Free Speech, Free Press, Free Religion? The Clash Between the Affordable Care Act and the For-Profit, Secular Corporation

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[1]

I. INTRODUCTION

United States Supreme Court Chief Justice John Marshall established the long accepted legal definition of a corporation when he stated that a "corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[2] Although the legal definition of a corporation explicates its nonhuman status, corporations are viewed as persons in the eyes of the Court.[3] Over time, corporations have slowly gained more and more constitutional protections.[4] Courts have awarded constitutional protections to corporations as long as those guarantees are not "purely personal."[5] If a constitutional provision's purpose, nature, and history indicate it is a purely personal guarantee, that provision is not applicable to corporations.[6] Additionally, constitutional protections can apply to corporations but not as fully as these protections do to individual persons.[7]

1. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *available at* http://founders.archives.gov/documents/Madison/01-08-02-0163, *archived at* http://perma.cc/TD97-Q989.

2. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (defining corporations legally).

3. *See* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (confirming corporations included as persons under Fourteenth Amendment).

4. *See* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) (listing constitutional provisions accorded to corporations over time); *see also* Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002) (dictating different constitutional rights given to corporations).

5. *See* United States v. White, 322 U.S. 694, 699 (1944). If a constitutional provision is purely personal, it does not apply to corporations. *See id.*; *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) (stating purely personal guarantees under Constitution do not extend to corporations), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

6. *See Conestoga Wood*, 724 F.3d at 384 (proposing this test as determinative of purely personal guarantee).

7. *See Pataki*, 292 F.3d at 347 (stating corporations' rights under Constitution without same breadth as those given to individuals).

A corporation's rights under the Constitution were first recognized in *Trustees of Dartmouth College v. Woodward*.[8] Corporations soon found protection under numerous constitutional amendments, including the Fifth Amendment's bar against double jeopardy in *United States v. Martin Linen Supply Co.*[9] and the Fourth Amendment's protection against unreasonable searches and seizures in *G.M. Leasing Corp. v. United States*.[10] The Court abided by its purely personal guideline, however, and prohibited the applicability of certain constitutional protections to corporations.[11] With specific regard to the First Amendment, corporations gained free speech protection in the landmark decision *Citizens United v. Federal Election Commission.*[12] Whether or not corporations are granted other First Amendment rights, however, remains unclear.[13]

Contention surrounding the applicability of all of the First Amendment's guarantees stemmed from the enactment of the Patient Protection and Affordable Care Act (ACA).[14] The ACA was enacted in March 2010 in an attempt to increase the number of Americans who have health insurance, while

8. 17 U.S. 518, 636 (1819) (defining purposes of corporations). Corporations were created to further the abilities of men. *See id.* The goals of a corporation are dictated according to the desires of the government. *See id*. Corporations' goals are to benefit the country in some way. *See id*.

9. 430 U.S. 564, 575 (1977) (finding corporations not subject to double jeopardy). The Supreme Court did not acknowledge the corporate identity in determining whether or not the Fifth Amendment's bar against double jeopardy applied. *See id*. Rather, the Court focused on the purpose of this Fifth Amendment guarantee as protecting against multiple trials, which if not applied to the corporation's situation, would unfairly result in multiple trials. *See id*. at 568-69.

10. 429 U.S. 338, 353 (1977) (allowing application of Fourth Amendment search and seizure to corporate entities). The Court focused its decision on the historical acceptance that a search of private property is unreasonable without consent or a valid search warrant. *See id*. at 352-53. Regardless of the corporate identity of the petitioner, private property was unreasonably searched and thus invalid. *See id*. 353-54.

11. *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65-66 (1974) (finding right to privacy not applicable to corporations); *see also* Wilson v. United States, 221 U.S. 361, 382 (1911) (determining corporations not protected against self-incrimination).

12. 558 U.S. 310, 365 (2010) (recognizing corporations' First Amendment free speech rights). The Supreme Court emphasized that, historically, there was no ban on corporations' free speech rights. *See id*. at 353. The Court also stated that a purpose of the First Amendment's free speech provision was to give individuals access to all channels available for communication with regard to elections. *See id.* at 349-50. Preventing corporations' free speech inhibits access to communication channels, and thus corporations must have free speech protections. *See id*.; *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 12-16 (1986) (deciding state's attempt to force corporation to transmit messages in billing envelopes violated First Amendment).

13. *Compare* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 384-85 (3d Cir. 2013) (stating corporations cannot assert claim under Free Exercise Clause of First Amendment), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133-34 (10th Cir. 2013) (determining corporations have protected rights under Free Exercise Clause of First Amendment), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

14. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 110 (D.D.C. 2012) (discussing ACA provisions and provisions' effect on corporations).

decreasing overall health care costs.[15] Under the ACA, a corporation with fifty or more full-time employees must provide its employees with minimal levels of health insurance, which include women's "preventive health services" covering abortifacient contraception coverage.[16] After its enactment, numerous corporations sought injunctive relief from this portion of the ACA, on the premise that it violated these corporations' religious beliefs, as protected by the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act (RFRA).[17] Thus, the Supreme Court was faced with the decision of whether it must extend religious freedom protections to for-profit, secular corporations.[18]

While the majority of courts faced with this issue were not persuaded to extend First Amendment or RFRA guarantees to corporations, the Supreme Court agreed with the few judges that have found merit in that proposition.[19] This Note argues that the Supreme Court erred in holding that the RFRA applies to for-profit, secular corporations because corporate purposes are not analogous to the purposes of either of the two provisions therein. Part II.A of this Note will explore the historical development of the corporation, in terms of its constitutional rights, and Part II.B will look specifically at the First Amendment.[20] Next, Part II.C will explain the ACA and its requirements on corporations.[21] Part II.D will look at how the circuit courts addressed these issues.[22] Next, Part III.A will then analyze how prior case law and corporate personhood theories should have barred the application of the RFRA to for-profit, secular corporations.[23] Part III.B will analyze the Supreme Court's decision in light of case law and corporate personhood theories.[24] Lastly, Part IV concludes by discussing the detriment of this decision on corporate power.[25]

15. *See* Korte v. U.S. Dep't of Health and Human Servs., 912 F. Supp. 2d 735, 737 (S.D. Ill. 2012) (describing general premise of ACA).

16. 26 U.S.C. § 5000A(f)(2) (2010); *see Conestoga Wood*, 724 F.3d at 400-02 (providing details of ACA provisions in relation to corporations).

17. 42 U.S.C. § 2000bb (1993); *see, e.g.*, *Conestoga Wood*, 724 F.3d at 382-89 (describing corporation's argument ACA violates its First Amendment rights); *Hobby Lobby*, 723 F.3d at 1129 (explaining corporation's position ACA violates its First Amendment guarantees); *Tyndale House Publishers*, 904 F. Supp. 2d at 110-11 (examining corporation's First Amendment rights in regards to ACA provisions).

18. *See Conestoga Wood*, 724 F.3d at 407-09 (evaluating corporation's free speech rights as applicable to corporations freedom of religion arguments).

19. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014); *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) (arguing corporation did have protected rights under First Amendment Free Exercise Clause), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

20. *See infra* Part II.A-B.

21. *See infra* Part II.C.

22. *See infra* Part II.D.

23. *See infra* Part III.A.

24. *See infra* Part III.B.

25. *See infra* Part IV.

II. HISTORY

A. The Legal Progression of the Corporation

Corporate personhood originated during the nineteenth century under the artificial person theory, also called the concession theory.[26] This theory viewed corporations as artificial beings that were created by the state after the state approved the corporation's charter.[27] Chief Justice Marshall embodied the main premise of this maxim in his description of a corporation in *Trustees of Dartmouth College v. Woodward*[28] stating, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[29] The primary purpose of the corporation under this theory was to serve the public good.[30] Although corporations did not receive protection from constitutional amendments under this model, *Woodward* proved corporations could find

26. *See* Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY U. CHI. L.J. 61, 67 (2005) (pinpointing artificial entity theory as corporate personhood concept at nation's founding). Corporate personhood theories were not novel to Americans during the country's founding because these theories were already developing in England. *See id.* The artificial theory of corporate personhood reigned for the first half of the nineteenth century. *See* Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP & FIN. L. 97, 106 (2009) (describing initial theory of corporate personhood); *see also* Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 916 (2011) (detailing beginning of artificial theory development).

27. *See* Ripken, *supra* note 26, at 107 (discussing corporation's dependence on state). Corporations only had the powers provided by the state, and the state could modify and even revoke corporate charters if it saw fit. *See* Krannich, *supra* note 26, at 68 (emphasizing state power over corporations). Corporations were thought of as government concessions; thus, this theory is called the concession theory as well. *See* 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, 218-19 (2011) (discussing origination of artificial identity theory).

28. 17 U.S. 518, 636 (1819) (considering whether state could unilaterally modify corporate charter).

29. *See id.* Marshall continues by dictating that the corporation is only a "creature of law" and owes its existence and powers to the state. *See id*. This case established the artificial entity theory and departed from British law in ruling that the state could not unilaterally amend a corporation's charter because it was a contract between the state and the corporation. *See* Krannich, *supra* note 26, at 159 (discussing premise of artificial entity theory and nexus of contracts model). While this case does highlight the corporation's existence as at the will of the state, it did ultimately allow corporations to be protected by the Contracts Clause in the Constitution. *See* Miller, *supra* note 26, at 916-17 (explaining ramifications of *Woodward* on corporate theory).

30. *See* Ripken, *supra* note 26, at 108 (stating main purpose of corporations to address social needs). States would grant charters to corporations so the corporations could serve a public function. *See id*. Charters were given to corporations when there did not seem to be an alternative for producing the community benefit. *See id*. Corporations were designed to serve the public and were created for this purpose and nothing else. *See* Krannich, *supra* note 26, at 67-68 (describing purpose of corporations as understood by artificial entity theory); *see also* A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 36 (1991) (emphasizing incorporations occurred only to serve public interest). The idea of corporations existing to facilitate the public interest remained the opinion of many jurists even into the twentieth century. *See* Hale v. Henkel, 201 U.S. 43, 74-75 (1906) (distinguishing corporations as entities created to benefit public); Wilson v. United States, 221 U.S. 361, 383 (1911) (defining corporations as product of states incorporated for public benefit). Due to this constraint, corporations were not very prevalent. *See* Krannich, *supra* note 26, at 68; *see also Woodward*, 17 U.S. at 637 (reiterating corporate purpose of promoting government wishes to benefit public).

solace within the Constitution generally.[31] This decision gave the corporation some power independent of the state and initiated corporate constitutional protection.[32]

Corporations' freedom from the state continued to grow in the second half of the nineteenth century.[33] During this time, another view of corporate personhood developed, known as the aggregate theory.[34] This theory focused on the individuals that comprised the corporation.[35] This philosophy concluded that the corporation could not be considered a separate entity, because the corporation could not exist or survive without the individuals within it.[36]

31. *See* 17 U.S. at 518 (providing corporations generally protected by Constitution). The Supreme Court determined that the state could not unilaterally modify a corporate charter the state had granted to a corporation. *See id.* at 637-38. The Court found its rationale within the Contract Clause of the Constitution. *See* Krannich, *supra* note 26, at 69 (discussing ruling in *Woodward*); *see also* Miller, *supra* note 26, at 916-17 (highlighting importance of *Woodward* case in corporate constitutional history).

32. *See* Krannich, *supra* note 26, at 70-71 (discussing *Woodward*'s role in establishing corporate theory which initiated corporate constitutional rights). This case sparked the expansion of corporate autonomy that would progress during the second half of the nineteenth century. *See id.* at 71.

33. *See* 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, 1044-45 (2013) (discussing why corporations should possess First Amendment freedom of religion protections). During the mid-nineteenth century, state incorporation statutes were instituted, eliminating state charters. *See id.* at 1045. The purpose of corporations as state vehicles for creating public benefits was slowly eroded, and the idea of the corporations belonging to the individuals who formed it began to develop. *See id.*; *see also* Ripken, *supra* note 27, at 221 (explaining idea of corporation existing as extension of its creators).

34. *See* Lepard, *supra* note 33, at 1045 (identifying second phase of corporate personhood as aggregate theory); *see also* Krannich, *supra* note 26, at 71-72 (discussing presence of aggregate theory of corporate personhood during nineteenth century); Ripken, *supra* note 26, at 110-11 (explaining development of aggregate theory because of recognition of human input).

35. *See* Ripken, *supra* note 27, at 220-21 (describing development of aggregate theory of corporate personhood). Corporations could not be formed without individuals taking the initiative to do so. *See id.* at 220. All corporate actions are conducted by the individuals within it and are therefore reflective of those individuals. *See id.* at 221; *see also* Lepard, *supra* note 33, at 1045 (emphasizing human action necessary in forming corporations).

36. *See* Lepard, *supra* note 33, at 1045 (highlighting recognition of entanglement of corporate members and their corporation). A corporation would not exist without human action and can only act through the actions of the individuals within it, and thus, the corporation cannot and does not exist as a separate entity from the people who comprise it. *See id.* This theory recognized the corporation as merely a "collection, or aggregate, of individuals" rather than a separate entity as under the artificial person theory. *See id.* at 1045; *see also* Ripken, *supra* note 27, at 221 (dictating premise of theory as rights of corporation are rights of people composing it). Corporations are "'owned, managed, and administered'" by those individuals in the corporation, and thus, it is illogical to view the corporation as a distinct entity, as it formerly was. *See* Ripken, *supra* note 27, at 221 (citation omitted). Additionally, the abandonment of needing a state-issued charter for corporate existence helped precipitate acceptance of this theory of corporate personhood. *See* Krannich, *supra* note 26, at 75. Krannich explains:

> Due to the general incorporation statutes, the corporate entity came to be seen "as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals." This made it difficult to ignore the individuals behind the corporate fiction. This concept of the corporate entity as a vessel for individual self-realization, coupled with the corporate bar's strong push for enhanced corporate rights, led to the adoption of the aggregate entity metaphor

Additionally, under the aggregate theory, individuals were thought to have created the corporation for their own mutual benefit, rather than for the benefit of the public.[37] The corporation was able to gain the protection of a constitutional amendment following this theory because the rights of the corporation were thought to be an extension of the rights of the people who comprised it.[38]

Corporations continued to gain constitutional protections as a third concept of corporate personhood developed in the twentieth century.[39] The real entity theory perpetuated the idea that the corporation was separate from both the state and the individuals that comprised the corporation.[40] Under the real entity theory, the corporation itself is an independent entity.[41] It has its own will and

in corporate and constitutional jurisprudence.

Id. at 75-76 (discussing ramifications of no longer needing state-issued charter for corporate establishment).

37. *See* Ripken, *supra* note 26, at 110 (defining theory as focusing on corporations serving corporate founders). Individuals came together to form corporations to facilitate their mutual benefit. *See id.* The aggregate theory differs principally from the artificial person theory by recognizing the existence of corporations to promote private interests instead of public interests. *See id.* at 111.

38. *See* Ripken, *supra* note 27, at 222-23. The Supreme Court again explained that a corporation is included in the definition of a person under the Fourteenth Amendment. *See id*.; *see also* Ripken, *supra* note 26, at 111. The Circuit Court for the District of California reasoned that it would be nonsensical if constitutional provisions intended to protect individuals ceased to offer those protections once the person becomes a member of a corporation. *See* Cnty. of San Mateo v. S. Pac. R.R. Co. (The Railroad Tax Cases), 13 F. 722, 744 (C.C.D. Cal. 1882) (emphasizing illogical nature of no longer protecting constitutional property rights of persons once incorporated).

39. *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 879 (1985) (confirming corporations' equal protection rights under Fourteenth Amendment); United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977) (establishing corporations' Fifth Amendment right against double jeopardy); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (dictating corporations' Fourth Amendment rights against unlawful searches and seizures). The Court has awarded the corporation these constitutional rights following the ideology behind the real entity theory of corporate personhood. *See* Ripken, *supra* note 26, at 116-17.

40. *See* Krannich, *supra* note 26, at 80 (discussing premises of real entity theory). As the twentieth century progressed, it was no longer feasible to view the corporation as an aggregate of individuals due to diffusing shareholder ownership and concentration of corporate power among top officials. *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 139-40 (2013) (rationalizing dissolution of aggregate theory of corporate personhood). The idea of corporations as entities separate from the people within these corporations illustrated a clear departure from corporate personhood under the aggregate theory. *See* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) ("Corporations are merely associations of individuals united for a special purpose."). The aggregate theory rested on the premise that individuals made up the corporation, which was, therefore, an extension of those individuals. *See* Krannich, *supra* note 26, at 78-80.

41. *See* Ripken, *supra* note 26, at 112 (describing real entity theory); *see also* Craig v. James, 71 A.D. 238, 241 (N.Y. App. Div. 1902) (reflecting view at turn of century of corporations as real entities). The corporation could no longer be seen as a mechanism of the individuals within it, and thus, the corporation logically was considered its own independent entity. *See* Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1067-68 (1994) (outlining evolution of corporate personhood). The real entity theory defines a corporation as a nonimaginary entity, in contrast to the artificial entity theory that governed corporate personhood at the turn of the nineteenth century. *See id*. The real entity theory also recognizes that corporations are not products of the law or state but exist independently. *See id.* at 1069. A corporation under this theory is "a full-fledged, living reality that exists as an objective fact and has a

goals free from those of each individual member.[42] In order to pursue and protect corporations' wills and goals, the Supreme Court awarded corporations numerous constitutional protections.[43] While courts have relied heavily on the real entity theory of corporate personhood to justify awarding corporations constitutional protections, courts have also utilized the other two theories when necessary to support their decisions.[44]

B. The Development of the Corporation with Regard to the First Amendment

Corporations have found protection under some provisions of the First

real personality in society." *See* Ripken, *supra* note 26, at 112.

42. *See* Lepard, *supra* note 33, at 1046 (discussing separation of corporate members from corporation). This further exemplified the idea of corporations being distinct from the corporations' members. *See id.* The corporation has a "collective consciousness" that is generated among the individuals but not reflective of any one individual's specific goals. *See* Ripken, *supra* note 26, at 114. The same is true of corporations' actions. *See id.* Under this theory, some view the corporation as analogous to an individual. *See id.* at 115.

43. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977) (finding corporations not subject to double jeopardy); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (allowing application of Fourth Amendment protection to corporate entities); Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (defining corporate rights). Even under the real entity theory of corporate personhood, however, there are some constitutional protections that do not extend to corporations. *See* United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950) (barring corporations from possessing right to privacy under Fourth and Fifth amendments). The Court reasoned that corporations do not have a right to privacy because corporations are naturally endowed with public attributes and derive corporate status from the public. *See id.* at 652. Law enforcement has an obligation to ensure that corporate behavior is consistent with public policy because of its impact on society. *See id.* at 652. Thus, an absolute right to privacy cannot exist. *See id.*; *see also* Wilson v. United States, 221 U.S. 361, 382 (1911) (deciding corporations do not have self-incrimination privilege). The Court stated that corporations could not enjoy the privilege against self-incrimination because it is assumed to exist for some public benefit. *See Wilson*, 221 U.S. at 383. As the Court explained in *Hale v. Henkel*:

> Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises has been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

201 U.S. 43, 74-75 (1906). A corporation's legal status and rights are dependent on its observance with the law. *See Wilson*, 221 U.S. at 383-84. Consequently, law enforcement has a right to ensure corporations obey the law and the privilege of self-incrimination would hinder investigation. *See id.* Thus, the Supreme Court is willing to refuse to apply a constitutional right to a corporation if it will be detrimental to the public good. *See id.*; *see also* Lepard, *supra* note 33, at 1045. The Supreme Court has acknowledged the need to separately establish and recognize corporate rights under the Constitution because corporations are independent from their individual members. *See* Lepard, *supra* note 33, at 1046; Miller, *supra* note 26, at 923 ("Real entity theory offers corporations the fullest protection under the Constitution.").

44. *See* Ripken, *supra* note 26, at 118 (explaining courts use of all three theories as needed). Courts have used any combination of the three theories to support an award of constitutional rights to a corporation. *See id.*

Amendment, most conspicuously the right to free speech.[45] Initially, the Supreme Court had little issue with granting corporations free speech rights under the First Amendment.[46] The Court stated that it was illogical to deny corporations free speech rights simply because of the existence of a corporate identity.[47] The Court reasoned that corporations needed this right protected because corporate free speech fosters the purpose of the First Amendment's freedom of speech provision.[48] In *First National Bank of Boston v. Bellotti*, the Court cemented the importance of a constitutional provision's *purpose* in determining its applicability to corporations.[49] The Court did not hesitate to

45. U.S. CONST. amend. I. The First Amendment states: "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." *Id.*; *see also* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 52-53 (2013) (acknowledging corporate free speech rights as significant in corporate constitutional protection efforts); Krannich, *supra* note 26, at 98 (recognizing Court's extension of First Amendment protections to corporations); Miller, *supra* note 26, at 910 (listing First Amendment rights awarded to corporations).

46. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43 (2010) (mentioning earlier holdings protecting corporate forms of political speech); Grosjean v. Am. Press Co., 297 U.S. 233, 244-49 (1936) (inferring corporations have free speech protections if furthering First Amendment purposes).

47. *See* First Nat'l. Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978) (finding no valid reason for speech losing protection solely based on corporate identity of speaker). The Court stated it could find neither constitutional justification nor court decisions to support barring speech simply because it comes from a corporate source. *See id.*; *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) (reiterating identity of speaker not decisive in determining free speech).

48. *See Bellotti*, 435 U.S. at 776-77 (explaining purpose of free speech provision while analogizing to corporate free speech purposes). The purpose of the First Amendment's free speech provision is to protect the liberty to discuss all public matters openly without fear of punishment by the government. *See* Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940). The Court expressed that the reason the Framers put this provision in the Constitution was to allow people to freely talk about the government without fear, and to produce a government fully reflective of the peoples' ideas and desires. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) (detailing purpose of First Amendment freedom of speech in regards to political expression). The Court considered this protection crucial to promote decision making and to prohibit the government from limiting the information available to individuals. *See Bellotti*, 435 U.S. at 776.

49. *See* 435 U.S. at 778 n.14 (distinguishing purely personal constitutional guarantees from those of corporations). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* This test has been used in subsequent cases as a guideline for determining the applicability of amendments to corporations. *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d. Cir. 2013) (outlining test to determine if First Amendment applicable to corporations), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). The purpose of the First Amendment's free speech provision was stated clearly in *Mills v. Alabama. See* 384 U.S. 214, 218 (1966). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *See id.* The Supreme Court in *Bellotti* relied heavily on this purpose as dictating the need to apply this protection to corporations. *See* 435 U.S. at 776-77.

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensible to decisionmaking in a democracy . . . . The inherent worth of the speech the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . .

Id. at 777.

find that protection of corporate free speech was necessary to facilitate the purpose of the Free Speech Clause, and thus, this provision applied to corporations.[50]

This consistent understanding among courts of the extension of free speech to corporations was abruptly challenged by the decision in *Austin v. Michigan Chamber of Commerce*.[51] The *Austin* Court upheld a state restriction on the independent expenditure of funds for political speech by corporations.[52] *Austin* presented a bifurcation in the view of whether or not corporations had free speech rights under the First Amendment.[53] For the next twenty years, restrictions on corporate expenditures for political speech remained valid, which conflicted with over a hundred years of precedent banning these types of restrictions.[54]

The precedent established by the *Austin* decision was later abandoned in the widely discussed *Citizens United* decision.[55] *Citizens United* overruled *Austin*, making it unconstitutional to restrict independent corporate expenditures because these restrictions violated corporations' First Amendment free speech rights.[56] *Citizens United* affirmed that corporations could possess First

50. *See Citizens United*, 558 U.S. at 346-47 (providing history of free speech guarantee given to corporations). The Court in *Bellotti* forbid denial of free speech rights simply based on the speaker's corporate identity. *See id.* at 347. This case affirmed the belief that corporations did, in fact, have free speech rights. *See id. But see* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668-69 (1990) (identifying government antidistortion interest in limiting corporate free speech in form of campaign contributions), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010).

51. 494 U.S. at 668-69 (deciding limits on corporate free speech in political realm justifiable). *But see* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (stating expenditure limitation violated First Amendment free speech rights). The Court reiterated that a corporation is a person under the Constitution, and thus, this limitation violated corporate rights along with individual rights to free speech. *See id.* at 39 n.45.

52. *See* 494 U.S. at 668 (stating state restriction on corporate expenditures legal). This decision reflected the idea that corporate expenditures in elections exert a large influence, and thus, must be regulated. *See* Ripken, *supra* note 26, at 225.

53. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010) (highlighting divide left by *Austin* decision); *see also* Daniel P. Ryan, *Citizens United, Austin, and the Unconstitutionality of MCL Section 169.254(1)*, 87 U. DET. MERCY L. REV. 445, 454 (2010) (discussing *Austin* decision as departure from norm). The *Austin* decision is regarded as "a constitutional anomaly." *See* Ryan, *supra*, at 454.

54. *See* Ryan, *supra* note 53, at 453-54 (noting misapplication of *Austin* reasoning used for twenty years).

55. *See Citizens United*, 558 U.S. at 363-65 (overruling *Austin* due to its misinterpretation of constitutional corporate freedoms). In *Citizens United*, a nonprofit corporation released a documentary criticizing a potential presidential nominee. *See id.* at 319. The corporation made television ads about the documentary's later release on cable television. *See id.* at 320. Anticipating its potential violation of a federal law prohibiting this type of independent expenditure, the corporation sought declaratory and injunctive relief. *See id.* at 321. The Supreme Court ruled that the federal law banning this type of independent expenditure violated the First Amendment's Free Speech Clause. *See id.* at 341. This decision squarely overruled *Austin* and discredited its antidistortion rationale for allowing a ban on corporate free speech. *See id*. at 349 (analyzing *Austin* reasoning). Although the Court in *Citizens United* had the chance to follow *Austin* precedent and affirm the limitation on free speech, it deliberately chose not to. *See* Ryan, *supra* note 53, at 453.

56. *See Citizens United*, 558 U.S. at 363 (declaring abandonment of *Austin* decision due to its unsound reasoning).

Amendment rights, reinstating a right historically held by individuals.[57]

Aside from freedom of speech, certain corporations and organizations have found protection under the First Amendment's right to freedom of religion.[58] The awarding of this protection hinges on the purpose of the First Amendment's Freedom of Religion Clause.[59] The purpose of this clause is to

57. *See id.* at 343 (reiterating corporate constitutional protections). The Supreme Court focused on the purpose of the provision and analyzed that in order to determine whether or not it was applicable to corporations. *See id.* at 339-56. The Court recognized speech as being, "an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *See id.* at 339. It relied on the purpose of the provision in applying it to corporations: "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *See id.* at 343.

58. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (granting religious organizations right to invoke First Amendment protection against laws hindering free religion). The Church of the Lukumi Babalu Aye was a nonprofit corporation practicing the Santeria religion. *See id.* at 526. In line with its religion, the corporation practiced animal sacrifices. *See id.* at 524-25. The city enacted ordinances banning this practice and the corporation sued. *See id.* at 527. The Supreme Court held that these ordinances violated the corporation's rights under the Free Exercise Clause. *See id.* at 524; Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987) (invoking First Amendment protection for nonprofit corporation). The appellee in *Amos* was discharged from the gym he worked at, which was operated by The Church of Jesus Christ of the Latter-Day Saints, because he did not qualify for a certificate stating he was a member of the Church. *See Amos*, 483 U.S. at 330. He sued claiming religious discrimination. *See id.* at 331. The Supreme Court, however, said the Establishment Clause allowed this because it was permitting the exercise of religion by an entity whose purpose was to follow that religion. *See id.* at 334-38. *But see* United States v. Lee, 455 U.S. 252, 257 (1982) (emphasizing burdens on free exercise rights not automatically unconstitutional). Lee was an Amish follower who owned a business. *See id.* at 254. He did not follow the social security tax regulations because these regulations violated his religious beliefs. *See id.* at 254-55. The Supreme Court ruled that Lee had to abide by the regulations because it was in the best interest of the public; further, it would be against the public interest if he did not "[b]ecause the social security system is nationwide, the governmental interest is apparent. . . . This mandatory participation is indispensable to the fiscal vitality of the social security system." *See id.* at 258. The Supreme Court concluded by reiterating the role of public interest in its decision "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *See id.* at 260.

59. *See* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (dictating purely personal constitutional guarantees not protected for corporations). The Court specified purely personal guarantees that corporations could not possess under the Constitution because these guarantees apply only to individuals. *See id.* Whether or not a guarantee is purely personal depends on "the nature, history, and purpose of the particular constitutional provision." *See id.* The analysis in *Bellotti*, however, hinges on the purpose of the constitutional provision in determining whether it is applicable to the corporation. *See id.* at 777-89. Awarding corporations this right furthers the public interest because the purpose of free speech protection is to facilitate free discussion of government affairs. *See id.* at 777. Consequently, the protection should be granted to corporations. *See id.*; *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) (determining free speech must prevail due to its purpose as mechanism of democracy). The Court in *Citizens United* relied mostly on the purpose of the free speech provision as grounds for its corporate application. *See id.* 558 U.S. at 339-59. Even the Court's historical analysis emphasizes the purpose of the First Amendment and the need to protect this purpose. *See id.*; *see also Lee*, 455 U.S. at 257 (discussing need of government to limit religious liberty for overriding purpose). While the *Lee* Court acknowledged the burden both the payment and receipt of social security benefits put on the Amish faith, the Court determined it was permissible to compel those of Amish faith to abide by social security requirements because the payment of these taxes did "not threaten the integrity of the Amish religious belief or observance." *See Lee*, 455 U.S. at 257. Furthermore, the law was not unconstitutional merely because a law burdened the exercise of religion. *See id.* The Court reasoned that

prevent any burdening of the exercise of religion.[60] Specifically, this clause was enacted to prevent the government from intermeddling with the religious activity of individuals.[61] Courts have allowed religious organizations to invoke First Amendment protection because the purpose of such religious entities is to facilitate individuals' religious practices.[62] Additionally, the Supreme Court has found that nonprofit corporations can also invoke this protection if they are operated for religious purposes.[63]

The recent issue facing the courts was whether or not a for-profit, secular corporation could find protection under the First Amendment's freedom of religion provision.[64] Similarly, the courts also considered whether these

mandatory participation in the social security system facilitated a public good and eliminating this mandatory participation would hinder public interest. *See id.* at 258. The Court would not condone noncompliance with the social security system by religious organizations due to the deleterious effect it would have on the public. *See id.* at 260-61.

60. *See* Colombo, *supra* note 45, at 28-33 (detailing history behind purpose of First Amendment Freedom of Religion Clause). The reason for the creation of the freedom of religion provision stemmed from the religious turmoil and persecution experienced in England. *See id.* at 28. The Framers did not want to perpetuate this standard but rather hoped to avoid religious dominance and allow individuals the ability to freely hold their own religious beliefs. *See id.* at 28-29. Those in minority religious groups were the strongest proponents of this because they wanted the freedom to believe what they wished, regardless of whether or not it was the norm. *See id.* at 30; *see also* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 49 DUQ. L. REV. 181, 211-18 (2002) (providing history of religious strife). The religious persecution experienced in England largely motivated the creation of a government that could not infringe individuals' religious belief. See Strang, *supra*, at 211-18. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (providing detailed history of religious backdrop to First Amendment right to religion).

61. *See* Colombo, *supra* note 45, at 31-37 (prefacing creation of First Amendment freedom of religion protection). The ultimate purpose of the First Amendment freedom of religion guarantee is to protect an individual's religious beliefs from government intrusion. *See id.*; *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 228 (1963) (defining purpose of First Amendment freedom of religion right). The purpose of the First Amendment is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *See Schempp*, 374 U.S. at 223. This is regarded as the definitive purpose of the First Amendment's Free Exercise Clause. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) (citing to *Schempp* as authority on purpose of First Amendment Free Exercise Clause), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

62. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (stating religious organizations can seek protection from employment discrimination laws under First Amendment). Punishing a church for failing to accept or retain a minister, for example, would make employment discrimination laws unconstitutional as applied to religious organizations in such circumstances. *See id.*; *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (granting religious organizations right to invoke First Amendment protection against neutral laws with adverse impacts); Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'the exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts[.]"); Letter from Thomas Jefferson to the Rev. Samuel Muller (Jan. 23, 1805), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, 428-30 (Albert Bergh ed., 1907) (stating fasting and prayer as religious exercises).

63. *See Amos*, 483 U.S. at 339 (allowing First Amendment protection for nonprofit corporation).

64. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013); *Conestoga Wood*, 724 F.3d 377; Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013);

corporations could seek refuge in the RFRA.[65] The RFRA was created to protect religious exercise by restricting laws from substantially burdening it.[66] In addition to seeking protection under the First Amendment, corporations are claiming religious protections under the RFRA.[67]

C. The Patient Protection and Affordable Care Act and the First Amendment

Congress passed the Patient Protection and Affordable Care Act in 2010 to improve the health care system and provide access to health care for the American people.[68] The ACA, promulgated by President Barack Obama, set out to reform the health care system and its failures in order to adequately serve Americans.[69] In efforts to create a greater quality of care, the ACA contains a provision stating that employment-based group health plans must provide certain preventive services to its participants.[70] The Department of Health and Human Services (HHS) asked the Institute of Medicine to recommend services that should be considered preventive and consequently mandatory.[71] The Institute's recommendation included coverage for "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity . . . .'"[72] HHS adopted this recommendation, thereby requiring employment-based group health plans to cover contraceptive methods.[73] These contraceptive methods include emergency contraceptives,

Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 917 F. Supp. 2d 394 (E.D. Pa. 2013), *rev'd*, No. 13-1144, 2014 WL 4467879 (3d Cir. Aug. 5, 2014); Grote Indus. LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012); Tyndale House Publishers v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012).

65. *See supra* note 64 (listing cases in which for-profit secular corporations seek protection from RFRA).

66. *See Autocam Corp.*, 730 F.3d at 625 (outlining purposes of RFRA).

67. *See supra* note 64 (providing cases which seek for RFRA application to for-profit, secular corporations).

68. *See* Lepard, *supra* note 33, at 1049 (outlining purpose of ACA and its provisions).

69. *See* Michael Barone, Jr., Comment, *Delegation and the Destruction of American Liberties: The Affordable Care Act and the Contraception Mandate*, 29 TOURO L. REV. 795, 797 (2013) (discussing reasons for ACA enactment). Some of the failures of the former American health care system include high costs, low coverage, insurance denial, and high taxes to support Medicare and Medicaid. *See id.*

70. *See* 42 U.S.C. § 300gg-13(a)(4) (2014).

71. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 (10th Cir. 2013) (explaining formulation of guidelines in regards to women's health), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

72. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under Patient Protection and the Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (alterations in original) (describing guidelines for coverage).

73. *See Hobby Lobby Stores*, 723 F.3d at 1123 (explaining purpose of provision). This provision of the ACA was enacted with the purpose of helping women stay in school, maintain employment, and contribute to society in a more meaningful way through prevention of unwanted pregnancies. *See* Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 548-49 (7th Cir. 2014) (discussing reasons for provision's enactment and its impact on women).

which function by preventing the implementation of a fertilized egg.[74] A few entities were initially exempt from these provisions, such as religious institutions and religious employers.[75]

While there is an exemption for religious institutions and employers, no such exemption exists for religious groups or individuals operating corporations.[76] For example, for-profit, secular corporations that operate around religious ideals and principles are not exempt from this mandate.[77] These corporations must include preventive services in corporate health care plans or face monetary penalties.[78] Consequently, many for-profit, secular corporations challenged the mandate, arguing that abiding by the mandate goes against these corporations' religious beliefs and violates these corporations' First Amendment right to freedom of religion and rights under the RFRA.[79]

D. How Circuit Courts in Hobby Lobby *and* Conestoga Wood *Addressed the ACA Issue Compared to the Supreme Court*

The decisions in *Hobby Lobby* and *Conestoga Wood* resulted in a circuit split surrounding the ACA's applicability to for-profit, secular corporations that adhere to religious beliefs.[80] The Tenth Circuit was the first to address the issue in *Hobby Lobby*.[81] Hobby Lobby is a secular, for-profit corporation owned and operated by a close-knit family known as the Greens.[82] The Greens formed and now operate the corporation in compliance with their Christian values.[83] Under the ACA, however, the Greens must provide health coverage

74. *See Hobby Lobby Stores*, 723 F.3d at 1123 (describing contraceptive methods).

75. 45 C.F.R. § 147.130(a) (2011). Under this exemption, a religious employer must meet criteria consisting of: "(1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization . . . ." 45 C.F.R. § 147.130(a)(1)(iv)(B) (2011).

76. *See* Barone, *supra* note 69, at 798 (describing limitations of religious exemption).

77. *See* Lepard, *supra* note 33, at 1051 (discussing nonexempt, disgruntled for-profit groups).

78. *See id.* (explaining position of religious for-profit groups in light of provision).

79. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); MK Chambers Co. v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013); Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 917 F. Supp. 2d 394 (E.D. Pa. 2013); Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012).

80. *Compare Conestoga Wood*, 724 F.3d at 389 (rejecting idea of for-profit secular corporations having religious beliefs), *with Hobby Lobby*, 723 F.3d at 1137-38 (holding for-profit secular corporations could have religious beliefs violated by ACA provisions).

81. *See Hobby Lobby*, 723 F.3d at 1120.

82. *See id.* at 1122 (providing background about corporation).

83. *See id.* (discussing religious principles guiding corporation). The religious undertones of the corporation can be found in the corporation's statement of purpose as well as in the procedures of the company,

to their employees that include contraceptive services, and if they fail to do so, they face steep penalties.[84] The Greens refused to provide health plans that cover contraceptives that prevent the implantation of a fertilized egg because use of such contraceptives is against their religious beliefs.[85] The Greens filed suit claiming that the ACA's provisions violated their corporation's rights under the RFRA and the Free Exercise Clause of the First Amendment.[86] The district court denied the Greens' claims and the Greens appealed.[87]

The Tenth Circuit Court reasoned that a corporation could seek refuge under the RFRA and the Free Exercise Clause of the First Amendment.[88] According to the court, the main obstacle in applying the RFRA to the corporation was that the RFRA's text offers protections to a "person."[89] The court subsequently invalidated this argument because both the plain language of the RFRA and case law classify a corporation as a person in reference to the Constitution, regardless of the corporation's profit status.[90]

Next, the court identified an obstacle in applying the Free Exercise Clause to corporations: the idea that it only pertained to individual persons.[91] The court reasoned this constitutional provision was not purely personal because, historically, courts have applied it to associations.[92] Also, the court highlighted

such as the corporation's adherence to Sunday as a day of rest. *See id.*

84. *See id.* at 1124-25 (stating new requirements for corporation under ACA). Hobby Lobby had no protection under the ACA for noncompliance because it did not fall under any sort of exception. *See id.*

85. *See Hobby Lobby*, 723 F.3d at 1125 (discussing Greens' objection to compliance with ACA). According to the Greens' religious beliefs, human life begins at conception. *See id.* Contraceptives that stop a fertilized egg from implanting, such as Plan B, are abortive and contrary to their Christian beliefs. *See id.*

86. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120-21 (10th Cir. 2013) (defining Greens' claims), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

87. *See id.*; *see also* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

88. *See Hobby Lobby*, 723 F.3d at 1129 (holding corporations could find protection under RFRA and Free Exercise Clause).

89. *See id.* (discussing main opposing argument of corporation not qualifying as person protected by RFRA).

90. *See id.* at 1129-32 (explaining rationale for including corporations in person definition during RFRA application). First, the court determined the plain meaning of the word "person" as defined by the Dictionary Act, which stated that "person" includes corporations. *See id.* at 1129 (citing Dictionary Act, 1 U.S.C. §1 (2012)). The court emphasized the lack of a for-profit corporation exclusion from the plain meaning definition. *See id.* at 1130 (reasoning Congress's decision to leave out exemption shows intent for RFRA to apply to for-profits). In regard to case law, the court found no case law persuasive to bar application of these religious provisions to for-profit corporations. *See id.* at 1132 (concluding "none of these cases say anything about what Congress intended in RFRA.").

91. *See id.* at 1133 (discussing issues raised with applying Free Exercise Clause to corporations). The government argued that the text of the First Amendment distinguished between nonprofit and for-profit corporations and this distinction governs the applicability of the RFRA. *See id.* The court disagreed and expressed the idea that corporations could find protection under the Free Exercise Clause. *See id.*

92. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133-34 (10th Cir. 2013) (discussing historical tendency to award associations free exercise rights), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). The court noted that, historically, these provisions were given to associations, insinuating such provisions thereby applied to corporations, because corporations are associations of people.

the illogical nature of the Free Exercise Clause's inapplicability to for-profit corporations, while sometimes applying to nonprofits and other business entities.[93] Additionally, the court reasoned that the term "exercise" was used to "extend beyond the walls" of a religious institution and protect religious conduct and belief.[94] According to the Tenth Circuit, the Greens had the right to contest the ACA's provisions for burdening their corporation's RFRA and Free Exercise Clause rights.[95]

The Third Circuit took the opposite position in *Conestoga Wood*.[96] In *Conestoga Wood*, the Hahn family owned a for-profit, secular corporation with 950 employees.[97] The Hahns are practicing Mennonites and follow a Christian-based religion that believes anything used to terminate a fertilized embryo is sinful.[98] The Hahns felt the ACA provision obligating their corporation to pay for health plans that provide such services to their employees violated their corporation's rights under the RFRA and First Amendment Free Exercise Clause because of their beliefs.[99]

The Third Circuit first addressed the Hahns' First Amendment claim, analyzing whether a corporation can exercise religion so as to fall under the protection of the Free Exercise Clause.[100] The Hahns argued that the Free Exercise Clause applied because of the *Citizens United* decision and if not, the

See id. at 1133 (noting Supreme Court's lack of distinction between corporations and associations).

93. *See Hobby Lobby*, 723 F.3d at 1133-34 (highlighting various times Free Exercise Clause has applied beyond individuals). This clause has applied to individuals with respect to their for-profit businesses and to religious organizations; thus, it is illogical not to apply it to the Greens' corporation because of its status as a corporation or for-profit business. *See id.* *But see* United States v. Lee, 455 U.S. 252, 258 (1982) (holding Amish man had to pay taxes as employer despite religious beliefs). The Supreme Court in *Lee* recognized Lee's right to run his for-profit business according to his religious beliefs, but it ultimately held that he must pay social security taxes—even though the taxes were contrary to his religion—because the good of the public was more important. *See id.* at 258-61.

94. *See Hobby Lobby*, 723 F.3d at 1134 (determining irrelevance of corporations not literally able to exercise religion). "Congress chose *exercise*, indicating that, as the Supreme Court has frequently held, the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct*, as well as religious belief." *Id.* (citing McConnell, *supra* note 60, at 1488-89).

95. *See id.* at 1121 (holding corporations can find protection under RFRA or Free Exercise Clause).

96. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013) (finding for-profit secular corporations could not have religious beliefs violated by ACA provisions), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). The Third Circuit agreed with the district court in ruling that the Free Exercise Clause and the RFRA were not applicable to for-profit, secular corporations. *See id.*; *see also* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407-08, 419 (E.D. Pa. 2013), *rev'd*, No. 13-1144, 2014 WL 4467879 (Aug. 5, 2014). The lower court found the application of these provisions to a corporation contrary to the corporation's purpose, historical understanding, and nature. *See Conestoga Wood*, 917 F. Supp. at 407-09. The lower court pointed out the illogical nature of applying these provisions in such a way. *See id.*

97. *See Conestoga Wood*, 724 F.3d at 381 (identifying Hahns' corporation).

98. *See id.* (describing beliefs of Hahn family).

99. *See id.* (outlining Hahns' complaint). While on appeal to the Third Circuit, the corporation complied with the ACA guidelines but sought an injunction to avoid compliance as well as the resulting penalty. *See id.*

100. *See id.* at 382-83 (evaluating First Amendment claim).

clause applied because of a Ninth Circuit principle.[101] The Third Circuit interpreted *Citizens United* as requiring a mainly historical analysis to determine whether or not a constitutional provision is purely personal.[102] Following *Citizens United*, the court decided that the Free Exercise Clause could not apply to corporations because there was no history of such application.[103] The court also found the Ninth Circuit's "passed through" principle—allowing corporations to assert the free exercise claims of its owners—was not applicable because the principle is contrary to the nature of a corporation, which is a distinct legal entity separate from its owners.[104]

Next, the court evaluated the Hahns' RFRA claim.[105] The Third Circuit reasoned that a corporation is not protected by the RFRA because a corporation cannot exercise religion, as determined through the court's Free Exercise Clause analysis.[106] In its conclusion, the court surmised that recognizing a for-profit, secular corporation's participation in religious exercise would be completely contrary to the principle that a corporation is distinct from its creators.[107] Thus, the Third Circuit disagreed with the Tenth Circuit's analysis, leading to a circuit split over whether a corporation has rights under the RFRA and the Free Exercise Clause of the First Amendment.[108] The Supreme Court ended this split with its decision, ultimately deciding for-profit, secular corporations are protected under the RFRA.[109]

101. *See Conestoga Wood*, 724 F.3d at 383 (discussing arguments for First Amendment application).

102. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383-84 (3d Cir. 2013) (applying reasoning of *Citizens United*), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). Although the Supreme Court in *Citizens United* stated that determining whether a constitutional provision is purely personal depends on the provision's history, purpose, and nature, the court in *Conestoga Wood* interpreted *Citizens United* as mainly focusing on the application of the Free Exercise Clause based on history. *See id.*

103. *See id.* at 384 (determining *Citizens United* not applicable). After considering the lack of history of the First Amendment's application to corporations, the court moved on to discuss the purpose of the Free Exercise Clause. *See id.* at 385.

104. *See id.* at 387 (deciding Ninth Circuit reasoning not applicable). The court deemed it illogical to say that a corporation is an instrument for its owners to express their own views because the nature of a corporation is the creation of a legally distinct entity, separate from those that incorporate it. *See id.* "It is a fundamental principle that 'incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created' the corporation." *See id.* (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)). The court emphasized that the ACA required the corporation to do something, as distinct from the Hahns, who did not have to do anything. *See id.* at 388. Thus, the Third Circuit found the Hahns' free exercise argument unconvincing. *See id.*

105. *See id.* at 388.

106. *See Conestoga Wood*, 724 F.3d at 388 (holding corporation has no RFRA claim). The court looked to the plain language of the RFRA, which restricts its application to only a "person's exercise of religion." *See id.* (quoting 42 U.S.C. § 2000bb-1(a) (2014)).

107. *See id.* at 388 (concluding corporation has no rights under RFRA or First Amendment Free Exercise Clause).

108. *See supra* note 80.

109. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (determining RFRA applied to for-profit, secular corporations).

The Supreme Court held the RFRA applied to for-profit, secular corporations because under the RFRA corporations are persons that can exercise religion.[110] The Court first provided historical background on the RFRA and stated that the RFRA encompassed both a separation from the Free Exercise Clause and the modified definition of the phrase "exercise of religion" that was determined by the Religious Land Use and Institutionalized Persons Act (RLUIPA).[111] After describing the ACA and the relevant mandate, as well as the situation of the Hahns and the Greens, the Court moved into its analysis, concluding that corporations were persons under the RFRA and could seek its protection.[112] The Court next analyzed whether the contraceptive mandate substantially burdened the exercise of religion because of the RFRA's applicability.[113] The Court concluded that the ACA substantially burdened the corporations by imposing large fees on noncomplying corporations.[114] While the Court conceded that the governmental interests could be considered compelling, the mandate was not the least restrictive means of accomplishing those interests.[115] The Supreme Court concluded that the contraceptive mandate of the ACA violated the religious rights of for-profit, secular corporations.[116]

III. ANALYSIS

A. Case Law Analyzing Whether the Free Exercise Clause, the RFRA, and Corporate Personhood Theories Prevent Extension of Religious Protection to Corporations

1. Applicability of the Free Exercise Clause and the RFRA to Corporations Centers on the Purposes of Both Provisions

Citizens United has served as a model for judges in evaluating the Free

110. *See id.* at 2768-70 (outlining RFRA's application to for-profit, secular corporations).

111. *See id.* at 2761-62 (tying RFRA to RLUIPA). Under RLUIPA, the RFRA no longer was to include reference to the First Amendment in its definition of the exercise of religion. *See id.* Instead, the exercise of religion was defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000cc-5(7)(A) (2014).

112. *See Burwell*, 134 S. Ct. at 2760-74 (deciding corporations were persons and no clear evidence existed showing corporations could not exercise religion).

113. *See id.* at 2774 (applying substantial burden test stipulated in RFRA to government actions burdening religious free exercise). The RFRA prohibits the government from substantially burdening a person's free exercise of religion. *See* 42 U.S.C. § 2000bb-1 (2014). If the government is substantially burdening free exercise, the government must prove that the burden furthers a compelling government interest and is the least restrictive way to further this interest. *See id.*

114. *See Burwell*, 134 S. Ct. at 2775-76 (emphasizing large penalties incurred if corporations do not abide by ACA).

115. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) (determining least restrictive mean standard not met by ACA mandate). The Court suggested other means, such as government financed contraceptives. *See id.*

116. *See id.* at 2785 (rendering Court's judgment).

Exercise Clause, the RFRA, and corporations.[117] The Court in *Citizens United* grounded its ruling in the analysis of both the history and purpose of the Free Speech Clause of the First Amendment.[118] The analysis must center on the purpose of the Free Exercise Clause and the RFRA because there is little history regarding the applicability of either provision to for-profit, secular corporations.[119] In regard to corporations, the Free Exercise Clause and the RFRA will only apply if the application will help foster the purposes of both provisions; as demonstrated below, it does not.[120] Thus, neither provision should apply to for-profit, secular corporations.[121]

2. The First Amendment's Free Exercise Clause Should Not Apply to Corporations

The First Amendment's Free Exercise Clause should not apply to corporations because the purpose of this constitutional provision makes it a purely personal guarantee.[122] The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."[123] This provision was included in the Bill of Rights to protect citizens against religious persecution by the government, which they had previously faced.[124] The goal was to prevent religious dominance and allow

117. *See generally* Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

118. *See Conestoga Wood*, 724 F.3d at 384 (stating Court's key considerations in *Citizens United*). Nature, purpose, and history are factors to be analyzed in determining whether or not a constitutional provision is "purely personal." *See* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978). The Court in *Citizens United*, however, focused only on the history and the purpose of the First Amendment's Free Speech Clause in determining its applicability to for-profit, secular corporations. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-56 (2010) (analyzing applicability of First Amendment's Free Speech Clause).

119. *See Conestoga Wood*, 724 F.3d at 385-86 (highlighting lack of historical jurisprudence to follow). The court identified the emphasis *Citizens United* placed on history in determining the applicability of the free speech provision. *See id.* The court found no case law pertaining to the First Amendment and for-profit, secular corporations, and thus did not draw any conclusions about history as a determining factor. *See id.* In comparing the issue in *Conestoga Wood* to *Citizens United*, the court commented, "[s]uch a total absence of caselaw takes on even greater significance when compared to the extensive list of Supreme Court cases addressing the free speech rights of corporations." *See id.* at 384-85.

120. *See supra* notes 118-19 and accompanying text.

121. *See infra* notes 123-34 and accompanying text.

122. *See* Autocam Corp. v. Sebelius, 730 F.3d 618, 627 (6th Cir. 2013) (stating purpose of Free Exercise Clause pertains to individuals only); *see also Conestoga Wood*, 724 F.3d at 385 (determining purpose does not allow protection by First Amendment for for-profit secular corporation). If a constitutional provision is purely personal, it does not apply to corporations. *See* United States v. White, 322 U.S. 694, 699 (1944) (establishing purely personal guarantees do not apply to corporations). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778 n.14.

123. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (defining purpose of Free Exercise Clause).

124. *See* Colombo, *supra* note 45, at 28-33 (detailing history behind purpose of First Amendment's

each individual to freely hold his or her own religious beliefs.[125] A corporation cannot hold its own beliefs because beliefs are derived from the mind of an individual.[126] Thus, the purpose of the Free Exercise Clause in protecting individuals against political persecution should restrict its application to individuals only and not to corporations.[127]

3. The RFRA Should Not Apply to Corporations

The RFRA should not apply to corporations because the purpose of the provision makes it a purely personal guarantee.[128] The purpose of these rights is to prevent the government from substantially burdening individuals' rights to exercise their religion.[129] The RFRA was enacted to prevent laws that were deemed neutral regarding religion from ultimately burdening religious exercise.[130] The RFRA quelled the fears of religious groups and institutions of having to desert their religious beliefs to comply with seemingly neutral laws.[131] Additionally, the RFRA protects the right to exercise religion—akin to the Free Exercise Clause—which corporations cannot do.[132] Thus, it should

guarantee of freedom of religion). The freedom of religion provision stemmed from the religious turmoil and persecution experienced in England in the sixteenth and seventeenth centuries. *See id.* at 28. The Framers did not want to perpetuate this turmoil and hoped to avoid religious dominance and therefore allowed individuals the ability to freely hold their own religious beliefs. *See id.* at 28-29. Minority religious groups were the strongest proponents of religious freedom because their communities were historically persecuted. *See id.* at 30; *see also* Strang, *supra* note 60, at 211-18 (providing history of religious strife). *See generally* McConnell, *supra* note 60 (providing detailed history of religious backdrop to First Amendment right to religion).

125. *See* Colombo, *supra* note 45, at 28-29 (discussing goals of Free Exercise Clause).

126. *See* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013) (observing corporations cannot believe, so Free Exercise Clause inapplicable), *rev'd*, No. 13-1144, 2014 WL 4467879 (3d Cir. Aug. 5, 2014). Corporations also cannot "pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) (discussing limitations of corporations), *rev'd*, 723 F.3d 1144 (10th Cir. 2013).

127. *See supra* notes 123-26 and accompanying text. *See also Conestoga Wood*, 917 F. Supp. 2d at 407-08 (summarizing reasons First Amendment's Free Exercise Clause does not apply to for-profit, secular corporations).

128. *See* Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1115-16 (D. Colo. 2013) (agreeing with *Hobby Lobby* in stating RFRA falls under purely personal guarantee framework).

129. *See* Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013) (outlining purpose of RFRA's enactment); *see also Briscoe*, 927 F. Supp. 2d at 1115 (discussing purpose of RFRA).

130. *See Autocam Corp.*, 730 F.3d at 625 (outlining RFRA purposes). The RFRA was specifically enacted to correct the outcome of a prior case. *See id.* Congress explicitly stated its purpose in enacting the RFRA as "to restore the compelling interest test" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government". *See id.* (citing 42 U.S.C. §2000bb(b)(1)-(2) (2014)). The Court's decision in *Smith* provided legislatures the power to pass neutral laws regarding religion without restrictions of the First Amendment. *See id.*

131. *See* Colombo, *supra* note 45, at 42 (commenting on fears in wake of *Smith* decision).

132. *See Autocam Corp.*, 730 F.3d at 625 (agreeing with other courts on lack of corporations' ability to exercise religion); *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) (determining corporations cannot exercise religion as necessary to receive RFRA protection), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

not apply to corporations because the purpose of the RFRA is to protect individuals' rights to religious exercise.[133]

4. Corporate Personhood Theories Do Not Support Protection for Corporate Religious Beliefs

The real entity theory of corporate personhood, which is currently the dominant theory, does not allow corporations to hold religious beliefs.[134] The real entity theory establishes corporations as separate, independent, legal entities with rights and responsibilities distinct from those of the corporations' creators or members.[135] Under this theory, corporations are real persons that have a purpose of maximizing profits, benefiting participants within them, and promoting public good.[136] The independent entity this theory creates bars a corporation from having the religious beliefs of its members or creators because it is recognized as completely separate from them.[137] Without a religious purpose or the ability to adopt the religious views of its creators, the corporation has no religion, and thus, cannot seek protection under the Free Exercise Clause or RFRA.[138]

The analysis previously conducted by courts under the real entity theory does not support the Hobby Lobby and Conestoga Wood corporations declaring

133. *See Conestoga Wood*, 724 F.3d at 388 (deciding corporations not protected by RFRA).

134. *See id.* at 387 (discussing inability of corporations to have religious beliefs of its creators). This theory distinctly separates the corporation from its members and makes it a completely independent entity, meaning it cannot possess the religion of its members. *See id*. at 387-88.

135. *See* Craig v. James, 71 A.D. 238, 241 (N.Y. App. Div. 1902) (reflecting view at turn of century of corporations as real entities); Phillips, *supra* note 41, at 1068-69 (discussing real entity principles). The real entity theory recognizes that corporations are not the product of the law or state but exist independently. Phillips, *supra* note 41, at 1068-69; Ripken, *supra* note 26, at 112 (describing real entity theory). The corporation is separate from both the members and the state. *See* Ripken, *supra* note 26, at 112. The corporation also has its own will that is not to be the same as that of its members. *See id.* at 114. A corporation under this theory is "a full-fledged, living reality that exists as an objective fact and has a real personality in society." *See id.* at 112.

136. *See* Ripken, *supra* note 26, at 116-17 (outlining various components of real entity theory).

137. *See Conestoga Wood*, 724 F.3d at 388 (highlighting distinction of religious beliefs of corporate owners from corporation); *see also* Grote v. Sebelius, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) (illustrating independent corporations holding religious beliefs of its creators illogical). The corporation's purpose is to make a profit. *See Grote*, 708 F.3d at 858. It has no religious beliefs. *See id.* The only religious beliefs are those of the creators and the members of the corporation. *See id.* The real entity theory views the corporation as a distinct, legal, separate entity from its creators and members, and thus, does not have religious beliefs. *See id.*

138. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 401 n.16 (3d Cir. 2013) (explaining ADA religious organizations exemption), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). A nonprofit organization, including a corporation, whose sole purpose is centered on religious values, does not have to abide by the mandate. *See id.* Without a religious purpose and an inability to exercise a religion itself, the corporation would need to adopt the religious views of its creators and members to avoid the mandate. *See id.* at 386. Under the real entity theory, however, this is impossible because the corporation is independent from its creators and members. *See id.* at 388.

and using corporate religion to circumvent ACA requirements.[139] In both *Pacific Gas & Electric Co. v. Public Utilities Commission of California* and *United States v. Martin Linen Supply Co.*, the Court emphasized human attributes that the corporations possessed, separate from each owner, which would be violated if not protected by the Constitution.[140] There are no human attributes relating to religion regarding a for-profit, secular corporation that would require protection.[141] Furthermore, the Third Circuit Court in *Conestoga Wood* applied the real entity theory in its decision, stating people incorporate with the purpose of creating a distinct legal entity with its own rights and privileges; thus, incorporators and owners cannot bestow their religion on the entity.[142] The real entity theory does not allow the corporation to inherit its owners' religion or create its own to avoid following ACA protocol because this theory makes the corporation a distinct legal entity with its own rights, wills, and privileges.[143]

Although the aggregate theory would seem to allow corporate religion, it would not allow that religion to block the application of the ACA.[144] The aggregate theory states that the corporation is not and cannot be a separate entity from its members.[145] This insinuates that the corporation could

139. *Compare* Pac. Gas. & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 12-16 (1986) (deciding state's attempt to force corporation to transmit messages in billing envelopes violated First Amendment), *and* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (establishing corporations' Fifth Amendment right against double jeopardy because threat of successive prosecution's induces anxiety), *with Conestoga Wood*, 724 F.3d at 381 (objecting to mandate's application to for-profit secular corporation), *and* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124-25 (10th Cir. 2013) (refusing to comply with mandate due to corporate religion), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

140. *See Pac. Gas. & Elec. Co.*, 475 U.S. at 12-16 (stating government could not force corporations to speak because it violates corporations' First Amendment rights). The Court connected corporate rights to individual rights stating "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *See id.* at 16; *see also Martin Linen Supply Co.*, 430 U.S. at 569 (deciding corporations were protected by Fifth Amendment from double jeopardy). Part of the Court's analysis in *Martin* for awarding corporations Fifth Amendment protection was to prevent the corporation from experiencing the "anxiety," "embarrassment," and "insecurity" that accompanies being subject to multiple trials even once found innocent. *See id.*

141. *See Grote*, 708 F.3d at 858 (Rovner, J., dissenting) (illustrating independent corporations holding religious beliefs of their creators illogical). Judge Rovner comments that without a mission stating religious goals, contracting according to religious beliefs, or some other evidence of strict adherence of corporate policies according to a religious belief, the corporation does not have a religious right to assert. *See id.* at 856.

142. *See Conestoga Wood*, 724 F.3d at 387-88 (highlighting distinctness of incorporators from incorporated entity). The desire and advantage of creating a distinct legal entity includes limited liability on the part of the owners, demonstrating that those incorporating recognize this distinction because it is a primary reason for the act of incorporating. *See id.* at 388.

143. *See supra* notes 41-44 and accompanying text (explaining purpose of real entity theory).

144. *See* Ripken, *supra* note 26, at 110 (describing aggregate theory principles). The aggregate theory emphasizes the dependent relationship of the corporation to its individuals: Without the individuals, the corporation cannot exist. *See id.* The rights and the duties of the individuals, therefore, are the rights and the duties of the corporation. *See id.*

145. *See* Lepard, *supra* note 33, at 1045 (highlighting recognition of entanglement of corporate members

potentially take on the religion of its members but could not have its own religion.[146] This conflicts, however, with the purpose of the corporation under this theory, which is to foster mutual benefit.[147]

The ACA was enacted to benefit the public, including members of corporations; thus, corporate religion could not bar the ACA's application under the aggregate theory.[148] Examining the Supreme Court's decisions in applying the aggregate theory's principles seems to indicate that corporations can possess owners' religions, but these principles do not provide much guidance on whether or not those religious beliefs could allow these corporations to bypass legislative requirements.[149]

The artificial person theory also does not support corporate religious beliefs

and their corporation). A corporation would not exist without human action and can only act through the actions of the individuals within it, and thus, the corporation cannot and does not exist as a separate entity from the people who comprise it. *See id.* This theory recognized the corporation as merely a "collection, or aggregate, of individuals" rather than a separate entity as under the artificial person theory. *Id.*; *see also* Ripken, *supra* note 27, at 221 (dictating premise of theory as rights of corporation encompass rights of people composing it). It is illogical to view the corporation as a distinct entity, as it formerly was, because corporations are "'owned, managed, and administered'" by those individuals in the corporation. *See id.* Additionally, the abandonment of needing a state issued charter for corporate existence helped precipitate acceptance of this theory of corporate personhood. *See* Krannich, *supra* note 26, at 75.

> Due to the general incorporation statutes, the corporate entity came to be seen 'as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals.' This made it difficult to ignore the individuals behind the corporate fiction. This concept of the corporate entity as a vessel for individual self-realization, coupled with the corporate bar's strong push for enhanced corporate rights, led to the adoption of the aggregate entity metaphor in corporate and constitutional jurisprudence.

Id. at 75-76 (discussing ramifications of no longer needing state issued charter for corporate establishment).

146. *See* Ripken, *supra* note 26, at 110 (addressing separation of corporation from person). A corporation cannot have its own independent religion because the corporation has "no existence or identity that is separate and apart from the natural persons in the corporation." *Id.*

147. *See* Lepard, *supra* note 33, at 1045 (describing purpose of corporations producing mutual benefits for their owners). *See generally* United States v. Lee, 455 U.S. 252 (1982). Even in the twenty-first century, the idea that businesses should not harm public interest still pervades. *See id.*

148. *See* MK Chambers Co. v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435, at *7 (E.D. Mich. Sept. 13, 2013) (defining purpose of ACA). The ACA's purpose is to promote public health and was not created to interfere with religion. *See id.* Specifically, the contraceptive mandate is designed to benefit women through preventing unwanted or unplanned pregnancies. *See* Univ. of Notre Dame v. Sebelius, No. 13-3853, 2014 WL 687134, at *1 (7th Cir. Feb. 21, 2014) (describing reasons for contraceptive mandate's enactment). Preventing unwanted or unplanned pregnancies will help women stay in school, hold down employment, and contribute to society in a more meaningful way. *See id.* The ACA and its contraceptive mandate would help facilitate the purpose of the corporation because it would allow its members to use their corporate status to benefit themselves. *See MK Chambers Co.*, 2013 WL 5182435, at *6.

149. *See* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (confirming corporations included as persons under the Constitution). The Court did not explain why corporations are considered persons, but stated this as an accepted fact at the beginning of the opinion. *See id.*; *see also* Ripken, *supra* note 27, at 222-23 (summarizing interpretations of judicial treatment of corporate personhood).

blocking the ACA's application.[150] This theory defines corporations as artificial beings, created by the state and thus existing as a government concession.[151] Under this theory, the government only assigns rights that facilitate the corporation's purpose: to serve the public good.[152] While this theory of corporate personhood is the oldest, judges still utilize this theory in the modern era.[153] Under the artificial person theory, corporations exist to serve the public good, and as a result, a corporation's religion would not be allowed to bar the ACA's application because the ACA helps foster the good of the public.[154]

Following the analysis conducted by courts in applying the artificial person theory of corporate personhood, both Conestoga Wood and Hobby Lobby would not be able to possess a religion protected under the RFRA or Free Exercise Clause.[155] In *United States v. Morton Salt Co.* and *Wilson v. United States*, the Supreme Court's application of constitutional protections to the corporations rested on whether it would help these corporations promote the

150. *See* Krannich, *supra* note 26, at 67 (describing artificial entity theory). Under this theory, a corporation is an artificial being that only exists to serve the public good. *See id.* at 68-69. A corporation only is given rights by the state to facilitate its purpose. *See* Ripken, *supra* note 26, at 106-07. Barring application of the ACA's contraceptive mandate would harm the public good, which the ACA was created to help. *See MK Chambers Co.*, 2013 WL 5182435, at *7.

151. *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (defining corporate rights and status); *see also* Ripken, *supra* note 26, at 107 (emphasizing government control and its role in formation of corporations under this theory).

152. *See Woodward*, 17 U.S. at 636-37 (discussing corporate function); *see also* Hale v. Henkel, 201 U.S. 43, 74 (1906) (distinguishing corporations as entities created to benefit the public); Miller, *supra* note 26, at 916 (highlighting corporate function of serving public good or benefit); Ripken, *supra* note 26, at 108 (stating state regulates corporate operations in terms of public interest). The government bestows rights upon the corporation "such as are supposed best calculated to effect the object for which it was created." *See Woodward*, 17 U.S. at 636. Corporations exists so the state can better serve the public: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit consitutes [sic] the consideration, and in most cases, the sole consideration of the grant." *See id.* at 637.

153. *See* United States v. Lee, 455 U.S. 252, 258 (1982) (highlighting function of social security system as benefiting public good so employer must comply).

154. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 401 n.16 (3d Cir. 2013) (dictating ADA religious organizations exemption), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). A nonprofit organization, including a corporation, whose sole purpose is centered on religious values, does not have to abide by the mandate. *See id.* Without a religious purpose and an inability to exercise a religion itself, the corporation would need to adopt the religious views of its creators and members to avoid the mandate. *See id.* at 386-87. Under the real entity theory, however, this is impossible because the corporation is independent from its creators and members. *See id.* at 387-88.

155. *Compare* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (implying corporate behavior must remain consistent with public interest to obtain constitutional rights), *and* Wilson v. United States, 221 U.S. 361, 382 (1911) (reiterating idea of corporate creation for benefit of public), *and Woodward*, 17 U.S. at 636 (declaring corporate purpose of serving public good), *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124-25 (10th Cir. 2013) (refusing to comply with mandate due to corporate religion), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

public good.[156] The Court emphasized that corporate existence should benefit the public and "corporate behavior [should be] consistent with the law and the public interest."[157] If awarding certain constitutional protections shall help the corporation better serve the public, these constitutional protections shall be granted.[158] Awarding protections to Conestoga Wood and Hobby Lobby corporations under the RFRA or First Amendment would not be permissible under the artificial person theory because the protections would not benefit the public and would hurt these corporations' employees.[159]

B. The Supreme Court Ignored Extensive Case Law Regarding the RFRA and Corporate Personhood Theories To Extend Religious Protections to Corporations

The Supreme Court circumvented dealing with previous corporate case law and constitutional analysis by deciding the case on technicalities.[160] The sole issue on certiorari was whether the RFRA applied, and if so, did the mandate substantially burden the exercise of religion.[161] First, the Court acknowledged the well-accepted principle that a corporation is considered a person.[162] The

156. *Morton Salt Co.*, 338 U.S. at 652 (highlighting need for constitutional protection to further public benefit from corporation); *see also Wilson*, 221 U.S. at 383-84 (emphasizing corporations function of benefitting public).

157. *See Morton Salt Co.*, 338 U.S. at 652 (citing importance of corporate compliance with public interest). The Court did not allow the corporation to possess a right to privacy because this would enable it to act against public interest. *See id.*; *see also Wilson*, 221 U.S. at 383-84. The Court did not award the corporation constitutional protection from self-incrimination because this would allow the corporation to mask illegal activities, ultimately harming the public, which is the opposite of what corporations are intended to do. *See Wilson*, 221 U.S. at 383-84.

158. *See Wilson*, 221 U.S. at 383 (discussing corporate function). The Court made clear that "the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law." *See id.*; *see also* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (declaring corporate purpose of serving public good). Although the artificial person theory was predominant in the early nineteenth century, the idea of not letting business interfere with the public good still remains. *See generally Lee*, 455 U.S. 252.

159. *Compare Morton Salt Co.*, 338 U.S. at 652 (implying requirement corporate behavior consistent with public interest to obtain constitutional rights), *and Wilson*, 221 U.S. at 383 (reiterating idea of corporate creation for benefit of public), *and Woodward*, 17 U.S. at 637 (declaring corporate purpose of serving public good), *with Hobby Lobby*, 723 F.3d at 1129 (applying statutory provision instead of public benefit test).

160. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014). The Supreme Court relied primarily on three cases in supporting its decision. *See id.* at 2760-79 (relying on *Smith*, *City of Boerne*, and *Braunfeld* in its analysis).

161. *See id.* at 2790 (Ginsburg, J., dissenting) (acknowledging assertion of Free Exercise Clause violation would fail on certiorari). Justice Ginsburg explained that any claim the parties had under the Free Exercise Clause was not tenable due to the precedent set in *Smith*. *See id.* at 2790. The *Smith* Court held that the incidental effect of government regulation prohibiting the exercise of religion does not violate the Free Exercise Clause. *See id*. Justice Ginsburg went on to note that if *Smith* was not controlling, the mandate still would not garner Free Exercise Clause protection because it would significantly encroach on third-party interests. *See id.*

162. *See id.* at 2759 (concluding corporations persons as required for RFRA application). The Court looked to both the Dictionary Act and case law to support the fact that a corporation legally is considered a

Court's analysis of whether a corporation can exercise religion as required under the RFRA, however, is befuddled and conclusory.[163]

The Supreme Court stated there was no reason that a corporation could not exercise religion as stipulated by the dissent.[164] In response to the argument that the corporate form prevented the exercise of religion, the Court held that the furthering of the religious freedom of the corporate form helps promote the religious freedom of the individuals within it.[165] This completely violates the real entity theory of corporate personhood—currently the dominant theory in legal jurisprudence—because the corporate entity is to be completely distinct from its members.[166]

Additionally, furthering religious freedom does not necessarily constitute an exercise of religion, especially not in reference to the contraceptive mandate.[167] The Court attempts to justify its reasoning by utilizing the definition of the exercise of religion given in *Smith*.[168] The facts of the instant case, however, do not fit the *Smith* definition of religious exercise either.[169]

person. *See id.* at 2768-69.

163. *See id.* at 2760 (highlighting supposed flaws in principal dissent's reasoning but not providing concrete reasoning of its own position).

164. *See Burwell*, 134 S. Ct. at 2760 (addressing views of dissents).

165. *See id.* (discussing effect of decision).

166. *See supra* notes 39-42, 134-38 and accompanying text (outlining premise of real entity theory of corporate personhood and its position as dominant theory).

167. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (discussing implications of deleting First Amendment from RFRA definition); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (declaring appointing of minster an exercise of religion); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535-36 (1993) (determining animal sacrifice constituted exercise of Santeria religion); Letter from Thomas Jefferson to the Rev. Samuel Muller (Jan. 23, 1802), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 62, at 428-30 (declaring fasting and prayer as religious exercise). *But see* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'the exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts[.]").

168. *See Burwell*, 134 S. Ct. at 2760-61 (citing *Smith* definition of exercise of religion).

169. *See Burwell*, 134 S. Ct. at 2770. The mandate does not require those with religious beliefs, in this case the Hahns or the Greens, to perform or abstain from performing a physical act that they are "engaged in for religious reasons." *Id.* (quoting *Smith*, 494 U.S. at 877). The mandate requires employers to provide health insurance. *See* 26 U.S.C. § 5000(A)(f)(2) (2014). The employers simply must provide health insurance. *See id.* Providing health insurance is the physical act required by the mandate. *See id.* Purchasing abortifacient materials with that insurance is the physical act of the individual *not* the Hahns or the Greens. *See Burwell*, 134 S. Ct. at 2779. The Supreme Court also misconstrues a quotation from the *Smith* decision to support its proposition. *See id.* at 2770. The Court interprets *Smith* as stating that the exercise of religion occurs when a physical act is performed or abstained from specifically for religious reasons. *See id.* That is not, however, the correct interpretation of the *Smith* decision. *Smith* states

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they

The Supreme Court also did not consider the purpose of the RFRA in evaluating its applicability as it did in prior decisions.[170] The concurring and dissenting opinions mention the purpose of the RFRA, but oversimplify it as protecting interests of religious freedom in general.[171] The fundamental purpose of the RFRA, however, is specific to protecting the *exercise* of religion, not just religious interests.[172] This purpose does not support its application to for-profit, secular corporations.[173]

Furthermore, the Court erred in disputing the dissent's argument against the mandate imposing a substantial burden.[174] The Court disagreed with the dissenters, stating their "argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*)."[175] This misstates the issue at hand because the focus of the RFRA is on the exercise of religion, not the actual religious beliefs held.[176] While the Hahns' and Greens' beliefs may be substantially burdened by the mandate, their religious exercise is not, as needed to garner RFRA protection.[177]

IV. CONCLUSION

In recent years, corporate entities have experienced an exponential growth of legal protection. In order to foster capitalistic ideas and a laissez faire economy, the corporation's power continually increases and its recognition as an independent being has become an accepted fact. The courts have aided in this corporate takeover by providing corporations with numerous legal protections, which originally only existed for individuals, but allowing for-

display.

Smith, 494 U.S. at 877 (alteration in original). In *Smith*, the phrase "engaged in for religious reasons" refers only to state prevention of an act that is engaged in for religious reasons. *See id.* The mandate does not force the Hahns or the Greens to provide this insurance because of religious reasons. *See supra* notes 69-74 and accompanying text (describing purposes behind ACA enactment). This insurance is required to provide better access to health care. *See* Lepard, *supra* note 33, at 1049.

170. *See supra* notes 49-50 and accompanying text (discussing purpose as instrumental in deciding application of constitutional amendments). *See generally Burwell*, 134 S. Ct. 2751.

171. *See Burwell*, 134 S. Ct. at 2785 (identifying mention of RFRA).

172. *See supra* notes 130-32 and accompanying text (discussing purpose of RFRA).

173. *See supra* notes 168-69 and accompanying text (analyzing application of exercise of religion to corporate form).

174. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775-76 (2014) (discussing substantially burdens argument).

175. *See id.* at 2778 (stating disagreement).

176. *See id.* at 2798; *see also supra* note 167 and accompanying text (highlighting what constitutes exercise of religion).

177. *See Burwell*, 134 S. Ct. at 2798. The Hahns and the Greens do not have to personally possess insurance plans allowing abortifacient materials nor do they have to use these types of materials; there are no restrictions on their beliefs or their personal actions. *See id.* Thus, the mandate does not burden their personal exercise of religion. *See id.*

profit, secular corporations to seek refuge under the Religious Freedom Restoration Act is an inappropriate use of judicial discretion. The applicability of constitutional protections and individual rights to corporations historically hinges on the purpose of those provisions. The purpose of the RFRA is to protect the individual's exercise of religion from the hand of the government and allowing corporations protection under this provision in no way facilitates this purpose. Additionally, this concept of corporate identity is not supported by the dominant theory of corporate personhood. The real entity theory has been utilized in recent years to afford the corporation more constitutional protection. This theory, however, does not allow for religious protection of the corporation because the corporate entity has no religious beliefs without those of its owners. Furthermore, the corporation should aim to benefit the public in some way, rather than harm it.

Bestowing religious protection to corporations allows these corporations to deny employees certain health coverage, directly harming the public. This counteracts the very purpose of the ACA—to help Americans access health care. The Supreme Court in its decision incorrectly found that a closely held corporation can exercise religion and the mandate substantially burdens such exercise. While the Supreme Court's decision could be interpreted to apply only to closely held corporations, it most likely will be applied to all corporations to continue the patterns of growth in corporate legal protection. Ultimately, the Supreme Court's decision served to benefit the corporate entity—which saves money by not providing insurance—at the expense of the public.

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