RELIGIOUS LIBERTY FOR EMPLOYERS AS CORPORATIONS, NATURAL PERSONS OR MYTHICAL BEINGS?
A REPLY TO GANS

Harry G. Hutchison,
George Mason University School of Law

Penn State Law Review, Vol. 120,
Forthcoming 2015

George Mason University Law and Economics Research Paper Series
15-50

This paper is available on the Social Science Research Network at http://ssrn.com/abstract=2685872
INTRODUCTION

David Gans and Ilya Shapiro’s recent book probes the question of corporate constitutional and statutory rights though a prism supplied by the Hobby Lobby case. Fostered by 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

*Professor of Law, George Mason University School of Law, Visiting Research Scholar, Harris Manchester College, the University of Oxford and Founding Fellow, Oxford Centre for the Study of Law and Public Policy. I am grateful to Elizabeth McKay and J. W. Verret for helpful comments on earlier drafts. This research was funded by the Law & Economics Center of George Mason University School of Law.
(RELIGIOUS LIBERTIES FOR CORPORATIONS). This manuscript delineates the facts, and legal arguments as well as the majority and dissenting opinions in Burwell v. Hobby Lobby.\(^2\) Serving as Director of the Human Rights, Civil Rights, and Citizenship Program, 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. Consistent with the weight of scholarly opinion and in sharp contrast to his co-author’s\(^3\) approach, Gans denies that for-profit corporations have free exercise rights.

The *Hobby Lobby* decision 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\(^4\) (ACA). “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.’”\(^5\) This provision gives rise to a so-called contraceptive mandate.\(^6\) Pursuing an 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.\(^7\) Two primary legal issues surfaced in this case: whether the Free Exercise Clause of the First Amendment or the Religious

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\(^1\) 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].

\(^2\) 134 S. Ct. 2751 (2014).

\(^3\) Senior Fellow, Constitutional Studies, Cato Institute.


\(^5\) *Hobby Lobby*, 134 S. Ct. at 2762 (citing 42 U.S.C. § 300gg—13(a) (4)).

\(^6\) 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 effected employee or, alternatively, if the employer decides to stop providing health insurance altogether, the employer must pay $2,000 per year for each of its full-time employees. *Id.*

\(^7\) 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. *Hobby Lobby* 134 S. Ct. at 2765-66.
Freedom Restoration Act of 1993 (RFRA) provides for-profit corporations with the right to an accommodation. Prescinding from a review of the First Amendment issue vetted by the Third Circuit Court of Appeals, the Supreme Court directed its attention to whether RFRA as amended by the Religious Land Use and Institutionalized Persons Act (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.” Holding that the HHS’ mandate was impermissible, as applied, the Court spurned the 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. The Court also found the government’s related claim—that the objecting firms’ for-profit status extirpated their RFRA claims—untenable. Implicitly, the Court decided that free exercise exemptions for profit-pursuing corporations are not necessarily a form of unjustifiable favoritism.

Whatever its merits, the Hobby Lobby opinion has provoked a wave of scholarship and a flurry of rancor. The Court’s decision generated a number of overlapping questions. First, since

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11 Hobby Lobby, 134 S. Ct. at 2759.
12 Id.
13 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).
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? Second, must the pragmatic or normative implications connected to the legal structure of for-profit corporations 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? Third, although Justice Douglas has cautioned us that “[g]eneralizations about standing to sue are largely worthless as such,” 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 or based on a derivative or...

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16 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), available at http://verdict.justia.com/2014/07/10/hobby-lobby-yields-rancor-wheaton-college-queues-d... (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 employees of reproductive health coverage, other organizations, would seek an exemption, and stating that the *Hobby Lobby* majority actually played games with accommodation).

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

18 *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).

19 See Garrett, *supra* note ___ at 138-147 (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).

20 Lupu & Tuttle, *supra* note ___ at 4-5.


third-party theory of prudential standing\textsuperscript{23} consonant with the view that they are more like partnerships, membership organizations\textsuperscript{24} or associations of individuals, rather than large publicly-held corporations.\textsuperscript{25} Finally, are the opponents of corporate free exercise correct in their presumption that free exercise claims are purely personal and individual\textsuperscript{26} as opposed to being the representative outworking of a voluntary collective group,\textsuperscript{27} so that profit pursuing corporations must be seen as non-religious entities lacking the anthropomorphic capacity necessary to practice religion?\textsuperscript{28} 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.\textsuperscript{29} If so, this would signify that the \textit{Hobby Lobby} case 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,”\textsuperscript{30} especially in the nation’s current and highly secular age.\textsuperscript{31}

\textsuperscript{23} Garrett, \textit{supra} note\textsuperscript{____} at 147-153 (suggesting that some rights may not be asserted by an organization \textit{i.e.}, a corporation).
\textsuperscript{24} Meese & Oman, \textit{supra} note\textsuperscript{____} at 287-88.
\textsuperscript{25} For one perspective on associational standing, see Garrett, \textit{supra} note\textsuperscript{____} at 137-138 (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). \textit{See also}, Margaret M. Blair & Elizabeth Pollman, \textit{The Derivative Nature of Corporate Constitutional Rights}, 56 \textit{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).
\textsuperscript{26} \textit{See e.g.}, \textit{GANS & SHAPIRO, supra} note\textsuperscript{____} at 14 (Gans stating that the fundamental right that the free exercise guarantee protects is a personal one grounded in human dignity).
\textsuperscript{27} \textit{See e.g.}, Meese & Oman, \textit{supra} note\textsuperscript{____} at 299 (it is a brute social fact that people practice religion collectively thus to protect religion only with the realm of conscience or individual action would do great violence to lived religion). \textit{See also}, Ronald Osborn, \textit{The Great Subversion: The Scandalous Origins of Human Rights, THE 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).
\textsuperscript{28} \textit{See e.g.}, Conestoga Wood Specialties Corp. v. Sec’y of HHS, 724 F.3d, at 385 (offering the conclusory contention that Conestoga, as a “secular, for-profit corporation,” lacks RFRA protection, because general business corporations do not, \textit{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). \textit{See also}, Gilardi v. U. S. Dept. Health & Hum. Svs., 2013 WL 5854246 *5-6 (D.C. Cir. 2013) (ruling that “[w]hen it comes to corporate entities, only religious organizations are accorded protection.”). \textit{See also}, Garrett, \textit{supra} note\textsuperscript{____} 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.
\textsuperscript{29} Lupu & Tuttle, \textit{supra} note\textsuperscript{____} 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. \textit{Id} at 4.
\textsuperscript{30} \textit{Id}. at 6.
\textsuperscript{31} \textit{See generally}, Hutchison, \textit{Metaphysical Univocity, supra} note\textsuperscript{____} 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).
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.\textsuperscript{32} 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.”\textsuperscript{33} The union of religion and moneymaking poses thorny issues within the domain of religious liberty law. Solving the riddle of 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\textsuperscript{34} goes to the heart of the \textit{Hobby Lobby} case 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.\textsuperscript{35} This paper is sparked by commentators including Justices of the Supreme Court\textsuperscript{36} and the Secretary of the Department of Health and Human Services,\textsuperscript{37} 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 emphasizes on the “legal separateness” of the corporate form as a dispositive attribute, Part II critiques this approach by evaluating

\begin{itemize}
  \item \textsuperscript{32} \textit{Rienzi}, \textit{supra} note___ at 60.
  \item \textit{Id}.
  \item \textit{GANS & SHAPIRO, supra note___} at 13-41 (Chapter 2 of their book examines the claim at the heart of \textit{Hobby Lobby}: Do corporation have a right to exercise religion?).
  \item \textit{See e.g., Hobby Lobby, 134 S. Ct. at 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 \textit{Gallagher v. Crown Kosher Super Market of Mass., Inc.}, 366 U. S. 617 (1961)).
  \item \textit{See e.g. id.} (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).
  \item \textit{Hobby Lobby, 134 S. Ct. at 2769} (citing Brief for HHS in No. 13–354, at 17; Reply Brief in No. 13–354, at 7–8 wherein the HHS concedes that a nonprofit corporation can be a “person” within the meaning of RFRA).
\end{itemize}
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 persons, or corporations. Cognizant of the fact that RFRA protection is not absolute, this article is not really about who ought to prevail in Hobby Lobby. Instead, while constitutional parameters occupy a prominent place in what follows, 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, without relying fully on the Dictionary Act to sort the relevant issues out. Contrary to Gans’s analysis, this essay 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.

I. GANS’S THESIS

Gans’s exposition originates with an examination of two questions: (A) “Do corporations have the same religious freedom rights under the First Amendment as individuals do?” and (B) “Does the mandate in the Affordable Care Act that requires for-profit corporations to provide contraceptive coverage—although it makes an exception for some religious institutions—violate both the First Amendment and also the Religious Freedom Restoration Act . . .?” This interrogation was followed by other enquiries regarding whether corporations can exercise or have the right to exercise a religion as well as an investigation of the scope of corporate constitutional and statutory rights. Later Gans’s explains and critiques the oral arguments by the parties and evaluates the implications of the Court’s decision in Hobby Lobby.

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.’” Gans intuits that during the Founding era, corporations stood on an entirely different footing than natural persons. Prompted by Justice

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38 Meese & Oman, supra note___ at 273.
39 GANS & SHAPIRO, supra note___ at 7 (Gans).
40 Id.
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,” 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 or incidentally.\footnote{id. at 8.} 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,\footnote{see e.g., Buccola, supra note 3 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 8 (Gans).} a view that lays the groundwork for substantial corporate regulation by the government.\footnote{Id. at 8.} His opposition to religious liberty rights for for-profit corporations is tightly attached to the belief that the Framers agreed to root the free exercise right in fundamentally human attributes—reason, conviction, and conscience—which are inapplicable to the corporate form.\footnote{Id. at 14.} Gans asserts that at the time of 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.”\footnote{Id. at 8.}

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.\footnote{Id. at 9.} Corporations retain constitutional rights to enter into contracts, and, in addition, can only be proceeded against under due process of law.\footnote{Id.} Corporations also retain rights under the Free Speech Clause.\footnote{Id.} 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.” Gans explains the inapplicability of the Fifth Amendment’s Self-Incrimination Clause to business corporations on grounds that this clause represents an explicit right of a natural person that protects the realm of human thought and expressions. Echoing the Obama administration’s contentions and reflecting the weight of scholarly opinion, Gans insists that for-profit corporations cannot exercise religion because they lack human attributes. 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 and (2) his persistent failure to note that when people get together in corporate form to establish churches, synagogues and mosque, 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 that Chief Justice Roberts (during oral arguments) indicated that he 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. Hence, the procurement of Justice Roberts’ option would extinguish employee access to contraceptives and enable “secular, for-profit corporations . . . to impose their religious beliefs on their employees.” Targeting RFRA, Gans states that this statute was designed to restore the balanced jurisprudence that characterized free exercise law from 1963 (Sherbert v. Verner) until 1990 (Employment Division v. Smith). Rather than elaborate on this contention, however, Gans opines that a Supreme Court decision favoring the employers in Hobby Lobby would

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49 Id.
50 Id.
53 GANS & SHAPIRO, supra note ___ at 38 (Gans).
54 Id. at 47.
55 Id. at 48.
indicate that the “rights of employees don’t count” thus facilitating extensive efforts by corporate employers to destroy rights otherwise found within the ACA.  

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. Second, Gans was disturbed because the Court determined that a secular for-profit corporation is entitled to a religious exemption from general business regulation that would otherwise protect employee access rights. Third, the *Hobby Lobby* ruling allows corporate rights to trump employee rights thus opening the floodgates to a host of new claims for religious exemptions under RFRA. Fourth, he contests Justice Alito’s reasoning. Specifically, Gans found the Court’s acceptance of the notion that a corporation is merely an organization used by natural persons to achieve desired ends—and therefore the firm must be protected in order to defend the liberty of humans who own and control the companies—highly objectionable because it 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. This is so because the Court did not simply restore pre-*Smith* free-exercise law but fundamentally altered it. Fifth, citing a number of cases, 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.

Reflecting his intuition that the corporate form is decisive, at its core, Gans’s submission is triggered by alarm that artificial entities would become all powerful. On his account, the Court’s rulings in *Citizens United*, *Hobby Lobby* and other cases jettisoned crucial 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 People.’ Thus fathomed, the extension of rights to

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58 *Gans & Shapiro*, supra note___ at 50-51 (Gans).
59 *Id.* at 56-57.
60 *Id.* at 57.
61 *Id.* at 57 & 64.
62 *Id.* at 57.
63 *Id.* at 57-58.
64 *Id.* at 67 (citing *Citizens United v. FEC* [campaign finance], and *Sorell v. IMS Health Inc.* [making it easier for corporations to challenge regulations of advertising and other forms of commercial speech]).
65 *Id.*
66 *Id.* at 72.
67 *Id.*
corporations is a ruinous development for the nation, 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 \textit{Citizens United} held that corporations may use special privileges that they alone possess to spend unlimited amounts of money to elect candidates to do their bidding, and by reiterating the claim that \textit{Hobby Lobby} gives owners of closely held firms the power to impose their religious beliefs on their employees by denying workers important federal rights. Finally, Gans deduces that the Roberts Court is committed to rewriting the basic rules of our system of government in order to advance corporate dominance, a development that facilitates the transmutation of corporations into instruments of discrimination without any logical stopping point.

\section{Corporate Rights and Corporate “Separateness” in the Dock?}

\subsection{Introduction}

Gans rightly notes that the \textit{Hobby Lobby} case generates numerous issues including whether corporations have either Article III or third-party standing. 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, any comprehensive examination of standing implies that the corporate rights debate pivots largely on the decisiveness of the corporate form itself: Whether or not corporate “separateness,” separation of ownership and control, limited liability and profit-maximization are attributes that ought to categorically inform the corporate rights debate, the

\begin{itemize}
\item \textit{Id.} at 72.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 27-28.
\item For a comprehensive discussion of third-party standing, see Garrett, \textit{supra} note \text{___} at 147-153. 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 rights, (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.” \textit{Id.} at 147-48 (citations omitted).
\item Blair & Pollman, \textit{supra} note \text{___} 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). \textit{But see}, Meese & Oman, \textit{supra} note \text{___} at 287-288 (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.’”).
\end{itemize}
novel question before the *Hobby Lobby* Court was whether business corporations like Conestoga Wood, Hobby Lobby and Mardel have Free Exercise rights protectable under either the Constitution or RFRA. 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. 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 definition of persons, which includes corporations, companies, associations, partnerships as well as individuals. The Court further observed that it had previously entertained free-exercise claims brought by nonprofit corporations. 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. Problems arise 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.

The *Hobby Lobby* decision in combination with the Court’s previous decisions in *Citizens United*, which validated the First Amendment rights of corporate entities despite vigorous opposition, and *Hosanna Tabor*, which exempted an ecclesiastical corporation from a generally applicable statute, has spurred numerous questions regarding the constitutional and statutory rights of corporations and other business entities. Provoked 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.” Sparked by the unremarkable observation that there is a distinction between natural and artificial persons, this contention encapsulates Justice Stevens’ principle claim in *Citizens

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75 *Hobby Lobby*, 134 S. Ct. at 2769.
76 *Id.* at 2769-72.
77 Buccola, *supra* note ___ at 2-4.
78 558 U. S. 466 (2010).
81 *Id.* at 707 (finding that a ministerial exception in this case thus thwarting the plaintiff’s claim of discrimination).
82 See e.g., Buccola, *supra* note ___ at 2-3 (observing that a number of cases have reinvigorated a century-old academic debate about the nature of the firm and the attribution of rights to corporations including the source as well as the content and limits of such rights).
that the corporate form is ripe for both regulation and restriction within the meaning of
the Constitution. 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. 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.

Building on this perception, one that reflects a mounting political movement against
corporate personhood, as well as the current spiritus mundi exposed by the nation’s
capitulation to ambitious egalitarianism, 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
such exemptions because they do not believe in the exempted practice.” Whether or not
burdens, can prevent corporations from lodging free exercise claims, the Hobby Lobby decision
has launched an ever-widening gyre mainly designed to vitiate the eligibility of for-profit
corporation for exemptions from generally applicable law. Stressing the notion of corporate
“separateness” which means, among other things, that shareholders are not held liable for the
debts of the corporation, opponents of this decision invoke the menacing specter of
anthropomorphism insisting that, although both the Constitution and RFRA recognize the
religious rights of natural persons, the inability of corporations to pray or physically engage in
worship prevents such entities from successfully pursuing exemptions within the meaning of

85 Id. at 394 (Stevens, J., concurring in part and dissenting in part).
86 Hutchison, Ampersand, Tornillo and Citizens United, supra note at 636.
87 Greenfield, supra note at 311.
88 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 hyperpluralism with ambitious egalitarianism).
89 Gedicks & Tassell, supra note at 11-18 (arguing that at 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).
90 Greenfield, supra note at 314.
RFRA. Although, the logic of this claim could apply equally to churches, synagogues and mosques since 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 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, such concessions correlate with the fact that religion and the nation’s history have been closely intertwined. Moreover within the context of the Free Exercise Clause, the adjudicative record before the passage of RFRA indicates that the ability 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 or not such exemptions were granted. Despite such history, spanning several decades, the possible application of religious exemptions to for-profit corporations continues to generate a barrage of scholarship. Gans’s particular contribution to the literature is examined in Part IV; however, before doing so, it is useful to (A) provide background on the basic principles of corporations, (B) place corporate rights analysis within the context of entrepreneurial choice, (C) examine corporate rights within the context of standing

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91 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.


92 Garfield, supra note ___ at 2 (claiming that the Obama administration has exempted core religious institutions such as churches, synagogues and mosques form 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).

93 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).

94 Rienzi, supra note ___ at 59.

95 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.
and the distinction, if any, between organizations and associations, and (D) 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.”

Consequently, the Supreme Court has repeatedly held that for-profit corporations are constitutional “persons.” Similarly, the “Dictionary Act,” “which defines terms appearing in the U. S. Code provides that, ‘unless the context indicates otherwise,’ the term “person” includes corporations, partnerships, and other entities, ‘as well as individuals’ without regard to whether such firms or individuals are engaged in profit seeking activities.”

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. The administration’s approach would elevate the dispositive force of corporate personhood. The government’s approach is grounded in the richly historic notion that the basic principles of corporate law and corporate personhood, mandate and make manifest an ontological division between corporations and other business enterprises or nonprofit entities because for-profit corporations enjoy an existence that is not necessarily coterminous with their shareholders.

Undeniably “[c]orporate personhood itself evolved in the late nineteenth century and in the early twentieth century as a complex and powerful legal concept.” Consistent with the evolutionary nature of the corporate personhood doctrine, 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. This development reflects observations

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97 Meese & Oman, supra note ___ at 275 (citing a number of cases).
98 Id. at 276.
99 Id. (citing Law Professors’ Brief, at 2-3).
100 Garrett, supra note ___ at 109.
101 See e.g., JAMES D. COX AND 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).
that are more than 80 years old.\textsuperscript{103} 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.\textsuperscript{104} Berle and Means’ 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.\textsuperscript{105} 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.\textsuperscript{106}

Whether or not corporate identity premised on corporate “separateness” is of limited relevance with respect an entity’s ability to engage in free exercise,\textsuperscript{107} it is worth noticing that the corporate form has a long history with antecedents dating back several centuries.\textsuperscript{108} Coextensive with the emergence of chartered joint stock companies during the seventeenth and eighteenth centuries, elements of the business corporation developed including the transferability of shares, and limited liability.\textsuperscript{109} The record suggests that until “a few centuries ago, the privately owned, for-profit business corporation did not exist”\textsuperscript{110} because before “the beginning of the nineteenth century, most business and commerce was conducted by proprietors and partnerships.”\textsuperscript{111} 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,

\textsuperscript{103} \textsc{Stephen M. Bainbridge}, \textit{Corporation Law and Economics} 8-10 (2002) [hereinafter, \textsc{Bainbridge, Corporation Law and Economics}].

\textsuperscript{104} \textit{Id.} at 10.

\textsuperscript{105} David Franz, \textit{Pillar, Ledger, and Mission: Ontologies of the American Corporation}, \textit{The Hedgehog Rev.}, 7, 8-9 (Summer 2009).

\textsuperscript{106} See e.g., Alan Trachtenberg, \textit{Images, Inc.: Visual Domains of the Corporation}, \textit{The Hedgehog Review} 19, 19 (2009) (quoting \textsc{Walter Lippman}, \textit{An Inquiry into the Principles of the Good Society} 13 (1943)).

\textsuperscript{107} See generally, Lupu & Tuttle, \textit{supra} note ___ at 1-40.

\textsuperscript{108} Pollman, \textit{Corporate Law and Theory}, \textit{supra} note ___ at 5.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textsc{Robert Charles Clark}, \textit{Corporate Law} 1 (1986) (footnote omitted).

\textsuperscript{111} \textit{Id.}
and of suing and being sued.” History confirms that corporations could be ecclesiastical in nature or public, originating in counties, cities and towns or private firms engaged in for-profit activity. Professor Garrett, for example, rightly notes that the underlying legal status of the corporation and its interest is a function of state law. “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.” 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. 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. Emerging from this history and regardless of veracity of this analysis, the idea that a corporation may exercise constitutional rights is nothing new. 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.

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. Law embodies beliefs about what is legitimate and beliefs influence decision making behavior. Building something is arguably a willful act of symbolic import, sometimes intended, sometimes not. Building high-rise structures, human settlements or corporations demands the capability to bring such vehicles into being and sustain

112 Pollman, Corporate Law and Theory, supra note __ at 5 (citing STEWART KYD, TREATISE OF THE LAW OF CORPORATIONS, Vol. I at 2-4, 7, 10, 13 (1793)).
113 Id.
114 Garrett, supra note ___ at 105.
115 Id.
116 Id.
117 Id. But see Meese & Oman, supra note ___ at 286 (showing that limited liability can be an attribute of sole proprietorships as a result of bargaining).
118 Garrett, supra note ___ at 110.
119 See infra Part II D.
121 Id.
122 Phillip Bess, Building on Truth, in FIRST THINGS, January 2015 at 47, 47.
them over time, 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. Beyond occupying the contestable domain of corporate social responsibility advocacy and its corresponding social activism, the question of moral authority inflames the debate regarding the First Amendment and free exercise rights, of corporations or other for-profit vehicles. In our contemporary epoch, nowhere is the legitimate authority of firms more in doubt than in the domain of corporate-rights adjudication. This debate is further muddled in virtue of the fact that the scholarly literature identifies three conflicting approaches for evaluating for-profit corporations.

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. This current wrangle advances questions “about the attribution of rights to corporations including the source, content, and limits of such rights.” 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” and because the Justices have looked to several different theories of the firm that yield predictably unpredictable judgments regarding the existence of corporate rights. Correspondingly, the Court has refused to proffer a general theory of corporate constitutional rights. Nor have the Justices engaged in a sustained effort to

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123 Id.
124 Id. at 48.
125 See e.g., Michele Benedetto Neitz, *Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 64 SMU L. REV., 243-244 (2015) (asserting that after *Hobby Lobby* corporations can be moral persons that do not need to maximize shareholder wealth).
126 Buccola, *supra* note at 9 (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).
127 Id. at 2-3.
128 Id. at 3.
129 Id.
130 Id.
131 Garrett, *supra* note at 98.
develop a coherent or comprehensible test for ascertaining the rights that corporations hold.132 Likewise the Court has abstained from defining what a corporation or organization is as a prelude to building a cohesive theory of corporate rights adjudication.133 As a consequence scholars have attempted to fill this void by debating for over a century on how best to define corporate rights.134

Countering this jurisprudential void, commentators repeatedly advert to the observation that the text of the Constitution fails to mention corporations135 or alternatively, as more fully developed in subsection D, place renewed emphasis on the notion of corporate “separateness.” 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. 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.136 It 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.137

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 comprehensible corporate personhood doctrine amounts to more than an exercise in incoherence.138 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.”¹³⁹ 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴²

As more fully explained in Part III the Court advances this entrepreneurial-choice-proposition by ascribing rights to corporations so as not to bias decisions about either the scope or mode of productive integration chosen by the firm.¹⁴³ 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.¹⁴⁴ Reflecting Alchian and Demsetz’s rich insights, the firm (whatever its ultimate form), size (the degree of integration) or its legal type (the mode of integration) is a response to the benefit of team production and the desire to drive costs lower.¹⁴⁵ 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

¹³⁹ Buccola, supra note ____ at 6.
¹⁴⁰ Id. at 17. See also, Butler, supra note ____ at 104 (showing that a sole proprietorship, partnership or corporation is equally conceivable).
¹⁴¹ Id. at 14.
¹⁴² Id. at 15 (offering an efficiency justification in order to advance the theory of organizational neutrality as a decisional principle for determining corporate rights).
¹⁴³ Id. at 19-27.
¹⁴⁴ Id. at 17.
¹⁴⁵ Id. at 16-17.
that would not have been possible without the development and empirical verification of the Efficient Capital Markets Hypothesis.\textsuperscript{146} Originating out of a customized “nexus of contracts” that is arranged to advance firm goals and to restrain the behavior of participants,\textsuperscript{147} 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.\textsuperscript{148} The emergence of customized corporations premised largely on Coasean economics and related insights arising from the nature of the firm\textsuperscript{149} 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.\textsuperscript{150} Though Berle and Means’ thesis sustains one of the nation’s most powerful tropes—the possibility that large and oppressive corporations, unrestrained by shareholders, run roughshod over both the nation’s and the individual’s interests—classical economics, in stark contrast, assumes that firms frequently unite ownership and control, thereby concentrating decision-making authority and economic consequence in the same hands.\textsuperscript{151} Unification challenges the Berle and Means’ 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.\textsuperscript{152}

But before proceeding, it is worth noting that state law (with regard to for-profit firms) is designed to encourage investment\textsuperscript{153} and establishes the essential default rules that help to shape a corporation. Although a firm’s separate legal identity develops out of specified default rules,\textsuperscript{154} these rules are frequently altered in combination with the goals, objectives, and beliefs of private actors who shape the entity within the confines of the nexus of contracts paradigm. The fusion of modified default rules and corresponding goals and objectives of the entrepreneurial group has

\textsuperscript{146} Butler, \textit{supra} note\_ at 106.
\textsuperscript{147} \textit{Id.} at 105.
\textsuperscript{148} See generally \textit{id.} at 99-103.
\textsuperscript{150} Butler, \textit{supra} note\_ at 101 (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).
\textsuperscript{151} See e.g., Meese & Oman, \textit{supra} note\_ at 280.
\textsuperscript{152} \textit{Id.} at 280-81.
\textsuperscript{153} Pollman \textit{Corporate Law and Theory, supra} note\_ at 5-6.
\textsuperscript{154} \textit{Id.} at 5.
the power to create an officially separate legal personality that operationally takes on a variety of forms. Whatever forms this fusion takes, the firm’s separate legal personality reflects a plethora of decisions that answer salient questions, which include what type of business to operate, what is the most operationally efficient employment structure, and what is the optimal capital structure and governance mechanisms as the incorporators proceed to build something of value.

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, a process that may give rise to corporations that are profoundly different in operation than the delineation that surfaces from Berle and Means’ singular focus on the separation of ownership and control that characterizes large publicly-held firms. 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. The absence of operational separation is harmonious 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, a move that mimics a sole proprietorship or a partnership.

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. 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 in order to exercise their religion. 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, which holds many scholars captive. 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

155 Hutchison, Choice, Progressive Values and Corporate Law, supra note___ at 448.
156 Meese & Oman, supra note___ at 280.
157 Id. 274.
158 Id.
159 Id. at 279-80.
constitutional or statutory rights of the firm. It follows that doubts arise regarding the contention that a corporation automatically forfeits free exercise protection when it organizes itself in this form, as opposed to organizing itself as a sole proprietorship or partnership.161

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,162 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.163 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. But even if Buccola’s insights are correct, in order 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 in the allegedly dispositive distinction between organizations and associations. The next subsection examines this weighty effort that is calibrated to resurrect Berle and Means’ thesis as impassable impediment to corporate rights.

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;

161 See e. g., Hobby Lobby 134 S. Ct., at 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).
162 Buccola, supra note ___ at 3. See also, Garrett, supra note ___ at 98 (noting that the Supreme Court has not offered a general theory defining the constitutional rights of corporations).
163 Id. at 17.
Surely the Second Coming is at hand\textsuperscript{164}

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’ analysis with respect to many corporations, the subject of corporate rights remains vast. Responding to the vastness, a number of contemporary scholars\textsuperscript{165} and Professor Garrett, in particular, stress the separation of the firm and its shareholders as a dispositive attribute for purposes of corporate rights adjudication.\textsuperscript{166} 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\textsuperscript{167} since Berle and Means. 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 or not 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,\textsuperscript{168} 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 different types of entities.\textsuperscript{169} “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 [in order to] decide if entities have asserted a sufficient injury creating standing to litigate the right.”\textsuperscript{170} At first blush, avoidance of

\textsuperscript{165}See e.g., Law Professors’ Brief, supra note\textsuperscript{___} at 1-13.
\textsuperscript{166}See e.g., Garrett, supra note\textsuperscript{___} at 110-136.
\textsuperscript{167}For an example of other scholarly efforts see Law Professors’ Brief, supra note\textsuperscript{___} at 1-13.
\textsuperscript{168}Law Professors’ Brief, supra note\textsuperscript{___} 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 that is separate and distinct from their shareholders).
\textsuperscript{169}Garrett, supra note\textsuperscript{___} at 110.
\textsuperscript{170}Id. at 110-111. 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
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-\textit{Hobby Lobby} intuition, which disputes the relevance of corporate identity within the domain of religious exemptions.\footnote{Lupu & Tuttle, \textit{supra} note\textsubscript{116} at 6 (arguing that after \textit{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).}

Garrett catalogues when an organization can litigate an injury to the entity itself, which is viewed as a threshold question of Article III standing.\footnote{Garrett, \textit{supra} note\textsubscript{115} at 136-156. 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. \textit{Id} at 137-147. Additionally, he discusses third-party standing grounded in the Supreme Court’s prudential or non-Article III third-party standing doctrine. \textit{Id.} at 147-156.} 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.”\footnote{Law Professors’ Brief, \textit{supra} note\textsubscript{5} 4.} 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.\footnote{Garrett, \textit{supra} note\textsubscript{115} at 136.} Though Article III standing may supply a useful scaffold on which to explicate whether an organization or association can litigate constitutional rights,\footnote{\textit{Id.} at 136-156.} the Supreme Court gingerly avoided the question whether corporation are “persons” with standing to assert constitutional rights in \textit{Citizens United}.\footnote{\textit{Id.} at 96.} In \textit{Hobby Lobby} the Court avoided the issue entirely by relying on its understanding of statutory rights under RFRA.\footnote{\textit{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-\textit{Hobby Lobby} lower court rulings concerning challenges to the ACA’s contraception mandate. \textit{Id.} at 140.}

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.\footnote{\textit{Id.} at 137-139.} 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, whereas for-profit corporations cannot represent the interests of their members because of the centrality of their legal structure. Hence, Garrett, among others, propounds the contention that such organizations lack the ability to litigate injury to others in contradistinction with entities such as a sole proprietorship, because a sole proprietorship is “nothing like a corporation; it is unincorporated, run by a single person, and is not in any way separate from that single owner.” 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. 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 organizational standing analysis is quite different from associational analysis because when an organization sues to assert its own interests, such interests are necessarily distinct from those of its shareholders or owners. Thus appreciated, “the Article III 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.” 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.” 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 conflate associational and

179 Id. at 138.
180 Id. (stating that “[a]s 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.”).
181 Law Professors’ Brief, supra note___ 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 extinguishing the right of a corporation to sue to assert rights of their shareholders).
182 Garrett, supra note___ at 138.
183 Id. at 143.
184 Law Professors’ Brief, supra note___ at 13 & 13-18.
185 Garrett, supra note___ at 139. But see Meese & Oman, supra note___ at 273-74 (disputing this claim).
186 Id. at 139.
187 Id.
organizational standing and assume that corporations and individuals, who constitute the firm, have common “beliefs” or financial interests. On this view, a non-profit corporation (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.”

There is much to untangle in such claims because they are not constitutive of an auto-legitimating narrative. 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” and disregards the fundamental feature of state corporate law: separation of ownership from the entity. 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. 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-contracts-entrepreneurial-choice setting beyond the statements made by the HHS, even if the prevailing default rule for publicly held firms requires management to

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188 Id. at 145.
189 Id.
190 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).
191 Garrett, supra note ___ at 145.
192 Id.
193 Id. at 146.
194 See e.g., Hobby Lobby, 134 S. Ct., at 2770 (stating that 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 (footnote omitted)).
increase the value of shareholder wealth?195 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,196 an observation, which 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,197 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 of the possibility that the corporate form is of limited relevance for purposes of assessing free exercise rights.198

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.199 Further, to the extent that the notion of profit in combination with legal “separateness” sustains Garrett’s

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195 BAINBRIDGE, CORPORATION LAW AND ECONOMICS, supra note ___ at 28-29 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)).
196 *Hobby Lobby*, 134 S. Ct. 2770.
197 See also, HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS 11 (2nd ed., 2006) and 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 value of the resources utilized).
198 Lupu & Tuttle, supra note ___ 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).
199 Rienzi, supra note ____ at 82 (showing that for “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 ventures, entity joint ventures, or even loosely affiliated individuals coming together in a temporary constellation for a particular project).
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. This prospect destabilizes Professor Garrett’s inclination to permit nonprofits to bring free exercise claims because they are, or resemble associations, while denying such rights to for-profit corporations because “legal separateness is the point of creating a [for-profit] corporation.” Additional destabilizing evidence arrives by observing that, although the federal government statutorily distinguishes between (tax-exempt) nonprofits and for-profit entities, 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. 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. 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

200 Economic profit is defined as the total revenues received from selling a product or service minus the total costs incurred in producing the product or service including the opportunity costs of production. BUTLER & DRAHOZAL, supra note___ 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 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. See e.g., id at 15. 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.

201 Garrett, supra note___ at 154.

202 Id. at 146.

203 Rienzi, supra note___ at 95 (quoting 26 U.S.C. § 501(c) (3)).

204 Id. at 96.

to exclusive humanism, the immanent frame and the secular age. 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, congruent with the fact that rational choice analysis implicates the fulfillment of both pecuniary and nonpecuniary wants—thus enabling actors to move beyond the maximization of self-interest and the exclusion of other objectives, (2) engaging with the notion of profit, in a robust way and applying it fairly to both the domain of unincorporated for-profit organizations and nonprofit entities, wherein the incentives for efficiency for nonprofits are not necessarily weaker than for for-profit corporations, and (3) proffering a defendable definition of what

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206 Hutchison, *Metaphysical Univocity*, supra note ___ at 40-44.
207 *Hobby Lobby*, 134 S. Ct. at 2770.
209 See e.g., BAINBRIDGE, *CORPORATION LAW AND ECONOMICS*, supra note ___ 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) and SEN supra note ___ at 4. Rationality is simply an abstraction developed as a useful model of predicting the behavior of a large number of individuals but does not necessarily purport to describe real people embedded in a real social order. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS*, supra note ___ at 23.
210 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 387-390. See also, BUTLER & DRAHOZAL, *supra* note ___ 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 value of the resources utilized).
211 See e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 9-10 (7th ed., 2007) (noting that resources gravitate toward their most valuable uses if voluntary exchange is permitted and profit opportunity is nothing more than a magnet drawing resources into an activity).
212 See also id at 422.
“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.”\(^{213}\) However, much of this claim agrees with the weight of scholarly opinion articulated by leading scholars,\(^{214}\) including Gans, and though much of Justice Ginsburg’s *Hobby Lobby* dissent promotes his analysis, the concrete evidence on the ground shows that corporations embodying shareholders’ religions are common, and pass without corporate law objections.\(^{215}\) This is so because of the nation’s impressive religious diversity and corporate law’s enormous choice-reifying flexibility.\(^{216}\) 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,\(^{217}\) to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships.”\(^{218}\) A proper contextual focus signifies that Garrett’s analysis among others\(^{219}\) indicating that nothing is more fundamental to modern corporate law than the complete separation of the owners from the legal entity\(^{220}\) or his corresponding contention that profit-maximization overwhelms other values, falls apart. 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

\(^{213}\) Garrett *supra* note ___ at 146.  
\(^{214}\) Law Professors’ Brief, *supra* note ___ at 3-5 (stating that the 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 Pennsylania, the home of Conestoga Wood).  
\(^{215}\) Meese & Oman, *supra* note ___ at 277.  
\(^{216}\) *Id.*  
\(^{217}\) *Id.*  
\(^{218}\) *Id.*  
\(^{219}\) Law Professors Brief, *supra* note ___ at 3-7 (supporting that claim that the legal form of a corporation is dispositive), *But see* Meese and Oman, *supra* note ___ at 280-81.  
\(^{220}\) Garrett, *supra* note ___ at 146.
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—a maneuver which justifies his opposition to corporate rights on grounds that such organizations (corporations) are quite different from associations—he concedes that corporate ownership can combine with the legal entity in some cases. This outcome is plausible, despite the likelihood that the separation of ownership and control is the default rule for most publicly traded corporations 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 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. 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, as the federal government declines to separate corporate owners of such firms from their businesses. Taken together, this analysis paves the way for most for-profit organizations (corporations) to not only 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. 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. The latter grouping of

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221 Garrett, supra note ___ 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”).

222 Hutchison, Choice, Progressive Values and Corporate Law, supra note ___ at 442.

223 Garrett, supra note ___ at 137-38.

224 Rienzi, supra note ___ at 97.

225 Id.

226 Garrett, supra note ___ 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 ___ 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.

227 Garrett, supra note ___ at 140.
cases appears to track with 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.””

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 including: houses of worship, organizations that assert religious identities but act in ways considerably removed from the typical functions of houses of worship and for-profit entities (corporate or otherwise) that claim religious identity. 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.

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, since 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.

III. DEVELOPING A FRAMEWORK FOR ANALYSIS

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229 Lupu & Tuttle, supra note ___ at 4-6.
230 Id. at 6.
Supplying analysis that echoes Meese and Oman’s scholarship regarding free exercise rights of corporations within the meaning of RFRA, Buccola “points to a unifying method in the Court’s apparent madness.” Buccola argues “that the great bulk of the Court’s corporate-rights jurisprudence reflects an interpretive principle that can be called “organizational neutrality.” 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 corporate form over other modes of social coordination such as partnerships, proprietorships, LLCs or nonprofit firms. 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.” 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.” After Buccola attends to a number of illustrations, it is possible to deduce that while a natural person has a right to exercise 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. 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

231 Meese & Oman, supra note___ 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 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.
232 Buccola, supra note___ at 4.
233 Id.
234 Id. at 4-5.
235 Id. at 5.
236 Id.
237 Id. at 5-7.
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.238

As a consequence of this process, shareholders customarily impose their religion on corporations.239 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 corporation 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 society treats corporations as legally distinct, for some purposes, this is simply a pragmatic choice rather than a normative judgment that human concerns do not apply to such firms.240 If corporate status standing 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 LLC’s, LLP’s, partnerships or sole proprietorships. An appropriate understanding of incentives and human behavior indicate that an overemphasis on corporate separateness as an adjudicative tool operates contrary to the principle of organizational neutrality. Since the legal separateness of the corporation is largely pragmatic rather than normative, corporations are just the means by which groups of people pursue common purposes signifying that the acknowledgment of the exercise of religion by for-profit corporations is not a categorical mistake.241 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.242 Organizational neutrality in the context of entrepreneurial choice divests the concept of corporate personhood of its talismanic force. 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.

IV. ANALYSIS

238 Meese & Oman, supra note___ at 277-279.
239 Id. at 279-80.
240 Id. at 300.
241 Id.
242 Pollman, Corporate Law and Theory, supra note___ at 16.
A. Prologue

Recall that Gans commences his analysis by agreeing that corporations have some constitutional and statutory rights. Questions surface with regard to 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’s stresses (1) the supposedly dispositive understanding of corporations enclosed by 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 and (2) the presumption that corporate separateness and the limited liability status of for-profit corporations disqualifies such firms from being eligible for an exemption. 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’s 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*

\[243\text{ GANS & SHAPIRO, supra note }\_\_\text{ at 17 (Gans).}\
\[244\text{ Id. at 22.}\]
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.” 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. Textual absence or presence may likewise infect any analysis of nonprofits as well. Language or its absence is part of the lens through which we see the world, a world that cannot be seen without distortion despite Jean Jacques Rousseau’s aspirations to the contrary. As his preferred gap-filler for purposes of interpreting the rights of corporations, Gans relies largely on history to fortify his contention that corporate rights should be viewed mainly as an unjustifiable anomaly. Offering a form of metaphysical idealism that resembles Berkeley’s romanticized view of the text Gans submits that despite the fact that corporations 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. What is missing as Jacques Derrida might point out, is not simply the text but context wherein everything (including linguistic convention) requires interpretation. 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.” Instead, corporations “became primarily regulated by regimes outside of corporate law.” As a consequence, for-profit corporations exhibit a variety of structures that are often at odds with Berle and Means’ conception. Though Gans concedes that

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246 *See e.g.*, *FCC v. AT & T*, 562 U.S. 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).

247 *See e.g.*, *James K. A. Smith, supra* note ___ at 35-37 (discussing Derrida and Rousseau).

248 *Id.* at 35.

249 *Gans & Shapiro, supra* note ___ at 7 (Gans).

250 *Id.* at 42-44.

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

252 *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).
corporations have some important constitutional rights, 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, and one that admittedly requires interpretation, he presents readers with unexplained puzzles. For instance, he observes that an 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. Gans, offering sparse analysis in comparison with Professor Garrett, cannot explain why this difference in treatment exist other than the invocation of anthropomorphic qualities such as conscience and human dignity, attributes that are unavailable for corporations. Gans falls back on a familiar refrain: when an owner of a firm acts on behalf of a corporation, she is not acting in an individual capacity and is accordingly disentitled to invoke individual rights. 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 human dignity (they do not) but because of the fundamental role speech plays in a democracy. Concurrently, he fails to explain why corporations possess constitutional rights within the realm of property and commerce when one could likewise argue that the owners should not be entitled to appeal to due process or the

253 GANS & SHAPIRO, supra note ___ at 9 (Gans).
254 Meese & Oman, supra note ___ at 287.
255 GANS & SHAPIRO, supra note ___ at 21 (Gans).
256 See generally, Garrett, supra note ___ at 138-147 (asserting that the legal structure of a corporation prevents for-profit corporations from being treated like associations or nonprofit entities).
257 GANS & SHAPIRO, supra note ___ at 21 (Gans).
258 Id.
259 Id. at 9
260 Id.
Fourteenth Amendment’s provision against unlawful discrimination because they are not natural persons, an approach that appears to have influential legs in the Congress.\footnote{261}{See e.g., Greenfield, supra note\textsuperscript{___} 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).}

After largely expending the explanatory force of human dignity, Gans’s 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, which cannot. 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.’”\footnote{262}{GANS & SHAPIRO, supra note\textsuperscript{___} at 22 (Gans).} He stipulates (despite evidence to the contrary)\footnote{263}{See e.g., Meese & Oman supra note\textsuperscript{___} at 286-87 (explaining why limited liability status fails to justify stripping corporations of their religious personhood).} that since corporations benefit from limited liability, which he asserts is unavailable to natural persons, and since 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.\footnote{264}{GANS & SHAPIRO, supra note\textsuperscript{___} at 22-23 (Gans).} 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.\footnote{265}{Meese & Oman, supra note\textsuperscript{___} 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).} 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. Lastly, Gans fails to notice that, although Justice Breyer and Justice Kagan agree that the \textit{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.\footnote{266}{\textit{Hobby Lobby}, 134 S. Ct. 2806 (Breyer, J. and Kagan J., dissenting).} Instead the Justices declined to agree with Justice Ginsburg’s contention that the plaintiffs’ for-profit corporate status deprives them of RFRA personhood.

On the other hand, Buccola’s approach in combination with the scholarship of Rienzi, and Meese & Oman, offers plausible reasons why most corporations, as closely held entities, look
very much like sole proprietorships, associations and partnerships. If this is true and quite apart from an inspection of the specific organizational structure in 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 accordingly ascribe corporate rights such that entrepreneurs would neither be rewarded nor punished for selecting the corporate form over other modes of social coordination. Risking 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.” Thus realized, organizational neutrality could be seen as both a positive and normative standard that neither biases entrepreneurs toward or away from integration nor can the artificial entities they create receive a subsidy at the expense of natural persons. 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. This progression permits entrepreneurs to decide which business form is optimal and allows them 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. 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.

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

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267 Buccola, supra note___ at 4-5.
268 Id. at 5.
269 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”).
270 Id.
271 Rienzi, supra note___ at 97-98.
charters empower the corporation to pursue any lawful business or purpose and state law provides this default option.272 The incorporators may adopt a charter reflecting shareholder views about what business the firm conducts, how to conduct it, limiting 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.273 Such provisions could impose the views of founding shareholders and perhaps even reduce profits.274 Alternatively, shareholders may elect directors who wish to amend the charter or alternatively, they can accomplish the same objective by amending the bylaws on their own initiative.275 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 in order to implement their views. They can enter 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.276 Although religiously motivated decision making within firms operated by manager-shareholders may sometimes increase profits,277 it is likely that the maximization of profits as an objective is waivable.278 This being so despite the fact that the case law 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.279 This intuition tracks with the fact that corporate law even empowers shareholders by a unanimous vote to ratify alleged corporate waste.280 “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.”281 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 a

272 Meese & Oman, supra note ___ at 281-282.
273 Id. at 282 (focusing much of their analysis and attention on Delaware law).
274 Id.
275 Id. at 282-83.
276 Id. at 283-84.
277 Id. at 284.
278 Id.
279 Id.
280 Id. at 284-85.
281 Id.
closely held corporation.”\textsuperscript{282} 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.\textsuperscript{283} 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 members, who, like shareholders, enjoy limited liability and some even engage in commercial activity.\textsuperscript{284}

Conclusions, surfacing within the domain of closely held firms appropriately re-emphasize this question: should the \textit{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 \textit{Citizens United} Court because some commentators asserted that for-profit corporations, operating under a cloud of disfavor, are bereft of constitutional rights,\textsuperscript{285} the onus remains on opponents to offer credible reasons for the non-existence of corporate constitutional or statutory rights. I next turn to the specific plaintiff firms and their organizational structure as part of my claim that much is missing from Gans’s analysis.

\textbf{2. Applying the Framework to actual \textit{Hobby Lobby} Plaintiffs.}

This subsection applies the above-referenced framework to the actual governance arrangements deployed by the three \textit{Hobby Lobby} plaintiff-firms in order to ascertain whether the corporations ought to retain free exercise rights. I set forth each corporation’s governance arrangements in turn.

The Hahn family, consisting of Norman and Elizabeth Hahn and their three sons 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.\textsuperscript{286} Their

\begin{itemize}
  \item \textsuperscript{282} \textit{Id.}
  \item \textsuperscript{283} \textit{Id.}
  \item \textsuperscript{284} \textit{Id.}
  \item \textsuperscript{285} \textit{See e.g., Citizens United v. Fed. Election Comm’n}, 558 U. S. at 394-395 & 427 (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{286} \textit{Hobby Lobby}, 134 S. Ct. at 2764.
\end{itemize}
church, part of a Christian denomination opposing abortion, believes that a fetus in its earliest stages shares humanity with those who conceived it.\textsuperscript{287} Organized under Pennsylvania law the Hahns exercise sole ownership of the business and control its board.\textsuperscript{288} 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.\textsuperscript{289} “As explained in Conestoga’s board-adopted ‘Statement on the Sanctity of Human Life,’ the Hahns believe that human life begins at conception.”\textsuperscript{290} 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 contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives.\textsuperscript{291}

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.\textsuperscript{292} The Hobby Lobby firm is organized as a for-profit corporation under Oklahoma law.\textsuperscript{293} The company has a very small number of shareholders and the family retains exclusive control with David and his three children serving as officers.\textsuperscript{294} Hobby Lobby’s statement of purpose commits the Greens 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.\textsuperscript{295} 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.\textsuperscript{296} Mardel is organized as a for-profit corporation under Oklahoma law with a tightly limited number of shareholders.\textsuperscript{297} With the possible exception of the fact that this firm was started by one of David Green’s sons, it appears that from both a practical and conceptual perspective, Mardel’s

\begin{footnotesize}
\begin{footnotes}
\item[287] id.
\item[288] id.
\item[289] id.
\item[290] id.
\item[291] id.
\item[292] id. at 2765.
\item[293] id.
\item[294] id.
\item[295] id. at 2766.
\item[296] id.
\item[297] id. at 2765.
\end{footnotes}
\end{footnotesize}
governance and operational arrangements mirror those of the Hobby Lobby firm operated by the Green family.

An inspection of the respective Hobby Lobby firms’ customized arrangements discloses that they reflect 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 mission 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. The various Hobby Lobby corporations, coherent with Meese and Oman’s intuition, are unique entities issuing forth consistently with the nexus-of-contracts paradigm that allows firms to emphasize values other than profit-maximization. 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 to not only 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. Moreover, the evidence on the ground does not indicate there is any clash between the religious liberty objectives of the owners and operators of the respective corporations, on one hand, and corporations as entities possessing a separate legal existence, on the other. Rather the shareholders and the respective corporations themselves represent a constellation of common beliefs and financial interests despite Garrett’s deduction to the contrary. 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, in point of fact 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 298

298 But see Garrett supra note ___ at 138 (disputing such claims).
299 Id. at 145.
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 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).300 Despite 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.301 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.302 This claim mirrors the D. C. Court of Appeals view303 and plainly echoes Justice Ginsburg’s Hobby Lobby dissenting opinion, wherein she proclaimed that there has always been a fundamental difference between secular, for-profit corporations, organized to make a business more profitable and churches and other religious bodies organized for the purpose of engaging in religious exercise.304

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

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300 GANS & SHAPIRO, supra note __ at 59 (Gans).
301 Id.
302 Id. at 59-60.
303 Gilardi v. U. S. Dept. Health & Hum. Svs., 2013 WL 5854246 *5-6 (D.C. Cir. 2013) (holding that when it comes to corporations only religious organizations are accorded protection).
304 GANS & SHAPIRO, supra note __ at 59-60 (Gans).
organized for both a religious and commercial purposes consistent with the myriad possibilities associated with entrepreneurial choice. Recall that the actual governance structure of the respective \textit{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.\footnote{Id. at 22.} Fourth, Gans’s approach appears to offer shifting contentions without providing principles that sustain his approach. Recall, he previously emphasized that corporate separateness was dispositive on the question of whether for-profit firms enjoy free exercise rights but inconsistently with that claim he is prepared to allow most religious bodies (organized as corporations replete with limited liability) to enjoy free exercise. Fifth, the relevant corporate-law question “was whether \textit{Hobby Lobby}, Mardel, and Conestoga Wood are the kinds of entities who can exercise religion within the meaning of RFRA.”\footnote{Buccola, \textit{supra} note \textsuperscript{38} at 38.} 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.”\footnote{Id.} Although Buccola correctly argues that this fact alone does not decide the case simply because not all persons are necessarily capable of exercising religion,\footnote{Id.} it is self-evidently clear 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.\footnote{Id.} “Yet lacking mind corporations lack the phenomenology of belief, hope, fear, or whatever that constitutes religious experience.”\footnote{Id.} The relevant issue becomes not whether a firm can “have religion” in some anthropomorphic sense but rather, should the religion of humans in fairness be attributed to the plaintiff firms.\footnote{Id.} This question can be answered through an analogy. To wit, since not one Supreme Court Justices offered an opinion claiming that the religion of humans who are members of religious

\footnote{Id. at 22.}
\footnote{Buccola, \textit{supra} note \textsuperscript{38} at 38.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
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.”312 Once again, organizational neutrality explains why employers’ views count.313 Buccola shows despite its clumsy language,314 the *Hobby Lobby* Court was merely trying to locate the person to be regulated, absent the corporate form the ACA would have regarded as the “employer.”315 “[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.”316 Within the corporate structure of Conestoga Wood, Hobby Lobby and Mardel, the controllers could be directors, shareholders or 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 neutrally directed the Court to consider what rights such employers would have had in an analogous but unincorporated enterprise, for example in a proprietorships.”317 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 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 employers of record, would be 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

312 *Id.* at 43.
313 *Id.*
314 *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).
315 *Id.*
316 *Id.* (footnotes omitted).
317 *Id.* at 42.
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.318 Taken as a whole, this subsection shows that Gans’s analysis as well as his understanding of corporate theory and of the pertinent ACA regulations themselves, are problematic.

D. Wrapping Up

Before the government grants a conscience-protecting exemption to a religious believer, the government may first have to establish that the person or institution in question is indeed exercising a religious belief that calls for an exemption. 319 This inquiry is highly complex, in part, because religion itself is a complicated concept.320 Complexity further arises regarding whether the one seeking an exemption falls within either the appropriate constitutional or statutory category, which 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, which 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,321 it is equally plain that the weight of scholarly opinion opposes religious liberty rights for corporate employers322 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

318 GANS & SHAPIRO, supra note__ at 59-60 (Gans).
319 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 conscience-protecting exemptions only to religious believers). But see Michael W. McConnell, The Origins and Historical Understanding of a Free Exercise of Religion, 103 HARV. L. REV. 1409-1517 (offering a defense of accommodation for religious believers).
321 Pollman, Corporate Law and Theory, supra note___ at 20.
322 Buccola, supra note___ at 36.
hallmark of the corporate form. 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, that is 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 with regard 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 essay shows that it is unlikely that the for-profit, limited liability structure of the Hobby Lobby firms disqualifies them from asserting free exercise rights despite the fact that they are legally separate from their shareholders. Nor are such customized firms, required to 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. Furthermore, the presumption that free exercise claims are purely personal and individual and thus that the exercise of religion can only characterize natural persons, 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

\[323\] 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___ at 1-13.
\[324\] Blair & Pollman, supra note___ 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).
\[325\] For a defense of the claim that religion is characteristic of natural persons, not artificial entities, see Hobby Lobby, 134 S. Ct. at 2785 (Ginsburg, J., dissenting).
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.

V. CONCLUSION

A careful examination of the shortcomings of David Gans’s analysis suggest that in order to solve the riddle of corporate religious liberties, any discussion of the *Hobby Lobby* decision should be less focused on what the correct outcome ought to be, and more animated by the recognition of 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 it is an individual, thus giving rise to a contest of rights between two individuals or groups of individuals. Impelled by answers that are derived from the following query: How, if an all, should the treatment of the *Hobby Lobby* employers free exercise claims differ assuming they were organized as for-profit sole proprietorships as opposed to 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 Ilya Shapiro illuminates, 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.”

Corporations today, unlike what was typical during the Founding epoch, do not rely on royal charters, national charters or permissions slips from elites. Instead, modern for-profit corporations exist as a nexus of contracts between various rights bearing individuals and

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326 GANS & SHAPIRO, supra note ___ at 11(Shapiro).
327 Id.
this contract is recognized by state law in order to facilitate commerce. 328 Although, a corporation is not a real person, and while some constitutional rights make little sense as applied to corporations, 329 nevertheless corporations embody an association of people—officers, directors, employees, and shareholders—who are natural born individuals. 330 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: denial of rights to a corporation denies rights to natural rights 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 as opposed to artificial persons (partnerships, LLCs or LLPs) or alternatively by a single individual (sole proprietorship). Finally, it appears that virtually every one 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 maker with regard to whether or not 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 Buccola’s organizational neutrality framework useful and therefore equally 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 employers 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.

328 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.
329 Id. at 10.
330 Id.