representatives and the Senate.[214] In particular, the opinion noted the shift from protection of conscience to protection of free exercise.[215] Based on this historical analysis, Judge Brown concluded free exercise rights were broad and encompassed both individuals and religious bodies.[216] However, the majority then began discussing jurisprudential history and ultimately concluded no "*corpus juris* exists to suggest a free-exercise right for secular corporations."[217] At the end of the paragraph summarizing the body of law, Judge Brown declared: "[*t*]*hus*, the 'nature, history, and purpose' of the Free Exercise Clause . . . militat[es] against" free exercise rights for secular corporations.[218] Therefore, the majority opinion seems to treat this jurisprudential history, rather than the history of the Free Exercise Clause, as dispositive.

In determining the Free Exercise Clause did not protect for-

212. *Id.* at 400–02.

213. There were two partial concurrences and dissents in *Gilardi*. While none merit extensive discussion because they did not thoroughly address the constitutional issue, their basic points are discussed below.

Judge Randolph concurred in part and concurred in the judgment in *Gilardi*, 733 F.3d at 1224 (Randolph, J., concurring in part and concurring in the judgment), but he explicitly stated the court should not reach the corporate right's issue because doing so was unnecessary. *Id.*

Judge Edwards also filed a separate opinion concurring in part and dissenting in part. *Id.* at 1225 (Edwards, J., concurring in part and dissenting in part). Judge Edwards agreed with the majority that corporations did not have RFRA standing but disagreed with the majority's ruling on the individual RFRA claim. *Id.* at 1226.

214. *Id.* at 1212 (majority opinion).

215. *Id.*

216. *Id.*

217. *Id.* at 1213–14.

218. *Id.* at 1214 (emphasis added).

profit corporations,[219] the majority cited the Annals of Congress (three times), the Bible (one time), one law review article (five times), and one book (one time).[220] But Judge Brown cited significantly more case law; in fact, thirty-seven times he referred to twenty-eight unique cases.[221] Further, the opinion spent many more words discussing this jurisprudential history.[222] The only other cited sources were Appellant's Brief (one time), Brief of Catholic Theologians (twice) and the Brief of the Archdiocese of Cincinnati (one time).[223]

Judge Rovner's ninety-page dissent in the Seventh Circuit provided an even more thorough historical analysis than Judge Brown's majority opinion.[224] At the outset, Judge Rovner quoted extensively from *Bellotti* and criticized other courts for insufficiently analyzing the corporate right's issue.[225] Then, she characterized religious faith as "one of those purely personal constitutional rights the Court will not extend to for-profit secular corporations."[226] After a brief discussion about the Supreme Court's conception of religion, Judge Rovner spent many more words discussing the history of religion at the Founding.[227] Judge Rovner began by showing that both Madison and Jefferson conceived of religion as a personal matter.[228] She then turned to the religious protections embodied in nine state constitutions that "underpin" the Free Exercise Clause.[229] Judge Rovner closed by

219. Section IV applying *Bellotti*'s history-based analysis starts on 1212 and ends at 1215 when Section V begins.

220. *Id.* at 1212–15.

221. *Id.*

222. The discussion of the history of the Free Exercise clause occupies two paragraphs. *Id.* at 1212. The discussion of jurisprudential history occupies roughly eleven paragraphs. *Id.* at 1212–15.

223. *Id.*

224. Judge Rovner's lengthy opinion had many components. The section on corporate free exercise rights was roughly eight pages. *Korte*, 735 F.3d 698–705 (Rovner, J, dissenting). Of that, roughly three pages were devoted to *Bellotti* and historical analysis. *Id.* at 698–701.

In the corporate right's section, Judge Rovner discussed how corporations are distinct from their owners. *Id.* at 694–95. Before turning to *Bellotti*, she then addressed the Supreme Court's free exercise cases involving churches, arguing the Court never recognized the plaintiffs had their own free exercise rights distinct from their members. *Id.* at 696–98. After *Bellotti*, Judge Rovner described corporations as artificial entities and explained why a court may want to treat for-profit, secular corporations different than religious organizations. *Id.* at 701–02. Finally, Judge Rovner wrapped up some minor points by conceding the profit-nature of activities was not dispositive, discussing the role of the procedural posture of the case, and pointing out logical difficulties with the majority's holding. *Id.* at 702–05.

225. *Id.* at 698.

226. *Id.*

227. *Id.* at 698–701.

228. Judge Rovner quoted and discussed Madison's *Memorial and Remonstrance* and Jefferson's Letter to the Danbury Baptists. *Id.* at 698–99.

229. *Id.* at 699–700. According to Judge Rovner, New Hampshire,

discussing the writing and ratification of the First Amendment[230] and the trend away from state involvement.[231]

Judge Rovner clearly conducted a thorough historical analysis,[232] but it is not as clear how much weight the historical analysis had in her decision. Judge Rovner conceded religious organizations may have some free exercise rights.[233] However, her historical analysis never dealt with the distinction between religious and non-religious organizations.[234] Rather, she draws these clearly dispositive distinctions based on case law and logic in other portions of the opinion.[235] Finally, Judge Rovner closes her historical analysis by stating "[a]ll this reinforces what one would otherwise intuit about religion,"[236] apparently indicating that the same conclusion would be reached even without the historical analysis. Therefore, while Judge Rovner's analysis was exemplary, it remains unclear exactly how much influence history had on her ultimate decision.

4. An Example of Proper of Analysis

In *Beckwith*, Judge Kovachevich applied *Bellotti* in two sections of her opinion—one finding that corporations have their own free exercise rights,[237] and the other finding that closely held corporations can assert the free exercise rights of their owners under the pass-through instrumentality theory.[238] In the former

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Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, and Virginia all had provisions referencing how worship must be conducted in accord with one's own dictates. Also, Judge Rovner mentioned New York's and South Carolina's use of "liberty of conscience," again indicating that religious belief is individual, not collective.

230. Judge Rovner conceded the proceedings in the First Congress and state legislatures shed little light. *Id.* at 699. However, she did address the Senate's decision to drop the freedom of conscience language. *Id.* She argued that the Senate did so because they believed the language to be interchangeable with, rather than narrower than, "free exercise." *Id.* at 700.

231. Judge Rovner discussed both the growth in the number of religions in the colonies and sates and the gradual decline of state established churches. *Id.* at 700–01.

232. The *Bellotti* section of the opinion begins on 698 with a quote from *Bellotti* and ends at the start of page 701 when Judge Rovner states "[a]ll this reinforces[.]" In this section, Judge Rovner quoted from two statutes (two times) and fifteen cases (twenty-three times). However, Judge Rovner also cited two primary sources (two times) and referenced many more, including nine states constitutions. Further, she cited three law review articles (fourteen times) discussing the history of religious liberty.

233. *Id.* at 702.

234. Rather than differentiating between organizations, Judge Rovner focuses on whether religion is personal in nature. *Id.* at 701–03.

235. *Infra* note 224.

236. *Korte*, 735 F.3d at 701 (Rovner, J., dissenting).

237. *Beckwith*, 960 F. Supp. 2d 1338–40.

238. *Id.* at 1335.

section, the court did not rely on a comprehensive historical inquiry, but, instead, merely asserted that there is "no evidence" that the corporate personhood "distinction mattered to the Framers."[239] In the pass-through section, though, the court engaged in a detailed inquiry into the "nature, history, and purpose of the Free Exercise Clause and the role of corporations during the founding era[.]"[240] While this comment is not concerned with the legal aspects of the pass-through theory,[241] the historical analysis the court engaged in is also relevant to for-profit corporations' free exercise rights.

Judge Kovachevich first described the purpose and fundamental nature of the Free Exercise Clause, citing two cases and a law review article.[242] In the subsequent sentence, she cited eleven state constitutions to support her conclusion that the free exercise liberty predated the Constitutional Convention or ratification of the Bill of Rights.[243] Judge Kovachevich then relied on two law review articles and a treatise to describe why a party's corporate status was not determinative.[244] Before discussing precedent, the opinion engaged in one final historical analysis by examining the link between "religious tolerance" and "commercial prosperity in the early colonization of our nation."[245] In doing so, Judge Kovachevich not only quoted case law, but also cited Patrick Henry's *Religious Tolerance* and Alexander Hamilton's *Report on Manufactures*.[246]

Judge Kovachevich's historical analysis follows the dictate of *Bellotti* to consider not only the nature and purpose of the constitutional provision at issue, but also its history.[247] This type of detailed inquiry that incorporates primary and secondary historical texts—rather than simply case law or jurisprudential history—should be applied when deciding whether for-profit corporations have free exercise rights.

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239. *Id.* at 1339.

240. *Id.*

241. *See infra* note 20 (discussing the pass-through theory and distinguishing it from corporations having their own free exercise rights).

242. *Id.* at 1340.

243. *Id.* (citing the constitutions of New Hampshire, Massachusetts, South Carolina, New York, Vermont, North Carolina, Virginia, Delaware, Maryland, New Jersey, and Pennsylvania).

244. *Id.* at 1341 (citing Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 DUQ. L.REV. 683, 703 (2012); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1651 (1988); STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:3 (2013 ed.)).

245. *Id.* at 1342.

246. *Id.* (citing Patrick Henry, *Religious Tolerance*, Stokes 1:311–12 (1766); Alexander Hamilton, *Report on Manufactures*, Papers 10:253–54 (Dec. 5, 1791)).

247. *Bellotti*, 435 U.S. at 778 n.14.

IV. PROPOSAL

It "often is the case [that] a page of history is worth a volume of logic."[248]

In determining whether for-profit corporations have free exercise rights, *Bellotti* requires that courts analyze free exercise history.[249] In doing so in Mandate cases involving for-profit corporate plaintiffs, courts need not discuss all free exercise history. Such an undertaking would be impossible; books and law review articles spanning hundreds of pages have not even completely summarized free exercise history. Further, such an undertaking would be of little value because most free exercise history is unrelated to corporate rights. Therefore, courts should focus on narrow, highly relevant historical inquiries that cut to the heart of the question at issue.

In keeping with this approach, what follows are two proposed historical arguments courts should consider in the Mandate cases. Courts should, of course, conduct further historical analysis; but, if they accept both arguments, it is likely they will find for-profit corporations have free exercise rights.

A. A Presumption in Favor of Expansive Readings of the Free Exercise Clause

Both Madison and Jefferson believed religious liberty was an inalienable right over which the social contract conveyed no power. Madison believed religious liberty was grounded in nature, not the state,[250] and Jefferson asserted that religious liberty is "the *most* inalienable and sacred of all human rights."[251] In his "Memorial and Remonstrance," Madison explained that this inalienable right "is precedent both in . . . time and . . . obligation, to the claims of Civil Society." [252] Therefore, the "institution of Civil Society" did not "abridge" religious liberty because "Religion is wholly exempt from its cognizance."[253] Jefferson shared Madison's beliefs and thought the right to religious liberty was completely exempted from the social contract.[254]

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248. Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 NOTRE DAME L. REV. 123, 127 (2007) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)) (internal quotation marks omitted).

249. *Bellotti*, 435 U.S. at 778 n.14.

250. RICHARD BROOKHISER, JAMES MADISON 8 (2011).

251. Usman, *supra* note 248, at 126 (emphasis added).

252. *Flores*, 521 U.S. at 561 (O'Connor, J., dissenting).

253. *Id.*

254. Usman, *supra* note 248, at 142.

Madison's and Jefferson's beliefs about the social contract informed their views about the power of civil government over religion. For instance, Madison strenuously objected to George Mason's proposal in the Virginia legislature to protect religious liberty. Specifically, Madison thought the use of the word "toleration" conveyed the deeply flawed notion that there is a superior who allowed individuals to exercise their religion.[255] More generally, Madison believed every man had a right "to exercise [religion] as [his conviction and conscience] may dictate" because religion was a personal matter.[256] To subject religious liberty to social determinations would undermine the personal nature of this most fundamental right.[257] Similarly, Jefferson was deeply disturbed by the lack of protections for religious liberty in the Constitution[258] because he believed people were accountable to "God alone" in matters of religion.[259] Madison's and Jefferson's belief that religion trumped civil government was not unusual, but, rather, was exemplary of the other Founders' beliefs.[260]

Many states implicitly restricted governmental interference with religious liberty to limited, enumerated instances that involved the most essential state interests.[261] For example, New York and Maryland only allowed for government interference when acts rooted in religion threatened the public order or public morals.[262] Georgia, Massachusetts, and New Hampshire crafted even narrower limits, eliminating the public morals exception.[263]

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255. *Flores*, 521 U.S. at 555 (O'Connor, J., dissenting); BROOKHISER, *supra* note 250, at 23–24.

256. Witte, *supra* note 183, at 390 (quoting the writings of Madison).

257. WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM 85 (2003) [hereinafter "WILLIAM MILLER"] (discussing Madison's views).

258. CHARLES B. SANFORD, THE RELIGIOUS LIFE OF THOMAS JEFFERSON 32 (1984).

259. *Id.* at 23.

260. Usman, *supra* note 248, at 139, 141.

261. McConnell, *supra* note 183, at 1461–62 (explaining that nine states had peace or safety limits and four of those had licentiousness or immorality limits and describing the former limit as the "most common feature of the state provisions); REPORT TO ATT'Y GEN., *supra* note 46, at 9 (describing how the phrase "free exercise" granted an expansive right with which the government could interfere only when there were threats to public peace and safety or the rights of others).

262. New York Constitution (Apr. 20, 1777), *as reprinted in* THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN REVOLUTIONARY AMERICA: A HISTORY IN DOCUMENTS 46 (Matthew L. Harris & Thomas S. Kidd eds., 2012) (limiting government interference to "acts of licentiousness" or acts "inconsistent with the peace or safety of this State"); Maryland Constitution (Nov. 11, 1776), *as reprinted in id.* at 48. (limiting government interference to acts that disturb "the good order, peace or safety" or infringe "the laws of morality, or injure others").

263. Georgia Constitution of 1777, *as reprinted in* McConnell, *supra* note 183, at 1456–57 (restricting government interference to acts "repugnant to the peace and safety of the State"); Massachusetts Constitution of 1780, *as*

Admittedly, Virginia's Declaration of Rights did not include such limiting language.[264] However, both George Mason and James Madison fought for such enumerated limits.[265] Also, Virginia's Statute for Religious Freedom limited government interference to "overt acts against peace and good order."[266] In their own writings and speeches, prominent political leaders strongly endorsed the concept of limited governmental power over religion in enumerated instances.[267] Although some states continued to target minority religions, these religious liberty clauses reflected the widespread and rapid trend toward religious liberty for all[268] by focusing on the nature of the action, rather than the identity of the actor.[269]

Based on the preceding historical analysis, the Founders clearly conceived of religious liberty as a broad natural right over which civil governments had limited powers, preferably only in enumerated circumstances. Consequently, there should be a presumption in favor of expansive interpretations of the Free Exercise Clause that must be overcome by historical evidence to the contrary. It is also worth noting that all the enumerated circumstances in state constitutions discussed above looked to the

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reprinted in Harris & Kidd, *supra* note 262, at 54 (limiting government interference to acts that "disturb the public peace, or obstruct others in their religious worship"); New Hampshire Constitution of 1784, *as reprinted in* McConnell, *supra* note 183, at 1456–57 (limiting government interference to acts that "disturb the public peace, or disturb others").

264. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 22 (1978) (hypothesizing the legislators could not decide between George Mason's and James Madison's proposals).

265. MEYERSON, *supra* note 104, at 68–69 (describing Mason's first draft which limited government interference to acts that "disturb the peace, the happiness, or the safety of society" and Madison's proposal that drastically limited government interference to acts that "manifestly endangered" the "preservation of equal liberty and the existence of the State").

266. WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 36 (1976); William Miller, *supra* 258, at 57.

267. *See*, *e.g.*, James Madison, Letter from James Madison to Edward Livingston (Jul. 10 1822), *as reprinted in* 5 THE FOUNDERS' CONSTITUTION 105–06 (Philip B. Kurland & Ralph Lerner eds., 1987) (expressing Madison's pleasure that Livingston has adopted the view that religion is immune from governmental interference unless it trespasses on private rights or the public peace); Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), *as reprinted in* 4 THE FOUNDERS' CONSTITUTION 640 (explaining Oliver Ellsworth's, a First Amendment framer and Chief Justice of the United States Supreme Court, view that governmental interference should be limited to "gross immoralities and impieties"); *Flores*, 521 U.S at 563 (O'Connor, J., dissenting) (describing Isaac Backus's, a delegate to Massachusetts' ratifying convention, view that government interference should be limited to acts that "injured" another).

268. Usman, *supra* note 248, at 137.

269. The Court has adopted a similar rule in the Free Speech context. *See*, *e.g.*, *Citizens United*, 558 at 350, 364 (noting the First Amendment generally prohibits speech restrictions based on the speaker's identity, even if the speaker is a corporation).

nature of the act, not the *actor*. Therefore, this presumption should be strongest when government interferes with religious exercise based on the identity of the actor, rather than the type or effect of the act.

In Mandate cases, this presumption would clearly weigh in favor of extending religious protections to Hobby Lobby and other corporate plaintiffs. By definition, an interpretation of a right that expands protection to a new category of persons without shrinking the substantive contours makes the right broader. Further, the strong form of the presumption should apply because most opponents of an expansive interpretation focus on the nature of the actors, including their for-profit and corporate statuses. Even if the presumption applies, it is just that, a presumption. Thus, the historical record must still be analyzed to determine whether there is evidence capable of overcoming the presumption by showing that persons with such characteristics should be denied free exercise rights.

B. The Application of Religious Protections to Commercial Actors and Actions

Throughout America's early history, religion "penetrated all discourse, underlay all thought,"[270] and permeated every area of life.[271] Alexis De Tocqueville observed religion was "mingled with all the habits of the nation" and "hardly any human action" originates without some relation to religious beliefs.[272] The Founders also believed faith was central to how individuals behaved not only at home or in the town square, but also in the marketplace.[273] Some Founders even openly admitted[274] their belief that the impetus for[275] and well-being of[276] the new nation

270. Usman, *supra* note 248, at 139.

271. MANSFIELD, *supra* note 183, at 12.

272. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 6, 20 (Henry Reeve trans., Phillips Bradley ed., 1945).

273. GARY KOWALSKI, REVOLUTIONARY SPIRITS: THE ENLIGHTENED FAITH OF AMERICA'S FOUNDING FATHERS 7 (2008).

274. In their writings, the Founders cited the Bible (34% of total citations) more than any other source. Barton, *supra* note 175, at 231–32.

275. Fears among colonists about the loss of religious liberty—in particular, the imposition of Catholicism or High-Church Anglicanism—played a role in instigating the Revolutionary War. Harris & Kidd, *supra* note 262, at 59–63. Further, John Adams, along with many colonists, understood the conflict with Britain as "a contest between spiritual tyranny and spiritual liberty." THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION 15 (2010).

276. During the War of Independence, George Washington believed the religious dedication of the troops influenced their chances of victory. MEYERSON, *supra* note 104, at 84. Washington also believed deeply in religious liberty and condemned insults to Catholicism among the troops as "so monstrous, as not to be suffered, or excused." *Id.* at 83. In his drive for

were bound intimately with religious practice and religious liberty.

1. General Effect of Religion on Commerce

Furthermore, religion was widely understood to influence commerce.[277] At the most basic level, Washington queried: "Where is the security for property . . . if the sense of religious obligation desert[.]"[278] Adam Smith believed that religion improved the economy by increasing the efficient allocation of resources and providing extra-legal means of establishing trust.[279] Religious leaders also understood the link between religion and commerce as American preachers "constantly refer[ed] to the earth," making it "difficult to ascertain from their discourses whether the principal object of religion is to procure eternal felicity in the other world or prosperity in this."[280] Likewise, John Witherspoon understood

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religious freedom within the military, Washington ordered troops not to burn an effigy of the pope and, thereby, probably killed the practice throughout all the colonies. *Id.* at 83–84; KOWALSKI, *supra* note 273, at 81.

Benjamin Franklin, and other Framers, believed God blessed the Constitution. Harris & Kidd, *supra* note 262, at 16. During his First Inaugural Address, George Washington expressed a similar sentiment, declaring that "providential agency" had guided "[e]very step" of the fledgling nation. MEYERSON, *supra* note 104, at 183. Washington also told the Senate that "Heaven . . . has done so much for our infant Nation." *Id.* at 184.

Beyond divine intervention, most of the Founders believed strong religious devotion was essential to the political health of any nation because it regulated personal behavior. *See*, *e.g.*, A Resolution for True Religion and Good Morals (1778), *as reprinted in* Harris & Kidd, *supra* note 262, at 31 (stating "true religion and good morals are the only solid foundations of public liberty and happiness."); *see also* The Northwest Ordinance (1787), *as reprinted in* Harris & Kidd, *supra* note 262, at 38–39 (stating "Religion, Morality, and knowledge" are "necessary to good government and the happiness of mankind"); Massachusetts Constitution of 1780, *as reprinted in* Harris & Kidd, *supra* note 262, at 53–54 (stating "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality"); MANSFIELD, *supra* note 183, at 146 (reprinting James Madison's quotation that "[r]eligion is the basis and Foundation of Government"); *id.* at 145–46 (reprinting John Jay's statement that society cannot maintain order and freedom without religion); *id.* at 144 (reprinting John Adam's assertion that the "constitution was made only for a moral and religious people" and is "wholly inadequate to the government of any other").

277. *See*, *e.g.*, Massachusetts Constitution of 1780, *as reprinted in* Witte, *supra* note 182, at 387 (declaring "the public worship of God and instructions in piety, religion, and morality promote the . . . prosperity of a people.") *See also* Barton, *supra* note 175, at 326 (reprinting the statement of Abraham Baldwin, a signer of the Constitution, asserting "those who wish well to the national prosperity" should encourage religious devotion).

278. Bradley S. Tupi, *Religious Freedom and the First Amendment*, 45 DUQ. L. REV. 195, 201 (2007).

279. Marcus Noland, *Religion, Culture, and Economic Performance*, INST. FOR INT'L ECON. http://www.iie.com/publications/wp/03-8.pdf (last visited Nov. 11, 2013).

280. DE TOCQUEVILLE, *supra* note 272, at 126–27.

moral duties to include industry, hard work, and frugality.[281] De Tocqueville perceived that this widely understood link between religion and commerce was so strong that, if Americans became irreligious, they would probably "lose by degrees the art of producing [material objects]."[282]

Beyond religion generally, "history teaches us that religious tolerance was intended to, and in fact did, inspire commercial prosperity in the early colonization of our nation."[283] Patrick Henry noted that religious liberty "appears to me the best means of peopling our country" because many European immigrants were motivated by a desire to escape religious extremism.[284] Henry further claimed religion was the "best means" of "enabling our people to those necessarys [sic] among themselves."[285] Likewise, Alexander Hamilton also cautioned that many men would not come to the United States, or any nation, merely for the prospect of economic benefit.[286] However, manufacturers "would probably flock from Europe to the [U]nited [S]tates to pursue their own trades or professions" motivated by "the powerful invitations of . . . religious toleration[.]"[287] As a final personal example, John Leland, a Baptist minister active in Virginia politics, believed religious intolerance not only alienated religious groups but also inhibited economic prosperity.[288]

2. Pennsylvania as an Example of the Intersection Between Commerce and Religion

Pennsylvania, in particular, exemplified the direct connection between religious liberty and commerce. Pennsylvania was, like many colonies, formed for both religious and economic reasons.[289]

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281. KIDD, *supra* note 275, at 106.

282. DE TOCQUEVILLE, *supra* note 272, at 148.

283. *Beckwith*, 960 F. Supp. 2d at 1342. *See also* Brian J. Grim, George Clark & Robert Edward Snyder, *Is Religious Freedom Good for Business?: A Conceptual and Empirical*, 10 INTERDISCIPLINARY JOURNAL OF RESEARCH ON RELIGION, 1, 13 (2014), *available at* http://www.religjournal.com/pdf/ijrr 10004.pdf (stating "Indeed, a notable finding is that religious freedom—taken as the inverse of religious restrictions and hostilities—is one of only three variables that remains a significant predictor of GDP growth.").

284. Patrick Henry, *Religious Tolerance*, *as reprinted in* Kurland & Lerner, *supra* note 267, at 58.

285. *Id.*

286. Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *as reprinted in* Kurland & Lerner, *supra* note 267, at 95.

287. *Id.*

288. Adams & Emmerich, *supra* note 178, at 1575 n.66.

289. This notion of *Deus enim et proficum* ("For God and Profit") dates back to the eleventh century when it was written in the ledgers of Italian and Flemish merchants. Samuel Gregg, *Why Max Weber Was Wrong*, PUBLIC DISCOURSE (Dec. 11, 2013), http://www.thepublicdiscourse.com/2013/12/ 11099. Clearly, many of the early colonists considered themselves Christian, but they were also motivated by commercial purposes. Harris & Kidd, *supra*

William Penn intended Pennsylvania to be a "holy Experiment."[290] However, Penn was also deeply in debt in the early 1680s,[291] and was clearly motivated by economic interests as well,[292] stating, "[t]hough I desire to extend religious freedom, yet I want some recompense for my trouble."[293] Penn clearly articulated his dual religious and commercial goals in *The Great Case of Liberty of Conscience*, writing "[w]e are pleading only for such *Liberty of Conscience*, as preserves the nation in Peace, Trade and Commerce[.]"[294]

In struggling to populate Pennsylvania, Penn relied on the connection between religious liberty and economic prosperity. For example, his pamphlet advertisements encouraged Europeans to emigrate to his colony. Penn faced a difficult market for immigrants in the 1670s to 1680s because emigration from Britain to other colonies was declining sharply.[295] Further, Penn could not simply rely on fellow Quakers to populate Pennsylvania. England was relatively safe for Quakers and, therefore, did not provide as strong an impetus for mass Quaker emigration.[296] Within the colonies, there was competition for Quaker immigrants because both West New Jersey and East New Jersey were relatively friendly to their religion.[297] Finally, Penn never sold Pennsylvania as a natural paradise sure to produce sensational profits.[298] Instead, he targeted non-Quakers through his pamphlets,[299] using appeals to the availability of land and religious freedom to attract "productive people."[300]

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note 262, at 7. They were everything from gold hunters and London investors to pious pilgrims and intense Puritans. JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 37 (2006). Even the passengers on the Mayflower were not of one mind; rather, only forty passengers were members of the Pilgrim band while fourteen were servants and the rest were non-separatists recruited from the merchant company financing the voyage. KOWALSKI, *supra* note 275, at 3. This band of passengers had diverse motivations and sought both religious freedom and a better livelihood. MEACHAM, *supra* note 291, at 37.

290. DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 5 (2006).

291. Richard S. Dunn, *William Penn and the Selling of Pennsylvania, 1681–1685*, 127 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 322, 323 (1983) (explaining how Penn was more than 10,000 pounds in debt).

292. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 102 (2003); MCCRAW, *supra* note 103, at 246–47.

293. LAMBERT, *supra* note 292, at 103.

294. McConnell, *supra* note 183, at 1447.

295. Dunn, *supra* note 291, at 322.

296. *Id.*

297. *Id.*

298. *Id.* at 323.

299. *Id.*

300. LAMBERT, *supra* note 292, at 103. *See also id.* at 100, 109 (describing how Penn openly recruited sectarians and dissenters while advertising throughout the British Isles and Western Europe, including Quakers and Baptists in England and Wales, Huguenots in France, and Pietists and

Penn's endeavor was exceptionally successful, drawing numerous immigrants. Most of the immigrants to Pennsylvania were, like Penn, motivated by both religious and economic goals.[301] For instance, Gabriel Thomas, an early Pennsylvania settler who arrived in 1682, declared, "'[T]is [religious persecution] that knocks all Commerce on the head."[302] By conveying this dual message, Penn was able to generate more immigration than any other colony.[303]

Pennsylvania succeeded in protecting the religious liberty of its varied immigrants[304] even as other colonies engaged in religious persecution.[305] In fact, more religions were active in Pennsylvania than any other colony.[306] Pennsylvanians proudly boasted about their colony's religious freedom. For instance, Gabriel Thomas wrote "there is no Persecution for Religion" in the colony.[307] Similarly, William Bradford explained to Madison that Pennsylvania is "the land of freedom" and "[p]ersecution is a weed that grows not in our happy soil."[308] Pennsylvania became so "associated with religious liberty" among the colonies[309] that James Madison noted religious liberty "so strongly marks the People of [Pennsylvania.]"[310]

Pennsylvania's religious liberty, and related immigration, resulted in[311] "great prosperity"[312] and the colony became "the largest and most successful of the proprietary provinces."[313] Some immigrants became wealthy international traders in Philadelphia,

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Reformed groups in Germany).

301. *Id.* at 110.

302. *Id.*

303. Usman, *supra* note 248, at 136.

304. *Flores*, 521 U.S. at 550–51 (O'Connor, J., dissenting).

305. *See* Usman, *supra* note 248, at 131–34 (noting Virginia was the most intolerant colony; Maryland came to rival Virginia for its intolerance, and the New England Puritans replicated England's religious persecution).

306. HOLMES, *supra* note 290, at 5. *See also* Charles E. Shield III, *Chancellor Kent's Abridgment of Emerigon's Maritime Insurance*, 108 PENN. ST. L. REV. 1123, 1146 (2004) (noting Pennsylvania had the most religions of any colony).

307. LAMBERT, *supra* note 292, at 110.

308. William Bradford, Letter from William Bradford to James Madison (Mar. 4, 1774), *as reprinted in* Kurland & Lerner, *supra* note 268, at 60.

309. Usman, *supra* note 247, at 136.

310. James Madison, Letter from James Madison to William Bradford (Apr. 1, 1774), *as reprinted in* Kurland & Lerner, *supra* note 267, at 61 [hereinafter Madison Letter to Bradford].

311. The connection between Pennsylvania's religious freedom and economic prosperity may not have been a one-way street. Commerce broke down religious hard-liners and incentivized individuals to work with and respect people of different religions. LAMBERT, *supra* note 292, at 123–24. Further, religious leaders across the colonies, including Pennsylvania, adopted the popular communicative methods driving the consumer revolution in England to reach out to new audiences. *Id.* at 138.

312. Usman, *supra* note 247, at 136.

313. Shield, *supra* note 306, at 1145.

while others became prosperous farmers east of the Appalachian Mountains.[314] Philadelphia became the metropolis of the thirteen colonies with the leading seaport and largest population.[315] In fact, Philadelphia was the "most important city commercially, politically, and socially among the colonies."[316]

It is indisputable that our Founding Fathers took notice of Pennsylvania's religious liberty and economic success. For example, James Madison summarized Pennsylvania's religious liberty and economic prosperity in a letter to William Bradford.[317] Madison began by recognizing the causes of Pennsylvania's success—its religious and civil liberties.[318] He then noted the benefits of these liberties: "Foreigners have been encouraged to settle amg. you. Industry and Virtue have been promoted . . . [and] Commerce and the Arts have flourished[.]"[319] Madison closed by noting how the absence of religious freedom "shackles and debilitates the mind, and unfits it for every noble enterprise, every expanded prospect."[320] The other Founding Fathers clearly shared some of Madison's admiration for Pennsylvania because two Continental Congresses, the Constitutional Convention, the Supreme Court, and the federal government all sat in Philadelphia for a time between 1774 and 1800.[321]

In summary, a basic analysis of America's religious history reveals that the founders and colonists believed religion and religious liberty affected all aspects of life, including commerce. Further, several founders explicitly saw a direct link between religious liberty and commercial prosperity. This link is best exemplified by Pennsylvania, where William Penn and his colonists explicitly connected religious liberty and commercial prosperity. These facts strongly indicate that an action's or actor's commercial nature should not exempt it from religious protection. Thus, they support, rather than cut against, the presumption established in the preceding section. Indeed, the historical record demonstrates that even if there were no presumption in favor of expansive free exercise rights, commercial actors, such as Hobby Lobby, should still be protected.

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314. MCCRAW, *supra* note 103, at 246–47.

315. HOLMES, *supra* note 290, at 17; Shield, *supra* note 306, at 1146. Philadelphia was even the second largest city in the British Empire during the 1770s. HOLMES, *supra* note 290, at 17.

316. Shield, *supra* note 306, at 1146.

317. Madison Letter to Bradford, *supra* note 310.

318. *Id.*

319. *Id.*

320. *Id.*

321. Shield, *supra* note 306, at 1146.

V. CONCLUSION

In reaching the merits of for-profit corporate challenges to the Mandate, the Supreme Court did not decide whether the Free Exercise Clause protects such plaintiffs.[322] The circuit courts that discussed this issue in their Mandate rulings have split.[323] Thus, this question remains unanswered. Both *Bellotti* and religion clause jurisprudence require that this issue be largely decided by examining the history of the Free Exercise Clause. Case law is, by definition, not historical. And the Supreme Court itself has admitted the deficiency of its historical analyses over the years. Thus, in studying free exercise history, courts must look to primary and secondary historical sources.

This comment has provided additional guidance on the resolution of the Mandate controversy by making two history-based arguments. First, there should be a strong presumption against narrow interpretations of free exercise rights, particularly those that draw distinctions based on the actor, not the nature of the action. Second, religious actors and actions should not be denied protection based on their commercial nature. These premises are not dispositive, and courts may compile an historical record sufficient to either overcome the first presumption or find a non-commercial distinction supported by history. If courts do accept these two premises, though, they most likely should also recognize for-profit corporate free exercise rights.

322. *Infra*, Part I.
323. *Infra*, Part III.