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## Postscript to Hobby Lobby: Prescription for Accommodation or Overdose?

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## Postscript to Hobby Lobby: Prescription for Accommodation or Overdose?

### Cover Page Footnote

Paula Walter is a Professor of Law at Baruch College, City University of New York, in New York City. Professor Walter is currently teaching Health Law in the MBA program at Baruch, with her most latest research focusing on medical, ethical, and legal issues.

## POSTSCRIPT TO HOBBY LOBBY:

### PRESCRIPTION FOR ACCOMMODATION OR OVERDOSE?

*Paula Walter*

#### I. INTRODUCTION

The debate in Congress, preceding the passage of the Patient Protection and Affordable Care Act (ACA),<sup>1</sup> unfurled an inquiry into the nature of healthcare in the United States and the role of the government in its delivery. The ACA was enacted into law in 2010 without Republican congressional support.<sup>2</sup> Multiple congressional attempts to repeal the ACA have failed<sup>3</sup> and, instead, a proliferation of lawsuits sought to accomplish through the judiciary what the failed legislative efforts could not.

The first United States Supreme Court decision in 2012 in *National Federation of Independent Business v. Sebelius*<sup>4</sup> was dispositive in its ruling that the ACA was constitutional and within the taxing power of the federal government.<sup>5</sup> The individual mandate, the linchpin of the ACA, which requires every adult to purchase health insurance, was validated.<sup>6</sup> Failure to

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<sup>1</sup> See generally Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as Amended 42 U.S.C. § 18001).

<sup>2</sup> S. Murray and L. Montgomery, *House Passes Health Care Reform Bill Without Republican Votes*, WASHINGTON POST, (March 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>.

<sup>3</sup> Nearly five years after its enactment, NPR reported that the Republican controlled House of Representatives was still fighting to repeal the ACA, and, had voted 239- 186, to “scrap” the law. Juana Summers, *House Votes To Repeal ACA, Though Bill Unlikely To Pass Senate*, NATIONAL PUBLIC RADIO (NPR) (published Feb. 3, 2015, 11:02 AM) (updated Feb. 4, 2015, 4:06 PM), <http://www.npr.org/2015/02/03/383578256/house-votes-to-repeal-aca-though-bill-unlikely-to-pass-senate>. In the immediate past two years, prior to the February 2015 vote, the Associated Press reported that there had been more than 50 separate efforts to repeal the law in the House. Stephen Ohlemacher, *House Republicans advance bill to undo health law*, THE ASSOCIATED PRESS (AP) (published Sep. 29, 2015, 1:15 PM), <http://bigstory.ap.org/article/af844907d2d242ca9d959ae415fa7567/house-gop-advances-filibuster-proof-bill-undo-health-law>.

<sup>4</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600-01 (2012).

<sup>5</sup> *Id.* Chief Justice John Roberts, in his majority opinion, held that the individual mandate requiring individuals to purchase health insurance was constitutional under the Taxing Clause of the United States Constitution.

<sup>6</sup> *Id.* Chief Justice Roberts also held, however, that the individual mandate provision exceeded Congress' power under the Commerce Clause.

obtain the required insurance results in a penalty payable upon the filing of that individual's taxes with the IRS.<sup>7</sup>

In June 2014, the United States Supreme Court, had its second consideration of litigation regarding provisions of the controversial ACA legislation in *Burwell v. Hobby Lobby Stores, Inc., Conestoga Wood Specialties Corp.* In that decision, the Court held that a for-profit corporation can assert a claim of free exercise of religion and request an accommodation from compliance with the contraceptive mandate.<sup>8</sup> This article contends that, consequent to the Court's ruling in *Hobby Lobby*, the efforts of the challengers to use the judiciary to derail the legislatively enacted contraceptive mandate provisions of the ACA have been successful, and suggests alternatives for dealing with the flood of anticipated accommodation claims.

## **II. HISTORY: ACA & CONTRACEPTIVE MANDATE PROVISION**

The second area of litigation focused on the legislation's proscription known as the contraceptive mandate, which required all employers with fifty employees to provide insurance coverage for "minimum essential services."<sup>9</sup> The contraceptive mandate is subsumed within the definition of an essential service. The ACA represents the first time that federal rules mandated insurance coverage of contraceptives as part of preventive care, at no cost, to female employees. This controversial regulation was not included in the original draft of the legislation. The Women's Health Amendment was introduced by Senator Barbara Mikulski in December 2009 and passed as the first amendment during the health reform legislation process.<sup>10</sup> The Secretary

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<sup>7</sup> 26 C.F.R. § 1.5000A-4 (2014).

<sup>8</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014).

<sup>9</sup> 45 C.F.R. § 156.604 (2014).

<sup>10</sup> Senator Barbara Mikulski, Democrat from Maryland, introduced a bill to fill a gap in the ACA by making the Women's Preventive Health Service a part of every health plan basic benefits package. On December 3, 2009, breaking a three-day stalemate, the Senate passed, by a vote of 61-39, the Women's Health Initiative. S. Amdt. 2791, 111th Congress (2009-2010); *See also* Press Release, Senator Barbara Mikulski, Senate Approves Mikulski Amendment Making Women's Preventive Care Affordable and Accessible (Dec. 3, 2009),

of the Department of Health and Human Services (HHS) requested that a panel of experts convened by the Institute of Medicine (IOM) “review the science and make recommendations for what women’s preventive health services should be covered.”<sup>11</sup>

In July 2011, the IOM published its final report, which recommended that, “the full range of Food and Drug Administration approved contraceptive methods and sterilization procedures and patient education and counseling for women with reproductive capacity” be adopted.<sup>12</sup> Among the twenty contraceptives, as defined by the Institute of Medicine, are four methods which some have categorized as abortifacients. These regulations were adopted in August 2011.<sup>13</sup>

In January 2012, the HHS announced the adoption of the religious employer exemption. The exemption from compliance with the contraceptive mandate was originally limited to religious employers or employers defined as houses of worship.<sup>14</sup> This waiver did not apply to religiously affiliated entities, such as universities, hospitals, or schools. The final rule in February 2013 accommodated the objections of the non-profit faith based charitable organizations not originally included in the narrow definition of “houses of worship.”<sup>15</sup> The accommodation available through this waiver exempts the religious employer and the religiously

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<http://www.mikulski.senate.gov/newsroom/press-releases/senate-approves-mikulski-amendment-making-women-and-39s-preventive-care-affordable-and-accessible>.

<sup>11</sup>Press Release, Senator Barbara Mikulski, Mikulski Applauds Adoption of IOM Guidelines for Women’s Preventive Health (August 1, 2011,) <https://www.mikulski.senate.gov/newsroom/press-releases/mikulski-applauds-adoption-of-iom-guidelines-for-women-and-39s-preventive-health>.

<sup>12</sup> Committee on Preventive Services for Women, *Clinical Preventive Services for Women: Closing the Gaps*, INSTITUTE OF MEDICINE (IOM) at 109-10 (2011) available at <http://www.nap.edu/read/13181/chapter/7#109>.

<sup>13</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014); See also *Women’s Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMINISTRATION: U.S. DEP’T. OF HEALTH AND HUMAN SERVS., <http://www.hrsa.gov/womensguidelines>.

- <sup>14</sup> (1) The inculcation of religious values is the purpose of the organization  
(2) The organization primarily employs persons who share the religious tenets of the organization  
(3) The organization serves primarily persons who share the religious tenets of the organization  
(4) The organization is a non-profit organization as described in section 6033(a) and section 6033(a)(3)(A)(i) or (ii) of the Internal Revenue Code of 1986 as amended

45 C.F.R. § 147.130(a)(1)(iv)(B) (2013)(overruled in 2015, new statute 45 C.F.R. § 147.130 (2015)).

<sup>15</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456-01 (Feb. 6, 2013).

affiliated employer from paying directly for the insurance coverage of contraceptives. The female employee does, however, retain her right to insurance coverage for contraceptives at no cost. This is accomplished when the employer notifies the insurer of his election to exercise the waiver.<sup>16</sup> The insurance company then issues a separate policy, directly to the female employee, to cover contraceptives at no cost to her. In effect, the cost of coverage for contraceptive insurance is transferred from the employer to the insurer.

Faith-based, for-profit entities were still not included in the final rule and did not qualify for an accommodation. The ACA provides for an assessment of a penalty on the employer should he choose not to comply with the contraceptive mandate and if, as a result of such non-compliance, one employee avails herself of the government subsidy to purchase health insurance.<sup>17</sup> The outcry that followed this final rule led to a multiplicity of lawsuits filed by

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<sup>16</sup> Religious non-profits are permitted to opt out of providing insurance coverage for contraception by completing an opt-out form. At that point a third party, the insurance company takes over the provision of coverage. Should the opt-out form be filed with the federal Department Human Health Services, the government then notifies the insurance administrator. In the most recent federal appeals court decision, *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 2015 U.S. App. LEXIS 13813 (2d. Cir. N.Y. 2015), the court ruled that the filing of the opt-out form, in and of itself, does not constitute a substantial burden. The Catholic Health Care System had challenged the filing of the waiver form and argued that the filing, in and of itself, was a substantial burden on the exercise of religion. The court held that, “there is no substantial burden here. The regulatory obligations imposed on third parties after Plaintiffs opt out do not transform the de minimus act of notification into a substantial burden.” *Id.* at 222. The burden that the accommodation places on plaintiffs is merely one of notification.

<sup>17</sup> Large employer not offering health coverage. If:

- (1) any applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000(A)(f)(2)) for any month, and
  - (2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the PPACA as having enrolled for such month in a qualified health plan with respect to which an application premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,
- then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of the individuals employed by the employer as full-time employees during such month.

26 U.S.C. § 4980H(a) (2011).

faith-based for-profit employers, typically, family-run, closely-held corporations operated according to Christian principles.<sup>18</sup>

These plaintiffs argued that the government was overreaching in its legislative regulation and that compliance with the contraceptive mandate constituted a substantial burden on their freedom to exercise religion. The faith-based employer argued that his sincerely held religious belief, which defines life's beginning at conception, precluded the endorsement of certain contraceptive procedures required by the ACA, specifically the four contraceptive measures that act as abortifacients.<sup>19</sup> The argument posits that the choice between compliance and assessment of a significant penalty constitutes a substantial burden on the exercise of religious freedom. In the facts of the *Hobby Lobby* case, the penalty would have amounted to a sum of \$475 million annually and \$3.3 million for the Conestoga Wood plaintiffs, based on a \$2000 per employee fine imposed by the statute.<sup>20</sup> The owners of the Hobby Lobby craft stores, the Green Family, initiated its lawsuit challenging the contraceptive mandate. At the time, the family owned more than five hundred stores with over 25,000 employees across forty-five states and with annual sales estimated at over two billion dollars.<sup>21</sup> In 2013, Mr. Green was listed as the 79th wealthiest person in the United States with a net worth of \$4.5 billion.<sup>22</sup> The Hobby Lobby stores, operating in accordance with Christian beliefs, were committed to the company mission statement, which believed in “honoring the Lord in all we do by operating the company in a

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<sup>18</sup> See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (2012) *rev'd and remanded*, 723 F.3d 1114 (2013) *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); *Grote v. Sebelius*, 708 F.3d 850, 853 (2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 *cert. granted*, 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (2013).

<sup>19</sup> See *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278 (2012). Included in its enumeration of covered contraceptive medicines is Ella, an emergency contraceptive that acts like an abortion drug and RU-486, also known as the morning after pill.

<sup>20</sup> 45 C.F.R. § 156.604

<sup>21</sup> *Our Story*, hobby lobby, <http://www.hobbylobby.com/about-us/our-story> (Oct. 28, 2015 at 2:30PM) Mr. David Green started his craft business in 1970 with a \$600 loan, which he grew into a successful crafts store.

<sup>22</sup> *The World's Billionaires: #228 David Green*, FORBES 400, <http://www.forbes.com/profile/david-green> (Oct. 28, 2015 at 1:00PM).

manner consistent with Biblical principles.”<sup>23</sup> Additionally, every family member in the business also signed a commitment statement in which he agreed to “use the Green family assets to create, support and leverage the efforts of the Christian mission.”<sup>24</sup> Like the Green family, Mr. and Mrs. Hahn and their three sons, the plaintiffs in *Conestoga Woods*, employed nine hundred and fifty employees in their wood cabinetry manufacturing business, which was operated in accordance with their Mennonite Christian principles.<sup>25</sup> Neither plaintiff operated his business as a mom and pop operation. Especially contentious for the challengers, also, was the allegation that the for-profit versus not-for-profit status is an arbitrary distinction and not well supported by the case law on religious accommodation claims.

The ACA is predicated on a balancing of the respective interests of employers and employees in the workplace. To what extent should an individual’s sincere religious beliefs be accommodated when that very accommodation will negatively impact others in what should be a neutral work space? To what extent can the employer’s sincerely held religious convictions be imposed on his employee’s legislatively granted rights and benefits? A circuit split developed at the appellate level.<sup>26</sup> In *Conestoga Wood*,<sup>27</sup> the Third Circuit held that the contraceptive mandate

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<sup>23</sup> *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (Oct. 28, 2015 at 2:30PM).

<sup>24</sup> *See generally*, DAVID GREEN, MORE THAN A HOBBY: HOW A \$600 START-UP BECAME AMERICAN’S HOME AND CRAFT SUPERSTORE (2005). Consistent with their beliefs, the Greens had in the past refused to rent space to a liquor store because their religious beliefs prohibited the promotion of alcohol use.

<sup>25</sup> Conestoga’s mission statement includes the following language: “we operate in a professional environment founded upon the highest ethical, moral and Christian principles reflecting respect, support and trust, for our suppliers, our employees and their families.” *First Amended Verified Complaint* at ¶ 33, *Conestoga Wood Specialties Corp. v. Sec’y of the U. S. Dep’t of HHS*, 724 F. 3d 377 (January 11, 2013), *available at* <http://www.clearinghouse.net/chDocs/public/FA-PA-0007-0008.pdf>. The Conestoga Board of Directors adopted, “The Hahn Family Statement on the Sanctity of Human Life,” which states that, “[t]he Hahn family has always believed that the Bible is the inspired, infallible, and authoritative word of God, the one and only eternal God . . . the Hahn family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore, it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.” *Id.* at ¶ 92.

<sup>26</sup> Both the seventh and tenth circuits held that secular, for-profit corporations could assert free exercise claims. *Grote v. Sebelius*, 708 F. 3d 850 (2013) and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1133 (2013). On the other hand, the third circuit in *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of HHS*, 724 F. 3d 377 (2013), found that a for-profit corporation could not mount a claim of free exercise.

was enforceable against the for-profit, closely held corporate employer, whereas the Tenth Circuit in *Hobby Lobby*<sup>28</sup> found in favor of the plaintiffs and held that the contraceptive mandate violated the religious freedom of the for-profit closely held corporation.

### **III. HOBBY LOBBY, CONESTOGA WOOD, AND THE UNITED STATES SUPREME COURT**

The United States Supreme Court decision in the consolidated cases of *Conestoga Wood* and *Hobby Lobby*<sup>29</sup> appeared to settle the issue in its ruling that the sincere religious beliefs of an employer, who conducts his business in the form of a closely held corporation, must be accommodated because of The Religious Freedom Restoration Act (RFRA).<sup>30</sup> Justice Alito further held that the interests of the employees of the for-profit corporation can be protected through the mechanism of shifting the insurance consequences from the employer to the insurance company itself, similar to the case of the religiously affiliated non-profit employer.<sup>31</sup>

The highest court made reference to the application of both the constitutional protections of the free exercise of religion and the statutory protection under the RFRA. However, the Court refrained from finding for the plaintiffs on constitutional free exercise grounds but instead ruled

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<sup>27</sup> *Conestoga*, 724 F.3d at 417.

<sup>28</sup> *Hobby Lobby*, 723 F. 3d at 1146-47

<sup>29</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

<sup>30</sup> 42 U.S.C. § 2000bb (1993)

<sup>31</sup> *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Initially, it seems that Judge Alito was more comfortable with the federal government directly assuming the payment for the insurance coverage of contraceptives when he states that, “[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue.” *Id.* at 2780.

He then backtracks from endorsing a government funded option and states instead, “[i]n the end, however, we need not rely on the option of a new, government-funded program in order to conclude that HHS regulations fail the least restrictive test . . . HHS has already established an accommodation for non-profit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive service. If the organization makes such certification, the organization’s insurance issues or third party administrator must ‘[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan’ and ‘[p]rovide separate payment for any contraceptive services required to be covered’ without imposing ‘any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.’” *Id.* at 2781-82 (citations omitted).

solely on the basis of the RFRA legislation.<sup>32</sup> Legal protection of one's right to exercise his religion without undue influence from government regulation is derived from two independent sources, (1) US Constitution and (2) statute. The First Amendment stipulates two separate guarantees for religious freedom, the Establishment Clause,<sup>33</sup> which prohibits the government from creating a state religion, and the Free Exercise Clause,<sup>34</sup> which allows an individual to worship as he wishes. Prior to the granting of statutory protection for religious worship through RFRA, the Free Exercise Clause prohibited the government from infringing on a citizen's free exercise rights.

#### **IV. THE RELIGIOUS FREEDOM RESTORATION ACT**

The Religious Freedom Restoration Act (RFRA) was passed by Congress in 1993 as a legislative response to the United States Supreme Court ruling in *Employment Division of Dept. of Resources of Oregon v. Smith*.<sup>35</sup> There, the Court held that free exercise claims need not be accommodated when the law, which impacts a person's religious belief was deemed neutral and was applied uniformly. The facts in the case related to drug rehabilitation counselors who were denied unemployment benefits after being fired for violating a state law that prohibited the use of the Hallucinogen drug Peyote. In their defense, they argued that the use of the drug was integral to their religious beliefs. The Supreme Court did not accept the argument that religious beliefs excused its practitioners from complying with laws and quoted its earlier precedent in *Reynolds v. United States* to assert that,

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<sup>32</sup> *Hobby Lobby Stores*, 134 S. Ct. at 2785 (“The contraceptive mandate, as applied to closely held corporations violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).

<sup>33</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibit, the free exercise thereof.”).

<sup>34</sup> U.S. CONST. amend. I

<sup>35</sup> *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.<sup>36</sup>

For a statute to pass judicial muster, the *Smith* Court emphasized that the legislation be neutral, of general applicability, and not specifically target an individual's free exercise of religion.<sup>37</sup>

Facially neutral laws were not to be invalidated if the interference with free exercise was incidental. The *Smith* case was said to establish a rational review standard.

The *Smith* test, challenged by groups of many different religious persuasions, resulted in Congress passing RFRA, which set the standard for the government to demonstrate that it had a compelling interest in enacting legislation that could potentially impact an individual's freedom of exercise.<sup>38</sup> However, a substantial burden on that person's free exercise of religion must be accommodated.<sup>39</sup> RFRA's purpose was said to restore the compelling interest, or the strict scrutiny standard, that had preceded the *Smith* decision. RFRA, although purporting to return to the pre-*Smith* standard of free exercise jurisprudence, in fact, heightened the test to that of a strict scrutiny standard.

In *Hobby Lobby*, the positive outcome for the for-profit corporate employer, namely, the accommodation of its free exercise claim, hinged on a close reading of the language in RFRA

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<sup>36</sup> *Id.* at 878 (citing *Reynolds v. United States*, 98 U.S. 145, at 166-167 (1878))

<sup>37</sup> *Id.* at 882.

<sup>38</sup> In the preamble to the legislation, Congressional findings and declaration of its purpose is found in the following statement at 42 U.S.C. § 2000bb(a),

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by law neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests 42 U.S.C. § 2000bb(a)(4)-(5)(2016).

<sup>39</sup> 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").

that prohibits the government, despite its compelling interest, from exercising a substantial burden on free exercise unless by the least restrictive means. Justice Alito, writing for the majority, assumed that the government has a compelling interest.<sup>40</sup> The federal government sustained its argument in favor of that compelling interest in two ways. Its first argument was predicated on the assumption that absent mandatory compliance, the government's interest in achieving the goal of comprehensive health insurance coverage would be compromised. Secondly, the government's national interest in public health also addressed the inequality that confronts women whose health costs exceed those of their male counterparts because women alone bear the costs of contraception and reproduction. As of this writing, the New York Times reported on July 8, 2015, that health care costs for women have been sharply reduced since the implementation of the contraceptive mandate.<sup>41</sup> The *Times* article was based on a University of Pennsylvania study that analyzed insurance claims of large insurance companies in the fifty states. The significant decline in expenditures for birth control, the study concluded, was probably due to the ACA, which was described as "the biggest piece of social legislation in decades, on women's pocketbooks."<sup>42</sup>

In contradistinction to the Supreme Court, there are still those who argue, based on a theory of implied consent, that an employee should not be permitted to invoke a free exercise claim when he chooses to work for an organization where it is clear from the circumstances that the employer seeks to accomplish religious objectives. That employee is then said to give

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<sup>40</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780. Alito J.'s response to the HHS arguments that the contraceptive mandate constitutes a compelling interest as it promotes "public health" and "gender equality." ("We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . .").

<sup>41</sup> Sabrina Tavernise, *Women Are Paying Less For Birth Control*, N.Y. TIMES, July 8, 2015, at A11; *see also* Sabrina Tavernise, *After Health Care Act, Sharp Drop in Spending on Birth Control*, N.Y. TIMES, July 7, 2015, <http://www.nytimes.com/2015/07/08/health/after-health-care-act-sharp-drop-in-spending-on-birth-control.html>.

<sup>42</sup> *Id.* The study estimated that savings from the pill alone were about \$1.4 billion in calendar year 2013.

implied consent to be free from governmental regulation of that workplace relationship.<sup>43</sup> In a case of mixed secular or commercial and religious objectives, the argument proceeds to assert that the partly secular aspect of the employment does not detract from the employee's implied consent because the employee has adequate notice of the importance of the religious objectives of his employer.<sup>44</sup> Similarly, others have questioned the nexus between the contraception mandate and the government's compelling interest by citing scientific disagreement, which questions what is meant by the term "unwanted pregnancy," and asks further whether the governmental contraceptive mandate would in fact lead to its reduction.<sup>45</sup> One author suggests that unintended pregnancies tend to have the greatest impact on poorer American women, but that this class of women makes little use of the free or very low cost contraceptives already available to them.<sup>46</sup> She further posits that cost turns out not to be a significant factor among women who use contraceptives at a higher rate and are willing and able to pay.<sup>47</sup>

Once the majority, in *Hobby Lobby*, determined that a not-for-profit corporation qualified as a person with capacity to assert a free exercise claim, the Court had no difficulty applying the two-prong RFRA test to the ACA contraceptive mandate. Justice Alito turned to the Dictionary Act for clarification of the term "person" and found that the Act specifically

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<sup>43</sup> Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONT. LEGAL ISSUES 401, 401-02 (2013).

<sup>44</sup> *Id.* at 423-25 ("[w]here religion is integrated into the day-to-day operations of an institution . . . employees are alerted to the importance of religious objectives to the institution. Accordingly, when individuals join the institution as employees we can safely assume that they understand that the institution is organized to achieve uniquely religious objectives . . . .")("[E]mployees understand that the company's objectives are not simply secular or commercial.")

<sup>45</sup> Helen M. Alvaré, *John F. Scarpa Conference on Law, Politics and Culture: Living the Catholic Faith in Public Life*, 58 Vill. L. Rev. 371, 398 (2013). Professor Alvaré points out that no agreement exists as to how to measure an "unintended pregnancy" and that the issue becomes even more murky because access to birth control does not translate into increased use, "Even if we accepted the IOM Report's claims regarding how to define unintended pregnancy, it is not clear that the Report's recommendation would lower rates of unintended pregnancy. . . . It can give women access to contraceptives but it cannot force them to use it."

<sup>46</sup> *Id.* ("For it turns out that there are many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost.")

<sup>47</sup> *Id.* at 399, 427.

included both the human or natural as well as the legal person in its definition.<sup>48</sup> Justice Alito further found that Congress, in its enactment of the ACA, did not intend to narrow the definition to limit “person” to a human person only. Had Congress intended to do so, argued Justice Alito, that intention would have been clarified in the ACA legislation.<sup>49</sup> By contrast, Justice Ginsburg, writing for the dissent, stated that the Dictionary Act definition of a “person” should control only where the context of the legislation’s use of the term does not indicate otherwise.<sup>50</sup> Justice Ginsburg concluded that precedent does not support the argument that a corporation can exercise religion and that only a human person can so choose.<sup>51</sup> The majority and the dissent were engaged in the classic argument of textual interpretation of a statute versus a purpose analysis of the legislation. The debate over the original meaning versus the context or purpose of the legislation has been part of an ongoing legal debate and the justices’ bias and respective views of the role of the judiciary is reflected in the *Hobby Lobby* decision.

The corporation, an artificial entity, is a legal person and its principal characteristics include the attributes of perpetual existence, limited liability, separate entity status, and separation of ownership from control. The corporation was created to meet a unique economic need, namely, that of raising revenue while simultaneously shielding the investors from unlimited liability as a result of their monetary stake in a business venture. The corporation, in its capacity as a legal person, has been endowed with certain constitutional rights, whereas other

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<sup>48</sup> *Burwell*, 134 S. Ct. at 2768 (“A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are association with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

<sup>49</sup> *Id.* at 2768-69 (arguing that the term “person” sometimes encompasses artificial persons (as the Dictionary Act instructs) and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for –profit corporations).

<sup>50</sup> *Id.* at 2793-94 (Ginsburg, J., dissenting) (“The Dictionary Act’s definition, however, controls only where ‘context’ does not ‘indicat[e] otherwise.’ § 1. Here, context does so indicate. RFRA speaks of ‘a person’s exercise of religion.’”).

<sup>51</sup> *Id.* at 2794.

rights have been reserved for the human person exclusively.<sup>52</sup> Recently, the United States Supreme Court, in *Citizens United v. Federal Election Commission*,<sup>53</sup> stated that political free speech could not be suppressed only because its speaker is a corporation.<sup>54</sup> Since the protection of both the rights to freedom of speech and the freedom of religion are found in the First Amendment, the *Hobby Lobby* plaintiffs sought to extend the *Citizens United* precedent to the Free Exercise Clause. Just as the corporation is endowed with free speech rights, so too should the corporation be endowed with free exercise rights. Can the *Citizens United* ruling be expanded to include the proposition that a corporation has free exercise rights? Reference was made to the earlier *First National Bank of Boston v. Bellotti*<sup>55</sup> case, where the Court found that the purpose of the Free Exercise clause is to secure religious liberty in the *individual* because the “historic function” of a particular guarantee is limited to the protection of the individual and whether a particular guarantee is “purely personal” and “is unavailable to corporations for some other reason depends on the nature, history and purpose of the particular constitutional provision.”<sup>56</sup> The opposing litigants each used this language to bolster its distinct argument.

The plaintiffs argued that just because the *Bellotti* Court found the Free Exercise Clause to be a purely personal right, it did not prevent the *Hobby Lobby* Court from extending the free exercise protection to for-profit corporations because protecting the free exercise rights of corporations, like Hobby Lobby and Conestoga, means protecting “the religious liberty of those

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<sup>52</sup> The United States Supreme Court has long held that corporations are “persons” in law. *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896); *see also* *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *United States v. White*, 322 U.S. 694, 698-99 (1944) The Supreme Court has also found that a corporation cannot assert a claim asserting the privilege against self-incrimination as this is a personal privilege applicable to natural individuals only.

<sup>53</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010).

<sup>54</sup> *Id.* at 342-43. The Supreme Court discussed, at length, the history of the corporation’s right to freedom of speech before concluding that the Bipartisan Campaign Reform Act of 2002 (BCRA)—a statute which would have placed limitations on a corporation’s advertising expenses in endorsing political candidates—unconstitutional.

<sup>55</sup> *See generally* *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>56</sup> *Id.* at 778-79 (citing *United States v. White*, 322 U.S. at 698–701).

who own and control those companies.”<sup>57</sup> The Court of Appeals for the 10<sup>th</sup> Circuit in *Hobby Lobby* found that there was “no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”<sup>58</sup>

In this reading of *Bellotti*, the plaintiffs focused on the nature of the right being protected rather than on the party invoking that protection. In reframing the inquiry in such manner, it becomes possible to disregard the question whether First Amendment rights is limited to the “human” persons but to instead focus on the nature of the protected activity. On the other hand, the Court of Appeals for the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of United States Human Health Services*<sup>59</sup> relied heavily on the “purely personal” language of *Bellotti*, and found that free exercise rights were limited to the natural person.<sup>60</sup> The Supreme Court followed its earlier precedent in *Citizens United* and focused on the right being protected rather than on the party invoking the claim to protection and simply sidestepped the issue as to whether a corporation, qua corporation, can exercise religion.

Next, Justice Alito questioned whether an individual barter his right to invoke a free exercise claim when he engages in business. In the earlier *Braunfeld v. Brown* case,<sup>61</sup> the Court did not view the link between the profit motive and religion as problematic. Mr. Braunfeld, a solo practitioner, argued that because the state’s Sunday laws required the closing of his retail store on Sundays, he incurred significant business losses. The state’s law impacted his free

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<sup>57</sup> *Burwell*, S. Ct. at 2768.

<sup>58</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d at 1135.

<sup>59</sup> *Conestoga*, 724 F.3d at 380-83 (3d Cir. 2013).

<sup>60</sup> *Id.* The Third Circuit emphasized the Supreme Court’s earlier precedents and history which had never protected religious liberty in a corporation unlike the Court’s history which found that among the corporation’s protected rights was included the right to free speech.

(“In analyzing which constitutional guarantees apply to corporations, the Supreme Court has held certain guarantees are “purely personal” because the ‘historic function’ of the particular guarantee has been limited to the protection of the individual. Whether or not a particular guarantee is “purely personal” or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”).

<sup>61</sup> *Braunfeld v. Brown*, 366 U.S. 599, 601-09 (1961).

exercise rights as an Orthodox Jew, as his religion prohibited conducting commerce on Saturday, Mr. Braunfeld's day of rest. Even though the Court ruled against Mr. Braunfeld on other grounds, it found that the pursuit of profit does not ipso facto mean the forfeiture of free exercise claims.<sup>62</sup>

Therefore, should the injection of the corporate form, which allows the separation of the business entity from its owner in order to insulate him from personal liability for the corporation's obligations, create a legal impediment to a free exercise claim? Justice Alito, relying on the *Braunfeld* decision, found that because the law permits a religious individual to both pursue an activity for-profit and simultaneously assert a free exercise claim, that precedent does not demand that sincerely held religious beliefs be abandoned simply because one's efforts to earn a livelihood collide with the statutory regulation of that business. With the corporate interface, the Supreme Court in *Hobby Lobby, Conestoga Wood* held that the owners of a family operated, closely-held, for-profit corporation can assert a free exercise claim precisely because they did not trade in that right due to their choice of business association:

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same? . . . While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, . . .<sup>63</sup>

Justice Ginsburg, on the other hand, writing for the dissent, stated that, “[h]ad Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation.”<sup>64</sup> For the dissent, the legal issue of accommodation could never be triggered once the corporate form of doing business is employed. Justice Ginsburg quoted the

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<sup>62</sup> *Burwell*, 134 S. Ct. at 2769-70 (“In *Braunfeld* . . . we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims.”).

<sup>63</sup> *Id.* at 2770-71.

<sup>64</sup> *Id.* at 2796 (Ginsburg, J., dissenting).

earlier *United States v. Lee*<sup>65</sup> decision as binding precedent for the proposition that the corporate form of doing business imposes restrictions on behavior, indicating,

[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.<sup>66</sup>

In the *Lee* case, an Amish farmer refused to contribute to the mandatory national social security system because his Amish religion forbade the receipt of social security benefits, which thus barred any contributions to that system. There, a clash between one's religious obligation and his statutorily imposed civic obligation was resolved by the courts in favor of the state laws, which furthered the government's compelling interest. Justice Ginsburg endorsed the thesis that engaging in commercial activity should always trump religious beliefs because the dissent cannot tolerate the possibility that one person's – the employer's religious faith – be imposed on others – the employee.<sup>67</sup> To the dissent, the voluntary nature of a commercial enterprise cedes to the statutory regulation of that very enterprise. To illustrate this point, Justice Ginsburg stated, “[w]orking for Hobby Lobby or Conestoga . . . should not deprive employees of the preventative care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.”<sup>68</sup>

How should one understand the gulf between the majority and the dissenting opinions? Each judicial position in this debate is an attempt to calibrate the role of religion in the marketplace. In *Hobby Lobby*, the majority is not disturbed by the infusion of religion and its values into the public sphere, whereas the dissent takes a dimmer view of the consequences when

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<sup>65</sup> U.S. v. Lee, 455 U.S. 252, 259 (1982).

<sup>66</sup> *Id.* at 262.

<sup>67</sup> *Burwell*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting) (“Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would ‘operat[e] to impose the employer’s religious faith on the employees.’”).

<sup>68</sup> *Id.*

religious values are conflated with economic ventures. In her final paragraph, Justice Ginsburg stated that, “[t]here is an overriding interest, I believe, in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims.’”<sup>69</sup> She did not view the judiciary as the appropriate forum for determining which religious beliefs are worthy of accommodation because, “approving some religious claims, while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another’ the very ‘risk the Establishment Clause was designed to preclude.’ The Court, I fear, has ventured into a minefield.”<sup>70</sup>

Justice Alito, in his majority opinion, accepted the judiciary as the appropriate forum to sort out the relative tensions between statutory regulation and religious accommodation. If a burden must be imposed, then only the least restrictive means to do so is permitted. Justice Alito dismissed the argument that opening the door to the closely-held, for-profit corporation’s claim of free exercise will beget a floodgate of claims resulting in “divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.”<sup>71</sup> In his dismissal of even the likelihood of a dispute of this nature, Justice Alito relied on state corporate law, which “provides a ready means for resolving any conflicts,”<sup>72</sup> to dictate how a corporation establishes its governing structure and to how to manage business disputes. There has also been an academic suggestion, by Professor Willis, that a new corporation’s law statute be enacted to legally recognize a new entity, that of the faith-based corporation, and that this newly created artificial entity be deemed a person for the purposes of RFRA.<sup>73</sup>

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<sup>69</sup> *Id.* at 2805 (citation omitted).

<sup>70</sup> *Id.* (citation omitted).

<sup>71</sup> *Burwell*, 134 S. Ct. at 2774 (citation omitted).

<sup>72</sup> *Id.* at 2775.

<sup>73</sup> Steven J. Willis, *Corporations, Taxes and Religion: The Hobby Lobby and Conestoga Contraception Cases*, 65 S.C. L. REV. 1, 58-61 (2013).

## V. REFINING THE DEBATE

How could the Court shoehorn the for-profit closely held corporation within the definition of a person with free exercise entitlement rights? The United States Supreme Court has taken a giant leap in its recognition of religious exercise claims for the for-profit corporation. Despite the Court's insistence that the case law restricts recognition of free exercise rights to the closely held, family run, for-profit corporations, the door has been opened, significantly, to future corporate demands for accommodation.

Scholars, who have examined more recent developments in constitutional law and especially the relationship between social and legal changes, posit the reasonable view that the contraceptive mandate controversy reflects a weakening of our social consensus on cultural issues.<sup>74</sup> In fact, one commentator goes so far as to suggest that the controversy surrounding *Hobby Lobby* would probably not have occurred thirty years ago “given the state of social consensus at the time.”<sup>75</sup> He posits that this clash reflects a deeper culture war as seen through the shift in perspective on the status of same sex marriage and gay rights.<sup>76</sup> Those of a more liberal Weltanschauung who advocated for same sex marriage were also in the forefront in the defense of the contraceptive mandate.<sup>77</sup> As of this writing, the United States Supreme Court, in *Obergefell v. Hodges*, held that there is a constitutional right to same sex marriage.<sup>78</sup> This ruling was handed down approximately one year after the Court's decision in the contraceptive mandate cases.

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<sup>74</sup> Ronald J. Colombo, *The Naked Private Square*, 51, HOUS. L. REV. 1, 10-11 (2013).

<sup>75</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 158 (2014).

<sup>76</sup> *Id.* at 159-60.

<sup>77</sup> *Id.* at 176-77 (“[T]he the debate over same-sex marriage and religious liberty is responsible neither for the contraception mandate nor for the litigation it produced. But the debate has a great deal to do with just how large Hobby Lobby loomed in the public conversation — and still does. . . . That Hobby Lobby was, so to speak, in some measure a gay rights case, and that any case that intersects with the culture wars is likely to receive an added amount of attention and controversy, . . .”).

<sup>78</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

What is being debated is the nature of religion and its place in society. If religion is seen as merely one of many traits an individual possesses, that single personal characteristic retains its unique position and can be separated from other variables, which compose the entirety of that individual's persona. If, on the other hand, one views religion as a belief system that permeates all aspects of that individual's persona, the totality of these traits becomes too interconnected to permit any one component to be unraveled from the others. The distinction between Sunday and the rest of the week is a false dichotomy because,

[H]uman beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time . . . [S]uch a result would be absurd. Individuals of strong religious convictions do not live in a vacuum or practice their faith only on their days of worship.<sup>79</sup>

Only a more fragmented understanding of the role of religion in one's life permits a bifurcation of that person's religious life as opposed to his commercial life.

Other scholars argue that the Court decisions favoring accommodation of a "corporate conscience" doctrine misunderstand the economic trade-off between wages and benefits.<sup>80</sup> Because the employee's total compensation package includes both wages and benefits, the benefits component should not be treated differently from wages. Both wages and benefits are earned by the employee and if the wage component does not constitute a burden to the employer, neither should the benefits component. In the United States, employer based healthcare coverage is traceable to an accident of history. During World War II, when employers faced a federal freeze on wages, the War Labor Board permitted the exemption of benefits from the definition of wages.<sup>81</sup> The employer's role in financing health care became further entrenched as the tax code

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<sup>79</sup> Ronald J. Colombo, *The First Amendment and the Business Corporation*, Oxford University Press (2015).

<sup>80</sup> Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 319-20 (2014).

<sup>81</sup> See generally, PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (Basic Books 1982).

granted preferential advantages to both the employer and the employee.<sup>82</sup> The employer's contribution could be subject to a reduced payroll tax whereas the employee is free of income tax on benefits conferred, although he is obligated to pay income tax on wages. If both wages and benefits combine to form the total compensation package, then the wage and benefits component each functions in an identical manner and it is therefore questionable why the benefits component should be delinked and become subject to a religious challenge. If the employer cannot raise free exercise concerns when his employee chooses to spend her earned wages on contraceptives, why then should the courts allow the employer to invoke that very argument when the employee is merely availing herself of federally granted benefits?

## VI. CONCLUSION

The ACA revolutionized the delivery of health care. As constituted by the ACA, the national health insurance system is financed through a combination of employer, employee, and public funding through government subsidies. With the 2012 Supreme Court decision in *National Federation of Independent Business v. Sebelius*,<sup>83</sup> which held that the penalty provision for non-compliance is legally a tax, the federal government sought to impose a regulated, mandatory health insurance justified by a compelling government interest. The ACA provisions should be seen as other federal insurance programs, such as workman's compensation and social security insurance.<sup>84</sup> With the *Hobby Lobby* decision, the Supreme Court has veered away from a line of cases that did not permit an accommodation for a free exercise claims in the instances of national mandatory regulation schemes enacted for the benefit of Americans and allowed,

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<sup>82</sup> *Id.*

<sup>83</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594.

<sup>84</sup> *See generally* *United States v. Lee*, 455 U.S. 252 (1982); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990).

instead, a diminution of insurance benefits from those envisioned by Congress when it passed the contraceptive mandate into law.

## VII. PROPOSAL

In *Hobby Lobby*, the Supreme Court allowed the owners of a family-owned, closely-held for-profit corporation to assert a claim of free exercise, which had the consequence of permitting these employers to interfere with their employees' federally mandated rights. It should be clear from the facts in both the *Hobby Lobby* and *Conestoga Wood* cases that a very small number of individuals – the employers (in each case, five people) – have, legally, been granted the power to encumber access to insurance coverage for a much larger group of persons – the employees. It has been estimated that in the United States, the closely-held corporation format of doing business constitutes about 90% of all corporations who employ approximately 62% of employees in the workforce.<sup>85</sup> By accepting the premise that a closely-held corporation is controlled by a small group of owners or shareholders, the Supreme Court treated the owners of that closely-held corporation and the corporation as the identical entity or same person. Through the conflation of the corporation with its owners, the corporation, as a legal entity, becomes compromised. After all, the corporation qua legal person, was birthed into law precisely to separate out ownership from control of that entity. The Supreme Court's decision marks a radical departure from the long held judicial precedents, which separate the corporate entity from its shareholders.

Furthermore, the majority's application of the Dictionary Act definition encouraged a shift in the corporate law. This, in turn, will only exacerbate and encourage the infusion of religious values and identities into what should be a neutral workspace. It is proposed that the dissent's restriction of the "person" to the human person would mitigate the problem of the

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<sup>85</sup> *The Economic Impact of Closely Held Businesses*, Center for Closely Held Businesses, WILLIAM PATTERSON UNIVERSITY, [www.wpunj.edu/CloselyHeld/EconomicImpact.dot](http://www.wpunj.edu/CloselyHeld/EconomicImpact.dot) (Oct. 28, 2015 at 2:15PM)

expression of religious values into the public workspace and its concomitant problem of encumbering access to legislatively granted rights. The specter of what Justice Ginsburg, in her dissent, anticipated as a proliferation of RFRA claims is based on the majority’s determination that “RFRA extends to for-profit corporations” and is, therefore, bound to “have untoward effects.”<sup>86</sup> Such an expansive interpretation of RFRA in its application to corporate personhood, states Justice Ginsburg “invites for-profit entities to seek religion based exemptions from regulation they deem offensive to their faith.”<sup>87</sup> In her dissent, Justice Ginsburg underscores that RFRA’s requirements

*[M]ust take adequate account of the burdens of a requested accommodation may impose on nonbeneficiaries. No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others – here, the very persons the contraceptive coverage requirement was designed to protect.*<sup>88</sup>

To mitigate the real possibility that the majority, the employees, not be held hostage to the faith of the minority, the employer, and from being prevented to easily access federally mandated benefits, I propose the adoption of either of the following solutions. In so far as the corporate form is a creation of the Legislature, that legislative body can amend its definition of personhood to expressly restrict, for certain purposes, its definition to the human or natural person and or the not-for-profit corporation. In fact, two states, Louisiana and Pennsylvania, have already done so.<sup>89</sup> An alternative approach might reconsider the current understanding of the closely held corporation.<sup>90</sup> I submit that the focus on ownership and control of the closely-held corporation,

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<sup>86</sup> *Burwell*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting)(internal citations omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2801.

<sup>89</sup> La. Rev. Stat. Ann. § 13:5234 (2015) Courts and Judicial Procedure, and Pa. Stat. Ann. § 2403 (2014) Religious Freedom Protection Act.

<sup>90</sup> A closely held corporation, as defined by the Internal Revenue Code, is a corporation where up to five shareholders own more than fifty percent of the outstanding stock. See 26 U.S.C. § 542(a)(2) (2015). See also *Publication 542: Corporations*, Dep’t. of the Treasury, Internal Revenue Service (IRS) (Rev. March 26, 2012) available at, <https://www.irs.gov/pub/irs-pdf/p542.pdf>.

should be redirected to an inquiry that instead considers the size of the corporation, the aggregate value of that company's assets, and the impact of that corporation in its industry. Hobby Lobby, after all, had over 60,000 employees across forty-five states. There, a minority of five individuals controlled the healthcare insurance fate and effectively blocked easy access to federally mandated contraceptive benefits of thousands of employees, most of whom did not share their employer's religious faith. To focus instead on the corporation's size, assets, and place in the industry would subvert the oppression of the majority (employees) by the minority (employers). To reframe the nature of the inquiry will also result in a closer adherence to the Congressional intent in the passage of the ACA as well as greater fairness and balance in the workplace.