R Corps: When Should Corporate Values Receive Religious Protection?

Elizabeth Brown*, Inara Scott**, & Eric Yordy***

DOI: https://doi.org/10.15779/Z38KP7TR9D

* Associate Professor of Business Law, Bentley University.

** Assistant Dean for Teaching and Learning Excellence, Associate Professor, Management, Oregon State University College of Business.

*** Associate Professor, The WA Franke College of Business at Northern Arizona University.

INTRODUCTION

Like an increasing number of companies that participate in social issues,[1] Ben & Jerry's is known for its values and commitment to social causes[2], such as LGBTQ Equality, Refugees, and Climate Justice.[3] Imagine a company similar to Ben and Jerry's that cares deeply about refugees, immigrants, and families in crisis. This company, which we will call Compassionate Ice, describes caring, kindness, and love for all people as its organizational values, mission, and purpose.

Now, imagine that the owners of Compassionate Ice, concerned about the death of migrants crossing at the Mexico-Arizona border, decide to provide jugs of water and food supplies for its employees to leave at strategic locations in the desert. Compassionate Ice also invests in a small shelter in the desert that is left open for anyone to stay at while they are traveling. The U.S. Border Patrol tracks the supplies back to Compassionate Ice at the same time when several undocumented migrants are found in the shelter. Prosecutors charge Compassionate Ice with violating immigration laws and leaving items in the desert without a permit.[4]

Alternatively, imagine that Compassionate Ice creates a new flavor, called Delectable Equity, and announces that fifty percent of the profits from sales of that flavor will go to support the Human Rights Campaign and other organizations that advocate for LGBTQ rights.[5] One of Compassionate Ice's employees assigned to work on the marketing campaign for the new flavor holds strong religious beliefs that homosexuality is wrong and requests a reassignment on religious grounds. In team meetings, she refuses to participate in efforts to promote the company's work related to the promotion of LGBTQ rights. Compassionate Ice believes this individual is harming the cohesiveness and

1. The current trend toward businesses focusing on values and "brand purpose" has been described in a number of ways. *See* Jeff Beer, *Brand Purpose is the Future for the Majority of Marketing Leaders*, FAST COMPANY (Jan. 29, 2019), https://www.fastcompany.com/90298076/brand-purpose-is-the-future-for-the-majority-of-marketing-leaders?utm_source=postup&utm_medium=email&utm_campaign=Fast%20Company%20Daily&position=2&partner=newsletter&campaign_date=01292019.

2. *See, e.g.,* Genevieve Roberts, *Ben & Jerry's Builds on Its Social-Values Approach*, N.Y. TIMES (Nov. 16, 2010), https://www.nytimes.com/2010/11/17/business/global/17iht-rbofice.html.

3. *Issues We Care About*, BEN & JERRY'S, https://www.benjerry.com/values/issues-we-care-about (last visited Feb. 28, 2019); *see also LGBT Equality*, BEN & JERRY'S, https://www.benjerry.com/values/issues-we-care-about/marriage-equality (last visited Feb. 28, 2019).

4. Ryan Lucas, *Deep In The Desert, A Case Pits Immigration Crackdown Against Religious Freedom*, NPR, (Oct. 18, 2018), https://www.npr.org/2018/10/18/658255488/deep-in-the-desert-a-case-pits-immigration-crackdown-against-religious-freedom; Amy B. Wang, *Border Patrol Agents Were Filmed Dumping Water Left for Migrants*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/border-patrol-accused-of-targeting-aid-group-that-filmed-agents-dumping-water-left-for-migrants/?utm_term=.c05861c3c7ab.

5. *See, e.g.,* HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/ (last visited Mar. 4, 2019); GLAAD, https://www.glaad.org/ (last visited Mar. 4, 2019).

value-driven culture of the company, but the company's lawyer has advised that the employee is likely entitled to a religious accommodation under Title VII.

If the company's values are secular, they will have little defense in either case. On the other hand, if the company's values are *religious*, it might have an argument under the Religious Freedom Restoration Act (RFRA).[6] The company could argue that it is protected from prosecution in the first instance,[7] or it might be able to argue that it is not required to accommodate the employee under Title VII in the second instance. This is similar to how a company may be able to avoid compliance with the Affordable Care Act's contraception provisions if those provisions burden the company's religious beliefs.[8]

The right of a corporation to secure protection for its religious values is relatively new. In *Burwell v. Hobby Lobby*,[9] the Supreme Court held for the first time that a closely held corporation can receive protection for articulated religious beliefs under the RFRA.[10] In the aftermath of *Hobby Lobby*, many scholars wondered if businesses could use the RFRA to avoid compliance with legal structures prohibiting various forms of discrimination, including those requiring equal treatment for LGBTQ employees and/or customers.[11] Others wondered if *Hobby Lobby* would lead to businesses being able to discriminate in housing, psychiatric care, and/or the provision of women's health care services.[12]

In this article, however, we approach the concept of corporate religion from a different perspective—the perspective of Compassionate Ice. That is, we examine how a business seeking to protect corporate values (such as diversity, equality, sanctuary, or women's access to reproductive care), which are not exclusively associated with a religion and are often held by secular entities, can invoke *Hobby Lobby* and other recent cases involving religious freedom.

To answer this question, one must explore a number of other difficult questions. How can one define whether a set of beliefs are "religious" when those beliefs are held not just by a single individual, but by a diverse collection of

6. 42 U.S.C. §§ 2000b-2000b-4 (2012).

7. *See* Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?* 20 U. PENN. J. CONST. L. 1101, 1121-22 (2018).

8. *See* Elizabeth Brown & Inara Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 AM. BUS. L.J. 55, 57 (2019).

9. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

10. *Id.* at 691.

11. *See, e.g.*, Hanna Martin, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 30–34 (2018); Vincent J. Samar, *The Potential Impact of Hobby Lobby on LGBT Civil Rights*, 16 GEO. J. GENDER & L. 547, 590 (2015); *see generally* Alex J. Luchenitser, *Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015).

12. *See* Richard J. D'Amato, *A "Very Specific" Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination*, 116 COLUM. L. REV. 1063 (2016); Robin Fretwell Wilson, *Not Equal Yet: Building Upon Foundations of Relationship Equality: When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 710 (2014).

individuals? Does the meaning of religion change when it is no longer exercised by a human being but instead by a corporation? Importantly, *how* would a court evaluate the religious claims of a business entity made up of diverse owners, members, and/or shareholders? And finally, what are the broader consequences, benefits and detriments of protecting such claims?

If corporations can establish the kind of religious freedom that the Court recognized in *Hobby Lobby*, we may see the emergence of a new kind of corporation: the religious corporation (not to be confused with religious institutions such as houses of worship[13]). Just as benefit corporations, or "B Corps," have emerged, balancing profit and purpose, so might religious corporations, or "R Corps,"[14] if they can demonstrate an institutional commitment to some defined religious belief. If they do, however, courts must develop a comprehensive approach to evaluating claims of corporate religion. This article furthers that development.

Scholars have considered the definition of religion in an individual context,[15] while others have sought to identify the theoretical basis for the Supreme Court's finding that a corporation can exercise a religion.[16] This article offers a new contribution by analyzing these currently unresolved issues *together* in the novel context of how a diverse corporation might be able to claim religious protection for what may be considered "liberal"[17] values.

---

13. Significant legal doctrine surrounds the treatment of religious institutions. For example, the Establishment Clause of the First Amendment prohibits "excessive entanglement" between the state and religious institutions. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The "ministerial exception" allows religious institutions to avoid compliance with Title VII. Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 188 (2012); *see also* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 647-655, 659-661 (2013) (describing application of Establishment clause in employment situations). We do not therefore apply our designation to institutions that could formally be considered a religious institution according to these doctrines.

14. *See infra* Part 5.

15. *See, e.g.*, Ethan Blevins, *A Fixed Meaning of 'Religion' in the First Amendment*, 53 Willamette L. Rev. 1 (2016); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 Hous. L. Rev. 909 (2016); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123 (2007).

16. Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655 (2016); Eric Rassbach, *Is Hobby Lobby Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625 (2015); Joseph R. Swee, *Free Exercise for All: The Contraception Mandate Cases and the Role of History in Extending Religious Protection to For-Profit Corporations*, 48 JOHN MARSHALL L. REV. 605, 613-614 (2015).

17. We acknowledge that the terms "liberal" and "conservative," create significant political and social connotations, and lack specific definitions. We also note that while generally associated with political parties (liberal-Democrat/conservative-Republican), these terms do not universally coincide with party affiliation. That said, certain values and beliefs are strongly associated with partisanship and carry some common understandings among our society today. *See* PEW RES. CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 1, 3, 10 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf. Party affiliation and liberal/conservative identification are highly predictive of beliefs regarding racism, discrimination, immigration and immigrants, foreign policy, homosexuality, gender, and religion. *Id*. at 31-48.

We undertake this analysis in light of three trends: (1) the resurgence and growth of religious activism—both liberal and conservative;[18] (2) the surge in corporations taking values-driven, controversial positions since the election of President Trump;[19] and (3) the growth in the profile and strength of the religious freedom movement.[20] Given these trends, we believe the country will see an increasing number of corporations that identify corporate values as religious beliefs in order to protect those values.

Our analysis utilizes a theoretical anomaly underlying the *Hobby Lobby* decision and its treatment of corporate religion to make a unique recommendation. In determining whether the corporations at issue in the case held sincere religious beliefs, *Hobby Lobby* left unresolved the question of whether corporate personhood and its attendant religious rights, if any, should be based on either a real entity or aggregate entity theory. That is, the opinion allows for an analysis that focuses on *either* the sincerity of the individual beliefs of the owners *or* the sincerity of the beliefs of the corporation itself.

While other scholars have tried to determine which theory is more appropriate, we instead suggest utilizing both approaches, depending on the particular characteristics of the corporation at issue. This joint approach is necessary to engage in sincerity testing, which prevents corporations from taking advantage of religious protection to further corporate profiteering.[21] As we will illustrate, sincerity testing involving a corporation that has owners who hold similar beliefs is a radically different prospect than sincerity testing in a

18. Tom Gjelten, *Provoked By Trump, The Religious Left Is Finding Its Voice*, NPR (Jan. 24, 2019, 5:04 AM), https://www.npr.org/2019/01/24/684435743/provoked-by-trump-the-religious-left-is-finding-its-voice; Rabbi Eric H. Yoffie, *Now Is Liberal Religion's Moment*, HUFFPOST (Nov. 22, 2017), https://www.huffingtonpost.com/rabbi-eric-h-yoffie/liberal-religions-moment_b_13117484.html.

19. Austin Carr, *Brands In The Age of Trump: A Survival Guide*, FAST COMPANY (Mar. 9, 2017), https://www.fastcompany.com/3068643/brands-in-the-age-of-trump-a-survival-guide; *see also* Elisha Fieldstadt, Michigan Pharmacist Denies Woman Miscarriage Medication Over Religious Beliefs, NBC NEWS (Oct. 18, 2018, 2:55 PM), https://www.nbcnews.com/news/us-news/meijer-pharmacist-denies-michigan-woman-miscarriage-medication-citing-religious-beliefs-n921711; Carson Gerber, *Tax Business Denies Service to Gay Couple, Cites Religion*, GREENSBURG DAILY NEWS (Feb. 16, 2019), https://www.greensburgdailynews.com/news/local_news/tax-business-denies-service-to-gay-couple-cites-religion/article_cca91204-d4cb-5152-bd57-902d07291f6d.html. A new front in the religious freedom battle may be opening up over the use of eminent domain to take land to build a border wall between the United States and Mexico. David Knowles, *A Tiny Chapel — and a Law Beloved by Evangelicals — Might Stand in the Way of Trump's Wall*, YAHOO (Feb. 12, 2019), https://news.yahoo.com/church-uses-religious-freedom-restoration-act-to-contest-trumps-new-wall-section-221341325.html.

20. Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), https://www.nytimes.com/2006/10/08/business/08religious.html; Ray Sanchez, *Why the Onslaught of Religious Freedom Laws?*, CNN (Apr. 7, 2016, 10:22 PM), https://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/index.html; Christopher Shea, *Why Jeff Sessions Thinks Christians are Under Siege in America*, VOX (Apr. 1, 2018, 9:30 AM), https://www.vox.com/the-big-idea/2018/8/1/17638706/religious-liberty-sessions-task-force-masterpiece-scalia-constitution.

21. *See* Part III.A.

corporation—whether closely held or publicly traded—in which the owners hold a diversity of beliefs.[22]

In this paper, we proceed under the scenario that a corporation seeks religious protection for a particular set of values it has adopted. We then seek to determine if the corporation could achieve that protection. As a first step, our analysis must assess whether the values can be construed as "religious" under current legal definitions of religion. This analysis is by no means simple. Determining what a religion is for an individual is already a complex task; it is significantly more complicated to determine when beliefs are held by a corporation. Then, using the two-path test we have devised, we propose a means for assessing the sincerity of the corporation's beliefs.

A roadmap for this article proceeds as follows: in Part I, we set the scene for our analysis by reviewing a brief history of some corporate values, the types of values that corporations today have adopted, and situations in which the ability of corporations to practice these values may be threatened by conflicting state or federal law. In Part II, we review the legal definitions and history of the term "religion." This discussion will enable us to determine whether values, which are not exclusively or predominantly associated with a religion, can still be considered religious under religious freedom doctrines. We also discuss the alternative theoretical bases that have been used to explain corporate personhood and explain how they might be used to determine whether a corporation can "hold" religious beliefs. In Part III, we explore the importance of a test for determining the sincerity of a corporation's religious beliefs. In Part IV, we propose a bifurcated test that courts can use to assess whether a corporation has sincerely held religious beliefs even when it has religiously diverse ownership. In Part V, we explain how corporations should act to demonstrate that their religious beliefs are sincere and propose a process for corporations seeking to adopt a religion. This process might ultimately be used by courts as proof of the religious affiliation of corporations. Finally, in Part VI, we conclude by considering the negative implications of extending religious protection to corporations that might seek to use that protection to further economic gains.

I. The Rise of Corporate Values and the Legal Challenges

In this part, we describe the trend toward stronger, more identifiable corporate values, and we consider why corporations may choose to explicitly identify and protect their values in today's complicated marketplace. Then, we discuss how common corporate values may be threatened by a variety of circumstances, including state and federal legislation and employee religious claims.

22. *See* Part III.

A. Brief History of Corporate Values

In order to understand the current trend toward the explicit identification of corporate values, it helps to briefly review their history. The history of capitalism, and in particular the growth of business in the United States, reveals an ongoing tension between profit-seeking and social/religious values. As Stanley Buder writes, "Much of modern history can be interpreted as a struggle between the material values associated with capitalism and other and often antithetical cultural and religious values for precedence in human life."[23] Many American business organizations had deep roots in organized religion,[24] and the more general American ethos (as centrally articulated by Adam Smith) also reflected a belief in the divine, celebrating the "invisible hand" of the market for its seamless unison of individual self-interest and the overall good of society.[25] Importantly, surveys from the 1940s demonstrate that business people predominantly believed that businesses had social responsibilities beyond simply financial gain.[26] It was not until the 1970s that more scholars began to push back against this notion. In his 1970 essay, Milton Friedman famously states that "there is one and only one social responsibility of business–to use its resources and engage in activities designed to increase its profits."[27]

---

23. STANLEY BUDER, CAPITALIZING ON CHANGE: A SOCIAL HISTORY OF AMERICAN BUSINESS 11 (2009).

24. AMANDA PORTERFIELD, CORPORATE SPIRIT: RELIGION AND THE RISE OF THE MODERN CORPORATION 122-135 (2018) (describing evolving notions of Christianity and corporations, and relationship between notion of corporation as a "person" and Christian spirituality). Porterfield notes, "Workers held owners accountable to ideals rooted in Pauline Christianity, and were outraged when they were violated." *Id*. at 124.

25. BUDER, *supra* note 23, at 60 ("[The] eternal appeal [of Smith's work] lies in the thesis that the market mechanism allows individuals to exercise their freedoms and self-interest while—effortlessly and without sacrifice—benefiting others. The ''invisible hand'' mediated the interests of all parties and guaranteed a self-regulating economy devoid of the internal contradictions. . .").

26. *See* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 269-270 (1999) (pointing to, *inter alia*, a 1943 survey of businessmen in Fortune magazine that found 93.5% of respondents believed businessmen had a social responsibility that extended beyond the scope of the business's profits). It is worth pointing out that theories of corporate social responsibility (known commonly as "CSR") explicitly address the social responsibility of the corporation as a whole in generally applicable, or universal terms, and do not address the role that individual religion or ethics might play in the corporate sphere. *See, e.g.,* Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L. J. 167, 171-192 (2018) (presenting a variety of definitions of CSR and identifying key conflicts in those varying definitions). In this way, it looks more like the real entity theory of corporate religion, and less like an aggregate theory.

27. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf. Notably, this essay argues that it is intended to counter those businessmen who "believe that they are defending free enterprise when they declaim that business is not concerned "merely" with profit but also with promoting desirable "social" ends; that business has a "social conscience" and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers." *Id*. These businessmen, Friedman believed, were "preaching pure and unadulterated socialism." *Id*.

Today, the predominant view among business leaders generally follows the Friedman approach, under the moniker of "shareholder primacy."[28] However, even among corporate leaders ascribing to a shareholder primacy or profit maximization approach, most corporate leaders agree that it is essential for businesses to operate under agreed-upon ethical or value frameworks.[29] In keeping with a shareholder primacy mindset, the reasons for establishing and enforcing ethics in the workplace are generally linked to practical business purposes; these generally include enhancing business performance, complying with legal obligations, preventing employee misconduct, and avoiding corporate scandals like those from Enron and Worldcom.[30]

Another reason for the resurgence of "corporate values" may have been an effort by businesses to earn the trust of customers and investors. After the dot-com collapse and the scandals at Enron, Tyco, WorldCom and others, consumers and investors became increasingly cynical about the nature of business decisions.[31] In the wake of these scandals and the legislation that followed, corporations began emphasizing ethics, and many adopted strong, differentiating corporate values. An increasing number of corporations today have become

28. *See* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1016 (2013) ("[S]hareholder primacy instructs management to prioritize shareholder interests over competing non-shareholder interests."); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (AM. LAW INST. 1994) ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

29. Surveys suggest most businesses have some form of written code of ethics and/or some type of ethics trainings for employees. For example, 2012 survey on global business ethics was conducted by the American Institute of Certified Public Accountants (AICPA) and the Chartered Institute of Management Accountants (CIMA) found 80% of survey respondents had a code of ethics or similar document. Terri Eyden, *Global Survey on Business Ethics*, ACCOUNTINGWEB (June 21, 2012), https://www.accountingweb.com/aa/auditing/global-survey-on-business-ethics; *see also* ETHICS RESOURCE CENTER, NATIONAL BUSINESS ETHICS SURVEY® OF FORTUNE 500® EMPLOYEES (2012), https://s3.amazonaws.com/berkley-center/120101NationalBusinessEthicsSurveyFortune500Employees.pdf (noting 82% of U.S. companies and 96% of Fortune 500 companies have written standards for ethical conduct, and that 76% of U.S. companies and 91% of Fortune 500 companies train employees in ethical conduct).

30. *See, e.g.*, ANNE T. LAWRENCE AND JAMES WEBER, BUSINESS AND SOCIETY: STAKEHOLDERS, ETHICS, PUBLIC POLICY 15th Ed., at 95-97 (2017); ETHICS AND COMPLIANCE INITIATIVE, MEASURING THE IMPACT OF ETHICS AND COMPLIANCE PROGRAMS 7 (2018), https://higherlogicdownload.s3.amazonaws.com/THEECOA/11f760b1-56e0-43c6-85da-03df2ce2b5ac/UploadedImages/research/GBES2018Q2Final.pdf; Muel Kaptein, *The Effectiveness of Ethics Programs: The Role of Scope, Composition, and Sequence*, 132 J. BUS. ETHICS 415 (2015) (summarizing literature and describing specific purpose of ethics and compliance program, and assessing effectiveness); *cf.* Han Donker, Deborah Poff and Saif Zahir, *Corporate Values, Codes of Ethics, and Firm Performance: A Look at the Canadian Context*, 82 J. BUS. ETHICS 527, 527 (2008) (noting that while "teachers of business ethics teach that business ethics is good for business. . . much of the general literature on the impact of having codes of ethics on decision making within organizations has been disappointing.").

31. Reggie Van Lee, et al., *The Value of Corporate Values*, STRATEGY & BUS. (May 23, 2005), https://www.strategy-business.com/article/05206?gko=9c265. According to Daniel Yanelovich, social trend analyst cited in the story, this is the third major wave of consumer and investor cynicism. The first ran from the Great Depression until World War I and the second from the economic downturn in the early 1960's until the early 1980's. *Id*.

proactive and deliberate in embedding corporate social responsibility ("CSR") and values into their strategy and culture.[32]

Today, corporate values can be found in a business's mission statement, corporate social responsibility reports, and direct marketing to customers.[33] Many corporations have adopted social values that are not historically religious in nature. These include diversity, transparency, integrity, and environmental stewardship.[34] Diversity policies and practices, particularly those targeted to supporting the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) employees, have increased exponentially in recent years.[35] Corporations may also adopt values for purposes of product differentiation[36] or branding.[37]

In 2001, David Baron of Stanford University first used the term "strategic CSR," otherwise known as corporate social responsibility, to refer to competing

32. *See, e.g.*, Berger-Walliser & Scott, *supra* note 26, at 168-69; Reggie Van Lee, et al., *supra* note 31; Rose M. Patten, *From Implicit to Explicit: Putting Corporate Values And Personal Accountability Front and Centre*, IVEY BUS. J. (Oct. 2004), https://iveybusinessjournal.com/publication/from-implicit-to-explicit-putting-corporate-values-and-personal-accountability-front-and-centre/; *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 28, 2012), http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/.

33. *Flash Report: 82% of the S&P 500 Companies Published Corporate Sustainability Reports in 2016*, 3BL MEDIA (May 31, 2017, 2:30 PM), https://3blmedia.com/News/Flash-Report-82-SP-500-Companies-Published-Corporate-Sustainability-Reports-2016.

34. *See* Heryati R, *190 Brilliant Examples of Company Values*, 6Q (Mar. 3, 2019), https://inside.6q.io/over-100-examples-of-company-values/ (Adidas: integrity and diversity; American Express: good citizenship; Ben and Jerry's: We strive to minimize our negative impact on the environment, and We seek strive to show a deep respect for human beings inside and outside our company and for the communities in which they live; Coca-Cola: diversity and integrity; Four Seasons: Supporting Sustainability and Advancing Cancer Research; Rackspace: transparency; and Starbucks: everyone is welcome, transparency, dignity, respect.).

35. Sarah McBride, *Record Number of Top U.S. Businesses Embracing Inclusive Policies for LGBTQ Workers*, HUMAN RIGHTS CAMPAIGN (Dec. 5, 2016), https://www.hrc.org/blog/record-number-of-top-u.s.-businesses-embracing-inclusive-policies-for-lgbtq (noting in 2002, only 3% of businesses had a diversity policy protecting gender identity, while 82% reported having such policies in 2017).

36. Though corporations have always attempted to distinguish their products from their competitors, the concept of product differentiation did not gain significant recognition until the 1950s, when changes in the economy led to more emphasis on product differentiation in advertising. *See* Wendell R. Smith, *Differentiation and Market Segmentation as Alternative Marketing Strategies*, 21 J. MARKETING 3 (1956). In 1956, Wendell R. Smith, professor of marketing and former president of the American Marketing Association defined product differentiation as "the bending of demand to the will of supply. It is an attempt to shift or to change the slope of the demand curve for the market offering of an individual supplier." *Id.* at 64. In other words, product differentiation is about convincing the consumer that what they want is aligned with what the company produces. *Id.*

37. Corporate branding is commonly defined in the marketing literature as a way for corporations to identify themselves to stakeholders and customers and differentiate themselves from competitors. *See, e.g.,* Majken Schultz et al., *Managing Corporate Reputation through Corporate Branding*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 420, 422 (Michael L. Barnett & Timothy G. Pollock eds., 2012); *see also* Susan McPherson, *6 CSR Trends to Watch in 2017*, FORBES (Jan. 19, 2017, 11:38 AM), http://www.forbes.com/sites/susanmcpherson/2017/01/19/6-csr-trends-to-watch-in-2017/#147a6af4ece1 (describing growth in CSR practices over the past decade as a "stunning transition"); *see also* NIELSON, DOING WELL BY DOING GOOD 2, 5–6 (2014), http://www.nielsen.com/content/dam/nielsenglobal/apac/docs/reports/2014/Nielsen-Global-Corporate-Social-Responsibility-Report-June-2014.pdf (world-wide survey showing strong and growing demand by employees and consumers for corporations to engage in responsible behavior).

for "socially responsible customers by explicitly linking their social contribution to product sales."[38] Since that time, the use of corporate social responsibility reports, values-based marketing, and cause-related marketing have grown dramatically. Furthermore, scholars have argued that defining a company's purpose and values can be essential to gaining a competitive advantage in the marketplace.[39] Research indicates that strong corporate values, including diversity, can increase a firm's financial performance.[40] They may also improve employee morale and customer loyalty.[41]

The emphasis on corporate values is not without controversy. In the current, highly politicized national context, "culture wars" give corporations incentives to take strong stances on highly divisive political issues. Indeed, corporations that fail to take stances on issues as diverse as white supremacy, gay marriage, gun control, and immigration can be called out by political activists as much for their silence as for anything they might say.[42] Or as one expert in corporate

38. Donald Siegel & Donald Vitaliano, *An Empirical Analysis of the Strategic Use of Corporate Social Responsibility*, 16 J. ECON. & MGMT. STRATEGY 773, 774 (2007) (citing D. Baron, *Private Politics, Corporate Social Responsibility and Integrated Strategy*, 10 J. ECON. & MGMT. STRATEGY 7 (2001)).

39. *See* L. Becchetti, et al., *The Socially Responsible Choice in a Duopolistic Market: A Dynamic Model of "Ethical Product" Differentiation*, 43 ECON. MODELLING 114, 114-15 (2014) (noting that a 2012 Nielsen survey of 28,000 individuals from 56 countries found that 48% of consumers are willing to pay more for products from socially responsible companies.); Mark Bonchek & Cara France, *How Marketers Can Connect Profit and Purpose*, HARV. BUS. REV. (June 18, 2018), https://hbr.org/2018/06/how-marketers-can-connect-profit-and-purpose (purpose is not just philanthropy; it is a source of competitive advantage); William Craig, *The Importance Of Having A Mission-Driven Company*, FORBES (May 15, 2018, 8:00 AM), https://www.forbes.com/sites/williamcraig/2018/05/15/the-importance-of-having-a-mission-driven-company/#7e71471b3a9c ("High-performance organizations are linked to being mission-driven companies. Mission statements must reflect commitment to higher social good for the community they serve, both local and global."); Ben Paynter, *Will Brands Without Social Purpose Thrive?*, FAST COMPANY (Dec. 18, 2018), https://www.fastcompany.com/90281516/will-brands-without-social-purpose-thrive (finding two-thirds of customers expected brands to "take a stand" on issues).

40. Rebecca Riffkin & Jim Harter, *Using Employee Engagement to Build a Diverse Workforce*, GALLUP (Mar. 21, 2016), https://news.gallup.com/opinion/gallup/190103/using-employee-engagement-build-diverse-workforce.aspx (describing Gallup study finding that "[t]he combination of employee engagement and gender diversity resulted in 46% to 58% higher financial performance. . ."); MCKINSEY & CO., DIVERSITY MATTERS (2017), https://assets.mckinsey.com/~/media/857F440109AA4D13A54D9C496D86ED58.ashx.

41. Robert C. McMurrian & Tampa Erika Matulich, *Building Customer Value And Profitability With Business Ethics*, 4 J. BUS. & ECON. RES. 11 (2006), https://www.researchgate.net/profile/Robert_Mcmurrian/publication/255610639_Building_Customer_Value_And_Profitability_With_Business_Ethics/links/540deffb0cf2d8daaacd3974/Building-Customer-Value-And-Profitability-With-Business-Ethics.pdf; *The Importance of Being Ethical*, INC.COM (Nov. 30, 2000), https://www.inc.com/articles/2000/11/14278.html.

42. Ryan Rudominer, *CSR Matters: In Trump Era, Silence No Longer an Option for Corporations*, HUFFPOST (Aug. 17, 2017, 2:07 PM), https://www.huffingtonpost.com/entry/csr-matters-in-the-trump-era-silence-is-no-longer_us_5995d0f7e4b033e0fbdec209; *Starbucks, Exxon, Apple: Companies Challenging (or Silent on) Trump's Immigration Ban*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/interactive/2017/business/trump-immigration-ban-company-reaction.html (noting that the degree to which a company speaks up on divisive issues may be related to the industry); *see also* GLOBAL STRATEGY GROUP, BUSINESS & POLITICS: DO THEY MIX? (2016), http://www.globalstrategygroup.com/wp-content/uploads/2016/12/2016-GSG-Business-and-Politics_Do-They-Mix_Fourth-Annual-Study.pdf; *When the 'Business of Business' Bleeds Into*

communications and branding put it, "[i]n the Trump era, silence is no longer an option for corporations."[43] At the same time, positive corporate image can drive a variety of positive outcomes, from financial performance to employee morale.[44]

Some corporations' values appear to genuinely drive the strategy and decision-making of the organization, and even transcend or at least stand on equal footing with the goal of profit-making. Ben and Jerry's, like a number of companies certified as "B Corps" or "benefit companies,"[45] has remained committed to its values-driven decision-making and pursuit of a social mission, even after its acquisition by Unilever.[46] Additionally, TOMS Shoes is well-known for its promise to donate one pair of shoes to children in need for every pair purchased.[47] Patagonia, perhaps one of the best known socially-driven companies, is deeply engaged in activism around climate change and sustainability.[48] Thus, while companies may adopt values (at least in part) to increase or expand market share, they may also be driven by authentic values that are incorporated throughout the company and articulated in formal corporate documents.[49]

Politicism, PENN STATE NEWS (Mar. 3, 2019), http://news.psu.edu/story/524718/2018/06/11/when-business-business-bleeds-politics.

43. Rudominer, *supra* note 42.

44. *See* Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699 (2015) (arguing that corporations should not have to accommodate religious practices that negatively impact corporation's image or brand).

45. *See generally* Janine S. Hiller, *The Benefit Corporation and Corporate Social* Responsibility, 118 J. BUS. ETHICS 287 (2013); *see also* BENEFIT CORP., *What is a Benefit Corporation?*, BENEFIT CORP., https://benefitcorp.net/ (last visited Mar. 3, 2018).

46. Brad Edmondson, *Activism as Brand Identity: Part of Ben & Jerry's Flavor and a Lesson for Other Mission-Driven Companies*, B THE CHANGE (Dec. 13, 2016), https://bthechange.com/activism-as-brand-identity-part-of-ben-jerrys-flavor-and-a-lesson-for-other-mission-driven-companies-cf7d61d0860e; David Gelles, *How the Social Mission of Ben & Jerry's Survived Being Gobbled Up*, N.Y. TIMES (Aug. 21, 2015), https://www.nytimes.com/2015/08/23/business/how-ben-jerrys-social-mission-survived-being-gobbled-up.html; *If It's Melted, It's Ruined!*, BEN & JERRY'S, https://www.benjerry.com/values/issues-we-care-about/climate-justice (Mar. 3, 2019); Adele Peters, *Why Ben & Jerry's Has a Corporate Activism Manager*, FAST COMPANY (July 10, 2018), https://www.fastcompany.com/90188065/why-ben-jerrys-has-a-corporate-activism-manager.

47. *Toms Takes Cause Marketing to a New Level*, CAMPAIGN CREATORS, https://www.campaigncreators.com/blog/toms-takes-cause-marketing-to-a-new-level/ (last visited Mar. 3, 2019). It is worth noting that a genuine commitment to social responsibility does not ensure that the company's strategy will be successful or even beneficial; many have criticized the TOMS model as ultimately causing harm in the communities where it donates shoes by undermining or destroying local businesses. Chris Cadogan, *Corporate Social Responsibility: Capitalist Corruption Or Genuine Aid?*, MCGILL INT'L REV. (June 19, 2018), https://www.mironline.ca/corporate-social-responsibility-capitalist-corruption-or-genuine-aid/.

48. Jeff Beer, *How Patagonia Grows Every Time It Amplifies Its Social Mission*, FAST COMPANY (Feb. 21, 2018), https://www.fastcompany.com/40525452/how-patagonia-grows-every-time-it-amplifies-its-social-mission.

49. These may include codes of ethics, codes of conduct and corporate ethics statements (for an analysis of effectiveness, *see generally* H. Bourne, M. Jenkins, & E. Parry, *Mapping Espoused Organizational Values*, J BUS. ETHICS (2017)) as well as human resource policies (*see generally* Thomas M. Begley and David P. Boyd, *Articulating Corporate Values through Human Resource Policies*, BUSINESS HORIZONS (July 2000)).

B. Threats to Secular Brand Values

Corporations that choose to espouse specific values may face challenges on several levels. In a capitalist economy, consumers will always have the ability to choose their service or product provider. If a company adopts a pro-environment position that results in higher prices, it may lose customers who are primarily concerned with price. If a company publicly adopts a pro-LGBTQ rights stance, that company may alienate people who are opposed to the LGBTQ lifestyle. A greater concern exists when legal requirements or prohibitions impact a company's ability to implement a values-driven strategy, as may occur when an employee seeks protection under Title VII to avoid compliance with company policies. In this section, we discuss some of the ways that a corporation's ability to advance commonly held values may be threatened by legal or regulatory issues.

1. Diversity and Inclusion

When corporations adopt values, they often adopt a commitment to diversity, equity, and inclusion.[50] However, morality has not always driven commitments to diversity. Diversity training and an intentional focus on increasing diversity in corporate America have their roots in compliance and legislative mandates.[51] The passage of the Civil Rights Act of 1964,[52] the Age Discrimination in Employment Act of 1967,[53] and the Rehabilitation Act of 1973[54] prohibited discrimination in employment based on the protected characteristics of race, religion, age, national origin, disability, color, and gender. As a result, corporate workforces became more diverse.[55] In response to these laws, corporations initially focused on compliance (eliminating discrimination as well as recruiting

50. It is important to note that these three principles are not all the same. *See* William Arruda, *The Difference Between Diversity And Inclusion And Why It Is Important To Your Success*, FORBES (Nov. 22, 2016, 11:40 AM), https://www.forbes.com/sites/williamarruda/2016/11/22/the-difference-between-diversity-and-inclusion-and-why-it-is-important-to-your-success/#3c1aefbe5f8f (describing the difference between diversity and inclusion); Alida Miranda-Wolff, *How to Talk about Diversity, Equity, and Inclusion*, ASCENT (June 20, 2018), https://theascent.pub/how-to-talk-about-diversity-equity-and-inclusion-96d5b582b25f (defining diversity, equity, and inclusion). For ease of reference, however, in this section we refer generally to policies related to equity, diversity, and inclusion as "diversity" policies.

51. Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training From 1964 to the Present*, 7 ACAD. MGMT. LEARNING & EDUC. 356 (2008).

52. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

53. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634, Pub. L. 90-202 (1967).

54. Rehabilitation Act of 1973, Pub. L. 93-112 (1973).

55. *See African-Americans in the American Workforce*, EEOC, https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/african_americans.cfm (last visited Mar. 3, 2019) (showing an increase from less than 1% of the officials and managers in the workforce to nearly 7% from 1966 to 2013 and an increase in office and clerical workers from 3.53% in 1966 to 15.76% in 2013); Crosby Burns, et al., *The State of Diversity in Today's Workforce*, CTR. FOR AM. PROGRESS (July 12, 2012, 9:00 AM), https://www.americanprogress.org/issues/economy/reports/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/.

women and minorities to demonstrate that discrimination was no longer occurring) and assimilating minority groups into the traditionally white male culture.[56]

It was not until the late 1980s that R.R. Thomas advocated for moving beyond affirmative action to empowering women and minorities to be more effective and powerful workers through inclusion in managerial roles.[57] Corporations began to diversify by educating the majority about the minority. Trainings focused on sensitivity to differences and an ability to work with diverse individuals, as opposed to embracing difference and incorporating it into the corporate culture.

Inclusion became more of a buzzword in the late 1990's, indicating acceptance of difference to make a stronger company.[58] Diversity trainings and policies became more focused on cross-cultural competence, or understanding and valuing differences, and continuing education in diversity and inclusion to strengthen a company. Today, the term diversity in the workforce has shifted from including more minority workers to a comprehensive paradigm where all workers need to be cross-culturally competent in order to maximize effectiveness in the workplace.[59]

Diversity values may be challenged by employees under Title VII's protections for religious freedom.[60] In *Altman v. Minnesota Department of Corrections*,[61] for example, employees who objected on religious grounds to the state's mandatory training on issues faced by gay and lesbian people in the workplace read their Bibles during the training. These employees were disciplined as a result.[62] The court overturned a summary judgment ruling in the employer's favor and found that the discipline may have been impermissible, given that other non-religious employees were similarly insubordinate during the training but were not disciplined. In *Buonanno v. AT&T Broadband, LLC*,[63] an employee successfully objected to his termination for refusing to sign a mandatory certification that stated he would abide by the company's diversity policy. The court found that the employer needed to engage in a more thorough interactive process with regard to his desired religious accommodation.[64]

---

56. Anand & Winters, *supra* note 51, at 357-58.
57. *Id*. at 359.
58. *Id*. at 363.
59. *Id*. at 362.
60. *See, e.g*., Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601-02 (9th Cir. 2004) (stating that employee felt he had religious obligation to object to his employer's diversity posters, which included pictures of gay people, and therefore prominently posted passages from religious scriptures condemning homosexuality in place where they could be seen by co-workers and customers).
61. Altman v. Minn. Dep't of Corrections, 251 F.3d 1199 (8th Cir. 2001).
62. *Id*. at 1201.
63. Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069 (D. Colo. 2004).
64. *Id*. at 1075, 1082.

Workplace conflicts related to diversity may also arise out of conflicts between employees, or between employees and supervisors. In *Matthews v. Walmart Stores, Inc.*,[65] an employee objected to being fired after condemning a co-worker for being gay. The employer found that the employee's conduct violated the company's discrimination and harassment policy.[66] In *Bodett v. Coxcom, Inc.*,[67] an employee similarly sued her employer after being terminated for criticizing her subordinate's homosexuality.[68]

It is worth noting that under Title VII, employers need not make an accommodation for an employee that causes an undue hardship, which has been interpreted as anything more than a *de minimis* financial burden.[69] Yet this standard has been interpreted inconsistently, and may not protect an employer that seeks to address employee morale, corporate values, or public perception of the corporation's brand.[70] Employers may also be required to engage in a substantial interactive process with the employee to determine if a religious accommodation can be found, which may or may not ultimately reflect back on the employer and the company's brand.

2. Privacy

Many companies have privacy statements or policies, including some that may be considered a corporate value. Apple CEO Tim Cook has argued that privacy is both a human right and a civil liberty, and he has sought to undercut his company's rivals by criticizing them for not holding this value as Apple does.[71]

Existing laws and regulations may compromise these companies' ability to implement their vision for privacy. For instance, after September 11, 2001, Congress enacted the USA PATRIOT Act in order to increase national security.[72] The Act allows enhanced surveillance, including mass data collection of phone records, and eases the requirements for obtaining search warrants and collecting

65. Matthews v. Walmart Stores, Inc., 417 Fed. Appx. 552 (2011).

66. *Id.* at 553.

67. Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004).

68. *Id.* at 741.

69. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 65 (1977).

70. *See* Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169 (2015) (arguing that courts should accept employer argument that harm to coworker morale will cause undue hardship); Flake, *supra* note 44, at 751-52 (arguing that courts should provide greater deference to employer claims that religious accommodations can negatively impact corporate brand image and cause greater than de minimis harm, in part because of difficulty of proving financial impacts).

71. *Apple CEO Tim Cook: 'Privacy Is A Fundamental Human Right'*, NPR (Oct. 1, 2015, 6:17 PM), https://www.npr.org/sections/alltechconsidered/2015/10/01/445026470/apple-ceo-tim-cook-privacy-is-a-fundamental-human-right; *Privacy*, APPLE, https://www.apple.com/privacy/ (last visited Mar. 2, 2019); Natalia Drozdiak & Stephanie Bodoni, *'This Is Surveillance.' Apple CEO Tim Cook Slams Tech Rivals Over Data Collection*, TIME (Oct. 24, 2018), http://time.com/5433499/tim-cook-apple-data-privacy/.

72. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

information about individuals without warrants.[73] As another example, although it later dropped the lawsuit, the FBI sought to compel Apple to create a "backdoor" to its iPhone to enable investigators to review the phone of a suspected terrorist in the San Bernardino mass shooting in 2016.[74]

3. Sanctuary

Immigration, as well as the treatment of undocumented people and their families, is currently an area of significant tension in the United States. The United States Immigration and Customs Enforcement (ICE), for example, may want to use employer databases or other resources to pursue deportation of undocumented individuals. Employers, however, may wish to provide sanctuary to workers (and/or their families) who face the threat of familial separation and deportation to dangerous areas. Also, in opposition to the threat of mass detentions, thousands of individuals and businesses have joined the New Sanctuary Movement, which seeks to provide protection for migrants and other potentially undocumented people who may be deported from the United States.[75] A potential clash here could look like the hypothetical included in the Introduction to this article, in which Compassionate Ice is prosecuted for helping migrants. Similar clashes have already occurred on an individual basis, as individuals charged for aiding migrants have raised religious freedom defenses to their prosecution.[76]

4. Access to Reproductive Care

Corporations have notably used religious freedom to avoid complying with laws requiring them to participate in the provision of contraception to their employees.[77] Employees of health clinics have also used claims of religious freedom to avoid treating women who seek certain medical procedures or require certain medications.[78] Indeed, the Department of Health and Human Services ("HHS") suggested that beneficiaries of the new system for registering religious

73. *Id*.

74. Arik Hesseldahl, *FBI Drops iPhone Case Against Apple After Outside Hack Succeeds*, RECODE (Mar. 28, 2016, 4:11 PM), https://www.recode.net/2016/3/28/11587332/fbi-drops-iphone-case-against-apple-after-outside-hack-succeeds; Cassandra Vinograd & David Wyllie, *Apple Objects in Battle Over San Bernardino Gunman's iPhone*, NBC NEWS (Mar. 2, 2016, 4:49 AM), https://www.nbcnews.com/storyline/san-bernardino-shooting/apple-objects-battle-over-san-bernardino-gunman-s-iphone-n530061.

75. *See* Brown & Scott, *supra* note 7, at 1107-10.

76. *See supra* notes 4-8 and accompanying text.

77. Luke W. Goodrich and Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SEATON HALL L. REV. 353, 364 (2018) (finding 78% of federal RFRA claims from 2012-2017 involved contraception).

78. Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 626-28 (2003); Martha S. Swartz, *'Conscience Clauses' or 'Unconscionable Clauses': Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y, L. & ETHICS 269, 269-72 (2013).

freedom complaints could include health care providers who did not wish to participate in certain types of reproductive care, including the provision of contraception and abortion.[79]

Alternatively, a clinic or pharmacy may object to having its employees turn away women seeking contraception or medically-necessary prescriptions related to reproductive care, but the organization may be bound by law to allow its employees to engage in such behavior. This issue is not speculative. A number of cases have arisen recently in which a pharmacist has refused to fill a prescription for medication on religious grounds. In one case, the pharmacist not only refused to fill the prescription, but also reportedly berated the customer for requesting it and refused to refer the patient to another pharmacist.[80] In another case, in violation of the company's policy, a Walgreens pharmacist refused to fill a prescription for medication that can cause a miscarriage and also would not refer the patient to another pharmacist.[81] In several states, a pharmacist can refuse to fill prescriptions that may cause a miscarriage or refuse to provide emergency contraception, even where the failure to do so jeopardizes the patient's health.[82] A business has little to no recourse against these laws, even if the refusal jeopardizes the business's commitment to protecting patients' health or violates its commitment to women's reproductive rights.

While these values are important to the corporations, whether because the owners and/or senior executives believe in them for their own sake, or whether they are adopted partly because they are good for business, that alone does not make them religious values. In the next section, we consider how religious freedom jurisprudence might help courts differentiate between corporate values and corporate religion.

II. WHEN DO VALUES BECOME RELIGION?

What can a business do when its commitment to a corporate value, like the ones discussed above, is threatened by a state or federal law, including Title VII? For individuals, the traditional means of protecting their value system against government intrusion is through the free exercise clause of the First

79. OFF. FOR CIVIL RIGHTS, *Conscience Protections for Health Care Providers*, https://www.hhs.gov/conscience/conscience-protections/index.html (last visited Oct. 26, 2019).

80. Fieldstadt, *supra* note 19.

81. Susannah Cullinane, *Walgreens Pharmacist Refuses to Fill Woman's Prescription to Induce a Miscarriage*, CNN (June 16, 2018, 10:48 AM), https://www.cnn.com/2018/06/25/health/arizona-prescription-walgreens-miscarriage/index.html.

82. *Pharmacist Conscience Clauses: Laws and Information*, NAT'L CONF. ST. LEGISLATURES (Sept. 2018), http://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx. While these practices may impact a business wishing to provide these services, health care providers who *want* to distribute such medications, even to protect the health of the patient, may not be protected if the hospital or clinic at which they work forbids such a practice. *See* Steph Sterling & Jessica L. Waters, *Beyond Religious Refusals: The Case for Protecting Health Care Workers' Provision of Abortion Care*, 34 HARV. J.L. & GENDER 463, 464-65 (2011).

Amendment.[83] Today, the RFRA arguably provides even greater protection than the First Amendment for individuals that believe the government has placed an undue burden on their religious expression.[84] Based on the *Hobby Lobby* ruling, the RFRA now also serves to protect religious freedom for closely held corporations.[85] Closely held corporations are majority owned by five or fewer owners.[86]

For any of the legal protections that exist for religious freedom, however, two fundamental, predicate questions must be addressed in assessing whether the activity of an individual or a corporation is protected: is the belief in question, in fact, religious as the law defines the term?[87] If so, is the religious belief sincerely held?

This section evaluates the definition of religion in legal history to determine if corporate values such as diversity, equity, or privacy can be considered religious. It also discusses the concept of sincerity, and how that has been applied in the context of assessing religiosity.

A. What is "Religion?"

Disagreement over the definition of religion has led to several different "eras" of free exercise jurisprudence as well as inter-branch battles. Given that Congress has passed statutes to impose its interpretations, and the Supreme Court has analyzed limits on those interpretations. State constitutional provisions and interpretations, as well as state statutes on religious freedom, complicate these nationwide ideological disputes. The definition of religious freedom is particularly complicated in the corporate context, with many questions left unanswered even more than four years after the *Hobby Lobby* decision.

1. The Early Supreme Court Approach – Reference to a God or a Creator

In 1878, in a case involving an accusation of polygamy by a member of the Church of Jesus Christ of Latter-Day Saints,[88] the Supreme Court noted,

---

83. 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*.

84. *See, e.g.*, William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 74 n.20 (2014) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 713 (2014)). Individuals may also find protection in certain state constitutional provisions and statutes, many of which are similar in language to the First Amendment and RFRA.

85. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014).

86. *FAQs*, I.R.S., https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-5 (last visited Mar. 3, 2019).

87. United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007) ("To prevail under RFRA, defendant must first (1) articulate the scope of his beliefs, (2) show that his beliefs are religious").

88. Reynolds v. United States, 98 U.S. 145, 161 (1878).

"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is the nature and scope of the religious freedom which has been guaranteed.[89]

To answer the question, the Court looked to the nation's founders and their statements prior to the adoption of the First Amendment.[90] In particular, the court quoted Thomas Jefferson as stating, "religion is a matter which lies solely between man and his God,"[91] which many have interpreted to require a relationship with a Deity.[92]

Twelve years later, the Supreme Court again faced a question of religious liberty.[93] In 1889, Samuel Davis and several others took a "voter-eligibility oath" affirming, among other things, that they were not polygamists and did not affiliate with any group that supported or encouraged members to engage in polygamy. Davis and the others were members of the Church of Jesus Christ of Latter-day Saints, a church that has taught and/or encouraged male members to have multiple wives.[94] Davis was convicted of fraud and appealed based on his religious beliefs and the First Amendment's free exercise clause.[95] In addressing the issue, the Court explained its position further by defining religion more clearly in terms of a relationship with a higher being: "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[96] Again, because the Court was not asked to assess the legitimacy of Davis's religion, the statement is merely dicta used to provide some context to Davis's argument for a religious exemption to a state limitation on voting.

89. *Id*. at 162. It is key to note for the purposes of this paper, we accept that religious belief is protected completely, where religious expression, or actions based on religious belief, are not wholly protected and may be limited or curtailed by the government. The "scope of religious protection" is not a topic we address in this paper. We focus on how corporations establish a religion that is protected by the 1st Amendment or the Religious Freedom Restoration Act, to the same extent, or the same scope of protection, as individual religious freedom.

90. *Id*. at 163.

91. *Id*. at 164.

92. *Id*. at 163-64. These statements were made in the same speech where Jefferson referred to the same issues as dealing with the "rights of conscience." But these statements were made to a committee of the Danbury Baptist Association so it is highly probable that the use of the term "rights of conscience" was not meant to broaden the definition of religion but was simply synonymous with "religious beliefs." However, this language was merely dicta, as the Court did not appear to question whether the Church of Jesus Christ of Latter-day Saints was, in fact, a bona fide religion.

93. Davis v. Beason, 133 U.S. 333, 342 (1890). This case was overruled in part by Romer v. Evans, 517 U.S. 620 (1996).

94. *Beason,* 133 U.S. at 333.

95. *Id*. at 340.

96. *Id*.

2. *Shifting to Sincere and Deeply Held Belief Systems*

By the mid-1940s, the Court shifted from a historical and doctrinal approach referencing creation and God to a more neutral or inclusive values-based analysis. The Court also clarified that any evaluation of the *truth* of a belief was not within the purview of the Courts and that the judicial system should focus on the sincerity of the belief, even those that seem bizarre or unusual.[97] In *U.S. v. Ballard*,[98] the Court overturned a previous conviction for mail fraud based on the lower court's analysis that the belief expressed by the defendants was false. It held that the court should not have undertaken such an inquiry.[99]

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[100]

Notably, the religion in question did not reference a creator or god, but instead was based on revelations received from "ascended masters."[101]

Within the next twenty years, the Court moved from discussing established or professed "religions" to discussing "conscience."[102] In several conscientious objector cases, the Court was faced with young men who did not want to participate in the Vietnam War. These men did not object because of their affiliation with any established religion, but instead had deeply held beliefs against war unrelated to any current religious beliefs.[103] Several individuals in the so-called "conscientious objector cases" were raised in churches that did not preach against war specifically, but those individuals had left those churches and had developed a sincerely-held aversion to war separately from any organized church.[104]

In addressing these situations, the Court interpreted the term "religious training and belief," defined by statute as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[105] The Court concluded that Congress'

---

97. United States v. Ballard, 322 U.S. 78 (1944). In *Ballard*, several defendants were convicted of mail fraud because they sent solicitations through the mail asking people to pay a membership fee to join the "I Am" movement. This movement was based on the defendants' statements, and apparently sincere belief, that they could receive revelation from certain "ascended masters" and could channel those masters to heal. The fraud conviction resulted from a finding that the belief was false and so therefore using the mail to induce people to invest was mail fraud. *Id*.

98. *Id*.

99. *Id*.

100. *Id*. at 87.

101. *Id*. at 79.

102. United States. v. Seeger, 380 U.S. 163 (1965).

103. *Id*.; Welsh v. United States, 398 U.S. 333, 339 (1970).

104. *Welsh*, 398 U.S. at 335.

105. *Seeger*, 380 U.S. at 165.

use of the term "Supreme Being" instead of "God" was meant to broaden the definition of religion. It further concluded the test of belief "in a relation to a Supreme Being" was based on whether the belief was sincerely held and occupied a place in the life of its possessor "parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[106]

The Court quoted Chief Justice Hughes (from a dissent in a previous case) to state, "[p]utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty."[107] The Court stated that, given the definition, the exemption is more correctly available to any person whose objections "can fairly be said to be 'religious.'"[108] Finally, the Court stated that this interpretation "embraces the ever-broadening understanding of the modern religious community."[109] Thus, religion seems to mean more than an established church affiliation or even a set of values that had some significant adoption in society.

III. An Era of Greater Ambiguity

However, the Supreme Court was apparently not ready to leave traditional religious ideas entirely out of its definition. In 1972, the Court heard *Wisconsin v. Yoder*, a case involving Amish and Mennonite families that did not want to send their children to school, but rather believed they should work on their family farms.[110] According to the Court, establishing that the families had a viable religious claim required determining whether the objection to schooling was based on religious or secular values. That is, simply because the Amish held sincere religious beliefs did not mean that their lifestyle preferences were worthy of religious freedom protections. Thus, the Court held that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[111]

Clearly concerned that every person could become a law unto himself, the Court noted that while the "determination of what is a 'religious' belief or

106. *Id*. at 165-66. The parallel place test was reaffirmed in *Welsh*, 398 U.S. at 339 (1970) (where another conscientious objector based on reasons related to conscience and not religious affiliation refused to declare religion as the reason for his objection.).

107. *Seeger*, 380 U.S. at 176 (quoting Chief Justice Hughes dissent in United States v. MacIntosh, 283 U.S. 605, 634 (1931)).

108. *Id*. at 180.

109. *Id*. at 180.

110. Wisconsin v. Yoder, 406 U.S. 205 (1972). Here the Court was faced with compulsory school attendance policies which required students to attend school until the age of 16. Several Amish and Mennonite families refused to send their children to school after the 8th grade (or age 14) and faced penalty. The families argued that their religious beliefs required the young people to be at home working on the farms. *Id*.

111. *Id*. at 215.

practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct. . .”[112] Ultimately, the Court found that the Amish’s way of life was “not merely a matter of personal preference, but one of deep religious conviction.”[113] In making that determination, the Court recognized that the Amish lifestyle was “shared by an organized group,” explicitly tied to their reading of Biblical text, and strictly enforced by the church community.[114] As a result, a belief that is “purely secular,”[115] or one that is not a part of a coherent belief system but instead appears to be an individual’s singular personal preference,[116] may not be considered religious.

At the same time, the Supreme Court has stated that a belief does not need to be *central* to a traditional religion, nor even central to the claimant’s professed religious tradition, to qualify for protection under RFRA.[117] Lower courts have also reinforced that principle. For example, in *U.S. v. Zimmerman*, the defendant argued that taking a blood sample would violate his religious faith.[118] Although Zimmerman was a professed Catholic, the district court did not find that a refusal to have blood drawn was central to Catholicism and therefore rejected his religious freedom claim.[119] The Ninth Circuit overturned that decision, noting,

> Zimmerman doesn’t have to show that his beliefs are central to a mainstream religion. . . Moreover, a belief can be religious even if it’s not ‘acceptable, logical, consistent, or comprehensible to others.’ . . . Nor is an individual limited to the religious doctrines of his upbringing; religious beliefs may evolve or change based upon life experiences or personal revelations.[120]

Consequently, the current definition of “religion” at the Supreme Court level remains unclear. Lower courts and scholars have, over time, attempted to set

---

112. *Id*. at 215-16.

113. *Id*. at 216.

114. *Id*.

115. Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981).

116. In Guzzi v. Thompson, 470 F. Supp. 2d 17, 25-26 (D. Mass. 2007), the court found that a prisoner’s belief in eating kosher meals was not religious where he was not Jewish. “If Guzzi alleged that he followed Judaism and alleged that his faith required him to keep kosher, the dispositive inquiry would be whether Guzzi sincerely held that belief. . . .If so, he would have a protected right to that religious exercise, and the Court would move directly to whether the government substantially burdened that right and demonstrated that its regulation of that religious practice is nevertheless reasonable. The complication in this case is that Guzzi does not allege that he follows Judaism. He describes himself as an Orthodox Catholic.” *Id*.

117. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 n.5 (2014) (citing to the Religious Land Use and Institutionalized Persons Act which amended the definition of religion for RFRA to read, “The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. 2000cc-5-7(A)). But even this new definition of religious exercise does not clearly define religion. It instead merely clarifies that action based in religion does not have to be based in the central tenets of a religious system, opening the door for more discussion about conscience and sincerely held beliefs. The definition, in fact, still includes the term “religion” as a limit on what is protected without defining religion.

118. United States. v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007).

119. *Id*. at 853.

120. *Id*. at 853-54.

forth more objective tests, but none have been universally adopted, as described in the next section.

IV. The Struggle in the Lower Courts

The definition of "religion" remains a difficult concept for courts. The Supreme Court has never given a clear test to determine if a set of beliefs are "religious." Lower courts have attempted to articulate objective tests to determine if beliefs are religion.

In *U.S. v. Meyers*,[121] nearly twenty-five years after *Yoder*, a federal district court judge proffered a five-prong test for determining whether a belief system constitutes a religion. It considered the following: (1) whether it addresses "ultimate ideas" of life, purpose and death; (2) some indication of the metaphysical, including issues such as heaven, purgatory, or other realities that "transcends the physical"; (3) a moral and/or ethical system that guides how the individual acts; (4) the comprehensiveness of the beliefs; and (5) whether the beliefs include "accoutrements of religion," such as writings, gatherings, ceremonies and founders or prophets.[122] A fair analysis based on this test would consider all of the factors, but no single factor should be a determining item.[123] The judicial system has not widely adopted this test. In 2013, the Fourth Circuit Court of Appeals determined that a set of beliefs must be "religious in nature under [that person's] 'scheme of things.'"[124] The court did not expand the definition of religion or even articulate a clear definition of it, but looked instead to the Supreme Court's language in *Yoder* that even pervasive beliefs must be religious and not simply a "way of life."[125] The court further noted that, while delicate, the distinction must be made and pointed to one particular factor: the need for "some organizing principle or authority other than herself that prescribes her religious convictions."[126]

Scholars and practitioners have also attempted to set forth definitions for the term "religion." James Donovan, a professor and librarian at the University of Kentucky College of Law, evaluated several anthropological definitions of religion and proposed that the most appropriate would be a "belief system which

121. United States v. Meyers, 906 F. Supp. 1494, 1499 (D. Wyo. 1995). While the federal law in question was the Religious Freedom Restoration Act, Judge Brimmer declared that for definitional purposes, religion under RFRA is the same as religion under the First Amendment. The court rendered this decision before RLUIPA amended RFRA in 2000. Even so, it provides a useful illustration of a court attempting to define religion in an objective manner for consistency and application purposes.

122. *Id*. at 1502-03.

123. *Id*. at 1503.

124. Moore-King v. County of Chesterfield, 708 F.3d 560, 571 (4th Cir. 2013) (citing United States v. Seeger, 380 U.S. 163, 185 (1965).

125. *Id*. (citing Wis. v. Yoder, 406 U.S. 205 (1972)) (noting that Supreme Court did not articulate the difference between way of life and religion but instead offered illustration to demonstrate the difference).

126. *Id*.

serves the psychological function of alleviating death anxiety."[127] Professor Kent Greenawalt of Columbia University proposed that religion should be defined by comparison of the proposed religion to that which is clearly religious.[128] As recently as 2016, Ethan Blevins, an attorney with the Pacific Legal Foundation, proposed a definition of religion centered on the "worship of a supernatural agent."[129] He argued that the narrow definition aligns with the understanding of the framers of the Constitution and their Judeo-Christian perspective of religion.[130]

Despite these attempts at definitions, courts wrestling with the definition of religion have produced outcomes that lack a consistent method of analysis. As one commentator put it, "No matter how they define 'religion,' courts appear to rule based on their instinct rather than on thoughtful, objective analysis."[131]

B. Defining Religion in the Corporate Context

Arguably, there should be no difference between the definition of religion for a corporation and the definition of religion for a human being, although the ways in which religion manifests and is evaluated will almost certainly differ between the two.[132] In this section, we consider what definition of religion we should apply in cases of corporations seeking protection for the types of values we discussed in Part I, and we examine how assessing corporate religion is complicated when owners of corporations hold different, or even conflicting, beliefs.

1. Applying Religion to Corporate Values

As previously noted, there is no universally adopted, legal definition of religion. In our view, the most comprehensive and readily applicable definition

127. James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion*," 6 SETON HALL CONST. L.J. 23, 95 (1995). *See* Eric D. Yordy, *Caught in the Clause: An Analysis of Same-Sex Marriage Through the Lens of the Establishment Clause*, 22 TUL. J. L. & SEXUALITY 55 (2013) for further explanation of the anthropological and other definitions proposed by legal scholars.

128. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 762 (1984).

129. Blevins, *supra* note 15, at 16.

130. *Id*. at 2.

131. Major Christopher D. Jones, *Redefining "Religious Beliefs" Under Title VII: The Conscience as the Gateway to Protection*, 72 A.F. L. REV. 1, 17 (2015).

132. For example, how can a nonhuman entity have beliefs about "fundamental and ultimate questions" when it lacks the capability to generate those questions itself? How can an entity that is capable of perpetual existence, a capacity that is one of its defining features, have beliefs about the meaning of life? We discuss this and other challenges inherent in determining what beliefs to attribute to corporations in Part II.B.1.

of religion is one adopted by the Third Circuit.[133] In 2017, the Third Circuit affirmed its use of a three-part test for defining a religion:

> First, religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[134]

This definition of religion is consistent with, albeit more detailed than, the most recent pronouncements from the Supreme Court that religion refers to a set of sincerely held beliefs which hold the place of traditional religion in the life of the believer.[135]

According to this definition, assessing whether a corporate value is religious requires situating the corporation's asserted beliefs within a larger context. While this larger context need not be a traditional religion, it must in some way mimic the role of a traditional religion in the corporation's life.

Applying this definition, how might a court analyze whether a corporate belief in sanctuary, diversity, privacy, or a woman's right to health care is religious? As with an individual, we believe the answer to that question lies in whether the belief is situated within the context of a broader religious tradition. Consider a commitment to equal treatment of LGBTQ employees and customers. On an individual level, religious faith could clearly motivate such a belief. For example, the business owner could be a member of the organization Believe Out Loud, which states "Jesus teaches us to welcome all. We believe our churches and society should do the same. We work for lesbian, gay, bisexual and transgender equality because God calls us to *do justice and love kindness*."[136] Situated within and explicitly motivated by a traditional religion (Christianity), it should not be difficult for a court to identify this as a religious belief.

Yet, by the same token, a belief in equality may arise out of purely secular, non-religious values. A commitment to equality may be motivated by a moral or personal conviction that is part of a "lifestyle choice"—not grounded in religion. It may arise out of a belief that treating people equitably will improve both relationships among employees, improve the corporation's image, or appeal to a diverse customer base. But these beliefs may not be situated within the context of a larger set of beliefs about life and death, ultimate meaning, or "deep and imponderable matters."[137]

---

133. Fallon v. Mercy Catholic Med. Ctr. of Se. Pa., 877 F.3d 487 (3rd Cir. 2017) (citing Malnak v. Yogi, 592 F.2d 197, 201 (3d Cir. 1979) (Adams, J. concurring)). The test cited was adopted by the 3rd Circuit in Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir 1981)).

134. *Id*. (citing to Malnak v. Yogi, 592 F.2d 197, 201 (3d Cir. 1979) (Adams, J. concurring)).

135. We return to the question of sincerity testing in Part III.

136. *What We Believe*, BELIEVE OUTLOUD, http://www.believeoutloud.com/background/what-we-believe (last visited Mar. 3, 2019). See Yordy, *supra* note 127, at 72-75, for examples of two established churches (the Metropolitan Church of Christ and the Unitarian Universalist Association) which support same-sex marriage and LGBTQ issues as part of the teaching. Business owners who adhere to those teachings would be in the same situation as members of the Believe Out Loud organization.

137. *Fallon*, 877 F.3d at 491.

The court's job, then, is to determine whether the individual corporate value can be situated within a larger belief system. Thus, a corporation may hold diversity as a secular value *or* as a religious value, depending on the larger context.

Situating a certain belief or value within a larger set of beliefs of this type may help curb potential abuses of corporate religious claims. The following example illustrates such potential abuses: imagine a publicly traded corporation declares that its religion exalts profitmaking above all else, and claims making money as one of its cardinal religious beliefs. According to prior court decisions, there are few legal reasons why a corporation could not make such a claim. In fact, popular spirituality guru Marianne Williamson, in her book *The Law of Divine Compensation: On Work, Money and Miracles*, urges her followers to see their jobs as a way of serving God, and notes, "[w]hatever your business, it is your ministry."[138] The fact that profitmaking is not a value held by any major religion is not, in itself, a barrier to claiming religious freedom for that belief.

Few would be surprised if a corporation made the same claim. After all, most for-profit corporations are obligated to make profits, and it is therefore central to their existence. The deeper question, however, would be whether this belief in profiteering was *religious*. Per our definition, in order to be a religious belief, the corporation must be able to situate its commitment to profits in a comprehensive belief system addressing fundamental and ultimate questions about deep and imponderable matters. Like the Amish in *Wisconsin v. Yoder*, a court would have to consider if the belief was a "lifestyle" choice or a secular value, rather than a religious belief. Absent some remarkable facts, it appears unlikely that a corporation could do so.

While this definition appears reasonable in the corporate context, the application nonetheless provides significant obstacles. Determining the role of an individual belief in the life of a human being is challenging enough—but how can we determine the role of an individual belief in a *corporation's* overall belief system? What does it mean for a corporation to hold a belief at all?

Two possibilities exist, based on the *Hobby Lobby* decision. One is that the corporation's religion will simply be found to mimic that of its owners. If an individual belief is *religious* for the owners, it is religious for the corporation. Alternatively, we might try to assess whether the corporation itself has religious beliefs, regardless of the individual beliefs of the owners. In *Hobby Lobby*, the Court essentially allowed for both possibilities, pointing to evidence of the

138. Marianne Williamson, *The Law of Divine Compensation: On Work, Money and Miracles*, MARIANNE WILLIAMSON, https://marianne.com/the-law-of-divine-compensation-on-work-money-and-miracles/ (last visited Mar. 3, 2019). Marianne Williamson is the author of seven New York Times bestselling books, a spiritual advisor to Oprah Winfrey, and a 2020 presidential candidate. Anna Peele, *Marianne Williamson Wants to Be Your Healer in Chief*, WASH. POST (Feb. 19, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/02/19/feature/self-help-author-marianne-williamson-wants-to-be-your-healer-in-chief/?utm_term=.9ebb25e4f494.

beliefs of both the *individuals* and the *corporation*.[139] We discuss these two approaches in the next part.

2. *Using Corporate Personhood Theory to Pinpoint Corporate Religion*

Since *Hobby Lobby*, a number of commentators have proposed theories under which a corporation might establish its religious freedom.[140] Others have opposed the entire concept of corporate religion as inconsistent with the natures of both corporations and religion.[141] Scholars have offered various opinions on the nature of corporate religion both because corporate religion *per se* is a relatively new concept and because the Supreme Court has not yet ruled directly on this issue. The fundamental theoretical issue addressed by these cases and scholars can be summarized as follows: when the corporation exercises religion, does it do so as an aggregate of the individual beliefs of the owners of the corporation, or as an individual entity with its own, separate beliefs? What source should the court use to determine the religion, if any, of a corporation?

How a corporation might establish its religion depends, in part, on how one thinks about the nature of a corporation's rights. There is, arguably, no single dominant theory of corporate personhood which might provide a definitive answer to this question.[142] Jason Iuliano suggests that three main theories of corporate personhood have influenced our legal doctrine: the artificial entity theory, the aggregate entity theory, and the real entity theory.[143] Each of these

139. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 699 (2014).

140. *See, e.g.*, Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811 (2018) (arguing that there should be no single theory of corporate personhood and the states should determine corporate rights); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (Winter 2014/2015) (discussing implications of *Hobby Lobby* and its impact on corporate personhood determinations from corporate law perspective).

141. *See, e.g.*, Caroline Mala Corbin, *Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions*, AM. CONSTITUTION SOC. (2014) (arguing that corporations cannot have religion because of nature of religion); James D. Nelson, *The Trouble with Corporate Conscience*, 71 VAND. L. REV. 1655 (2018) (criticizing the use of the standard corporate form for prosocial purposes); Thomas E. Rutledge, *A Corporation Has No Soul – The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014) (arguing that corporations cannot have religion because of their inherent independence as business form).

142. *See, e.g.*, Ronit Donyets-Kedar, *Challenging Corporate Personhood Theory: Reclaiming the Public*, 11 LAW & ETHICS HUM. RTS. 61 (2017) (noting inconsistencies in corporate personhood jurisprudence and calling for more clarity in corporate personhood theory generally); Tamara R. Piety, *Why Personhood Matter*s, 30 CONST. COMMENT. 361 (2015) (criticizing case-by-case adjudication of corporate personhood and attendant rights); Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605 (2016) (arguing that a unified theory of corporate personhood is critical to a comprehensive determination of corporate constitutional rights).

143. Jason Iuliano, *Do Corporations Have Religious Beliefs*, 90 IND. L.J. 47, 55-56 (2015).

theories has dominated a particular era, with one evolving into the next over time.[144]

The artificial entity theory characterizes corporations as state law creations that have no rights other than those explicitly granted in their charters.[145] The artificial entity theory dominated legal treatment of the corporation throughout much of the 1800s.[146] This was largely replaced by the aggregate entity theory, which considers corporations to be aggregations of shareholders who endow the corporation with its powers and rights.[147] Aggregate entity theory evolved in the late 19th century as courts began to think of corporations as extensions of their human creators.[148] During this time, corporations were granted some constitutional protections that had previously been reserved for human beings, such as the constitutional rights of due process and equal protection.[149] Under the final theory of corporate personhood, called the real entity theory, corporations are treated as creations with their own rights, separate from their shareholders and from the state.[150] This theory emerged in the early 20th century, primarily in criminal cases which held that corporations can be subject to criminal sanctions,[151] even for crimes that require a *mens rea*.[152]

Some have criticized the aggregate entity theory in the context of determining corporate religion. One scholar argues that expanding religious rights under the aggregate theory may remove the underlying justification for the limited liability that corporations offer. Essentially, the aggregate entity theory would allow owners to avoid individual liability for corporate harms while enjoying individual protection for rights through the corporate form.[153] Another criticism focuses on the practical difficulties inherent in the inquiry envisioned by an aggregate entity theory.[154] Trying to parse the differences among the religious beliefs of the corporation's shareholders in order to create a single, aggregate entity may present insurmountable problems for the court.[155] Because this process may be infeasible, these scholars suggest that the separation of the corporate form from the shareholders makes such religious identification

144. *See* James G. Wright, *A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights*, 49 J. MARSHALL L. REV. 889, 891-908 (2016) at for an excellent discussion of the evolution of corporate personhood doctrine.

145. Iuliano, *supra* note 143, at 56.

146. *Id*.; *see also* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–11 (1990).

147. *Id*. at 56.

148. *Id*. at 58.

149. Iuliano, *supra* note 143, at 59-60.

150. *Id*. at 56.

151. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 497-98 (1909).

152. Mininsohn v. United States, 101 F.2d 477, 478 (3d Cir. 1939).

153. Wright, *supra* note 144, at 917.

154. *See, e.g.*, Stephen Makino, *Examining Corporate Religious Beliefs in the Wake of* Burwell v. Hobby Lobby, 25 S. CAL. INTERDISC. L.J. 229, 252 (2016); Tesch Leigh West, *When Corporations Go to Church: Free Exercise under Hobby Lobby*, 27 B.U. PUB. INT. L.J. 37, 62 (2018).

155. Makino, *supra* note 154, at 252.

inappropriate.[156] By definition, if the beliefs of the owners directly conflict, the aggregate entity theory cannot be the basis of a finding of corporate religion, unless the court interprets "aggregate entity" to mean "winner take all." In other words, whichever individual "wins" arguments over corporate control receives constitutional protection for her rights, while the other individual owners do not.

In this vein, several scholars champion the real entity theory as the most appropriate basis on which to determine the religion of a corporation.[157] Supporters of the real entity theory might, in response to the aggregate entity theory, argue that inferring beliefs from a corporation's charter and actions (i.e., treating the corporations as a real entity) is more easily done than assessing the sincerity of an individual's claimed beliefs (i.e., treating the corporation as an aggregate of individual beliefs), and that therefore the real entity theory is the only feasible basis for determining the source of any corporate religion.

Though some suggest he rejected the real entity theory, Justice Alito himself in *Hobby Lobby* seemed to allow a corporation's beliefs to be separate from those of its owners when he addressed how to resolve religious disputes among corporate owners:

> The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. . .State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. . .Courts will turn to that structure and the underlying state law in resolving disputes.[158]

Here, Justice Alito appears to suggest that the court may find the corporation has a religious value even where some of the owners openly eschew that value.

In addition, because corporations have been held to be capable of criminal intent, Iuliano argues, it is rational to conclude that corporations have intentions of their own as a general matter.[159] Sean Nadel argues that there may be benefits to allowing publicly traded companies to have religious freedom because it would "push companies to take moral stances on issues at the behest of their shareholders."[160]

Under the real entity theory and its assumption that corporations have intentions, the critical issue is how those intentions are determined. Iuliano suggests that the best explanation of the source of corporate intent is a non-

156. Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, Sebelius v. Hobby Lobby Stores, Inc. 723 F.3d 1114 at 2 (10th Cir. 2013) (Nos. 13-354 and 13-356).

157. Iuliano, *supra* note 143, at 56; Makino, *supra* note 153, at 253; *See* John B. Stanton, *Keeping the Faith: How Courts Should Determine Sincerely-Held Religious Belief in Free Exercise of Religion Claims by For-Profit Companies*, 59 LOY. L. REV. 723, 751-52 (2013).

158. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

159. Iuliano, *supra* note 143, at 78.

160. Sean Nadel, *Closely Held Conscience: Corporate Personhood in the Post-*Hobby Lobby *World*, 50 COLUM. J.L. & SOC. PROBS. 417, 439 (2017). It is unclear, however, that endowing those moral stances with the additional First Amendment protection that religion offers is necessary when so many corporations already adopt moral positions and values as part of their CSR programs. *See infra* Part IA.

summative account in which the joint intentions of a group create a group agent.[161] In turn, that group agent becomes the intentional actor, and presumably the holder of any corporate religion. This theory is only effective in the context of RFRA claims, however, when the group of owners is cohesive enough in its joint intentions to reflect a unified sincerely held religious belief. Alternatively, one might simply determine corporate intent based solely on objective measures. For example, one might determine corporate religious beliefs based on the corporate charter, bylaws, and policies.

However, one problem with the real entity theory is that the Court may have rejected it in *Hobby Lobby*. As alluded to above, Justice Alito, quarreling with the Third Circuit's holding that corporations cannot take action separate from their owners, wrote that this observation was "quite beside the point. Corporations, 'separate and apart from' the human beings who own, run and are employed by them, cannot do anything at all."[162]

Some scholars also adamantly argue against allowing for an extension of corporate religious rights as the real entity theory may suggest. "Corporations are not [. . .] sentient beings," writes Andrew J. Fleming.[163] "They cannot decide for themselves which religion [. . .] to possess. If a corporation is to have a religious or political affiliation, it is because the owners and officers (often the same people in the closely held context) superimpose their own religious and political beliefs onto the corporate personality."[164]

The problem with the existence of these competing theories is that they could yield different results from a single set of facts. While corporate bylaws might provide evidence that the owners intended to close the business on Sundays, that may be insufficient to demonstrate the corporation's beliefs about the meaning of life and the answers to life's imponderable questions. As a result, they would be insufficient to prove the belief is *religious*. Under a real entity theory, the company would lose a claim for religious freedom. Using an aggregate theory, however, we might deduce (as the Court did in *Hobby Lobby*) that the corporate policies are situated within a set of Christian religious beliefs, based on the individual beliefs of the owners, and the company would win.

Moreover, in circumstances in which owners have conflicting beliefs, how should the court determine the nature of the corporation's belief system as a whole, and how is it to situate an individual religious practice (i.e., closing on Sunday) within that belief system? Imagine, for example, that Hobby Lobby is inherited by a pair of twins, one of whom has deeply held Christian beliefs, while the other is an avowed atheist. Is the practice of closing on Sundays religious

161. Iuliano, *supra* note 143, at 83.

162. *Hobby Lobby*, 573 U.S. at 682.

163. Andrew J. Fleming, *Dissecting* Hobby Lobby's *Corporate Person: A Procedural Proposal for Aligning Corporate Rights and Responsibilities*, 81 BROOK. L. REV. 1749, 1751 (2016).

164. *Id*. at 1751-52.

because it is religious for half of the ownership, or *non*-religious because it is not religious for the other half of the ownership?

If courts adopted the aggregate theory of corporate personhood in corporations with shareholders that have differing religious views, the aggregate entity theory would require courts to determine whose views supersede. That determination alone might violate the Establishment Clause. Conversely, which religion would be ascribed to the corporation when different shareholders hold the same belief (e.g., protecting the environment) but ascribe that belief to different religions (e.g., Christianity and Judaism)? When multiple religions share certain values in common, does the corporation need to assert a single religion in order to get religious protection for those values?

Using a real entity theory, courts might look to a variety of objective expressions by the corporation to determine the corporation's religion. For example, a court may consider board policies, statement of purpose, and other actions by the company to objectively manifest an intention to operate under a particular Christian worldview. In *Hobby Lobby*, the Court cited two corporate documents reflecting the religious beliefs of both Conestoga and the Hahns. The first was Conestoga's "Vision and Values Statements," which affirmed "that Conestoga endeavors to 'ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage.'"[165] The second document, the "board-adopted 'Statement on the Sanctity of Human Life,'" explained that "the Hahns [believed] that 'human life begins at conception.'"[166]

Similarly, the Court described the religious beliefs of Hobby Lobby as reflections of the beliefs of its owners, the Green family, through reference to objective evidence of corporate purpose, intent, and actions.[167] "Hobby Lobby's statement of purpose commits the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.' Each family member has signed a pledge to run both Hobby Lobby and Mardel, a Christian bookstore business also owned by the family, in accordance with the family's religious beliefs and to use the family assets to support Christian ministries."[168] The analysis did not stop with statements, but went on to consider the extent to which the businesses' acts reflected those stated values. Accordingly, it noted the that Greens' businesses "refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'"[169] The Court

165. *Hobby Lobby*, 573 U.S. at 701 (alterations in original).
166. *Id*.
167. *Id*. at 702-03.
168. *Id*. at 711, n.33 (citations omitted).
169. *Id*. at 703.

also noted that Hobby Lobby and Mardel stores closed on Sundays, "even though the Greens calculate that they lose millions in sales annually by doing so."[170]

The court's reference to objective evidence of corporate policies and actions would allow the court to bypass the differences between the owners. But this would force the company to objectively manifest its religious expression in a sufficient enough manner, such that religious finding could be determined by these measures alone.

In order for a corporation to adopt a religion for RFRA purposes, its owners must know how the court will assess that religion. The answer to which type of analysis the court will conduct cannot constitutionally be "whichever analysis favors a finding of religion"; this practice would suggest a clear preference for religion that is constitutionally forbidden.[171] As we turn to the next step of the analysis, sincerity testing, we uncover a similar problem.

III. DETERMINING THE SINCERITY OF CORPORATE RELIGION

Based on the definition of religion adopted in Part II, corporate value such as diversity, privacy, or equality *could* be considered religious, depending on how that value is situated within a larger set of beliefs. Recall, however, that the Court has also made it clear that a religion must be *sincerely held* to receive protection under RFRA.[172] In this part, we discuss the notion of sincerity testing in religious freedom claims and consider the application of the aggregate and real entity theories in these contexts.

A. Developing Sincerity Tests for Corporations

In attempting to assert corporate religion and its attendant rights, the corporation must withstand sincerity testing.[173] The Court addressed the importance of sincerity at some length in both *Burwell v. Hobby Lobby* and

170. *Id.*

171. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). While the Lemon Test has seen many iterations and alterations, the principles it articulates remain useful in considering matters of the separation of church and state. *See* Karthik Ravishankar, *The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts*, 41 DAYTON L. REV. 261, 297 (2016) ("When a court applies Lemon, what it really does is break up its evaluation of precedent into three categories: purpose, effect, and entanglement.").

172. "To qualify for RFRA's protection, an asserted belief must be 'sincere': a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Hobby Lobby*, 573 U.S. at 717 n.28.

173. *See id.* at 725.

Wisconsin v. Yoder.[174] Sincerity testing is widely accepted in other legal contexts, including the military draft[175] and bankruptcy.[176]

The concept of sincerity comes from the conscientious objector cases. Specifically, in *U.S. v. Seeger*, the Supreme Court stated, "the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption [to the draft registration laws]."[177] The Court further stated that courts cannot review the truth of a belief ,but courts must determine the sincerity of the belief.[178] In the conscientious objector cases, the Court found that the believers were sincere and thus could not be found in violation of the draft laws.

In 2016, a federal district court judge evaluated the Pastafarian religion to a different result.[179] The judge stated that while courts may not determine the truth of a religion, it is appropriate for the government to question whether the beliefs are "authentic."[180] In *Cavanaugh v. Bartelt*, the court determined that the Pastafarian religion, with its belief in a divine Flying Spaghetti Monster, was not a religion, despite having a guiding text and multiple members.[181] In evaluating the history of the so-called religion, however, the Court found that it was a parody of religion and not a sincerely held belief that took the place of religion in the life of the purported believer.[182]

Sincerity testing will be critical to future determinations of corporate religious freedom. As Corey Ciocchetti points out, corporations may have an incentive after *Hobby Lobby* to claim religious exemptions to laws, and some of these claims may be insincere.[183] This is easy to imagine, considering the potential that RFRA offers for corporations to avoid laws that may be inconvenient or unprofitable. For example, if it were too easy for a corporation to establish a "sincerely held religious belief" in the avoidance of Western medicine, that corporation might claim under RFRA that it need not comply with

174. Wisconsin v. Yoder, 406 U.S. 205, 209-10 (1972); Justice Ginsburg, however, expressed concern about sincerity testing in Hobby Lobby, and advocated for accepting the sincerity of a claimed belief on its face. *Hobby Lobby*, 573 U.S. at 743, 770 (Ginsburg, J. dissenting).

175. Witmer v. United States, 348 U.S. 374 (1955).

176. *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59 (2014).

177. United States v. Seeger, 380 U.S. 163, 165-66 (1965).

178. *Id*. at 185.

179. Cavanaugh v. Bartelt, 178 F. Supp. 3d 819 (D. Neb. 2016).

180. *Id*. at 828.

181. *Id*. at 830.

182. Interestingly, the Court in *Cavanaugh* stated that the court should not assess the truth of a purported religion but could evaluate the sincerity of belief, but then went on to note that there must be something religious about the belief, that pastafarianism was a parody that looked like religion but clearly wasn't, and that any sincere belief in it was based in a misrepresentation of pastafarianism itself. *Id*. at 824.

183. Corey A. Ciocchetti, *Religious Free and Closely Held Corporations: The* Hobby Lobby *Case and its Ethical Implications*, 93 OR. L. REV. 259, 340 (2014).

all federal health care provision mandates, just as Hobby Lobby successfully argued that it need not comply with mandates compelling the provision of contraceptive care to its employees. Notwithstanding the Court's dismissal of third-party harms in *Hobby Lobby*, the potential impact of insincere claims may have negative effects on millions of employees even if only closely held corporations may make such claims, since such businesses employ more than half of all working Americans.[184]

One objection to sincerity testing is the difficulty of determining whether a corporation is sincere. However, some respond that it is no more difficult to determine whether a corporation is sincere than it is to determine whether a natural person is sincere.[185] In fact, because corporate decision-making tends to be recorded in the form of interactions among the board of directors and/or the managers, it may be easier to determine sincerity in a corporate setting than when assessing the human mind.[186]

While sincerity testing has been well developed in the case law with regard to individuals, there is less precedent that might guide a court in assessing the sincerity of a corporation's religious beliefs for RFRA purposes. If corporations of any type are allowed to have a religion, however, it is imperative that courts evaluate the sincerity of their beliefs.

There are at least four factors which a court might consider in assessing the sincerity of a corporation's religious beliefs *beyond the attribution of the beliefs of the owners*. These could be said to correlate with (1) the corporation's charter or other foundational documents, (2) the consistency of a corporation's adherence to its claimed religion, (3) the depth and scope of its commitment to that religion, and (4) its willingness to be subject to potentially unprofitable or otherwise undesirable consequences of its religious adherence. Each of these 4 factors can be further explained as follows.

Charter. The first potential indicator of a corporation's religious sincerity is its charter. Indeed, some have suggested that this should be the primary marker of corporate religion.[187] A charter may contain language referring to foundational beliefs, values, or religious tenets that will help to guide and govern the company. If a charter does not express specific values or beliefs, however, the court may still infer those beliefs from the actions of the corporation as a whole.

Consistency. A second factor a court might consider in evaluating religious sincerity is the consistency with which a corporation manifests its asserted

184. *Id*.; Alison Griswold, *How Many People Could the* Hobby Lobby *Ruling Affect?*, SLATE (June 30, 2014, 2:32 PM), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations .html.

185. Iuliano, *supra* note 143, at 95.

186. *Id*.

187. Makino, *supra* note 154, at 254; Alan T. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law and the Theory of the Firm*, 127 HARV. L. REV. F. 273, 281 n. 59-61 (2014).

beliefs. Courts have used consistency to assess the sincerity of professed religious beliefs in individual cases. In *Dobkins v. District of Columbia*, a Jewish man objected to the court's continuation of his trial past sunset, the start of the Jewish Sabbath.[188] The court found no basis for adjusting the trial schedule after it learned that the man sometimes worked in his office during the Sabbath. There is no reason why a corporation might not undergo the same kind of evaluation.[189]For example, in assessing the sincerity of Hobby Lobby's Christian beliefs, the Court referred to the facts that their stores were closed on Sundays, that part of its profits were donated to Christian missionaries, and that the owners paid for newspaper ads celebrating Jesus Christ.[190]

Commitment. A third factor used to measure religious sincerity might be the depth and extent of the corporation's commitments to its beliefs. The history of a corporation's adoption of beliefs can be reflected in the corporation's meeting minutes, texts, emails and other internal documents. These could help the court evaluate whether the asserted beliefs are relatively recent and perhaps coincidental with some associated potential profit, or more longstanding and therefore likely a more genuine reflection of the entity's religious values.

Consequences. A fourth factor indicating sincerity is a corporation's willingness to abide by the consequences of its professed beliefs. For example, a retail business whose owners are Orthodox Jews might strengthen its claim to a sincerely held religious belief in abiding by the principles of the Jewish Sabbath if it withstands the consequent loss of income associated with closing for business on Saturdays.[191]

Each one of these factors could serve as an important indicator of the sincerity of a corporation's religious beliefs. None of them, however, should be a *sine qua non* in this regard. A court should consider each one of them in the context of an overall claim of religious sincerity.

B. Sincerity Testing in Aggregate and Real Entity Models

The factors discussed above provide a roadmap for how a court might determine the sincerity of a corporation's beliefs apart from the beliefs of the owners. However, we still face the complicated question of which theory, aggregate or real entity, to use when assessing sincerity.

In an aggregate model, if all the owners share the same religious beliefs, a court could fairly consider whether the religious beliefs are sincerely, genuinely, and honestly held by all shareholders of the corporation simply by addressing the beliefs of each individual. In *Hobby Lobby*, the Court appeared to do this by

188. Dobkins v. District of Columbia, 194 A.2d 657 (D.C. 1963).
189. *Id*. at 659.
190. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 699,(2014).
191. Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961).

considering statements by the individual owners of the companies at issue in the case.[192] But what should a court do when the owners do not share similar beliefs?

Imagine again that Hobby Lobby has been inherited by twins. One tells the court he is a devout member of the Mennonite Church. The other tells the court, "I don't buy any of this religion stuff, but it does seem to be good for business." Given this clear lack of sincere belief expressed by one of the owners, can the court overlook this statement and find Hobby Lobby's belief to be sincere?

Using a real entity theory, the question would depend on if the corporation itself had sincere religious beliefs. As described above, this determination may be made by considering a variety of factors, including charter, consistency, commitment, and consequences. But what if the owner of the company has a sincere religious belief and runs his company according to his religion, but simply doesn't put it into objectively measurable policies? Lacking bylaws and board statements of purpose, can the court look past the real entity to the individual behind it?

Once again, a court cannot declare a preference for religion and choose whichever method of analysis yields a finding that the corporation is religious. Thus, we reach the same impasse that we did in Part II—the court must decide ahead of time whether it intends to use the aggregate or real entity theories of analysis of corporate religion. It may not pick and choose whichever theory appears to yield the outcome it seeks.

IV. Applying a Bifurcated Test to Determine Religious Sincerity

As explained earlier, a diversity of scholarly views exists concerning the nature of corporate religion and the proper means of gauging its sincerity. There is a need for a unified approach that can guide religious corporate owners and leaders toward a process of religious adoption and that can also provide courts with a constitutionally sound approach to determining whether the corporation has a sincerely held religious belief.

We have found in Parts II and III that the aggregate and real entity theories yield conflicting and unsatisfactory outcomes in a variety of cases. Yet, by the same token, a court must resolve in advance which theory it intends to apply, rather than picking the theory to match an outcome it prefers. To address these concerns, we propose a two-phase process for evaluating whether an asserted corporate belief correlates with a religious practice within the meaning of RFRA. For corporations in which the owners express unified religious beliefs, we propose that courts adopt the aggregate entity test, in which evidence may be gathered from both the corporation and its owners to demonstrate that the belief is both religious and sincerely held. For corporations in which the owners have

192. *Hobby Lobby*, 573 U.S. at 700-04.

diverse or differing views, we propose adopting a real entity test, in which the individual beliefs of the owners *cannot* be considered, but rather the corporation's beliefs must be sufficiently demonstrated by objective measures of the corporation's charter, commitment, consistency, and consequences.

In Part IV.A, we define in more detail the differences between these two types of corporations. In Part IV.B, we demonstrate how to apply the aggregate theory to a religiously unified corporation andhow to apply the real entity theory to a religiously diverse corporation.

A. Religiously Unified or Religiously Diverse?

As explained in more detail below, we expect that a judicial evaluation of corporate religious claims will differentiate between two kinds of corporations. The first is when a corporation's human owners are unified enough in their religious beliefs to exercise those beliefs through the corporation. In these cases, like the cases in *Hobby Lobby*, the beliefs of the corporation and the beliefs of the individual owners are all in alignment. We refer to these as "religiously unified" corporations.

It is tempting to associate "religiously unified" with small, closely held, or S corporations, but it would be falsely limiting to do so in this context. S corporations are those which have fewer than 100 shareholders, in addition to other restrictions.[193] Hobby Lobby itself is an S corporation and is also a closely held corporation.[194] Having a limited number of owners does not mean, however, that the business itself is small or that the decisions it makes are circumscribed in their impact. Closely held corporations may be quite large, and their decisions can affect several thousands of employees. Hobby Lobby itself has over 32,000 employees.[195] Other closely held corporations include Albertson's (275,000 employees), Cargill (155,000 employees), and Koch Industries (120,000 employees).[196] Therefore, it is necessary to distinguish "religiously unified" as its own designation, rather than confusing it with the size of the corporation or number of owners.

The second kind of corporation is that in which the corporation's owners differ in their religious beliefs. We refer to these corporations as "religiously

193. *S Corporations*, INTERNAL REVENUE SERVICE, https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations (last visited Mar. 3, 2019).

194. Drew DeSilver, *What Is a 'Closely Held Corporation,' Anyway, and How Many Are There?*, PEW RES. CTR. (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/.

195. *Our Story*, HOBBY LOBBY, https://www.hobbylobby.com/about-us/our-story (last visited Mar. 3, 2019).

196. *America's Largest Private Companies*, FORBES, https://www.forbes.com/largest-private-companies/list/ (last visited Mar. 3, 2019).

diverse" corporations.[197] If courts follow the real entity theory of corporate personhood, then religious differences among the various shareholders will not affect the religion of the corporation. The religion will belong to the corporation itself rather than to an aggregation of owners. Notably, a closely held corporation may be religiously diverse. Because as few as two owners may find themselves on opposite sides of a religious spectrum, we believe it is crucial to identify their religious conformity, not their numbers.

The use of "religiously unified" and "religiously diverse" designations here is not intended to suggest that all religiously unified corporations should be found to have religious values, or that any religiously diverse corporation maintaining corporate bylaws proclaiming adoption of a religion should be found to be religious. If a corporation claims a RFRA exemption to a federal law, the court should require the corporation to describe the religious belief at issue and to establish that it is part of a religion as defined in Part II. The corporation must then also establish the sincerity of its belief, as defined in Part III, and explain how that religious expression is burdened by the challenged law.[198] Both religiously unified and religiously diverse corporations may or may not be able to establish both bona fide religion and sincerity, although as we explain below, the process by which they do so may vary considerably.

1. Establishing the Religion of Religiously Unified Corporations

In *Hobby Lobby*, the Court appears to associate the religion of the subject corporations' owners with the corporations themselves, referring alternatively to the beliefs of the individual owners ("[t]he Hahns and Greens have a sincere religious belief that life begins at conception"[199] and "[l]ike the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs"[200]) and the beliefs of the corporation ("the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage"[201] and "[b]y requiring the Hahns and Greens and their companies to arrange for [contraception coverage] the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs."[202]). In other words, according to *Hobby Lobby*, the religion of

197. We expect that the great majority of publicly traded corporations will be religiously diverse and the majority of religiously unified corporations will be closely held and S corporations for purely logistical reasons. The greater the number of people, the more likely they are to differ in any religious beliefs they may have. This need not be the case, however; one can imagine a closely held corporation with three owners, each of whom has her own unique religious traditions, which would qualify as religiously diverse if the corporation is religious at all.

198. Religious Freed Restoration Act, 42 U.S.C. § 2000bb (1993).

199. Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 720 (2014).

200. *Id*. at 703.

201. *Id*. at 720.

202. *Id*. at 719.

the individual owners may be imputed to the corporation if certain conditions are met.

Some scholars have proposed limitations on future religious freedom claims to cases where the owners' religion is sufficiently distinct and compelling to justify imputing it to the corporation. James D. Nelson, for example, suggests that only "constitutive communities" (in which "individual members view their affiliation with the collective as a core aspect of their own identity") should be able to bring corporate RFRA claims.[203] In such corporations, he posits, "membership in a group is intimately tied to personal identity," and, therefore, RFRA claims are more appropriate than in groups where ownership or membership is more external to the self.[204] Stephen Bainbridge argues that a corporation's religion should be derived from the religion of the owner when the extent of the owner's control would be sufficient to justify piercing the corporate veil.[205]

Certain federal regulations, adopted in the wake of *Hobby Lobby*, appear to go even further, adding a "few owners" limitation to a rule that also imposes an implicit aggregate entity test. The HHS regulations establishing exemptions from the contraceptive mandate at issue in *Hobby Lobby*, titled Coverage of Certain Preventative Services Under the Affordable Care Act, adopt a newly complex definition of a closely held corporation.[206] To be eligible for this exemption, the HHS regulations require a corporation to have no publicly traded stocks and to be majority- owned by five or fewer "individuals."[207] The corporation must also object to providing services based on the owners' religious belief.

While we see the allure of size-based limitations, we do not believe the number of owners addresses the real issue in these cases, which is whether the owners of the company share similar enough religious beliefs and values to justify imputing those values in some singular form onto the corporation. Rather, we conclude that religious unity among owners is more important than the number of corporate owners in determining how a corporation's religion should be assessed for RFRA purposes. Therefore, we propose that corporations whose owners share common religious beliefs may ascribe those beliefs to the corporations. If the corporate owners can be said to have a religion collectively, then that religion may be imputed to the corporation.

---

203. James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1582 (2013).

204. *Id*. at 1568 (emphasis removed).

205. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 235, 236-37 (2013).

206. Accommodations in Connection with Coverage of Preventive Health Services, 45 C.F.R. § 147.131 (b)(4)(iii) (2017).

207. *Id*. Specifically, the regulation provides that the corporation must "ha[s] more than 50 percent of the value of its ownership interests owned directly or indirectly by five or fewer individuals, or must have an ownership structure that is substantially similar. . ." *Id*. at 41,326. Members of the same family count as only one individual for purposes of this determination.

2. *Establishing the Religion of Religiously Diverse Corporations*

Scholars such as Bainbridge and Nelson suggest that corporations whose owners are not unified in their beliefs should not be able to establish a corporate religion for RFRA purposes.[208] We disagree and suggest that if there is a diversity of beliefs among corporate owners, whether the entity is public or privately held, the corporation should be able to adopt a religion of its *own*, independent from the human beings who control it.

We believe this is a necessary conclusion, based on Justice Alito's statement that the owners of the corporation may very well have conflicts over religion, and that such conflicts should not nullify the finding of a corporate religion.[209] A necessary corollary to this statement is that when the human beings or other corporate entities who share majority control of a corporation differ in their religious beliefs, then we must find some alternative way to assess the corporation's religion. While a court may gauge the religion of a unified set of corporate owners by reference to the beliefs they have collectively, this model fails to provide a workable means of assessing the religious beliefs of more diverse corporate entities. In these corporations, we believe reference to the real entity theory of corporate personhood is more logical for the purpose of evaluating religious sincerity.

In practice, we propose determining the corporation's religion by reference to objective evidence of the 4Cs: charter, commitment, consistency, and consequences. If the corporation can show sufficient evidence that it has a religious belief system and situate a particular corporate practice or value within that belief system, then a court should be able to conclude that the value is religious for purposes of RFRA, even without reference to the personal beliefs of the corporate owners.

B. *Establishing Sincerity Using a Bifurcated Approach*

Given the importance of sincerity testing to RFRA claimants, how should a court go about sincerity testing in the context of corporate claims? Who or what should be the source of the corporate religion whose sincerity is being tested?

For similar reasons to those described in Part IV.A, we believe courts should adopt a bifurcated approach to determining whether a religious belief is sincerely held by a corporation: religiously unified corporations should be assessed according to the aggregate entity theory while religiously diverse corporations should have the sincerity of their religious beliefs assessed according to the real entity theory.

208. *See supra* notes 201-03 and accompanying text.
209. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).

In an aggregate theory case, as in *Hobby Lobby*, the court would consider the religious beliefs of the corporate owners and the corporation as one.[210] It is true that the sincerity of the businesses' religious beliefs was never questioned in *Hobby Lobby*, and therefore the Court did not need to evaluate sincerity in its opinion. Nevertheless, the Court's references to both the personal religious beliefs of the owners and the outward indicia of those beliefs by the companies suggests that other corporations seeking RFRA accommodations should be able to make a similar showing.[211]

By contrast, in a religiously diverse corporation, the court would have to look solely at the objective manifestations of the corporation's religious sincerity. We propose doing so again by reference to the 4Cs: charter, consistency, consequences and commitment. The *Hobby Lobby* analysis of the corporate religions of Conestoga, Hobby Lobby and Mardel correlates with this test. The reference to the Conestoga documents outlining their values, together with the company's decision to limit contraceptive coverage, could fall under charter, consistency, and commitment. The Hobby Lobby and Mardel ministry contributions and their ad buys could also be categorized under those three factors. The Green family companies' willingness to suffer financial losses as a result of closing on Sunday, in accordance with religious beliefs, could demonstrate consequences.

V. A CORPORATE PROCESS FOR ADOPTING A RELIGION: TIME FOR R CORPS?

Given the paucity of case law regarding determination of whether corporations are "religious" for RFRA purposes, in this section we propose a general path for corporations seeking to adopt a religion and demonstrate that adoption using the 4Cs. This process might ultimately be used by courts as proof of the religious affiliation of corporations.

The first step of the process would be for the owners to determine if they are religiously unified or religiously diverse. If the corporate owners are religiously diverse, they would have to determine if they wished to have the corporation adopt a singular religion, and if so, what that religion would be. In accordance with the discussion in Part II regarding the definition of religion, it would not be enough for the corporation to assert isolated beliefs and call them religious—the belief would have to be situated within a larger belief system. In a religiously unified corporation, this discussion would result in a finding that the owners share the same religious beliefs and desire to have the corporation act on and reflect those beliefs.

210. *See supra* notes 141-55 and accompanying text

211. *See supra* notes 161-66 and accompanying text.

As a next step, for either type of entity, the process should be informed by the Court's description of the corporate parties' religions in *Hobby Lobby*, and our description of the 4Cs. Thus, a corporation should consider adopting or revising its corporate charter with specific reference to the religious beliefs of its owners, so that those beliefs might be more directly identified with the corporation in future proceedings. This would support the charter test of corporate religious sincerity. The corporation should also act on the beliefs set out in its charter or other adopted statements of belief. If a corporation expressed a religious belief in the importance of healing the world, or *tikkun olam* as it is expressed in Judaism, the corporation might adopt a corresponding practice of committing some part of its workforce to provide community service on a regular basis. The correlation of religious beliefs with religious practices would help to demonstrate commitment.

We then recommend that the corporation periodically review its actions, including its operational policies and ethical codes of conduct, to ensure that it is acting consistently with the beliefs set out in its charter and that it is actually carrying out the commitments aligned with its religious beliefs. In doing so, it might undertake a kind of internal review similar to a due diligence process. This alignment of behavior and belief would help to demonstrate its consistency.

Finally, in some circumstances, a corporation may be able to support its claimed religion by demonstrating that it accepts unprofitable or otherwise undesirable consequences of its religious beliefs and practices. This might come in the form of lost profits as a result of closing on popular shopping days, whether weekly, as the Greens did by closing Hobby Lobby and Mardel on Sundays, or on religious holidays, such as a Jewish bakery might do if it closes during the week of Passover when it is against Jewish law to bake bread.[212]

If there is a rise in the number of corporations asserting religious freedom claims, as the development of case law governing such claims might lead us to expect, it may be useful to have an independent certification process to assist courts in evaluating these types of claims. Benefit corporations,[213] for example, may become certified B Corps by undergoing an assessment by B Labs, an independent non-profit entity.[214] Similarly, an independent non-profit might certify corporations wishing to establish themselves as religious by using an R Corps designation. The process of gaining R Corp status could reflect an assessment testing the 4Cs through objective manifestations of corporate intent and practice. As with B Corps, we expect that such designations would be helpful

212. *See* Heather Norris, *Kosher For Passover – For Local Bakeries, Holiday Means Break From Work*, BALT. JEWISH TIMES (March 12, 2015), https://jewishtimes.com/35267/kosher-for-passover/special_coverage/passover/.

213. BENEFIT CORP., *supra* note 45.

214. *Benefit Corporations & Certified B Corps,* BENEFIT CORP., https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps (last visited Mar. 4, 2019).

but not sufficient in themselves to establish religious bona fides for corporations making such claims under RFRA.

Conclusion

We began this paper with the central purpose of determining if a corporate value such as diversity or privacy could be regarded as religion, and if so, how a corporation would go about adopting such a value.

What we discovered in the process of answering this question was that there is a large tangle of issues surrounding corporate religion, including: whether a corporate religion can be a single value or if it must be situated within a complete value system; how to determine the corporate religion when owners are not unified in their religious beliefs; and how to judge the sincerity of a corporation's values when the corporation stands on its own as a real entity with a religious value system independent of its owners.

To address these questions, we have created a system for addressing corporate claims that we believe has significant potential to fairly resolve complex cases involving corporate religion. First, we offer a bifurcated process of addressing religion cases that asks first if the corporate owners are religiously unified or religiously diverse, and then apply distinct tests for determining corporate religion based on that assessment. We propose using a multi-factor test to assess the sincerity of any corporation's religious beliefs.

A final assessment of our scholarship would ask: 1) Have we made it easier, or more difficult for corporations to establish a religion? and 2) Is this a good or bad outcome? With regard to the first question, we see arguments on either side. On one hand, we have created a mechanism by which a religiously diverse corporation can adopt a religion even if none of the members have any religious values at all. Some would say this is an unprecedented expansion of the doctrine of religious freedom. On the other hand, we have narrowed the way that a religiously diverse corporation can establish its religion, by requiring that such a corporation be able to establish that (1) it has a full religious belief system, and not simply one or two isolated religious values, and (2) all indicia of religion be expressed objectively by the corporation. Therefore, in a religiously diverse corporation, the court cannot simply look at one devout owner and ascribe that owner's beliefs to the corporation.

With regard to religiously unified corporations, we have additionally made things easier and more difficult. Corporations may find it easier to establish a corporate religion under an aggregate entity theory when owners can point to *either* their personal beliefs *or* the corporation's objective manifestations of belief. But we have also made it harder to establish religion where sincerity must be tested in all of the owners in a unified system.

This give-and-take expresses our fundamental discomfort with the prospect of making it *easier* for corporations to designate a religion, which may lead to

increased use of religious claims for private gain, and our twin discomfort with the prospect of *limiting* a fundamental right to religious freedom.

We also share a concern that the growth of religious corporations will harden divisions between people, particularly if religion increasingly enters the marketplace. Our process creates the possibility that a publicly traded corporation could establish a corporate religion. How would this change impact American society? One problem with this sort of centralized adoption of religion is that, over time, it may tend to create more religious unity among the owners of a corporation. Investors who do not follow the adopted religion of the corporation may choose to divest their shares. For example, if a corporation decides to adopt Seventh Day Adventist beliefs, the investors who object to or simply dislike those beliefs may sell their shares. We might expect more Seventh Day Adventists to buy those shares, resulting in a more religiously concentrated and unified ownership over time. This process may hasten a trend away from a secular marketplace to a stratified and divided marketplace of increasingly rigid and exclusionary religious corporations.

Whether it is beneficial to public policy for the United States to make it easier for corporations to develop religious identities is not an easy question to answer. In a country wherever-increasing partisanship arguably tears apart its social fabric and undermines the efficiency and effectiveness of our institutions, further entrenching divisions should give us pause. That said, it is possible that society could benefit from having clearer structures and rules regarding the corporate exercise of religion. However, it is important that we maintain tolerance for different beliefs, along with a policy of indifference to religion, and that we preserve the civil rights protections that religious fundamentalism may sometimes threaten to undermine. Whether more religion in corporations is beneficial or detrimental may ultimately depend on how corporate religion evolves, the limits on the exercise of corporate religious, and how we preserve the other rights and freedoms that we also cherish as a nation.