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I. INTRODUCTION

David Gans and Ilya Shapiro's recent book probes the question of corporate constitutional and statutory rights through a prism supplied by *Burwell v. Hobby Lobby.*[1] Fostered by a number of public debates moderated by Jeffrey Rosen, the book is entitled *Religious Liberties for Corporations?: Hobby Lobby, the Affordable Care Act and the Constitution*[2] ("*Religious Liberties For Corporations*"). This manuscript delineates the facts and legal arguments as well as the majority and dissenting opinions in *Hobby Lobby.* Serving as Director of the Human Rights, Civil Rights, and Citizenship Programs, of the Constitutional Accountability Center, Gans emphasizes the Founders' conception of corporations and offers predictions regarding the future trajectory of corporate rights beyond the narrow, yet clamorous, domain of religious liberty.[3] Consistent with the weight of scholarly opinion and in sharp contrast to his co-author's[4] approach, Gans denies that for-profit corporations have free exercise rights.[5]

The *Hobby Lobby* decision[6] was triggered by litigation brought by three corporations that sought an exemption from the requirements of the Patient Protection and Affordable Care Act of 2010[7] ("ACA"):[8] "Unless an exemption applies, ACA requires employer's group health plan or group-health-insurance coverage to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'"[9] This provision gives rise to a so-called contraceptive mandate.[10] Pursuing an

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

2. DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS? HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION (2014) [hereinafter when specific propositions are cited, the specific name of the co-author will be cited where necessary to avoid confusion].

3. *See, e.g.*, GANS & SHAPIRO, *supra* note 2, at 72 (stating that the Hobby Lobby decisions is part of an ongoing effort by the Roberts' Court to rewrite the Constitution to favor corporations (Gans)).

4. Senior Fellow, Constitutional Studies, Cato Institute.

5. GANS & SHAPIRO, *supra* note 2, at 14 (stating "[t]he text, history, and purpose of the constitutional guarantee of the free exercise of religion all make clear that secular, for-profit corporations cannot claim to exercise religion" (Gans)).

6. *Hobby Lobby*, 134 S. Ct. 2751 (2014).

7. Patient Protection and Affordable Care Act (PPACA) of 2010, Pub. L. 111-148, 124 Stat. 119.

8. *Hobby Lobby*, 134 S. Ct. 2751 (2014).

9. *Id.* at 2762 (citing 42 U.S.C. § 300gg—13(a)(4)).

10. The mandate is codified at 26 U.S.C. § 5000A (f)(2); §§ 4980H(a) (generally requiring employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage' that provides 'minimum essential health coverage"). "Any covered employer that does not provide such coverage must pay a substantial price." *Hobby Lobby*, 134 S. Ct. at 2762. Specifically noncompliant employers must pay $100 per day per affected employee or, alternatively, if the employer decides to stop

accommodation that would relieve them from the force of this mandate, the three plaintiff-firms offered an argument that was grounded on religious principles and beliefs that were identified in corporate documents and practices.[11] The primary legal issue considered by the Court was whether the Religious Freedom Restoration Act of 1993[12] ("RFRA") provides for-profit corporations with the right to an accommodation.[13] Prescinding from a review of the Free Exercise Clause issue vetted by the Third Circuit Court of Appeals,[14] the Supreme Court directed its attention to whether RFRA, as amended by the Religious Land Use and Institutionalized Persons Act[15] ("RLUIPA"), permits the United States Department of Health and Human Services ("HHS") to require that the plaintiff-corporations "provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[16] Holding that HHS's mandate was impermissible, as applied, the Court spurned HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships because it found that Congress did not intend to discriminate against men and women who wish to run their businesses as for-profit corporations.[17] The Court also

providing health insurance altogether, the employer must pay $2,000 per year for each of its full-time employees. *Id.*

11. The Hahn family, as devout members of the Mennonite Church, own and operate Conestoga Wood, and they have incorporated their religious beliefs into the governance and operation of the firm. *Hobby Lobby*, 134 S. Ct. at 2764. Organized under Pennsylvania law, the Hahns exercise sole ownership of the closely held business and control its board, hold all of its voting shares, operate the company in accordance with their religious beliefs and moral principles, and commit to a moral injunction that ensures a reasonable profit in a manner that reflects their religious heritage. *Id.* The Green family owns Hobby Lobby Stores and Mardel, and they incorporated their unanimous religious beliefs, including a commitment to "honoring the Lord in all that they do" into the corporations; to wit, each family member has signed a pledge to run the business in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. *Id.* at 2765–66.

12. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1993). Following the Supreme Court's decision in City of Boerne v. Flores, 521 U. S. 507 (1997), Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2000). Evidently, RLUIPA amended RFRA and effected a complete separation between RFRA and the First Amendment. *Hobby Lobby*, 134 S. Ct. 2761–62.

13. *Id.* at 2759.

14. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U. S. Dep't of Health and Human Servs., 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356).

15. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

16. *Hobby Lobby*, 134 S. Ct. at 2759.

17. *Id.*

found the Government's related claim—that the objecting firms' for-profit status extirpated their RFRA claims—untenable.[18] Implicitly, the Court decided that free-exercise exemptions for profit-pursuing corporations are not necessarily a form of unjustifiable favoritism.[19]

Whatever its merits, the *Hobby Lobby* opinion has provoked a wave of scholarship[20] and a flurry of rancor.[21] The Court's decision generated

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18. *Id.* (noting that HHS has already devised and implemented a system that putatively seeks to respect the religious liberty of religious nonprofit corporations and fails to provide any reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections).

19. *See, e.g.,* Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 329 (1991).

20. *See, e.g.,* Mark L. Rienzi, *God and the Profits: Is there Religious Liberty for Money-Makers*, 21 GEO. MASON L. REV. 59 (2013) (examining how the legal system treats business firms in a variety of context); Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons,* 127 HARV. L. REV. F. 273, 278–94 (2014); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 110–36 (2014) (offering a taxonomy of corporate constitutional rights). *See generally* Alan E. Garfield, The *Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1 (2014); Thad Eagles, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims* 90 N.Y.U. L. REV. 589 (2015) (looking past *Hobby Lobby* in order to examine the potential effects of business regulation on individuals and developing a framework for considering corporate religious liberty claims); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby's *Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Chad Flanders, Zoe Robinson & Micah Schwartzman, eds., forthcoming 2015), http://ssrn.com/abstract=2602028; Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Chad Flanders, Zoe Robinson & Micah Schwartzman, eds.,forthcoming 2015), http://ssrn.com/abstract=2595663; Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions,*38 HARV. J..L. & GENDER 1, 1 (forthcoming 2015) (GW Law School Public Law and Legal Theory Paper No. 2014-32, GW Legal Studies Research Paper No. 2014-32), http://ssrn.com/abstract=2466571; Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Chad Flanders, Zoe Robinson & Micah Schwartzman, eds., forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535991; Elizabeth Pollman, *Corporate Law and Theory*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Chad Flanders, Zoe Robinson & Micah Schwartzman, eds., forthcoming 2015), http://ssrn.com/abstract=2609585 [hereinafter, Pollman, *Corporate Law and Theory*]; Vincent S. J. Buccola, *Corporate Rights and Organizational Neutrality*, IOWA L. REV., (forthcoming), http://ssrn.com/abstract=2569305; and Harry G. Hutchison, *Metaphysical Univocity and the Immanent Frame: Defending Religious Liberty in Secular Age?*, 45 SW. U. L. REV. at 28, 42–43 (forthcoming 2015), http://ssrn.com/abstract=2596872 [hereinafter, Hutchison, *Metaphysical Univocity*].

21. *See, e.g.,* Marci A. Hamilton, *Hobby Lobby Yields More Rancor as Wheaton College Queues Up to Deny Contraceptive Coverage to its Females Employees*, VERDICT BLOG (July 10, 2014),, http://verdict.justia.com/2014/07/10/hobby-lobby-yields-rancor-wheaton-college-queuses-deny-contraceptive-coverage-female-employees (decrying the fact that after the male Catholic members of the Supreme Court declared that closely held corporations have souls and therefore can use their faith to deprive their female employ-

a number of overlapping questions. First, since the *Hobby Lobby* plaintiffs are institutions characterized by the pursuit of profit, limited liability, and a legal separation from their shareholders, do those attributes, either together or separately, bar them from asserting a free-exercise right?[22] Second, must the pragmatic[23] or normative implications connected to the legal structure of for-profit corporations[24] require them to maximize profits, in principle, or can such entities maximize other values as well, coherent with the deduction that religious exercise may take corporate form for a wide spectrum of actions and purposes that include full involvement in the marketplace?[25] Third, although Justice Douglas has cautioned us that "[g]eneralizations about standing to sue are largely worthless as such,"[26] can the plaintiff-firms satisfy the "case and controversy" requirement because they suffered a concrete injury to their own interest within the domain of Article III[27] or based on a derivative or third-party theory of prudential standing[28] consonant with the view that they are more like partnerships, membership organizations,[29] or associations of individuals, rather than large publicly-held corporations.[30] Finally, are the opponents of corporate free exercise correctly presuming that

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ees of reproductive health coverage, other organizations, would seek an exemption, and stating that the *Hobby Lobby* majority actually played games with accommodation).

22. Meese & Oman, *supra* note 20, at 276 (critiquing arguments made by the administration and leading scholars).

23. *Id.* at 300 (observing that while society treats corporations as legally distinct persons for some purposes, this is a pragmatic choice rather than a normative judgment that human concerns do not apply to such firms).

24. *See* Garrett, *supra* note 20, at 138–47 (arguing that the legal structure of a corporations prevents for-profit corporations from being treated as associations for purposes of constitutional adjudication because under Article III norms the courts are compelled to ask whether the entity itself suffered a "concrete injury" to its own interests, apart from any separately identified injury to third parties such as employees, officers or owners coupled with a second inquiry wherein the corporation must have suffered harm that implicates or be caused by the violation of the right being asserted by the entity and further suggesting that in the *Hobby Lobby* case, the Court conflated the distinct issue of statutory standing with Article III organizational standing).

25. Lupu & Tuttle, *supra* note 20, at 4–5.

26. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).

27. Baker v. Carr, 369 U.S. 186, 204 (1962).

28. Garrett, *supra* note 20, at 147–53 (suggesting that some rights may not be asserted by an organization *i.e.,* a corporation).

29. Meese & Oman, *supra* note 20, at 287–88.

30. For one perspective on associational standing, *see* Garrett, *supra* note 20, at 137–38 (expressing the view that the Supreme Court's test for associational standing remains permissive and broad because the Court views an association as a collection of individuals who retain their separate interests in asserting constitutional rights). *See also* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WILLIAM & MARY L. REV.1673, 1731 (2015) (suggesting that the Supreme Court often accepts the associational argument signifying that corporate rights are derivative of the people the firm represents).

free-exercise claims are purely personal and individual[31] as opposed to being the representative outworking of a voluntary collective group,[32] so that profit pursuing corporations must be seen as non-religious entities lacking the anthropomorphic capacity necessary to practice religion?[33] These questions and their correlative answers evoke the possibility that for-profit status and corporate identity are of limited relevance for purposes of pursuing religious exemptions.[34] If so, this would signify that *Hobby Lobby* ought to be seen as "far less about which entities have rights of religious exercise, and far more about what rights of religious exercise corporate [and other] identities may legitimately assert,"[35] especially in the nation's current and highly secular age.[36]

Since the nation's religious diversity has increased during the past century, it is decidedly likely that many citizens come from different religious traditions with different religious views on moneymaking.[37] One corollary of America's "religious diversity is that some participants in our market economy will attempt to exercise religion and make money at the same time."[38] The union of religion and moneymaking poses thorny issues within the domain of religious liberty law. Solving the riddle of

31. *See, e.g.*, GANS & SHAPIRO, *supra* note 2, at 14 (stating that "[t]he fundamental right that the free exercise guarantee protects is a personal one" grounded in "human dignity" (Gans)).

32. *See, e.g.*, Meese & Oman, *supra* note 20, at 299 ("It is a brute social fact that people practice religion collectively. [Thus][t]o protect religion only with[] the [realm] of . . . conscience or individual action would do great violence to lived religion."). *See also* Ronald Osborn, *The Great Subversion: The Scandalous Origins of Human Rights*, HEDGEHOG REV. 91, 98 (2015) (suggesting that the spread of Christian moral intuitions and the concept of community were redefined as a voluntary association of individuals).

33. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of HHS, 724 F.3d 377, 385 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356) (offering the conclusory contention that Conestoga, as a "secular, for-profit corporation[]," lacks RFRA protection, because general business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees,* exercise religion—they do not pray, worship, observe sacraments or take other religiously-motivated actions). *See also* Gilardi v. U. S. Dept. Health & Hum. Servs., 733 F.3d 1208, 1214 (D.C. Cir. 2013) (ruling that "[w]hen it comes to corporate entities, only religious organizations are accorded the protection . . . ."). *See also* Garrett, *supra* note 20, at 141 (noting that the D.C. Circuit has found that there no basis for concluding that a "secular" organization can exercise religion). The acceptance of these claims means that for-profit corporations would be incapable of litigating in their own right.

34. Lupu & Tuttle, *supra* note 20, at 1–6. To be fair, the authors also state that corporate entities, including churches deserve exceptional treatment only with respect to their distinctively religious activities. *Id.* at 4.

35. *Id.* at 6.

36. *See generally* Hutchison, *Metaphysical Univocity, supra* note 20, at 34–60 (describing three types of secularity within the zeitgeist, which often fails to find that religion is credible given the onset of a secular age, a move that is coupled with the advent of exclusive humanism and the immanent frame).

37. Rienzi, *supra* note 20, at 60.

38. *Id.*

whether corporate personhood, as an attribute, is sufficient to sustain or preclude employers' religious liberty claims, either within the meaning of the Constitution or within the textual parameters of RFRA,[39] goes to the heart of *Hobby Lobby* and forges a pathway to resolve future controversies. Additionally, the solution to this riddle answers a related question: whether sole proprietorships or other business organizations such as general partnerships or nonprofits that apparently enjoy undisputed free exercise rights can be distinguished in principle from for-profit corporations, who do not.[40] This Article is sparked by commentators, including Justices of the Supreme Court[41] and the Secretary of the Department of Health and Human Services,[42] who puzzlingly confine their opposition to free exercise rights to for-profit corporate employers as opposed to nonprofits or other entities, thus raising the question of whether there is some corporate law principle, theory of the firm, business policy, or constitutional provision that necessarily disfavors for-profit corporations.

Part I supplies a sketch of Gans's claims. Part II provides background by first considering the evolving history and meaning of the corporate entity coupled with the emergence of separation of ownership and control as a defining attribute; second, by placing the corporate rights wrangle in the context of entrepreneurial choice; and finally, by referencing the fiery academic debate regarding corporate constitutional and statutory rights. Although the weight of current corporate rights scholarship places renewed emphasis on the "legal separateness" of the corporate form as a dispositive attribute, Part II critiques this approach by evaluating Professor Garrett's comprehensive contribution to the literature as a prelude to explicating the potential shortcomings of Gans's exposition of corporate rights. Part III develops a framework for analyzing Gans's claims. Part IV offers analysis and answers the crucial question: whether the assertion of religious liberty rights by employers ought to be reserved for those who manifest themselves as mythical beings, natural

39. GANS & SHAPIRO, *supra* note 2, at 13–41 (examining,in Chapter 2 of their book,the claim at the heart of *Hobby Lobby:* Do corporation have a right to exercise religion?).

40. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 n.13 (Ginsburg, J. dissenting) (implicitly accepting the claim that for-profit sole proprietorships enjoy Free Exercise rights while disputing such rights for for-profit corporations in the context of a discussion of *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961)).

41. *See, e.g., id.* at 2796–97 (stating that for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate religious values shared by a community of believers).

42. *Id.* at 2769 (citing Brief for HHS at 17 (No. 13-354); Reply Brief at 7–8 (No. 13-354) wherein the HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA).

persons, or corporations. Cognizant of the fact that RFRA protection is not absolute,[43] this Article is not about who ought to prevail in *Hobby Lobby*. Instead, this Article concentrates much of its attention on which employers ought to have the right to *bring* a free exercise claim largely within the boundaries of RFRA while being mindful of constitutional paramaters and without relying fully on the Dictionary Act,[44] which enables courts to determine the meaning of any statute.[45] Contrary to Gans's analysis, this Article shows that there are few, if any, reasons that can be derived from a robust theory of the firm for discriminating against corporate employers regarding their ability to qualify for RFRA exemptions on the basis of their organizational form.

II. GANS'S THESIS

Gans's exposition originates with an examination of two questions: (1) whether corporations have the same religious freedom rights under the First Amendment as individuals; and (2) whether the mandate in the ACA that requires for-profit corporations to provide contraceptive coverage—although it makes an exception for some religious institutions—violates both the First Amendment and also the Religious Freedom Restoration Act.[46] Gans's interrogation was followed by other inquiries regarding whether corporations can or have the right to exercise a religion as well as an investigation of the scope of corporate constitutional and statutory rights.[47] Later, Gans explains and critiques the oral arguments by the parties and evaluates the implications of the Court's decision in *Hobby Lobby*.[48]

To answer the initial questions presented, Gans directs readers' attention to the following observation: the introduction to the Constitution indicates that the document "was written for the benefit of 'We the People of the United States.'"[49] Gans intuits that during the Founding era, corporations stood on an entirely different footing than natural persons. Prompted by Justice John Marshall's early nineteenth century observation that a corporation is simply "an artificial being, invisible, intangible, and existing only in the contemplation of the law,"[50] Gans reasons that a corporation is simply a creature of the law that merely possesses the properties, which the charter of creation confers upon it, either expressly

43. Meese & Oman, *supra* note 20, at 273.
44. Dictionary Act 1 U.S.C. § 1 (2012).
45. *Hobby Lobby,* 134 S. Ct. at 2769.
46. GANS & SHAPIRO, *supra* note 2, at 7 (Gans).
47. *Id.* at 14–17.
48. *Id.* at 63–65.
49. *Id.* at 7.
50. Kharas v. Barron C. Collier, Inc., 157 N.Y.S. 410, 411 (N.Y. App. Div. 1916).

or incidentally.[51] Citing James Madison's claim that "[a] charter of incorporation . . . creates an artificial person not existing in law," Gans's overall perspective reflects a concessionary/artificial entity model of corporations,[52] a view that lays the groundwork for substantial corporate regulation by the government.[53] His opposition to religious liberty rights for for-profit corporations is tightly attached to the belief that "[t]he Framers rooted the free exercise right in fundamentally human attributes—reason, conviction, and conscience—that make little sense as applied to corporations."[54] Gans asserts that, at the time of our nation's founding, "corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity."[55]

Nevertheless, he acknowledges that modern corporations today have important constitutional rights, some of which—apparently tied to matters of property and commerce—prevent corporate property from being taken without compensation.[56] Corporations retain constitutional rights to enter into contracts and, in addition, can only be proceeded against under due process of law.[57] Corporations also retain rights under the Free Speech Clause.[58] But without thoroughly explaining why corporate personhood gives rise to certain rights or why the absence of inherent dignity precludes others, Gans revisits his foundational claim that "since the Founding, corporations have been treated differently than individuals . . . [with regard] to certain fundamental, personal rights, and the Constitution's guarantees cannot be applied wholesale to corporations."[59] Gans explains that the inapplicability of the Fifth Amendment's right against self-incrimination to "business corporations because the Fifth Amendment right 'is an explicit right of a natural person, protecting

51. GANS & SHAPIRO, *supra* note 2, at 8 (Gans).

52. *See, e.g.*, Buccola, *supra* note 20, at 3, 10–11 (explaining that when courts conclude that a regulation is valid, they often emphasize the "artificial" nature of corporations that on this account come into being only by virtue of the state's affirmative charter or the state's concession and accordingly the law need not look upon it as upon a natural person). *See also* Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 100 (1989) (showing that if either the artificial entity or concessionary theory is accepted, it may provide a basis for state regulation). Gans's approach presumes the validity of corporate regulations premised on the view that corporations are simply artificial entities thus enabling the state to regulate them in a way it could not regulate natural persons. *See* GANS & SHAPIRO, *supra* note 2, at 8 (Gans).

53. GANS & SHAPIRO, *supra* note 2, at 8 (Gans).

54. *Id.* at 14.

55. *Id.* at 8.

56. *Id.* at 9.

57. *Id.*

58. *Id.*

59. *Id.*

the realm of human thought and expression.'"[60] Echoing the Obama administration's contentions[61] and reflecting the weight of scholarly opinion,[62] Gans insists that for-profit corporations cannot exercise religion because they lack human attributes.[63] He maintains this view despite: (1) his later admission that business owners have the right to pursue Free Exercise Clause protection even though the pursuit of accommodation, in a given case, cannot justify a religious exemption that undermines the government's regulatory interest[64] and (2) his persistent failure to note that, when people get together in corporate form to establish churches, synagogues and mosques, the formation of such entities and their corresponding absence of human attributes (inherent dignity) does not preclude the defense of the free exercise rights of these institutions.

After the moderator observed during oral arguments that Chief Justice Roberts might favor a narrow ruling upholding the free exercise rights of closely held firms under RFRA rather than under the First Amendment, Gans reproved this option because it would both fundamentally revise free exercise law and imply that the rights of affected employees do not count.[65] Hence, the procurement of Justice Roberts's option would extinguish employee access to contraceptives and enable "secular, for-profit corporations . . . to impose their religious beliefs on their employees."[66] Targeting RFRA, Gans states that this statute was designed to restore the balanced jurisprudence that characterized free exercise law from 1963 (*Sherbert v.Verner*)[67] until 1990 (*Employment Division v. Smith*).[68] Rather than elaborate on this contention, however, Gans opines that a Supreme Court decision favoring the employers in *Hobby Lobby* would indicate that the "rights of employees don't count," thus facilitating extensive efforts by corporate employers to destroy rights otherwise found within the ACA.[69]

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60. *Id.*

61. Brief for Petitioners at 15–22, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (Jan. 10, 2014) (No. 13-354) (suggesting the Obama administration argued that for various reasons the *Hobby Lobby* entities did not qualify as a RFRA "person").

62. Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 2–3, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (Jan. 28, 2014) [hereinafter Law Professors' Brief] (claiming that the term "person" does not include for-profit corporations).

63. GANS & SHAPIRO, *supra* note 2, at 14 (contending that free-exercise protects human attributes including human dignity (Gans)).

64. *Id.* at 38.

65. *Id.* at 47.

66. *Id.* at 48.

67. Sherbert v. Verner, 374 U.S. 398 (1963).

68. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

69. GANS & SHAPIRO, *supra* note 2, at 50–51. For a similar perspective, *see also*, Leo. E. Strine, Jr., A job is Not a Hobby: *The Judicial Revival of Corporate Paternalism and its Problematic Implications* 41 J. OF CORP. L. 71 (2015). *But see* Harry G.

Responding to the *Hobby Lobby* opinion itself, Gans found the decision to be highly objectionable. First, the decision represents the first time in history that the Court ruled that a corporation has religious free exercise rights.[70] Second, Gans was disturbed because, "for the first time in history, the Court ruled that a secular for-profit corporation is entitled to a religious exemption from general business regulation protecting the rights of employees."[71] Third, "[t]he ruling confers on corporations the right to trump and effectively extinguish the rights of its employees."[72] Thus appreciated, *Hobby Lobby* opens "the floodgates to a host of new claims for religious exemptions under RFRA."[73] Fourth, he contests Justice Alito's reasoning. Gans, objected specifically to the Court's acceptance of the notion that a corporation is merely an organization used by natural persons to achieve desired ends, and accordingly, the firm must be protected in order to defend "the liberty of humans who own and control the companies."[74] Such a notion, according to Gans, poses a clear and present danger to the nation in the sense that it lays the foundation for the Court to provide additional rights to corporations in the future.[75] This is so because the Court did not simply restore pre-*Smith* free-exercise law but fundamentally altered it.[76] Finally, citing cases,[77] Gans argues that *Hobby Lobby* is part of a larger trend toward recognizing the First Amendment rights of corporations, which thus empowers firms to attack government regulation.[78]

Reflecting his intuition that the corporate form is decisive at its core, Gans's submission is triggered by alarm that artificial entities would become too powerful as a compliant Supreme Court ignores the wisdom of the Framers.[79] On his account, the Court's rulings in *Citizens United*,[80] *Hobby Lobby*, and other cases discarded decisive aspects of the Constitution's text and the nation's history while disregarding the Founders' decision to exclude corporations from their account of 'We the

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Hutchison, *Hobby Lobby, Corporate Law and Unsustainable Liberalism: A Reply to Judge Strine*, (forthcoming) 39 HARV. J. OF L. AND PUB. POLICY (2016).

70. *Id.* at 56–57.

71. *Id.* at 57.

72. *Id.* at 57, 64.

73. *Id.* at 57.

74. *Id.* at 57 (internal quotations omitted).

75. *Id.*

76. *Id.* at 57–58.

77. *Id.* at 67 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (referring to campaign finance); Sorell v. IMS Health Inc., 131 S.Ct. 2653 (2011) (making it easier for corporations to challenge regulations of advertising and other forms of commercial speech)).

78. *Id.*

79. *Id.* at 72.

80. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

People.'[81] Thus fathomed, the extension of rights to corporations is a ruinous development for the nation,[82] as turgid corporations are unleashed to dominate the lives of natural persons, apparently in contravention of Justice John Marshall's richly historical view of corporations. Gans advances his parade of horribles by stating that *Citizens United* held that corporations may use special privileges that they alone possess to spend vast amounts of money to elect candidates willing to act on their behest, and by reiterating the claim that *Hobby Lobby* gives owners of closely held firms the opportunity to foist their religious beliefs and prevent workers from exercising important federal rights.[83] Finally, Gans deduces that the Roberts Court is committed to altering the essential rules of government in order to advance corporate dominance,[84] a development that facilitates the transmutation of corporations into instruments of discrimination without any logical stopping point.[85]

III. CORPORATE RIGHTS AND CORPORATE "SEPARATENESS" IN THE DOCK?

A. Introduction

Gans rightly notes that *Hobby Lobby* generates numerous issues including whether corporations have either Article III or third-party standing.[86] Regardless of whether the Supreme Court has ever based its corporate rights jurisprudence on the notion that a corporation is a person in its own right,[87] any comprehensive examination of standing implies that the corporate rights debate pivots largely on the decisiveness of the cor-

81. GANS & SHAPIRO, *supra* note 2, at 72.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 27–28.

86. For a comprehensive discussion of third-party standing, *see* Garrett, *supra* note 20, at 147–53. Garrett states that the Supreme Court has articulated the following test for third-party standing purposes: "'Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party,' but a third party has standing when there is (1) some injury to the party litigating the right, (2) a close relationship to the nonparty whose rights are directly being litigated, and (3) some obstacle to that nonparty litigating, such that fundamental rights might otherwise go unprotected." *Id.* at 147–48 (citations omitted).

87. Blair & Pollman, *supra* note 30, at 1678 (asserting that early case law shows that the "Court has never based its corporate rights jurisprudence on the idea that a corporation is a constitutionally protected 'person' in its own right"). *But see*, Meese & Oman, *supra* note 20, at 287–88 (noting that the "Supreme Court unanimously recognized over a century ago: 'Under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution'").

porate form itself.[88] Whether corporate "separateness," separation of ownership and control, limited liability, and profit-maximization are attributes that ought to categorically inform the corporate rights debate, the novel question before the *Hobby Lobby* Court was whether business corporations, like Conestoga Wood, Hobby Lobby, and Mardel, have Free Exercise rights protectable under the Constitution or RFRA.[89] It has been argued that in order to sustain their claims, the respective corporate plaintiffs had to appropriate the religious beliefs of the owners thus disregarding the company's personhood.[90] Irrespective of the truth or falsity of this claim, as we have previously seen, the Court, in reaching its decision, found that nothing in RFRA indicates that Congress intended to depart from the Dictionary Act's definition of persons, which includes corporations, companies, associations, partnerships, and individuals.[91] The Court further observed that it had previously entertained free-exercise claims brought by nonprofit corporations.[92] The *Hobby Lobby* Court decided that neither the corporate status of the plaintiff-firms nor their pursuit of a profit per se disqualified them from successfully lodging a free-exercise claim.[93] Problems arise, however, because the Court failed to offer a coherent explanation of its reasoning based on an examination of corporate theory either in this case or in its prior opinions.[94]

The *Hobby Lobby* decision, in combination with the Court's previous decisions in *Citizens United*[95] (validating the First Amendment rights of corporate entities despite vigorous opposition)[96] and *Hosanna Tabor*[97] (exempting an ecclesiastical corporation from a generally applicable statute),[98] has spurred numerous questions regarding the constitutional and statutory rights of corporations and other business entities.[99] Pro-

88. *See infra* Parts II.B, II.C, and II.D.

89. Burwell v. Hobby Lobby, 134 S.Ct. 2751, 2769–73 (2014) (discussing whether corporations may exercise free-exercise primarily within the meaning of RFRA but also within the meaning of the Free Exercise Clause and further explicating why RFRA did more than codify the Supreme Court's pre-Smith Free Exercise precedents).

90. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 314 (2015).

91. *Hobby Lobby*, 134 S.Ct. at 2768–69.

92. *Id.* at 2769.

93. *Id.* at 2769–72.

94. Buccola, *supra* note 20, at 2–4.

95. Citizens United v. Fed. Election Comm'n, 558 U. S. 310 (2010).

96. *Id.* at 426–29 (Stevens, J., concurring in part and dissenting in part).

97. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

98. *Id.* at 707 (finding that a ministerial exception in this case thus thwarting the plaintiff's claim of discrimination).

99. *See, e.g.*, Buccola, *supra* note 20, at 2–3 (observing that a number of cases have "reinvigorated a century-old academic debate about the nature of the firm" and "the at-

voked by the *Citizens United* decision, for instance, many commentators argue that "the Constitution does not protect nonprofit corporations, for-profit corporations, or other business organizations because they are not 'real' people."[100] Sparked by the unremarkable observation that there is a distinction between natural and artificial persons, this contention encapsulates Justice Stevens's principle claim in *Citizens United* that the corporate form is ripe for both regulation and restriction within the meaning of the Constitution.[101] This view effectively implies that corporations are quasi-public entities that deserve unique treatment coherent with the claim that they are designed to serve a social function for the state.[102] It follows, therefore, that "when rights-bearing individuals pool their economic . . . ideological [or religious] resources to form a firm that enters into [the stream of] commerce" via a contractual agreement, "their constitutional rights do not necessarily remain intact for a variety of public welfare reasons."[103]

Building on this perception, one that reflects a mounting political movement against corporate personhood,[104] as well as the current *spiritus mundi* exposed by the nation's capitulation to ambitious egalitarianism,[105] opponents of such rights emphasize the consequentialist claim that exempting corporate employers from otherwise generally applicable laws inflicts unjust burdens on "so-called 'third parties'—persons who derive no benefit from an exemption because they do not believe or engage in the exempted religious practices."[106] Whether or not burdens can prevent corporations from lodging free-exercise claims, *Hobby Lobby* has launched an ever-widening gyre mainly designed to vitiate the eligibility of for-profit corporation for exemptions from generally applicable law.[107] Stressing the notion of corporate "separateness"— meaning,

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tribution of rights to corporations including the source as well as the content and limits of such rights").

100. Harry G. Hutchison, Ampersand, Tornillo, *and* Citizens United: *The First Amendment, Corporate Speech, and the NLRB,* 8 NYU J.L. & LIBERTY 630, 676 (2014) (citing the literature).

101. *Citizens United,*558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

102. *Id.*

103. Hutchison, *supra* note 100, at 636.

104. Greenfield, *supra* note 90, at 311.

105. *See, e.g.*, STEVEN SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 138 (2014) [hereinafter STEVEN SMITH] (quoting Kahn on the intersection of the nation's hyper pluralism with ambitious egalitarianism).

106. Gedicks & Tassell, *supra* note 20, at 1–18 (arguing that "[a]t the time *Hobby Lobby* was decided, the great weight of free-exercise and anti-establishment precedent precluded religious exemptions that impose costs on third parties").

107. *See, e.g.,* Law Professors' Brief, *supra* note 62, at 2–3; Garrett, *supra* note 20, at 102, 107 (contending that corporations lack the capacity to litigate on behalf of others and hence cannot profit from an exemption from generally applicable law).

among other things, that shareholders are not held liable for the debts of the corporation[108]—opponents of this decision invoke the menacing specter of anthropomorphism insisting that the inability of corporations to pray or physically engage in worship prevents such entities from successfully pursuing exemptions within the meaning of RFRA,[109] although both the Constitution and RFRA recognize the religious rights of natural persons. Although the logic of this claim could apply equally to churches, synagogues, and mosques as most are incorporated organizations or associations and thus cannot physically engage in worship, the Obama administration has offered concessions (exemptions) to religious objectors otherwise covered by the contraceptive mandate[110] in spite of their corporate form as either ecclesiastical or nonprofit charitable corporations. While it is doubtful that the administration's position on the legal separateness of the corporate form or on other issues arising out of the ACA can be seen as a model of consistency,[111] such concessions correlate with the fact that religion and our nation's history have been closely intertwined.[112] Within the context of the Free Exercise Clause, moreover, the adjudicative record before the passage of RFRA indicates that the ability

108. Greenfield, *supra* note 90, at 314.

109. Holding that Conestoga, as a "secular, for-profit corporation," lacks RFRA protection, the Third Circuit wrote:

> General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees,* exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.

Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d. Cir. 2013) (emphasis added) (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114, 1147 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014)).

110. Garfield, *supra* note 20, at 2 (claiming that the Obama administration has exempted core religious institutions such as churches, synagogues, and mosques from compliance with the mandate and has created a workaround for religious nonprofit institutions enabling employees of these institutions to receive contraceptive care without their employers having to pay for it).

111. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2763–64 (observing that in addition to exemptions for religious organizations, the "ACA exempts a great many employers from most of its coverage requirements. Employers providing 'grandfathered health plans'—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate"). *See also* BETSY MCCAUGHEY, BEATING OBAMACARE 2014: AVOID THE LANDMINES AND PROTECT YOUR HEALTH, INCOME, AND FREEDOM 46 (2014) (noting that the Obama administration has issued more than 1400 waivers from ACA regulations without statutory authority).

112. Rienzi, *supra* note 20, at 59.

of businesses to pursue religious exemptions within the parameters of the First Amendment did not depend on their profit making status, and this observation remains lively regardless of whether such exemptions were granted.[113] Despite such history, spanning several decades, the possible application of religious exemptions to for-profit corporations continues to generate a barrage of scholarship.[114] Gans's particular contribution to the literature is examined in Part IV. Before we start the examination in Part IV, however, it is useful to provide background on the basic principles of corporations; to place corporate rights analysis within the context of entrepreneurial choice; to examine corporate rights within the context of standing and the distinction, if any, between organizations and associations; and to develop a framework for analysis.

B. Background

Justice Brennan observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[115] The Supreme Court, consequently, has repeatedly held that for-profit corporations are constitutional "persons."[116] The Dictionary Act, similarly, provides that, "unless the context indicates otherwise . . . the word 'person' . . . include[s] corporations[,] . . . partnerships[,] . . . as well as individuals."[117] Such definition is "without regard to whether such firms or individuals are engaged in profit seeking activities."[118] Though the language, "unless the context indicates otherwise," fails to authorize judges to fashion optimal definitions of "persons" on a statute-by-statute basis, many scholars and the Obama administration assert that the term "person" does not include for-profit corporations, even if the *Hobby Lobby* firms' shareholders are the authentic source of religious exercise by the firms.[119] It follows that the administration's approach would elevate the dispositive force of corporate personhood.[120] The Obama administration's approach is grounded in the richly historic notion that the basic principles of corporate law and corporate personhood mandate and manifest an ontological division be-

113. *Id.* at 60. Rienzi states: "The Supreme Court has previously recognized religious liberty rights for people earning a living, including some business owners and the Court has repeatedly recognized that the corporate form itself is not inherently incompatible with religious exercise, at least in the context of nonprofit corporations." *Id.* (footnotes omitted).

114. *See supra* note 19 and accompanying text.

115. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687 (1978).

116. Meese & Oman, *supra* note 20, at 275 n.15 (citing a number of cases).

117. Dictionary Act, 1 U.S.C. § 1 (2012).

118. Meese & Oman, *supra* note 20, at 276.

119. *Id.*

120. *See supra* Part II.C for a fuller explanation of this claim.

tween corporations and other business enterprises or nonprofit entities because for-profit corporations enjoy an existence that is not necessarily coterminous with their shareholders.[121]

Undeniably, "[c]orporate personhood itself evolved in the late nineteenth and early twentieth centuries as a complex and powerful legal concept."[122] Consistent with the evolutionary nature of the corporate personhood doctrine,[123] the separation of ownership and control of the artificial vehicle known as a corporation surfaced as a strikingly essential attribute of public corporations in the work of Berle and Means.[124] This development reflects observations that are more than 80 years old.[125] Separation of ownership and control, as an attribute, emerged in the nineteenth century and "facilitated the growth of large industrial corporations . . . [as part of an antique move] that created the potential for shareholder and managerial interest to diverge."[126] Berle and Means's analysis, primarily confined to large publicly traded firms and the potential agency costs associated with dispersed shareholders who lack operational control, is grounded in the perception that investors could not necessarily rely on the communicative proficiency of quidnuncs or on unannounced visits by investors themselves to keep tabs on managers.[127] As popularized by Walter Lippman in the 1940s, Berle and Means' thesis provided an explanation for the rise in concentrated economic power and the State's consequent regulatory response to such power from the middle of the twentieth century onward.[128]

It is worth noticing that the corporate form has a long history with antecedents dating backing several centuries,[129] even if this history does not fully explain the concept of corporate identity premised on corporate separateness.[130] Coextensive with the emergence of chartered joint stock companies during the seventeenth and eighteenth centuries, elements of

121. Meese & Oman, *supra* note 20, at 276 (citing Law Professors' Brief, *supra* note 62, at 2–3).

122. Garrett, *supra* note 20, at 109.

123. *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, CORPORATION LAW 3–4 (2012) (describing the evolution of this doctrine for purposes of the assertion of constitutional rights by corporate entities).

124. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 8–10 (2002) [hereinafter BAINBRIDGE, CORPORATION LAW AND ECONOMICS].

125. *Id.*at 9.

126. *Id.* at 10.

127. David Franz, *Pillar, Ledger, and Mission: Ontologies of the American Corporation,* HEDGEHOG REV., 7, 8–9 (2009).

128. *See, e.g.,* Alan Trachtenberg, *Images, Inc.: Visual Domains of the Corporation*, HEDGEHOG REV. 19, 19 (2009) (quoting WALTER LIPPMAN, AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY 13 (1943)).

129. Pollman, *Corporate Law and Theory*, *supra* note 20, at 5.

130. *See generally* Lupu & Tuttle, *supra* note 20, at 1–40.

the business corporation developed, including the transferability of shares and limited liability.[131] The record suggests that until "a few centuries ago, the privately owned, for-profit business corporation did not exist"[132] because before "the beginning of the nineteenth century, most business and commerce was conducted by proprietorships and partnerships."[133] Defined in the eighteenth century, the corporation came to be seen as "'a collection of many individuals united into one body,' has 'perpetual succession under an artificial form' and is 'vested by the policy of the law, with a capacity of acting, in several respects, as an individual particularly of taking and granting property, contracting obligations, and of suing and being sued.'"[134] History confirms that corporations could be ecclesiastical in nature, public, originating in counties, cities and towns, or private firms engaged in for-profit activity.[135] Professor Garrett, for example, rightly notes that the underlying legal status of the corporation and its interest is a function of state law.[136] "State law defines the organizational requirements for being recognized as a type of corporation or partnership, as well as the legal consequences of such status."[137] A corporation may have a large group of shareholders and separate management if it is a public corporation, or it may be a large corporation with private owners, or it may have a small group of owners consistent with the fact that the vast majority of corporations are quite small.[138] Moreover, it is likely that limited liability is not necessarily a defining characteristic of corporations since limited liability partnerships and LLCs, which are unincorporated entities, enjoy limited liability like corporations in contradistinction to the default rules that apply to general partnerships or sole proprietorships.[139] Emerging from this history and regardless of veracity of this analysis, the idea that a corporation may exercise constitutional rights is nothing new.[140] The next subsection places this history within the context of entrepreneurial choice before directly confronting the renewed scholarly emphasis on "separateness" as a defining attribute of a corporation.[141]

131. *Id.*

132. ROBERT CHARLES CLARK, CORPORATE LAW 1 (1986) (footnote omitted).

133. *Id.*

134. Pollman, *Corporate Law and Theory*, *supra* note 20, at 5 (citing 1 STEWART KYD, TREATISE OF THE LAW OF CORPORATIONS 2–4, 7, 10, 13 (1793)).

135. *Id.*

136. Garrett, *supra* note 20, at 105.

137. *Id.*

138. *Id.*

139. *Id. But see* Meese & Oman, *supra* note 20, at 286 (showing that limited liability can be an attribute of sole proprietorships as a result of bargaining).

140. Garrett, *supra* note 20, at 110.

141. *See infra* Part II.D.

C. Placing Corporate Rights in the Context of Entrepreneurial Choice

Theories about the corporation and corporate rights hinge on perceptions of what corporations look like or should look like.[142] Law embodies beliefs about what is legitimate, and beliefs influence decision making behavior.[143] Building something is arguably "a willful act of symbolic import, sometimes intended, sometimes not."[144] Building high-rise structures, human settlements, or corporations demands the capability to bring such vehicles "into being and sustain them over time,"[145] a move that ultimately reflects the scope of intentional human choices available. Doubts emerge when the various entities and structures that result from the instantiation of human choice are said to represent "legitimate authority" based on morality "'more than' mere power, more than the human capacity to will something and make it so."[146] Beyond occupying the contestable domain of corporate social responsibility advocacy and its corresponding social activism,[147] the question of moral authority inflames the debate regarding the First Amendment and free-exercise rights of corporations or other for-profit vehicles.[148] In our contemporary epoch, nowhere is the legitimate authority of firms more in doubt than in the domain of corporate-rights adjudication.[149] This debate is further muddled in virtue of the fact that the scholarly literature identifies three conflicting approaches for evaluating for-profit corporations.[150]

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142. David Millon, *Theories of the Corporation* 1990 DUKE L.J. 201, 243 (1990).

143. *Id.*

144. Philip Bess, *Building on Truth: An Argument for a Return to Metaphysical Realism in Architecture and Urbanism*, FIRST THINGS (Jan. 2015), http://www.firstthings.com/article/2015/01/building-on-truth.

145. *Id.*

146. *Id.*

147. *See, e.g.*, Michele Benedetto Neitz, Hobby Lobby *and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 SMU L. REV. 243, 243–44 (2015) (asserting that after *Hobby Lobby* corporations can be moral persons that do not need to maximize shareholder wealth).

148. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (Ginsburg, J., dissenting) (attacking the Court's decision to hold that "commercial enterprises, including corporations, along with partnerships and sole proprietorships can opt out of any law . . . they judge incompatible with their sincerely held religious beliefs" and that "[c]ompelling governmental interests in uniform compliance with the law, and the disadvantages that religion-based opt-outs impose on others, hold no sway").

149. *See, e.g.*, Garrett, *supra* note 20, at 110–56 (contesting the legitimacy of corporate rights).

150. Buccola, *supra* note 20, at 9 (stating that the three tropes include: (1) an "aggregate" theory, which emphasizes the contractual aspect of the corporation, (2) a "real entity" theory, which posits an autonomous entity distinct from natural persons, and (3) an "artificial entity" or "concession" theory, which implies that the corporation owes its existence to the state's largesse).

Prompted by the Court's recent decisions in *Hobby Lobby* and *Citizens United*, corporate ontology is all the rage, and this rage arguably reflects more than a century of decision making. To be sure, contemporary cases have provoked a savage academic debate about the nature of the firm, a roiling tempest that is compounded by the public's reaction.[151] This current wrangle advances questions "about the attribution of rights to corporations, including the source as well as the content, and limits of such rights."[152] There is a vanishingly small probability that such questions will disappear because the Court, throughout its history, "has articulated inconsistent and mutually incompatible theories of the corporation"[153] and because the Justices have looked to several different theories of the firm that yield predictably unpredictable judgments regarding the existence of corporate rights.[154] Correspondingly, the Court has refused to proffer a general theory of corporate constitutional rights[155] and to engage in a sustained effort to develop a coherent or comprehensible test for ascertaining the rights that corporations hold.[156] Likewise, the Court has abstained from defining a corporation or organization as a prelude to building a cohesive theory of corporate rights adjudication.[157] As a consequence, scholars have attempted to fill this void by debating how best to define corporate rights for over a century.[158]

Countering this jurisprudential void, commentators repeatedly advert to the observation that the text of the Constitution fails to mention corporations[159] or, alternatively—as more fully developed in Subsection D—place renewed emphasis on the notion of corporate "separateness."[160] The absence of textual language gives rise to interpretation issues that are compounded by the willingness of some commentators to rely on historically accurate but antiquated conceptions of the firm.[161] Corporations are best understood as one type of organization—there are others—that reflects a conglomeration of people who possess legal rights in the first place, rather than anachronistic entities surfacing from the grant of monopoly power like the British East India Company during the Founding era, or like Fannie Mae or the U.S. Postal Service in our current era.[162] It

151. *Id.* at 2–3.
152. *Id.* at 3.
153. *Id.*
154. *Id.*
155. Garrett, *supra* note 20, at 98.
156. Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 32 (2014) [hereinafter Pollman, *A Corporate Right to Privacy*].
157. Garrett, *supra* note 20, at 108.
158. *Id.*
159. Pollman, *Corporate Law and Theory*, *supra* note 20, at 6.
160. *See infra* Part II.D.
161. *See generally supra* Part II.B.
162. GANS & SHAPIRO, *supra* note 2, at 15–16 (contesting Gans's claims (Shapiro)).

is likely that corporations during the Founding era bear little relationship to the modern corporation that originates out of the entrepreneurial-choice-nexus-of-contracts paradigm or the much celebrated Berle and Means framework. The status of current adjudicatory norms within the realm of corporate law prompts scholars to question whether corporate theory in the form of a metaphysical inquisition provides a basis for courts to ascertain whether corporations are the kinds of beings that can or should have rights, or instead, proffer a realist appraisal that looks at society's interests and the functional relations involved.[163]

Given the Supreme Court's undulating record, Professor Stephen Bainbridge posits that it is a mistake to suppose that the Court's recent efforts to fashion a comprehendible corporate personhood doctrine amounts to more than an exercise in incoherence.[164] Though such claims are well-founded, Professor Vincent Buccola maintains, that, though "the Justices have invoked . . . various conceptions of the firm in the course of their many opinions, the body of the Court's corporate-rights jurisprudence, taken as a whole, can be understood to reflect to a surprising degree the contractarian premises of transaction-and agency-costs economics."[165] In spite of the ad hoc nature of corporate-rights adjudication, nearly all of the Court's decisions are consistent with the goal of ensuring that its legal rules have a non-distortive and, therefore, neutral effect on the organizational form chosen by venturers.[166] From this standpoint, it is possible to see that the Court's approach to corporate rights is grounded in the presupposition that "regulatory burdens ought to attach to cooperative activity in virtue of the activity's substance, not the mode through which entrepreneurs choose to coordinate."[167] Whether or not the Court ever intended to invoke this presumption in the first place, entrepreneurs, cognizant of transaction-and agency-cost economics within a competitive realm, choose to economize on the social costs of production.[168]

As more fully explained in Part III, the Court advances this entrepreneurial-choice-proposition by "ascrib[ing] rights to corporations so as not to bias decisions about either the scope or mode of productive inte-

163. Pollman, *Corporate Law and Theory, supra* note 20, at 6.

164. Stephen Bainbridge, *Taub asks "Is* Hobby Lobby *a Tool for Limiting Corporate Constitutional Rights?"* PROFESSORBAINBRIDGE.COM (June 12, 2015), http://www.professorbainbridge.com/professorbainbridgecom/2015/06/taub-asks-is-hobby-lobby-a-tool-for-limiting-corporate-constitutional-rights.html

165. Buccola, *supra* note 20, at 6.

166. *Id.* at 14. *See also* Butler, *supra* note 52, at 104 (showing that a sole proprietorship, partnership, or corporation is equally conceivable).

167. Buccola, *supra* note 20, at 14.

168. *Id.* at 15 (offering an efficiency justification in order to advance the theory of organizational neutrality as a decisional principle for determining corporate rights).

gration" chosen by the firm.[169] Consistent with this disguised yet orderly paradigm, profit pursuing entrepreneurs, as potential employers, choose a specific form of organization based on the observation that the partnership, limited partnership, business trust, LLC, sole proprietorship, consumer cooperative, or corporation could "be optimal, depending on a range of factors including . . . the capital-intensity of the industry, the enterprise's scale, and the idiosyncratic personalities of the venturers."[170] Reflecting Professors Alchian and Demsetz's rich insights derived from economic analysis, the firm (whatever its ultimate form), the size (the degree of integration), or the legal type (the mode of integration) is a response to the benefit of team production and the desire to drive costs lower.[171]

The development of the modern theory of the firm "provides the theoretical basis for the contractual theory of the corporation," facilitating its formation for any lawful purpose, a move that "would not have been possible without the development and empirical verification of the Efficient Capital Markets Hypothesis."[172] Originating out of a customized "nexus of contracts" that is arranged to advance firm goals and to restrain the behavior of participants,[173] this process is particularly useful for large publicly-traded firms and easily adaptable for others and explains why a particular form of business organization is utilized by specific entrepreneurs.[174] The emergence of customized corporations, premised largely on Coasean economics and related insights arising from the nature of the firm,[175] provide a sturdy platform to question the normative implications of the previously ascendant, and still resilient, separation of ownership and control thesis popularized by Berle and Means.[176] Though Berle and Means's thesis sustains one of the nation's most powerful tropes—the possibility that large and oppressive corporations, unrestrained by shareholders, run roughshod over both national and individual interests—classical economics, in stark contrast, assumes that firms

169. *Id.* at 20.

170. *Id.* at 17.

171. *Id.* at 16–17.

172. Butler, *supra* note 52, at 106.

173. *Id.* at 105.

174. *See generally id.* at 99–103.

175. Buccola shows that the study of transaction-cost economics arguably commenced with the publication of Ronald Coase's 1937 article on the nature of the firm. Buccola, *supra* note 20, at 15–16. *See also* R. H. Coase, The *Nature of the Firm,* 4 ECONOMICA 386 (1937); Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 37 DEL. J. OF CORP. L. 437, 445–48 (2010) [hereinafter Hutchison, *Choice, Progressive Values, and Corporate Law*].

176. Butler, *supra* note 52, at 101–02 (explaining the applicability of the Berle & Means thesis to large publicly traded corporations and disputing its resulting emphasis on the need for greater state regulation that preempts private ordering).

frequently unite ownership and control, thereby concentrating decision-making authority and economic consequence in the same hands.[177] Unification challenges the Berle and Means's framework and implies that the notion of passive shareholders responding to centralized management may be more myth than reality, an observation that applies particularly to closely held firms irrespective of firm size.[178]

But before proceeding, it is worth noting that state law (with regard to for-profit firms) is designed to encourage investment[179] and establishes the essential default rules that help to shape a corporation.[180] Although a firm's separate legal identity develops out of specified default rules,[181] these rules are frequently altered in combination with the goals, objectives, and beliefs of private actors who shape the entity within the confines of rational choice as part of the nexus of contracts paradigm.[182] The fusion of modified default rules and corresponding goals and objectives of the entrepreneurial group within the context of the contractarian model has the power to create an officially separate legal personality that operationally takes on a variety of forms.[183] It follows that, whatever forms this fusion takes, the firm's separate legal personality reflects a plethora of decisions that answer salient questions, which include the type of business to operate, the most operationally efficient employment structure, and the optimal capital structure and governance mechanisms as the incorporators proceed to build something of value.[184] Entrepreneurial decision making, emerging from a largely voluntary-mutual-benefit setting, is propelled by the group's goals, objectives, and intentions, as well as their time horizon.[185] This process that may give rise to corporations

177. *See, e.g.*, Meese & Oman, *supra* note 20, at 280.

178. *Id.* at 280–81.

179. Pollman, *Corporate Law and Theory, supra* note 20, at 5–6.

180. *See, e.g.*, BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 14–16, 29–31 (discussing state law and the source of default rules that emerges from the choice made by members of the entrepreneurial group).

181. Pollman, *Corporate Law and Theory, supra* note 20, at 5.

182. *See, e.g.*, BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 23–31 (discussing rational choice and showing that a corporation arises as a nexus of contracts).

183. *Id.* at 29–31 (showing how voluntary contracts and the choice of default rules gives rise to a commercial entity that reflects the choices the parties make). *See also* Meese & Oman, *supra* note 20, at 280–85 (describing the various ways that the incorporators can choose to operate a corporation, including devices that enable corporations to look very much like partnerships).

184. Buccola, *supra* note 20, at 17 (discussing optimal structure within a contractarian setting that depends on a number of factors including, for example, the capital-intensity of the industry, the enterprise's scale, and the idiosyncratic personalities of the venturers).

185. Hutchison, *Choice, Progressive Values, and Corporate Law, supra* note 175, at 448.

that are profoundly different in operation than the delineation that surfaces from Berle and Means's singular focus on the separation of ownership and control that characterizes large publicly-held firms managed by entrenched managers because no one shareholder or group of shareholders acting together own sufficient stock to claim control.[186] Hence, for many firms, the notion of a "separate legal personality" associated with a corporate employer does not necessarily imply any separation between the entrepreneurial group's goals and objectives and the goals and objectives of a for-profit corporation itself.[187] The absence of operational separation corresponds with classical economics, which assumes that for-profit firms frequently unite ownership and control, thereby "concentrating decision-making authority and economic consequences in the same hands,"[188] a move that mirrors the operation of a sole proprietorship or a partnership.[189]

Congruent with the contractual and variable nature of corporate law, shareholders, within the parameters of a customized firm, are capable of exercising the ordinary prerogatives of business ownership themselves.[190] As an empirical matter, it is questionable whether any "essence of corporateness, . . . [in practical terms,] precludes shareholders with such prerogatives [in mind] from employing for-profit corporations to exercise their religion."[191] Corporations whose owners impose their personal religious beliefs on the firm are commonplace because investors can alter default rules that contradict the essentialist version of the for-profit firm,[192] which holds many scholars captive.[193] Since entrepreneurs choose from a variety of organizational forms, and since they can also choose to modify default rules governing the internal operations of a firm, this convergence of inchoate choices has implications for any unbiased enquiry into the constitutional or statutory rights of the firm.[194] It follows that doubts arise regarding the contention that a corporation automatically forfeits free-exercise protection when it organizes itself in

186. BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 10.

187. Meese & Oman, *supra* note 20,at 282–83 (showing that in some corporations, directors and shareholders are often one and the same).

188. *Id.* at 280.

189. *Id.* at 280–84 (showing how some firms replicate the ownership and management structure of a partnership).

190. *Id.*at 274.

191. *Id.*

192. *Id.* at 279–80.

193. *See generally, e.g.*, Law Professors' Brief, *supra* note 62.

194. *See generally* Meese & Oman, *supra* note 20, at 279–301.

this form, as opposed to organizing itself as a sole proprietorship or partnership.[195]

Buccola and other scholars, despite the Supreme Court's failure to clarify the extent of a for-profit corporation's legal entitlements as opposed to the legal entitlements of ecclesiastical corporations, nonprofits, and sole proprietorships,[196] and in contrast with the weight of scholarly opinion, stress the contractarian, entrepreneurial-choice foundations of the corporation and the Court's implicit commitment to decision-making and rule-making that is grounded in non-distortive legal rules that have a neutral effect on the organizational form chosen by venturers.[197] This analysis disputes the contemporary application of the Berle and Means' thesis as the primary basis for any discussion of corporate rights and substitutes entrepreneurial choice within a customized nexus-of-contracts framework for a viewpoint that depends on the idea of a widely dispersed shareholder group whose power is diminished by collective action problems.[198] But even if Buccola's insights are correct, for them to be sustained within the domain of corporate free-exercise rights, they must withstand the energetic efforts of many contemporary scholars engaged in renewed attempts to ground their opposition to corporate rights within the notion of corporate separateness, the concept of limited liability, and the allegedly dispositive distinction between organizations and associations. The next subsection examines this weighty effort that is calibrated to resurrect Berle and Means's thesis as impassable impediment to corporate rights.

195. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (rejecting the claim that "the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships").

196. Buccola, *supra* note 20, at 3. *See also* Garrett, *supra* note 20, at 98 (noting that the Supreme Court has not offered a general theory defining the constitutional rights of corporations).

197. Buccola, *supra* note 20, at 17.

198. For a discussion of dispersed ownership and the avoidance of chaos that would come from vesting power in the hand of widely dispersed shareholders, within the context of the Berle & Means paradigm, see BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 10.

D. The Second Coming of "Separateness" on the Road to Hobby Lobby?

> Turning and turning in the widening gyre
> The falcon cannot hear the falconer;
> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world, . . .
> Surely some revelation is at hand;
> Surely the Second Coming is at hand.[199]

Despite Justice Brennan's observation that by 1871, it was well understood that for-profit corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis, and despite the existence of the entrepreneurial-choice paradigm that disputes the applicability of Berle and Means's analysis with respect to many corporations, the subject of corporate rights remains vast. Responding to the vastness, a number of contemporary scholars,[200] including Professor Garrett, in particular, stress the separation of the firm and its shareholders as a dispositive attribute for purposes of corporate rights adjudication.[201] Gans's contribution to the literature is part of this robust effort, but Professor Garrett's analysis is arguably the deepest and, perhaps, most comprehensive available[202] since Berle and Means published theirs. If Garrett's approach prevails as basis for constraining corporate rights, then corporate "separateness" faces the prospect of an impending resurrection, an event that would signify that Gans's rejection of corporate rights ought to withstand scrutiny. But if not, it becomes highly doubtful that Gans's approach survives.

Sparked principally by the question of whether a corporation has standing to litigate constitutional rights in federal courts, and echoing claims made by leading scholars that corporations are distinct legal entities protected from intrusion by shareholders who enjoy limited liability behind the corporate veil,[203] Garrett initially affirms that for each constitutional right the Court has considered, it "has adopted a consistent approach by largely avoiding questions concerning the inherent nature of

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199. William B. Yeats, *The Second Coming*, POETRY FOUNDATION, http://www.poetryfoundation.org/poem/172062 (last visited Oct. 29, 2015).

200. *See, e.g.*, Law Professors' Brief, *supra* note 62, at 1–13.

201. *See, e.g.*, Garrett, *supra* note 20, at 110–36.

202. For an example of other scholarly efforts see Law Professors' Brief, *supra* note 62, at 1–13.

203. *Id.* at 3–5 ("The first principle of corporate law is that for-profit corporations are entities that possess legal interest and a legal identity of their own—one separate and distinct from their shareholders.").

different types of entities."[204] "Instead, the Court focuses on the consequences of finding that an organization has standing to assert the right by examining the purposes of the particular constitutional right [to] decide if entities have asserted a sufficient injury creating standing to litigate the right."[205] At first blush, avoidance of questions regarding the inherent nature of different types of entities appears to be congruent with the deduction that corporate personhood ought to be seen as immaterial, or with Lupu and Tuttle's post-*Hobby Lobby* intuition, which disputes the relevance of corporate identity within the domain of religious exemptions.[206]

Garrett catalogues when an organization can litigate an injury to the entity itself, which is viewed as a threshold question of Article III standing.[207] Here, he returns to a familiar theme that invokes a panegyric offered by Gans and a large number of scholars: the infrangibility and centrality of corporate "separateness."[208] He observes that the Court has held that "a plaintiff must be able to show a cognizable injury in fact to have a case or controversy that may be heard by Article III courts."[209] Though Article III standing may supply a useful scaffold on which to explicate whether an organization or association can litigate constitutional rights,[210] the Supreme Court gingerly avoided the question whether corporation are persons with standing to assert constitutional rights in *Citizens United*.[211] In *Hobby Lobby*, the Court avoided the issue entirely by relying on its understanding of statutory rights under RFRA.[212]

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204. Garrett, *supra* note 20, at 110.

205. *Id.* at 110–11. Garrett examines the Contract Clause, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the First Amendment, the Fourth Amendment, the Fifth Amendment, the Double Jeopardy Clause, the litigation of fines under the Sixth Amendment, the Eighth Amendment and the Due Process Clause, and claims under Structural provisions of the Constitution. *Id.* at 111–36.

206. Lupu & Tuttle, *supra* note 20, at 6 (arguing that after *Hobby Lobby*, the focus should be on the extent to which an organization and its activities are distinctively religious and that exemptions should directly relate to the "distinctively religious qualities the exemptions are designed to recognize and protect").

207. Garrett, *supra* note 20, at 136–56. Among other things, Garrett asserts that two lines of cases are particularly crucial to the question of constitutional litigation by organization—one line of cases holds that organizations can raise constitutional rights by asserting concrete injury to its own interests, but not those of others, and second, the Court adopts a more flexible test for associations and membership organizations that permits standing to assert the potentially broader interest of individual members. *Id.* at 137–47. Additionally, he discusses third-party standing grounded in the Supreme Court's prudential or non-Article III third-party standing doctrine. *Id.* at 147–56.

208. Law Professors' Brief, *supra* note 62, at 4.

209. Garrett, *supra* note 20, at 137.

210. *Id.* at 136–56.

211. *Id.* at 96.

212. *Id.* at 97. Avoidance of the standing issue may have been surprising given that the issue of corporate standing was prominent in the confusion in the pre-*Hobby Lobby*

Offering a narrowly drawn framework secured by the distinction between associations and organizations, Garrett postulates that the Supreme Court's test for associational standing remains permissive and broad, wherein the Court emphasizes the common interest of members and describes how the association is simply the medium through which individual members seek to make more effective the expression of their views.[213] Garrett maintains that there are "sound reasons for treating nonprofit organizations and other types of organizations as associations, [when and] if they, like membership organizations, represent the viewpoints of individuals,"[214] whereas for-profit corporations cannot represent the interests of their members because of the centrality of their legal structure.[215] Hence, Garrett, among others,[216] propounds the contention that such organizations lack the ability to litigate injury to others[217] in contradistinction to an entity such as a sole proprietorship, which is "nothing like a corporation; it is unincorporated, run by a single person, and is not in any way separate from that single owner."[218] If this synopsis fairly exemplifies Garrett's scholarship, then, in tandem with the weight of scholarly opinion, it signifies that corporate legal structure presents an impermeable barrier to corporate litigation on behalf of corporate free-exercise rights.[219] Before determining whether such a conclusion withstands examination, I next turn to Garrett's extensive elaboration of organizational standing as opposed to associational standing wherein he stresses the debilities accompanying any attempt to expand corporate rights.

Garrett contends that "[o]rganizational standing analysis is quite different from associational analysis. When an organization sues to assert its own interests, . . . [such interests] are necessarily distinct from those of its shareholders or owners."[220] Thus appreciated, "the Article III

lower court rulings concerning challenges to the ACA's contraception mandate. *Id.* at 140.

213. *Id.* at 137–39.

214. *Id.* at 138.

215. *Id.* ("As a result, there may be sound reasons to treat nonprofit organizations and other types of organizations as associations if they, like membership organizations, represent the viewpoints of individuals. However, as discussed next, a for-profit corporation cannot do so given its legal structure and lacks the ability to litigate injury to others.").

216. Law Professors' Brief, *supra* note 62, at 10–16 (emphasizing the principle of the separation between a corporation and its shareholders, a principle that deprives shareholders of the ability to act on behalf of the corporation and likewise extirpating the right of a corporation to sue to assert rights of their shareholders).

217. Garrett, *supra* note 20, at 138.

218. *Id.* at 143.

219. Law Professors' Brief, *supra* note 62, at 13–18.

220. Garrett, *supra* note 20, at 139. *But see* Meese & Oman, *supra* note 20, at 273–74 (disputing this claim).

inquiry proceeds by asking whether the entity itself suffered a 'concrete injury' to its own interests, apart from any separately identified injury to third parties, such as employees, officers, owners, or shareholders."[221] Second, Garrett argues that "[n]ot only must the organization claim an injury to the interests of the organization, but the particular harm that the corporation suffers must also implicate or be caused by the violation of the right being asserted by the entity."[222] On this view of the cathedral, a corporation would be disqualified from bringing a free-exercise claim when it does so in order to protect "the religious liberty of the humans who own and control" it because allowing such litigation to enter the courthouse door would "conflat[e] associational and organizational standing, and . . . assume[] that corporations and individuals[,] [who constitute the firm,] . . . have common 'beliefs' . . . or financial interests."[223] On this view, a non-profit corporation (e.g., church, synagogue or mosque) can engage in religious exercise (apparently on associational grounds) whereas a for-profit corporation "lacks the relevant free exercise injury, since it lacks 'religious liberty' as a for-profit corporation."[224]

There is much to untangle in such claims because they are not constitutive of an auto-legitimating narrative.[225] Suffice it to say that stressing form over substance, and emphasizing clarity when the highly variable goals and objectives of entrepreneurs/organizers give rise to diverse entities organized in widely different ways, Garrett insists that for a court to indicate that "a for-profit company is no different than a non-profit or an association or a religious entity . . . ignores the relevance of the corporate form entirely"[226] and "disregard[s] the fundamental feature of state corporate law: separation of ownership from the entity."[227] Corporations, so the claim goes, are not entitled to litigate on behalf of owners' personal interests, but rather must ensure litigation arises "out of a duty to maximize corporate profits, returns to owners or shareholders[,] or 'other' corporate goals."[228] In response to the questionable provenance of such claims, one might ask a series of questions. First, what is the source of the corporate duty to maximize profits within a nexus-of-

221. Garrett, supra note 20, at 139.

222. *Id.* at 140.

223. *Id.* at 145.

224. *Id.*

225. For a discussion of auto-legitimation, see, e.g., JAMES K. A. SMITH, WHO'S AFRAID OF POSTMODERNISM? TAKING DERRIDA, LYOTARD AND FOUCAULT TO CHURCH 66 (2006) [hereinafter JAMES K. A. SMITH] (showing that the work of Jean-François Lyotard demonstrates that the notion of auto-legitimation arises within a narrative that arises out of custom, homogeneity and therefore the authority of the claim is implicit in the narrative itself).

226. Garrett, *supra* note 20, at 145.

227. *Id.*

228. *Id.* at 145–46.

contracts-entrepreneurial-choice setting beyond the statements made by the HHS,[229] even if the prevailing default rule for publicly held firms requires management to increase the value of shareholder wealth?[230] Second, is the pursuit of profits, standing alone (maximized or not) a categorically disqualifying attribute that eviscerates the free-exercise rights of such corporations, when it is clear that a variety of other entities such as unincorporated firms or nonprofits can pursue profits without suffering a diminution of their free-exercise rights? Finally, what is the content and scope of "other corporate goals" that Garrett finds worthy of corporate rights litigation?

Considering each question in turn, the *Hobby Lobby* Court noted that not all corporations that decline to organize as nonprofits do so in order to maximize profit,[231] an observation that tracks with the deduction that profit maximization may lack fundamentality. Likewise, law and economics scholarship shows that profit maximization far from existing as legal principle is simply "[a] corollary of the self-interest assumption for individual behavior,"[232] a concept that implicates a large slew of economic activity beyond the realm of for-profit corporations, assuming, of course, that the managers of other entities respond rationally to incentives. Further, despite Garrett's endeavor to define and constrain for-profit corporations on the basis of their presumptively dispositive "separation of ownership and control" attribute, this characteristic, even if truly representative of publicly held for-profit corporations, flies in the face

229. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) ("HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut). Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners."). (citations omitted).

230. BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 28–29 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)).

231. *Hobby Lobby*, 134 S. Ct. at 2771.

232. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS 11 (2d ed. 2006); *see also id.* at 514 (offering a Glossary definition that explains the idea that "profit accrues only when the value of the good produced is greater than the sum of the values of the . . . resources utilized").

of the possibility that the corporate form is of limited relevance for purposes of assessing free-exercise rights.[233]

Second, if the pursuit of profit is a disqualifying objective, then this claim, when examined impartially, would implicate sole proprietorships and unincorporated entities such as partnerships and LLCs, which, whether they exclusively focus on maximizing profits or not, are just as much the outcome of entrepreneurial choice as the establishment of a for-profit corporation.[234] Further, to the extent that the notion of profit in combination with legal "separateness" sustains Garrett's objections to corporate rights, it becomes important to note that a comprehensive understanding of economic theory enriched by the concepts of a "normal" and "economic" profit provides a basis to dispute the possibility of drawing a neat line that divides for-profit corporations from other institutions, which humans create. Consistent with the possibility that opacity prevails within the line-drawing arena of institutional rights, it is clear that nonprofit corporations can pursue their free-exercise rights while simultaneously operating commercial enterprises that earn either a normal or an economic profit.[235] This prospect destabilizes Professor Garrett's inclination to permit nonprofits to bring free-exercise claims because they are, or resemble, associations,[236] but deny such rights to for-profit corporations because "legal separateness is the point of creating a [for-profit] corporation."[237] Additional destabilizing evidence arrives by observing

233. Lupu & Tuttle, *supra* note 20, at 6 (stressing that exemptions should depend on the distinctively religious qualities the exemptions are designed to recognize rather than whether entities have rights of religious exercise).

234. Rienzi, *supra* note 20, at 82 (showing that "[f]or nearly a century, scholars have discussed the role of 'corporate social responsibility,'" consistent with the idea that "directors of a business corporation should not focus exclusively on [the pursuit of] profit" but rather the "businesses should consider the impact of the business's actions on a variety of stakeholders, such as the company's employees, its customers, the community, or the environment" and this idea extends to a variety of entities including partnerships, "contractual joint venture[s], entity joint venture[s], or even . . . loosely affiliated individuals coming together in a temporary constellation for a particular project").

235. "Economic profit is defined as the total revenues received from selling a product or service minus the total costs of producing the product or service, including the opportunity costs [of production]." BUTLER & DRAHOZAL, *supra* note 232, at 11. Thus understood, whether the firm is a for-profit or nonprofit entity, it arguably must cover all of its cost including opportunity costs, or the costs of some foregone activity in producing its goods or services. Opportunity costs reflects the fact that a firm, whether for-profit or not, must attract inputs—resources or factors of production—from alternative uses. *Id.* at 15. In considering the costs of production, "economists and many courts are careful to recognize both the explicit costs recorded in the firm's books and the implicit costs that reflect the value of resources used in production by the firm for which no explicit payments [have been] made." *Id.* When and if a nonprofit takes in more revenue than its total explicit and implicit costs, it earns an economic profit. *See id.* at 15–16.

236. Garrett, *supra* note 20, at 154.

237. *Id.* at 146.

that, although the federal government statutorily distinguishes between (tax-exempt) nonprofits and for-profit entities,[238] it, nonetheless, allows religious tax-exempt-nonprofits, such as churches, to earn a profit on "unrelated income," a maneuver that does not pose a threat to such entities' free-exercise rights.[239] Further, the possibility, if not the propensity, of nonprofits to earn a profit can be advanced by scrutinizing Danish evidence showing that when nonprofit foundations are used to control other entities, they are on average as profitable as companies with conventional investor ownership.[240] The foregoing analysis arguably renders much of Garrett's presumed distinction between associations and organizations moot for purposes of standing analysis.

Third, one could imagine that a principled understanding of "other goals" would be capacious enough to encompass religious exercise even if one is hindered by a precommitment to exclusive humanism, the immanent frame, and the secular age.[241] At a minimum, "other goals" could include ethical or moral objectives that are apparently rife in many organizations, associations, and corporations. This possibility renders virtually any attempt by scholars to cabin the institutional pursuit of religious exemptions in some binary fashion that presumptively excludes corporations, highly suspect.

Instead of (1) offering a statutory rule requiring all corporations to maximize profits—one that negates the live possibility of creating dual-purpose, benefit or hybrid corporations,[242] congruent with "the fact that [] rational choice [analysis] implicates the fulfillment of both pecuniary and nonpecuniary wants"[243]—thus enabling actors to move beyond the max-

238. Rienzi, *supra* note 20, at 95 (citing I.R.C. § 501(c)(3) (2006 & Supp. 2012)).

239. *Id.* at 96.

240. *See, e.g.*, Henry Hansmann & Steen Thomsen, *Managerial Distance and Virtual Ownership: The Governance of Industrial Foundations* 4 (European Corp. Governance Inst., Fin. Working Paper No. 372/2013, 2013), http://ssrn.com/abstract=2246116.

241. Hutchison, *Metaphysical Univocity, supra* note 20, at 40–44.

242. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

243. Hutchison, *Choice, Progressive Values, and Corporate Law*, *supra* note 175, at 439 (internal quotations omitted). As thus appreciated, a complete description of "human rationality admits to a wider array of explanations for the choices human make." Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values,* 14 WM. & MARY BILL RTS. J. 1309, 1312 (2006). Rationality does not necessarily succumb to John Stuart Mill's antinomian individualism wherein flawed conceptions of autonomy and individuality combine with an obsessional enmity to tradition and convention. *See, e.g.*, JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 260 (1996). Rather, as Amartya Sen observes, rationality as activated within the human actor signifies "the need to subject one's choices to the demands of reason[,]" which encompasses more than simply maximizing one's self-interest to the exclusion of other objectives. AMARTYA SEN, RATIONALITY AND FREEDOM 4 (2002).

imization of self-interest and the exclusion of other objectives;[244] (2) engaging with the notion of profit,[245] in a robust way and applying it fairly to both the domain of unincorporated for-profit organizations and nonprofit entities,[246] wherein the incentives for efficiency for nonprofits are not necessarily weaker than for for-profit corporations;[247] and (3) proffering a defendable definition of what "other goals" are constitutively sufficient for purposes of sustaining corporate rights litigation, Garrett's submission is driven by the contention that "nothing [is] more fundamental to modern corporate law than the complete separation of owners from the legal entity itself."[248] However, much of this claim agrees with the weight of scholarly opinion articulated by leading scholars,[249] including Gans, and though much of Justice Ginsburg's *Hobby Lobby* dissent promotes his analysis, evidence shows that "corporations embodying shareholders' religions are common, [and] pass[] without corporate law objec-

244. *See, e.g.*, BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 412 (showing that wealth maximization is often seen as a standard of conduct for directors but this norm "does not stand for the proposition that courts will closely supervise the conduct of corporate directors to ensure that every decision maximizes shareholder wealth"). *See also id.* at 23 (noting that "rational choice does not claim that humans are driven solely by pecuniary incentives" but also arguing that "a rational actor's behavior is completely determined by incentives[,]" whether pecuniary or not); SEN, *supra* note 243, at 4. "[R]ationality is simply an abstraction developed as a useful model of predicting the behavior of a large number of people–it does not purport to describe real people embedded in a real social order". BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note 124, at 23.

245. From an economic perspective, profits are often defined on the basis of the value of all inputs and outputs at their opportunity costs. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH (International Student Edition) 332 (6th ed. 2003). Profits, correctly understood, as determined by accountants do not necessarily accurately measure economic profits. *Id.* Thus when and if costs are accurately determined within the framework of economic profits, there is no apparent reason why a "nonprofit" cannot earn and have the objective of earning an economic profit. For a discussion of profits and producer's surplus, see *id.* at 387–90. *See also* BUTLER & DRAHOZAL, *supra* note 232, at 514 (offering a Glossary definition that explains the idea that "profit accrues only when the value of the good produced is greater than the sum of the values of the . . . resources utilized").

246. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 9–10 (7th ed. 2007) (noting "that resources tend to gravitate toward their most valuable uses if voluntary exchange—a market—is permitted . . . [and accordingly] profit opportunity is nothing more than "a magnet drawing resources into an activity").

247. *See also id.* at 422.

248. Garrett, *supra* note 20, at 146.

249. Law Professors' Brief, *supra* note 62, at 3–5 (stating that "[t]he first principle of corporate law is that for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders" and that this principle applies regardless of whether the firm has one hundred or one million shareholders and further opining that the "centrality of corporate 'separateness' is well-established in the United States" and further asserting that "legal separateness is recognized in every state including Oklahoma, the home of Hobby Lobby, and Pennsylvania, the home of Conestoga [Wood]").

tions"[250] because of the nation's impressive religious diversity and corporate law's enormous choice-reifying flexibility.[251]

As we have already seen, the "structure of corporate governance is contingent and contractual, enabling shareholders of closely held corporations [and perhaps even large publicly-held firms,][252] to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships."[253] A proper contextual focus signifies that Garrett's analysis, among others,[254] indicates that "nothing [is] more fundamental to modern corporate law than the complete separation of the owners from the legal entity"[255] and that profit-maximization overwhelms other values. Hence, if Garrett's analysis typifies scholarly claims within the domain of corporate rights, it appears that the center cannot hold potentially unleashing anarchy within the domain of corporate rights scholarship. This is so for two reasons: (1) because unification of ownership and control, rather than operational separation, is possible and indeed is likely for many closely held corporations as well as other firms; and (2) because many other entities that retain free-exercise rights within the bounds of Garrett's analysis such as nonprofits or unincorporated entities (i.e., sole proprietorships, partnerships, LLPs, or LLCs) are stained by both their pursuit and receipt of profit within the commercial arena, while retaining both their status (if they ever held such status) as artificial entities, and their free-exercise rights.

Predictably, despite Garrett's initial reification of the corporate form and his elevation of corporate separateness—a maneuver which justifies his opposition to corporate rights on grounds that such organizations (corporations) are quite different from associations—Garrett concedes that corporate ownership can combine with the legal entity in some cases.[256] This outcome is plausible, despite the likelihood that the separation of ownership and control is the default rule for most publicly traded corporations[257] in contradistinction to closely held ones. The unification of ownership and control as a vehicle to advance the joint interests of shareholders/managers within the domain of closely held firms fosters

250. Meese & Oman, *supra* note 20, at 277.

251. *Id.*

252. *Id.*

253. *Id.*

254. Law Professors' Brief, *supra* note 62, at 7–8 (supporting that claim that the legal form of a corporation is dispositive). *But see* Meese & Oman, *supra* note 20, at 280–81.

255. Garrett, *supra* note 20, at 146.

256. Garrett, *supra* note 20, at 148 (conceding for purposes of third party standing analysis that "[o]ne can imagine that an owner of a closely held corporation might be an effective advocate for the corporation itself").

257. Hutchison, *Choice, Progressive Values and Corporate Law, supra* note 175, at 442.

the likelihood that such entities, just like membership organizations, can more than adequately embody the viewpoints of individuals who establish them since such entities function like associations.[258] Consistent with unification, most for-profit corporations file their tax returns as "S" corporations, meaning that they "elect to pass corporate income, losses, deductions and credits through to their shareholders for federal tax purposes", just like partners in a partnership,[259] as the federal government declines to separate corporate owners of such firms from their businesses.[260] Taken together, this analysis paves the way for most for-profit organizations (corporations) not only to represent the interest of their members, but also to benefit from the Supreme Court's permissive and broad test for associational standing without having its governance arrangements closely scrutinized.[261] Though some courts have held that free-exercise claims are purely personal or, alternatively, that such claims cannot be litigated by secular organizations, a number of lower courts have decided that free-exercise claims can be asserted by organizations on behalf of individuals, who can themselves exercise religious practices on a derivative or third-party theory of prudential standing.[262] The latter grouping of cases appears to track with the Supreme Court's century-old claim that "[u]nder the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution."[263]

Given this picture, the claim that for-profit status standing alone or in conjunction with legal "separateness" is sufficient to disconnect for-profit corporations from free-exercise rights merely because of their chosen business form becomes doubtful. Corporate "separateness" reveals itself as a rather indeterminate and frail instrument and its weakness is intensified in virtue of the nimble observation that religious exercise may take corporate form for a wide spectrum of actions and purposes, includ-

258. Garrett, *supra* note 20, at 137–38.

259. Rienzi, *supra* note 20, at 97.

260. *Id.* at 97–98.

261. Garrett, *supra* note 20, at 137–38. Despite the breath of Garrett's claims, which evince the belief that a corporation ought to shorn of any connection with an association because such a linkage might facilitate the exercise of first amendment values, it is possible that "the case law implies a deep and tractable logic." Buccola, *supra* note 20, at 1 (observing that the case law supplies a corporate rights jurisprudence that reflects an unstated principle of "organizational neutrality"). This observation, if true, supports the conclusion that for-profit firms, at least in some cases, ought to be treated just like associations for constitutional and statutory purposes.

262. Garrett, *supra* note 20, at 140.

263. Meese & Oman, *supra* note 20, at 287–88 (quoting Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 189 (1888)).

ing: houses of worship, organizations that assert religious identities but act in ways noticeably different from the typical functions of houses of worship, and for-profit entities (corporate or otherwise) that claim religious identity.[264] If true, going forward, the pertinent question may be far less about which entities qua entity "have rights of religious exercise, and far more about precisely what rights of religious exercise corporate [and other] identities may legitimately assert."[265]

Together, this examination shows that neither the attribute of corporate separateness nor for-profit status precludes corporations from exercising free-exercise rights even though a complete answer to the question of whether and when corporations enjoy, and ought to enjoy, constitutional or statutory rights exceeds the scope of this enterprise. Nonetheless, because principled frameworks are available that illuminate pathways toward appropriate answers to such questions, any adequate response to Gans's analysis ought to direct attention toward a principled conceptual framework, within which courts can discover when corporate constitutional and/or statutory rights exists in a given case. In spite of the renewed appeal of corporate separateness, Professor Buccola's scholarship, in concert with others, offers a plausible and principled conceptual framework within which to commence the pursuit of answers.

IV. DEVELOPING A FRAMEWORK FOR ANALYSIS

Supplying analysis that echoes Meese and Oman's scholarship regarding free-exercise rights of corporations within the meaning of RFRA,[266] Buccola "points to a unifying method in the Court's apparent madness."[267] Buccola argues "that the great bulk of the Court's corporate-rights jurisprudence reflects an interpretive principle that can be called "organizational neutrality."[268] Rather than reifying legal "separateness" as a dispositive attribute, the Justices, consistent with the range of choices available to an entrepreneur, "ascribe corporate rights such that entrepreneurs are neither rewarded nor punished for selecting the

264. Lupu & Tuttle, *supra* note 20, at 4–6.

265. *Id.* at 6.

266. Meese & Oman, *supra* note 20, at 275 (offering three basic claims in support of corporate rights including: (a) that "corporate law itself does not discourage for-profit corporations from advancing religion[,]" (b) that religious for-profit businesses "do not undermine the goals of corporate law, nor would it undermine such goals to grant these firms religious exemptions from otherwise neutral laws in appropriate cases[,]" (c) that "given the plausible reasons for protecting religious exercise by for-profit corporations, there is [little] reason to reject the most natural reading of RFRA's text, namely that 'person' includes private corporations of all kinds").This framework appears to be compatible with Buccola's organizational neutrality analysis.

267. Buccola, *supra* note 20, at 4.

268. *Id.* at 4–5.

corporate form over other modes of social coordination," such as partnerships, proprietorships, LLCs, or nonprofit firms.[269] This account reveals that the "Court holds that corporations can exercise a given right otherwise attributable to natural persons if denying it would penalize entrepreneurs' decision to integrate productive activity into an incorporated entity."[270] The converse is likewise true, and, therefore, "the Court holds that corporations cannot exercise a right otherwise attributable to natural persons if recognizing it would subsidize integration—if, that is, it would bias entrepreneurs toward incorporation."[271]

After Buccola attends to a number of illustrations, it is possible to deduce that while a natural person has a right to exercise his or her religion either within the meaning of the First Amendment or RFRA, it is likewise apparent that an incorporated entity holds title to its religious rights in its own right, at least for purposes of litigation since the deprivation of such rights would otherwise distort economic activity.[272] This is so because the deprivation of religious liberty to a corporate entity grounded solely in its mode of integration would and should encourage entrepreneurs to select other modes of social coordination. The logic of Buccola's contribution, coupled with the indeterminate nature of corporate separateness as an explanatory vehicle, point us in one direction: corporations, as a general matter, ought to retain rights to bring free-exercise claims because to do otherwise would bias business formation in the direction of partnerships or sole proprietorships. This conclusion tracks with the rich possibilities Meese and Oman demonstrate in their scholarship: within the nexus of contract framework, the structure of governance is contingent and contractual, thus enabling shareholders to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses all while maintaining limited liability.[273]

As a consequence of this process, shareholders customarily impose their religion on corporations.[274] In practice, it is worth noting that (1) for-profit corporations infused with their owners' religion are common; (2) such businesses do no violence to corporate law, which is primarily contractual and facilitative; (3) there is no evidence that these firms generate greater corporate dysfunction than their secular counterparts; and (4) despite the fact that, for some purposes, society treats corporations as legally distinct, this is simply a pragmatic choice rather than a normative

269. *Id.* at 5.
270. *Id.*
271. *Id.*
272. *Id.* at 5–7.
273. Meese & Oman, *supra* note 20, at 277–79.
274. *Id.* at 279–80.

judgment that human concerns do not apply to such firms.[275] If corporate status alone serves to deprive firms of the right to practice their religion, as Gans and others contend, such a rule would appear to incentivize firms to reform themselves as LLCs, LLPs, partnerships, or sole proprietorships. An appropriate understanding of incentives and human behavior indicates that an overemphasis on corporate separateness as an adjudicative tool operates contrary to the principle of organizational neutralineutrality. Since the legal separateness of the corporation is largely pragmatic rather than normative, "[c]orporations are just [the] means by which groups of people pursue common purposes," signifying that the "acknowledging the exercise of religion by for-profit corporations is by no means a category mistake"[276] This is particularly true of closely held corporations, despite the fact that there is no singular definition or uniform corporate law on closely held corporations.[277] Organizational neutrality in the context of entrepreneurial choice divests the concept of corporate personhood of its talismanic force.[278] Therefore, the widely supported "legal separateness" trope is unlikely to divorce most for-profit corporations from eligibility for exemptive relief within the meaning of RFRA or the Constitution. The next section examines implications arising from this conclusion in the context of Gans's claims.

V. ANALYSIS

A. Prologue

Recall that Gans commences his analysis by agreeing that corporations have some constitutional and statutory rights.[279] Questions surface regarding whether his assessment of for-profit corporations offers a persuasive taxonomy of when corporate personhood enjoys and ought to enjoy constitutional and/or statutory protection. Gans stresses (1) the supposedly dispositive understanding of corporations enclosed by the nation's Framers, a platform that supports his foundational contention that it is impossible for natural persons to alienate their religious exercise to a corporation;[280] and (2) the presumption that corporate separateness

275. *Id.* at 300.

276. *Id.*

277. Pollman, *Corporate Law and Theory, supra* note 20, at 16.

278. Meese & Oman, *supra* note 20, at 279–84 (contesting the importance of the corporate form and corporate personhood for purposes of impartial adjudication and showing how entrepreneurial choices can void any operational separation between ownership and management of closely held firms).

279. GANS & SHAPIRO, *supra* note 2, at 9 (Gans).

280. *Id.* at 17 (Gans).

and the limited liability status of for-profit corporations disqualifies such firms from being eligible for an exemption.[281]

Subsection B shows that a persuasive account of corporate personhood entails more than an acknowledgement of the metaphysical fact that corporations, as opposed to natural human beings, are bereft of souls, or that corporate separateness, limited liability, or the pursuit of profit combine to preclude the exercise of corporate rights. Initially, this exposition refrains from focusing on the actual facts of *Hobby Lobby*. Instead, Subsection B builds on the clarifying framework instantiated in Part III to develop conceptual answers to relevant questions. Next, Subsection B provides an opportunity to interrogate Gans's corporate rights elucidation by scrutinizing the specific corporate employers in *Hobby Lobby* through the prism provided by the clarifying framework.

Subsection C suggests that Gans fails to consider one of the most salient attributes of Hobby Lobby, Mardel, and Conestoga Wood: their status as employers within the meaning of the ACA. If this attribute is essential, as Professor Buccola suggests, then the germane question is not whether the *Hobby Lobby* corporations have the same or different constitutional or statutory rights as natural persons. Rather, the relevant question in this subsection, as in Subsection B, is whether the *Hobby Lobby* entities as *employers* ought to be treated differently from any other cognizable employer such as a proprietorship, nonprofit corporation, ecclesiastical corporation, or whatever the case may be. Finally, Subsection D wraps up my critique.

B. Corporate Rights? Examining Gans's Claims on the Road to Hobby Lobby

1. Gans's Thesis in the Mirror of Closely Held Firms

Admittedly, the Constitution does not specifically mention corporations in its text, but nevertheless, it does establish rights for "persons," "people," and "citizens."[282] Textual absence and indeed textual presence cohere with hermeneutical challenges, thus producing a quandary that infects the application of statutory law (both state and federal) to for-profit businesses.[283] Textual absence or presence may likewise infect any analysis of nonprofits as well. Language or its absence is part of the

281. *Id.* at 22.

282. ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 10–15 (2010) (observing the absence of textual references to corporations in the Constitution).

283. *See, e.g.*, FCC v. AT&T Inc., 562 U.S. 397(2011) (offering an interpretation on the question of whether corporations have a right to personal privacy within the meaning of the Freedom of Information Act).

lens through which we see the world, a world that cannot be seen without distortion, despite Jean Jacques Rousseau's aspirations to the contrary.[284] Gans relies largely on history as his preferred gap-filler for purposes of interpreting the rights of corporations to fortify his contention that corporate rights should be viewed mainly as an unjustifiable anomaly.[285] Offering a form of metaphysical idealism that resembles Berkeley's romanticized view of the text,[286] Gans submits that, despite the fact that corpocorporations are formed by natural human beings (who themselves are part of the category referred to as "We the People"), the Constitution fails to supply any explicit legal protections for corporate entities even after the Framers added the Bill of Rights to protect the fundamental rights of citizens.[287] What is missing, as Jacques Derrida might point out, is not simply the text, but context, wherein everything (including linguistic convention) requires interpretation.[288] Hence, Gans's attention to the Framers understanding of corporations appears at variance with the fact that "[m]ore than a century ago, states eased restrictions that regulated corporate behavior through their charters and various doctrines of corporate law."[289] Instead, corporations "became primarily regulated by regimes outside of corporate law."[290] As a consequence, for-profit corporations exhibit a variety of structures that are often at odds with Berle and Means's conception. Though Gans concedes that corporations have some important constitutional rights,[291] within the domain of adjudicative norms, he fails to explain adequately why and when important constitutional or statutory rights are, and ought to be, available to modern corporations in some cases and why such rights are, and ought to be, lacking in others.

Rather than develop a conceptual framework of corporate rights, one that rightly notes that there is no single model of corporate governance, one that observes that there is no fundamental distinction between closely held corporations and the partnerships or sole proprietorships they imitate,[292] and one that admittedly requires interpretation, Gans presents readers with unexplained puzzles. For instance, he observes that an

284. *See, e.g.*, JAMES K. A. SMITH, *supra* note 225, at 35–37 (discussing Derrida and Rousseau).

285. GANS & SHAPIRO, *supra* note 2, at 14 (Gans).

286. JAMES K. A. SMITH, *supra* note 225, at 35.

287. GANS & SHAPIRO, *supra* note 2, at 7 (Gans).

288. JAMES A. K. SMITH, *supra* note 225, at 42–44.

289. Pollman, *Corporate Law and Theory*, *supra* note 20, at 20.

290. *Id.* at 20–21 (adverting to the fact that employee protections are left to employment and labor law and likewise suggesting that consumers and other business participants are protected by regimes outside of corporate law).

291. GANS & SHAPIRO, *supra* note 2, at 9 (Gans).

292. Meese & Oman, *supra* note 20, at 287.

individual owner who operates an unincorporated business has the legal capacity to assert an objection based on the Fifth Amendment's privilege against self-incrimination whereas a corporation cannot.[293] Gans, offering sparse analysis in comparison with Professor Garrett,[294] cannot explain why this difference in treatment exists other than that the invocation of anthropomorphic qualities, such as conscience and human dignity, are unavailable for corporations.[295] Gans falls back on a familiar refrain: when an owner of a firm acts on behalf of a corporation, she is not engaging in conduct in her individual capacity and is accordingly disentitled to invoke individual rights.[296] Although he frequently summons human dignity as an explanatory tool to explain why corporations, as a general matter, cannot invoke free-exercise rights, Gans nonetheless admits that for-profit "corporations enjoy rights under the Free Speech Clause, not because they possess personal dignity or freedom of conscience [—they do not—], but because of the fundamental role . . . speech plays in [a] democracy."[297] Concurrently, he fails to explain why corporations possess constitutional rights within the realm of property and commerce[298] when one could likewise argue that the owners should not be entitled to appeal to due process or the Fourteenth Amendment's provision against unlawful discrimination because they are not natural persons, an approach that appears to have influential legs in the Congress.[299]

After largely expending the explanatory force of human dignity, Gans returns to the contention that there is a chasm that separates shareholders or corporate owners who as individuals can pray and the corporation, operating as a legally separate entity, cannot.[300] Gans submits that "corporate owners 'cannot move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'"[301] He stipulates (despite evidence to the contrary)[302] that

293. GANS & SHAPIRO, *supra* note 2, at 21 (Gans).

294. *See generally*, Garrett, *supra* note 20, at 138–47 (asserting that the legal structure of a corporation prevents for-profit corporations from being treated like associations or nonprofit entities).

295. GANS & SHAPIRO, *supra* note 2, at 21 (Gans).

296. *Id.*

297. *Id.* at 9.

298. *Id.*

299. *See, e.g.*, Greenfield, *supra* note 90, at 311 (describing a proposed People's Rights Amendment to the Constitution that would say that the rights protected by the Constitution are rights of natural persons).

300. GANS & SHAPIRO, *supra* note 2, at 17 (Gans).

301. *Id.* at 22 (quoting Conestoga Wood Specialties Corp. v. Sec'y of the U. S. Dep't of Health and Human Servs., 724 F.3d 377, 389 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356) (Gans)).

because corporations benefit from limited liability, which he asserts is unavailable to natural persons, and because free exercise is inseparable from human actors, corporate employers cannot now object when they are denied free-exercise rights because of their status as corporations.[303] At the same time, Gans does not notice that individuals associated with non-profit corporations or even the owners of sole proprietorships, under the right circumstances, can also benefit from limited liability without risking their religious liberty rights.[304] Yet Gans has not been heard to complain that either the application of limited liability status to such entities or, alternatively, their status as artificial institutions, as the case may be, disqualifies them from a religious exemption. On the contrary, he admits that such institutions qualify for accommodation.[305] Lastly, Gans fails to notice that, although Justice Breyer and Justice Kagan agree that the *Hobby Lobby* plaintiffs' challenge to the contraceptive coverage requirement fails on the merits, these Justices did not decide that for-profit corporations or owners are ineligible to bring claims under RFRA.[306] Instead, the Justices declined to agree with Justice Ginsburg's contention that the plaintiffs' for-profit corporate status deprives them of RFRA personhood.[307]

On the other hand, Buccola's approach, in combination with the scholarship of Rienzi and Meese and Oman, offers plausible reasons why most corporations, as closely held entities, look very much like sole proprietorships, associations, and partnerships.[308] If this is true and quite apart from an inspection of the specific organizational structure of Conestoga Wood, Hobby Lobby Stores, or Mardel, it appears that the organizational neutrality standard offers a sturdy platform from which to defend corporate rights. To repeat, the Justices tacitly respond to the possibility that myriad entrepreneurial choices produce a plethora of economic vehicles, and they accordingly ascribe corporate rights such that entrepreneurs would neither be rewarded nor punished for selecting the corporate form over other modes of social coordination.[309] Risking

302. *See, e.g.*, Meese & Oman, *supra* note 20, at 286–87 (explaining why limited liability status fails to justify stripping corporations of their religious personhood).

303. GANS & SHAPIRO, *supra* note 2, at 22–23 (Gans).

304. Meese & Oman, *supra* note 20, at 286 (demonstrating that sole proprietorships can bargain with all creditors for limited liability and suggesting that the result of such bargaining would have no impact on the ability of such entities' free-exercise rights).

305. GANS & SHAPIRO, *supra* note 2, at 28 (admitting tacitly that religious institutions including the artificial entity, an ecclesiastical corporation in *Hosanna-Tabor* are entitled to accommodation (Gans)).

306. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751,2806 (2014) (Breyer & Kagan, JJ., dissenting).

307. *Id.*

308. *See supra* Parts II & III.

309. Buccola, *supra* note 20, at 4–5.

further repetition, the "Court holds that corporations can exercise a given right otherwise attributable to natural persons if denying it would penalize entrepreneurs' decision to integrate productive activity into an incorporated entity."[310] The opposite is also correct.[311] Thus realized, organizational neutrality could be seen as both a positive and normative standard that neither biases entrepreneurs toward or away from integration nor grants a subsidy to artificial entities at the expense of natural persons. [312] This approach fits well with the reality that the corporate form can be essentially identical, in practice, to a partnership or sole proprietorship wherein the various possible entities available to entrepreneurs are all operationalized within a default rule paradigm that reifies customization.[313] This progression permits entrepreneurs to decide which business form is optimal and allows them to deviate from the wealth maximization norm. In harmony with organizational neutrality, IRS rules and regulations commonly treat many corporations as entities that are indistinguishable from sole proprietorships for tax purposes, that is, indistinguishable from their owners.[314] This outline shows that Gans's understanding of corporations is insufficiently conceptual as he overlooks the explanatory power of organizational neutrality for purposes of corporate rights adjudication, and the possible fusion of entrepreneurial choice with the corporate form. Corporate theory shows that volitional choice gives rise to a process that enables the establishment of firms that are nominally separate from their owners, but actually and operationally virtually undifferentiated from them.[315]

Operationally, shareholders advance the indistinguishability of owners and the firm by imposing their views on a corporation via the corporate charter consistent with the fact that many charters empower the corporation to pursue any lawful business or purpose, a default option that state law provides.[316] The incorporators may adopt a charter reflecting shareholder views about what business the firm conducts, how to conduct it, how to limit the products the firm may sell, what days it may operate, what belief system the firm will subscribe, to or what wages the entity may pay.[317] Such provisions could impose the views of founding

310. *Id.* at 5.

311. *Id.* (stating that "the Court holds that corporations cannot exercise a right otherwise attributable to natural persons if recognizing it would subsidize integration—if, that is, it would bias entrepreneurs toward incorporation").

312. *Id.*

313. *See, e.g.*, Meese & Oman, *supra* note 20, at 280–87.

314. Rienzi, *supra* note 20, at 97–98.

315. *See, e.g.*, Meese & Oman, supra note 20, at 280–85.

316. *Id.* at 281–82.

317. *Id.* at 282 (focusing much of their analysis and attention on Delaware law).

shareholders and perhaps even reduce profits.[318] Alternatively, shareholders may elect directors who wish to amend the charter, or they can accomplish the same objective by amending the bylaws on their own initiative.[319] Other avenues are available to shareholders in closely held corporations who wish to control and operate the firm themselves. First, shareholders in such firms do not need to amend the charter or bylaws to implement their views because they can execute shareholder agreements constraining the firm, or shareholders can simply eliminate directors altogether and vest themselves with operational control over the corporation, effectively replicating the management and ownership structure of a partnership.[320] Although religiously motivated decision-making within firms operated by manager-shareholders may sometimes increase profits,[321] the maximization of profits as an objective likely is waivable.[322] This is so despite the case law that may indicate that fiduciaries must maximize profits, because it is equally likely that shareholders can waive this rule like other default rules, particularly when the shareholders unanimously amend the charter to valorize such a choice.[323] This intuition tracks the fact that corporate law even empowers shareholders by a unanimous vote to ratify alleged corporate waste:[324] "In sum, modern corporate law [consistent with entrepreneurial choice] provides shareholders of closely held corporations with numerous tools for structuring the firm to mirror the allocation of responsibilities in other forms of business enterprises, including partnerships."[325] Further, "there is simply no distinction relevant to the exercise of religion between the nexus of contracts known as the partnership and that known as the closely held corporation."[326] Despite Gans's contentions to the contrary, it is manifest that shareholders operating through the above-referenced governance arrangements within the context of closely held firms—often called for-profit "incorporated partnerships"—would still retain limited liability, unlike partners in a general partnership, and the firms themselves would retain artificial entity status.[327] Nor should the firms' status as artificial entities foreclose free-exercise rights any more than the incorporated status of a church, synagogue, or mosque would, despite the fact that many also have mem-

318. *Id.*
319. *Id.* at 282–83.
320. *Id.* at 283–84.
321. *Id.* at 284.
322. *Id.*
323. *Id.*
324. *Id.* at 284–85.
325. Meese & Oman, supra note 20, at 285.
326. *Id.*
327. *Id.*

bers, who, like shareholders, enjoy limited liability and some even engage in commercial activity.[328]

Conclusions, surfacing within the domain of closely held firms, appropriately re-emphasize this question: should the *Hobby Lobby* firms be treated any differently than a sole proprietorship, mosque, or partnership for ACA purposes by virtue of the fact that they are organized as corporations? Although a similar issue previously divided analyses of the *Citizens United* Court because some commentators asserted that for-profit corporations, operating under a cloud of disfavor, are bereft of constitutional rights,[329] the onus remains on opponents to offer credible reasons for the non-existence of corporate constitutional or statutory rights. This Article next turns to the specific plaintiff firms and their organizational structure as part of its claim that much is missing from Gans's analysis.

2. Applying the Framework to actual *Hobby Lobby* Plaintiffs.

This subsection applies the above-referenced framework to the actual governance arrangements deployed by the three *Hobby Lobby* plaintiff-firms to ascertain whether the corporations ought to retain free-exercise rights. It sets forth each corporation's governance arrangements in turn.

The Hahn family, consisting of Norman and Elizabeth Hahn and their three sons, are devout members of the Mennonite Church that own and operate Conestoga Wood, incorporating their religious beliefs into the governance and operation of the firm.[330] Their church, part of a Christian denomination opposing abortion, believes that a fetus, in its earliest stages, shares humanity with those who conceived it.[331] Under Pennsylvania law, the Hahns exercise sole ownership of the business and control its board.[332] They hold all of its voting shares, operate the company in accordance with their religious beliefs and moral principles, and commit to a moral injunction that ensures a reasonable profit in a manner that reflects their religious heritage.[333] "As explained in Conestoga's board-adopted 'Statement on the Sanctity of Human Life,' the Hahns believe that human life begins at conception."[334] Consistent with this policy and operating as an association of likeminded people, they sought an accommodation within the meaning of RFRA from the ACA's contra-

328. *Id.*

329. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 394–95, 427 (2010) (Stevens, J., concurring in part and dissenting in part).

330. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764 (2014).

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

ceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives.[335]

The Green family, consisting of David and Barbara Green and their three children, are Christians who own and operate two family businesses, Hobby Lobby Stores and Mardel.[336] The Hobby Lobby firm is organized as a for-profit corporation under Oklahoma law.[337] The company has a very small number of shareholders and the family retains exclusive control with David and his three children serving as officers.[338] Hobby Lobby's statement of purpose commits the Greens to "honoring the Lord in all that they do" through the corporations; each family member has signed a pledge to run the business in accordance with the family's religious beliefs and to use the family assets to support Christian ministries.[339] In defense of its statement of purpose, Hobby Lobby sued HHS and other federal agencies and officials, challenging the contraceptive mandate within the meaning of RFRA and the Free Exercise Clause.[340] Mardel is organized as a for-profit corporation under Oklahoma law with a tightly limited number of shareholders.[341] Mardel was started by one of David Green's sons and operates as an affiliate of Hobby Lobby.[342] Evidently, from both a practical and conceptual perspective, Mardel features governance and operational arrangements that mirror those of the Hobby Lobby firm operated by the Green family.[343]

An inspection of the respective *Hobby Lobby* firms' customized arrangements discloses the owners' entrepreneurial choices, signifying that each entity falls within a defendable definition of a closely held enterprise. The three firms have a limited number of shareholders who are members of the same family, the shareholders retain exclusive control, and there is no evidence of shareholder disagreements regarding the goals, objectives, and missions of the respective firms. Thus cognized, the respective firms are a medium through which individual shareholders, who share common beliefs, seek to make more effective the expression of their views within both the economic marketplace and the marketplace of ideas.[344]

The various *Hobby Lobby* corporations, coherent with Meese and Oman's intuition, are unique entities issuing forth consistently with the

335. *Id.* at 2765.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id* at 2766.
340. *Hobby Lobby*, 134 S. Ct. at 2766.
341. *Id.* at 2765.
342. *Id.*
343. *Id.* at 2765–66.
344. *But see* Garrett *supra* note 20, at 138 (disputing such claims).

nexus-of-contracts paradigm that allows firms to emphasize values other than profit-maximization.[345] From an operational standpoint, there is little evidence in the record that separates corporate ownership from control, and much evidence that suggests that the *Hobby Lobby* plaintiff-firms are more like an association. This deduction paves the way for such firms not only to represent the interest of their members, but also to benefit from the Supreme Court's permissive and broad test for associational standing without having their governance arrangements closely scrutinized. Moreover, the evidence on the ground does not indicate any clash between the religious liberty objectives of the owners and operators of the respective corporations and corporations as entities possessing a separate legal existence. Rather, the shareholders and the respective corporations themselves represent a constellation of common beliefs and financial interests despite Garrett's deduction to the contrary.[346] If true, this analysis renders illusory the concept of corporate separateness with regard to the actual plaintiff-firms' statutory or constitutional rights because no relevant separateness plausibly exists.

Given the size of each firm's shareholder group and operational structure, each *Hobby Lobby* firm could rightly be called an "incorporated" partnership. Thus, if partnerships are eligible for an exemption within the meaning of RFRA, it becomes doubtful that these respective incorporated entities should be shorn of the right to an exemption from the ACA mandate. Even if observers are persuaded to abandon reliance on the Dictionary Act's inclusion of corporations within its definition of persons, or alternatively, to forsake Buccola's organizational neutrality standard, Conestoga Wood, Hobby Lobby, and Mardel ought to be seen as persons (that have standing) for purposes of litigating most constitutional and statutory rights claims because it is impossible to draw a neat line between the firms and a partnership. This analysis imperils Gans's understanding of the actual *Hobby Lobby* plaintiffs' governance approach.

Notwithstanding the force of this conclusion, the Dictionary Act definition of a person may prove useful. For instance, Gans revisits history, provoked by Justice Alito's comment that the Obama administration has already conceded that non-profit corporations could be considered exempt persons within the meaning of RFRA—a concession that contradicts the allegation that for-profit corporations are not covered by RFRA (because there is no dictionary definition of the phrase "corporations" that could include non-profits but not for profit firms).[347] Despite

345. Meese & Oman, *supra* note 20, at 283.

346. Garrett, *supra* note 20,at 145.

347. GANS & SHAPIRO, *supra* note 2, at 59 (Rosen).

Justice Alito's analysis, Gans declares that the unbroken history from the Founding until *Hobby Lobby*, of treating religious organizations differently from commercial enterprises when it comes to religious free-exercise rights, impugns the Court's holding.[348] Underscoring the purported distinction between secular, for-profit corporations on one hand, and churches and other religious bodies organized for purposes of engaging in religious exercise on the other, Gans argues religious bodies alone are entitled to religious exemptions.[349] This claim mirrors the Court of Appeals for the District of Columbia's view[350] and plainly echoes Justice Ginsburg's *Hobby Lobby* dissenting opinion, wherein she proclaimed, "there has always been a fundamental difference between secular, for-profit corporations, organized to make running a business more profitable, and churches and other religious bodies, organized for the purpose of engaging in religious exercise."[351]

As an initial matter, such claims fail to account for the possibility that religious groups also engage in commercial activity and nevertheless retain eligibility for religious accommodation for free-exercise purposes. Second, neither Justice Ginsburg nor Gans's approach accounts for the possibility that for-profit firms, congruent with the outline provided by Meese and Oman, may be organized for both religious and commercial purposes consistent with the myriad possibilities associated with entrepreneurial choice. Recall that the actual governance structure of the respective *Hobby Lobby* firms mirrors Meese and Oman's exposition of the possible governance arrangements within the boundaries of closely held firms. Third, neither Justice Ginsburg nor Gans's claims fit within the organizational neutrality framework that has previously undergirded the Court's analysis—wherein the Court defends corporate rights so as not to bias entrepreneurial choice in one direction or another—thus enabling corporate owners to move freely between corporate and individual status, and therefore, contrary to Gans's claims, to gain the advantages and avoid the disadvantages of the respective forms.[352] Fourth, Gans's approach appears to offer shifting contentions without providing principles that sustain his approach. Recall that he previously emphasized corporate separateness was dispositive of whether for-profit firms enjoy free-exercise rights, but inconsistent with that claim, he was prepared to allow most religious bodies (organized as corporations replete with limited lia-

348. *Id.* at 59–60 (Gans).

349. *Id.*

350. Gilardi v. U.S. Dept. Health & Hum. Svs., 733 F.3d 1208, 1210 (D.C. Cir. 2013) (holding that when it comes to corporations only religious organizations are accorded protection).

351. GANS & SHAPIRO, *supra* note 2, at 59–60 (Gans).

352. *Id.* at 22.

bility) to enjoy free exercise.[353] Fifth, the relevant corporate-law question "was whether Hobby Lobby, Mardel, and Conestoga Wood are the kinds of entities who can exercise religion within the RFRA's meaning."[354] Because "RFRA's prohibition of governmental burdens on religious exercise applies to the exercise of all 'persons,'" then it makes sense to consider the Dictionary Act itself, which "defines 'person' to include corporations."[355] Although Buccola correctly argues that this fact alone does not decide the case, simply because not all persons are necessarily capable of exercising religion,[356] it is self-evident that corporations may be "persons" and the oversight of natural persons who compose them may incline such organizations toward conduct that accords with a particular religious tradition.[357] "Yet[,] lacking mind[,] corporations lack the phenomenology of belief, hope, fear, or whatever that constitutes religious experience."[358] The relevant issue becomes not whether a firm can "have religion" in some anthropomorphic sense, but rather, whether the religion of humans should, in fairness, be attributed to the plaintiff firms.[359] This question can be answered through an analogy. To wit, since not one Supreme Court Justice offered an opinion claiming that the religion of humans, who are members of religious institutions, should not in fairness be attributed to religious bodies (corporate or not), it appears that a similar attribution ought to apply to for-profit corporations as well signifying that free-exercise rights surface for such firms.

C. The Salience of Employer Status Within the Meaning of the ACA

As Professor Buccola notes, opponents of the *Hobby Lobby* decision "have asked why the religious views of the shareholder-managers counted in the Court's analysis, but not the views of other patrons, such as employees."[360] Once again, organizational neutrality explains why employers' views count.[361] Buccola shows that, despite its clumsy language,[362] the *Hobby Lobby* Court was merely trying to locate the person to be regulated, absent the corporate form the ACA would have regarded

353. *Id.* at 28 (discussing the religious body that operates Hosanna-Tabor).
354. Buccola, *supra* note 20, at 39.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 44.
361. *Id.*
362. *Id.* (showing that the Court inconsistently referred to "shareholders," "owners," and "owners and controllers" in attempting to find the persons whom, absent the corporate form, the ACA mandate applied to).

as the "employer."[363] "[A]lthough the majority opinion declares that recognizing a free-exercise claim would protect the companies' 'owners and controllers,' it does not logically follow that every corporate exercise of religion would protect the shareholder-managers directly."[364] Within the corporate structure of Conestoga Wood, Hobby Lobby, and Mardel, the controllers could be directors, shareholders, managers, or all of the above. But, most importantly for our current purposes is the simple fact that the "regulation at issue in *Hobby Lobby* was a regulation of employers—in particular employers with 50 or more employees—and thus neutrality directed the Court to consider what rights such employers would have had in an analogous but unincorporated enterprise, for example in a proprietorship."[365] Thus appreciated, the religious commitments of Conestoga Wood's, Hobby Lobby's, and Mardel's shareholder-managers were central to appropriately deciding the case, not because they owned the capital contribution, but because they were the employers of record pursuant to a series of agreements arising out of the entrepreneurial choice framework. On the other hand, if the shareholder-owners had decided to reconfigure the governance structure of the respective firms and elect non-religious directors for purposes of managing the firm, then such directors, as the employers of record, would likewise be empowered to decline to seek an exemption from the ACA mandate. Moreover, since the ACA regulation at issue is directed toward employers, it neutrally applies to all employers whether they are for-profit, nonprofit, religious, non-religious, incorporated, or unincorporated entities. If any such employers are entitled to an exemption, it is manifest that all other employers ought to be equally entitled to an accommodation, despite Gans's contention that religious bodies alone are entitled to religious exemptions.[366] Taken as a whole, this subsection shows that Gans's analysis, as well as his understanding of corporate theory and the pertinent ACA regulations, is problematic.

D. Wrapping Up

Before the government grants a conscience-protecting exemption to a religious believer, the government must first have to conclude that the person or institution in question is indeed exercising a religious belief that calls for an exemption.[367] This inquiry is highly complex, in part,

363. *Id.*

364. Buccola, *supra* note 20, at 44. (citations omitted).

365. *Id.* at 42–43 (emphasis omitted).

366. GANS & SHAPIRO, *supra* note 2, at 59–60 (Gans).

367. This formulation of the basis for exemptions, on one account may be too narrow. *See*, Michael J. Perry, *American Religious Freedom: Reflections on Koppelman and Smith*, 77 REV. OF POL. 287, 295 (2015) (asking whether it is constitutional to grant con-

because religion itself is a complicated concept.[368] Complexity further arises regarding whether the party seeking an exemption falls within either the appropriate constitutional or statutory category that entitles it to be seen as a person within the meaning of the law. *Hobby Lobby* pivots around the question of whether or not exemptions from generally applicable law are available to for-profit firms, despite evidence that clearly shows that corporations are persons for many constitutional and statutory purposes.

Although it is manifest that *Hobby Lobby*, like *Citizens United*, adds weight to the work of corporate law while shining a light on what corporate law does and does not do,[369] it is equally plain that the weight of scholarly opinion opposes religious liberty rights for corporate employers[370] premised on the conclusion that to hold the opposite view amounts to a misapprehension of the separation between shareholders and the firm, a view that is allegedly the hallmark of the corporate form.[371] This position, which coincides with the linchpins of Gans's analysis—limited liability, legal separateness, and the pursuit of profit—would leave the *Hobby Lobby* employers, who are neither mythical creatures nor natural persons in high dudgeon, without the capability to pursue religious accommodation. As we have seen, Gans frequently adverts to the forceful claim that allowing for-profit corporations to assert free-exercise rights within the meaning of either the Constitution or a statute would deprive employees of important positive rights guaranteed by the ACA. Whether this contention is accurate or not, it fails to inform readers why concern for third-parties is necessarily dispositive to for-profit corporations because he does not explain why putative third-party harm cannot prevent employers who operate religious institutions (which are often corporations), sole proprietorships, or nonprofit corporate entities from gaining an accommodation that he is prepared to deny the *Hobby Lobby* employers.

This Article shows that the for-profit, limited liability structure of the *Hobby Lobby* firms is unlikely to disqualify them from asserting free-exercise rights, despite the fact that they are legally separate from their shareholders. Additionally, such customized firms are not required to

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science-protecting exemptions only to religious believers). *But see generally* Michael W. McConnell, *The Origins and Historical Understanding of a Free Exercise of Religion*, 103 HARV. L. REV. 1409 (offering a defense of accommodation for religious believers).

368. Aaron R. Petty, *Accommodating "Religion"*,TENN. L. REV. (Feb. 5, 2015, forthcoming) (manuscript at 1), http://ssrn.com/abstract=2560867.

369. Pollman, *Corporate Law and Theory, supra* note 20, at 20.

370. Buccola, *supra* note 20, at 37.

371. *Id.* The leading perspective on the *Hobby Lobby* case apparently surfaces in an amicus brief filed and signed by 44 scholars of corporate and criminal law. *See generally* Law Professors' Brief, *supra* note 62, at 1–13.

maximize profits, which signifies that the respective firms can maximize other values. Moreover, Conestoga Wood, Hobby Lobby, and Mardel, operating very much like "incorporated" partnerships, membership organizations, or associations, rather than publicly-held corporations, can establish standing sufficient to defend their free-exercise rights irrespective of whether such rights are properly derivative or direct.[372] Furthermore, the presumption that free-exercise claims are purely personal and individual, and thus that the exercise of religion can only characterize natural persons,[373] cannot bar the respective firms, as employers, from exercising their religion within a collective group any more than such claims can bar mosques, synagogues, or churches that operate within a corporate structure from asserting their free-exercise rights. Gans's central claim that the owners of the *Hobby Lobby* corporations, as employers, ought to forfeit their RFRA rights because they organized their respective entities as a corporation as opposed to a partnership, nonprofit, or sole proprietorship, is unconvincing. Taken as a whole, this subsection shows that Gans's conclusion that for-profit corporations, in general, and the *Hobby Lobby* plaintiff-firms, in particular, lack free-exercise rights is afflicted with numerous shortcomings. Equally important, commentary, which stresses the identity of the corporate form, or the presumably dispositive character of the often legally correct but operationally insignificant notion of "separation of ownership and control" as a defining attribute of most for-profit corporations, appears to be orthogonal to both the concept of organizational neutrality and the entrepreneurial-choice paradigm from which most customized corporations emerge.

VI. CONCLUSION

A careful examination of the shortcomings of David Gans's analysis suggests that, to solve the riddle of corporate religious liberties, any discussion of the *Hobby Lobby* decision should focus less on what the correct outcome ought to be, and more on recognizing the principles that ought to govern similar cases going forward. Far from exalting corporations above individuals, as Gans contends, the *Hobby Lobby* Court rightly treats a corporation like an individual, thus giving rise to a contest of rights between two individuals or groups of individuals. In answering how, if at all, the treatment of the *Hobby Lobby* employers' free-exercise

372. Blair & Pollman, *supra* note 30, at 1731 (stating that Court accepts the argument that corporations represent an association of natural persons and that this argument clearly indicates corporate rights to be derivative, not direct or original rights).

373. For a defense of the claim that religion is characteristic of natural persons, not artificial entities, see Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2784 (2014) (Ginsburg, J., dissenting).

claims should differ from others' (assuming they were organized as for-profit sole proprietorships rather than for-profit corporations), it is possible to grasp the analytical insufficiencies associated with Gans's approach to corporate rights. Though he relies exhaustively on the intellectual history of the Founding, as part of a reverential tapestry that precludes free-exercise rights for corporations, Ilya Shapiro illuminates that such history is of dubious significance "because at that time . . . corporations were more like what we would now consider to be quasi-governmental public utilities than modern businesses."[374] Corporations today, unlike what was typical during the Founding epoch, do not rely on royal charters, national charters, or permissions slips from elites.[375] Instead, modern for-profit corporations exist as a nexus of contracts between various rights-bearing individuals, and this contract is "recognized by [state] law [in order] to facilitate commerce."[376] Although a corporation is not a real person, and although some constitutional rights make little sense as applied to corporations,[377] corporations nevertheless embody an association of people—officers, directors, employees, and shareholders—who are natural born individuals.[378] Thus, it is likely that Gans and other scholars have simply overemphasized the corporate form by conflating the existence of a right with the means used to exercise it.

This exposition prompts a syllogism: a denial of rights to a corporation denies rights to natural, right-bearing individuals represented in the firm. As the entrepreneurial choice framework shows, it is abundantly clear that volitional choice could give rise to a wide variety of alternative firms that are operated as unincorporated associations by natural persons, as opposed to artificial persons (e.g., partnerships, LLCs or LLPs), or alternatively by a single individual (e.g., sole proprietorship). Finally, it appears that virtually everyone justly concedes that such non-corporate entities retain free-exercise rights either within the RFRA framework or within the meaning of the Free Exercise Clause. Such firms, acting as employers within the meaning of the ACA, are the decision-makers on whether they will pursue RFRA or Free Exercise Clause claims. Irrespective of whether such employers prevail on the merits of their claim, virtually no one denies that such employers retain free-exercise rights. Courts, in responding to this state of affairs, ought to find Professor Buc-

374. GANS & SHAPIRO, *supra* note 2, at 11(Shapiro).

375. *Id.*

376. *Id.* Coherent with such claims, Shapiro remarks that Justice John Marshall, who is often cited for the observation "that corporations are artificial beings" in *Dartmouth College*, nevertheless ruled in favor of the "[]pre-modern[] corporation in its dispute with the state." *Id.*

377. *Id.* at 10.

378. *Id.*

cola's organizational neutrality framework useful and therefore, extend equal rights to corporate employers arising out of the entrepreneurial choice framework, despite the fact that they are not natural persons. While this analysis does not indicate that any type of employer should necessarily prevail under either the RFRA or the Free Exercise Clause, it does suggest that all employers that pursue religious liberty are entitled to their day in court, regardless of their organizational and governance structure.