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PPACA and the Moral Integrity of Corporations

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I. INTRODUCTION

The Patient Protection and Affordable Care Act (PPACA) requires employers to provide contraceptive coverage to their employees at no additional cost.[1] This requirement is a subject of moral objection, and has been challenged[2] as violating the Religious Freedom Restoration Act (RFRA)[3]

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 19 (2010) (codified as amended throughout 42 U.S.C.). The PPACA requires group health plans and insurance issuers to offer certain preventative care and screenings with no cost sharing. Public Health Service Act, 42 U.S.C. § 300gg-13 (2010). The law delegates the task of enumerating the preventative care and screenings to the Health Resources and Services Administration (HRSA). *Id.* The HRSA, in turn, adopted the recommendations of the Institute of Medicine. *Women's Preventive Services Guidelines*, HEALTH RESS. AND SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited March 31, 2014); *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (February 15, 2012). This includes coverage of "[t]he full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Clinical Preventive Services for Women (Report Brief)*, INST. OF MED. 3 (July 2011), *available at* http://www.iom.edu/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf.

2. *See, e.g.* Complaint at 65, Roman Catholic Archbishop of Wash. v. Sebelius, No. CV 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013); Complaint at 27-28, Priests for Life v. Sebelius, No. CV 13-1261 (EGS), 2013 WL 6672400 (D.D.C. Dec. 19, 2013). Although the Obama administration has administered an exception for religious employers, the exception is available only to nonprofit "religious employers" as narrowly defined by I.R.C. § 6033(a)(3)(A)(i), (iii). Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39874 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147.131(a)) *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-07-02/pdf/2013-15866.pdf. The exception itself has been the subject of challenge. *See, e.g.*, Complaint at 28, Little Sisters of Poor Home for Aged, Denver v. Sebelius, 134 S.Ct. 1022 (2014) (No. 1:13CV02611) (arguing that the required act of self-certification would entangle the organization in the very behavior objected to) [hereinafter Little Sisters]. Notably, the question of whether contraceptive use is moral or ethical is outside of the scope of this article. Moreover, "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Ind. Sec. Div., 404

and Free Exercise Clause of the First Amendment.[4] This challenge has given rise to a circuit split, which is typified by the Tenth Circuit's *en banc* opinion in *Hobby Lobby Stores, Inc. v. Sebelius*,[5] and the Third Circuit's opinion in *Conestoga Wood Specialties v. Sec'y of U.S. Dep't of Health & Human Servs.*[6] Both cases turned on the analysis of whether corporations are persons capable of religious exercise for the purposes of RFRA and the Free Exercise clause of the First Amendment.[7] The court in *Hobby Lobby* ruled in favor of the corporations, finding that corporations are capable of religious beliefs.[8] The court in *Conestoga*, in contrast, ruled in favor of the government, finding that corporations are not capable of religious beliefs, and that the religious beliefs of a corporation's owners cannot pass through to the corporation.[9] These two cases have been consolidated and granted

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U.S. 707,714 (1981).

3. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2009) [hereinafter RFRA]. RFRA was enacted as a "super-statute" to bind the Federal Government. Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995). RFRA superseded the decision of *Employment Division v. Smith*, in which the Supreme Court held that the government could burden religious exercise if the law was generally applicable, despite the Free Exercise Clause of the First Amendment. Jonathon Tan, *The HHS Mandate*, 47 U. RICH. L. REV. 1301, 1338 (2012-13); *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

4. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . ." *Id.* (emphasis added).

5. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 U.S. 678 (2013) (argued March 25, 2014) [hereinafter Hobby Lobby].The Tenth Circuit opined that Hobby Lobby and Mardel (both closely held corporations) are "persons" for the purpose of the Religious Freedom Restoration Act, that the contraceptive-coverage requirement of the Affordable Care Act substantially burdens the corporations' religious practice, and that the government failed to articulate a compelling interest. *Id*. at 1136, 1141, 1143.

6. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388-389 (3d Cir. 2013) *cert. granted,* U.S. 678 (2013) (argued March 25, 2014) [hereinafter Conestoga]. The Third Circuit opined that for profit corporations cannot assert claims under either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act, and that the owners of the closely held corporation Conestoga Wood Specialties likewise could not assert these claims. *Id.*

7. Hobby Lobby, *supra* note 5, at 1126 ("The Principal questions we must resolve here include: (1) whether [the corporations] are "persons" exercising religion for purposes of RFRA . . . ."); Conestoga, *supra* note 6, at 388-89 (concluding directly after finding that the corporation could not engage in the exercise of religion, by extending this logic to likewise find that the owners of the corporation could not bring claims).

8. *Id.* at 1137, 1147.

9. Conestoga, *supra* note 6, at 388.

writ of *certiorari* to the Supreme Court of the United States.[10]

However, both courts overemphasized the applicability of religious freedom guarantees to corporations and overlooked the practical implications of the PPACA contraception mandate on the managers of corporations.[11] This article argues that the RFRA and Free Exercise Clause guarantees of religious freedom necessitate the opportunity for corporations to object to the contraception mandate, regardless of whether corporations are capable of religious exercise. Individual managers and owners of corporations are unquestionably persons capable of religious beliefs, the exercise of which can be substantially burdened by laws applicable to corporations.[12]

Part II of this article introduces the cases defining the circuit split. Part III critiques the opinions of both the Third and Tenth Circuits for analyzing the law in an overly idealistic manner that ignores practical implications of the PPACA on individual business owners. Part IV proposes that the threshold of whether a corporation is considered religious for purposes of RFRA and the Free Exercise Clause should depend on a majority vote of shares, and explains why such a threshold is sensible.

II. SCOPE, ISSUES, AND APPLICABLE LAW

While the contraception mandate has been challenged by an array of business entities,[13] this article focuses only on the questions presented by

10. *See generally* Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2013); Conestoga Wood Specialties Corp. v. Sebelius, 134 S.Ct. 678 (2013). Another case, Autocam Corp. v. Sebelius is pending petition. *Autocam Corp. v. Sebelius*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/autocam-corp-v-sebelius/ (last visited March 30, 2014).

11. *See, e.g.*, Conestoga, *supra* note 6, at 381 ("As we conclude that for profit, secular corporations cannot engage in religious exercise, we will affirm the order of the District Court."); Hobby Lobby, *supra* note 5, at 1126.

12. *See, e.g.*, Conestoga, *supra* note 6, at 385 (referring to religious exercise as an "inherently 'human' right.").

13. *See, e.g.*, Little Sisters, *supra* note 2 (nonprofit religious corporation); Legatus v. Sebelius, 901 F.Supp.2d 980 (E.D.Mich. 2012) (nonprofit religious trade group); Univ. of Notre Dame v. Sebelius, 2014 WL 687134 (N.D.Ind. 2013) (nonprofit religious university); Monaghan v. Sebelius, 931 F.Supp.2d 794 (E.D. Mich. 2013) (secular for profit corporation). Courts have distinguished the religious rights of for profit versus nonprofit corpora-

secular, for-profit, closely held corporations.[14] These corporations pose a peculiar question; certain religious and non-profit organizations, as opposed to secular for-profit ones, have been either excluded from some implications of the PPACA, or deemed protected by RFRA and the Free Exercise Clause guarantees.[15] Sole proprietorships and partnerships enjoy religious protections coextensive with that of their owners,[16] whereas corporations are distinct legal persons from their owners and managers.[17] Also, courts often distinguish closely held corporations from those that are publicly traded.[18]

Businesses have challenged the contraception mandate under RFRA and the Free Exercise Clause, both of which are of similar and substantial import.[19] Because the two authorities are so similar, they can be substantially collapsed into a single analysis.[20] The test under both authorities is that the

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tions. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012). "[T]he text of the First Amendment . . . gives special solicitude to the rights of religious organizations." *Id.* Nonetheless, as this article attempts to make clear, applicability of RFRA and the Free Exercise Clause of the First Amendment to natural persons (i.e. individuals) may render distinctions between certain entities useless for determining whether business entities can refrain from certain activities such as providing contraceptive coverage. *Id*.

14. 26 C.F.R. §1.170A-13 (2014); I.R.C. §542(a)(2). A closely held corporation is any corporation other than an S Corporation which, "[a]t any time during the last half of the taxable year[,] more than 50 percent in value of its outstanding stock is owned, directly or indirectly, by or for not more than 5 individuals." *Id.*

15. Coverage of Certain Preventative Services Under the Affordable Care Act, *supra* note 2; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, *supra* note 13.

16. *See, e.g.*, Transcript of Oral Argument Sebelius v. Hobby Lobby, Inc., No. 13-354, 15 (argued March 25, 2014) ("the government concedes that sole proprietorships and partnerships and nonprofit corporations are all protected by RFRA") [Hereinafter Transcript of Oral Argument].

17. WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE L. OF CORP. § 25 ("It is generally accepted that a corporation is an entity distinct from its shareholders . . . . directors and officers . . . .") [hereinafter FLETCHER].

18. *See, e.g.*, Transcript of Oral Argument, *supra* note 16, at 52 ("Whether it applies in the other situations is . . . a question that we'll have to await another case when a large publicly-traded corporation comes in and says, we have religious principles . . .").

19. Hobby Lobby *supra*, note 5, at 1133 ("Undoubtedly, Congress's understanding of the First Amendment informed its drafting of RFRA . . . ."); RFRA, *supra* note 3 ("The purposes of this chapter are (1) to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

20. *See, e.g.*, Conestoga, *supra* note 6, at 388 ("Our conclusion that a for profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion

government may place a substantial burden on the exercise of religion only if the burden is the least restrictive means of furthering a compelling government interest.[21] The underlying question of applicability concerns whether the law was intended to protect the religious beliefs of corporations.[22]

The Third Circuit Court in *Conestoga* considered the case of Conestoga Wood Specialties Corporation, a for-profit, secular, closely held corporation owned entirely by the Hahns family.[23] The court distinguished the rights of for profit versus non-profit corporations, and focused on the distinct entity doctrine of corporate law.[24] Finding that for-profit, secular corporations are incapable of exercising religion, the court held that the corporation lacked standing.[25] Similarly, the court found that the individual owners could not bring a claim on behalf of the corporation.[26] Using this reasoning, the court

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that a for profit, secular corporation cannot engage in the exercise of religion."); Hobby Lobby, *supra* note 5, at 1133 (Noting, "Congress, through RFRA, intended to bring the Free Exercise jurisprudence back to the test established before *Smith*," the court collapsed the Free Exercise analysis into the RFRA analysis.).

21. *See* RFRA *supra*, note 3. While the plain language of the statute invokes the language reserved for the highest constitutional standard – namely, the "least restrictive means of furthering a compelling governmental interest" – this standard was hotly contested in oral argument before the Supreme Court. *Id.*; *See, e.g.*, Transcript of Oral Argument, *supra* note 16, at 13-14.

22. *See, e.g.*, Conestoga *supra* note 6, at 381 ("Before we can even reach the merits . . . we must consider a threshold issue: whether a for profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA."). This is the central question defining the current circuit split. *Compare* Hobby Lobby, *supra* note 5, at 1128 (finding that the corporations are "persons exercising religion" under RFRA), *with* Conestoga, *supra* note 6, at 388 (denying claim based on lack of standing since "for profit, secular corporation[s] cannot engage in the exercise of religion.").

23. Conestoga, *supra* note 6, at 381, 388.

24. *Id.* at 386, 388. "That churches – as means by which individuals practice religion – have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for profit, secular corporations should be granted these same protections." *Id.* at 386. "Since Conestoga is distinct from the Hahns, the [contraception m]andate does not actually require *the Hahns* to do anything. All responsibility for complying with the [contraception m]andate falls on *Conestoga*." *Id.* at 388 (emphasis in original). The doctrine of distinct corporate entity recognizes the corporation as a distinct legal entity from the corporation's shareholders, officers, and directors for many purposes. FLETCHER, *supra* note 17.

25. *Id*. at 388.

26. *Id*. at 389.

denied Conestoga the requested preliminary injunction.[27] The court's analysis, then, presented a paradigm whereby the corporation is the only entity impacted by the contraception mandate, yet lacks the standing to object to the mandate because the entity cannot exercise religious beliefs.[28] Meanwhile, the individual owners are capable of exercising religious beliefs, but lack standing to object to the contraception mandate since the mandate does not directly impact them.[29]

The contrasting opinion of the Tenth Circuit in *Hobby Lobby* involves two corporate entities, Hobby Lobby and Mardel, both of which are closely held, for-profit corporations owned and managed by the Green family.[30] The Tenth Circuit Court, *en banc*, found that because the Dictionary Act[31] generally includes corporations within the meaning of the term 'persons,' and because RFRA does not specifically exclude corporations from the law's application, corporations are persons protected under RFRA.[32] Based on this reasoning, the court found that Hobby Lobby should be granted a preliminary injunction from the PPACA to protect its religious freedom.[33]

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27. *Id.*

28. *Id.* at 388-89.

29. *Id.* at 389 ("The [contraception m]andate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga.").

30. Hobby Lobby, *supra* note 5, at 1122. "The Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee) . . . ." *Id.*

31. 1 U.S.C. 1.

32. Hobby Lobby, *supra* note 5, at 1129, 1137. Notably, the court distinguished the applicability of statutes which specifically exclude for profit corporations from RFRA, such as the Americans with Disabilities Act and the National Labor Relations Act. *Id.* at 1129-30. The court found this precedent compelling, given that RFRA omitted such exemption, in contrast to these prior acts of Congress. *Id.* The court also suggested that the for profit versus nonprofit distinction may be arbitrary in this context, noting "[w]e are also troubled . . . by the notion that Free Exercise rights turn on Congress's definition of "nonprofit." *Id.* at 1135. Even nonprofit entities that "exercise religion" do not "pray, worship, or observe sacraments . . . ." *Id.* at 1136.

33. *Id.* at 1147. The court, finding that "all preliminary injunction factors tip in favor of Hobby Lobby and Mardel," remanded the case to the district court with instructions to enter a preliminary injunction. *Id.*

III. LIMITATION OF CORPORATE FORM

Applying the RFRA test to the corporation alone, as the Third and Tenth Circuits did, ignores a practical reality; government regulation of corporations can incidentally or directly affect individuals.[34] The contraception mandate, in effect, requires the owners and managers of closely held corporate employers to either 1) shop for, select, and enroll the corporation's employees into a qualified health plan, or 2) do nothing and subject their corporation to substantial taxes.[35] This effect of the PPACA cannot be ignored, and it must be analyzed under the scrutiny of RFRA and the Free Exercise Clause.

The outcome of *Conestoga* clearly illustrates the principle at issue. The court held that the contraception mandate applies only to corporations, and the Free Exercise guarantees apply only to individuals, such as the Hahns.[36] This analysis clearly and entirely separates the Hahns' religious rights from the corporation they own; it likewise separates the Hahns from the corporation's obligation under the mandate.[37] If this analysis is accurate, then there is no need for the Hahns' religious rights to apply to the corporation, or for the Hahns to assert their own religious rights.[38] Indeed, this analysis neatly

34. *E.g.* 42 U.S.C. § 300gg-13, *supra* note 1. The PPACA contraception mandate requires *employers* (many corporations fall into this category) to provide no-cost sharing coverage of contraceptive services to *employees* (individuals). *Id.* The direct effect, then, of the regulation of corporations here is to provide a benefit to individuals. *See id*.

35. Tax on Conversion of Qualified Plan Assets to Employer, I.R.C. § § 4980D(b)(1), 4980H(c)(1) (2012). Practically speaking, a corporation can only act by or through an individual. FLETCHER, *supra* note 17, at § 30 n. 1 *citing* Meyer Intellectual Properties Ltd. v. Bodum, Inc., 597 F. Supp. 2d 790, 796 (N.D.Ill. 2009) rev'd, 690 F.3d 1354 (Fed. Cir. 2012). It is this individual's behavior with which this article is concerned. The Tenth Circuit estimates that the fines faced by Hobby Lobby and Mardel (both owned by a single management trust) would be $475 million per year for excluding contraceptive coverage from their health plan (13,000 employees at $100 per employee per day), or $26 million per year if they dropped health insurance benefits altogether (13,000 employees at $2,000 per employee per year). Hobby Lobby, *supra* note 5, at 1125 citing I.R.C. § § 4980D(b)(1), 4980H(c)(1).

36. Conestoga, *supra* note 6, at 388, 389.

37. *Id.* ("For the same reasons that we concluded that the Hahns' claims cannot "pass through" Conestoga, we hold that the Hahns do not have viable claims,").

38. *Contra, e.g.*, Legatus v. Sebelius, *supra* note 13, at 988 (finding that beliefs of the

separates the Hahns from the corporation they own and control.[39] This separation seems to reflect the fundamental doctrine that corporations are separate legal entities from their owners.[40] Indeed, the purpose of the Free Exercise Clause "is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority."[41]

However, a more practical analysis dismantles this clear distinction; the ambitions, values, and volition of a corporation cannot be so neatly separated from those of its owners. The key is that the contraception mandate does not, in practice, only apply to the corporation, for the corporation cannot in fact act on its own behalf.[42] The mandate depends in a real way on the volition of the individuals who manage a company, such as the Hahns.[43] Herein lies the problem, because the Hahns, as individuals, are entitled to the protection of the First Amendment, which "secure[s] religious liberty in the individual by prohibiting *any* invasions thereof by civil authority."[44] The Hahns cannot simply isolate the act of managing their corporation from all other acts which are subject to their consciences, as if their consciences do not apply to business decisions.[45] Considered from the perspective of the Hahns, their options are to either compromise their religious beliefs by authorizing, and perhaps even selecting, contraceptive coverage, or subject

owners of a closely held, for profit corporation can pass through to the corporation, thus giving a "strong case for standing").

39. Conestoga, *supra* note 6, at 389.

40. FLETCHER, *supra* note 17.

41. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 233 (1963) (emphasis added).

42. FLETCHER, *supra* note 17, at § 30 n. 1 *citing* Meyer Intellectual Properties Ltd. v. Bodum, Inc., 597 F. Supp. 2d 790, 796 (N.D.Ill. 2009) rev'd, 690 F.3d 1354 (Fed. Cir. 2012), ("Corporations can speak, act and have knowledge only through their human agents.").

43. *Id.*; Conestoga, *supra* note 6, at 390 (Jordan, Circuit Justice dissenting). The Hahns are "hands-on owners" who "manage their business." *Id.*

44. *Sch. Dist. of Abington Twp.*, 233.

45. Conestoga, *supra* note 6, at 390 (Jordan, Circuit Justice dissenting) ("[W]here people try to live lives of integrity and purpose, that kind of division sounds as hollow as it truly is).

their business to substantial taxes implicated by the PPACA.[46] The substantial burden is apparent. While the corporation remains a distinct entity from the Hahns for many purposes,[47] such clear distinction does not carry into every aspect of relationship between the Hahns and their corporation.[48] The outcome of *Conestoga*, then, places the Hahns in a situation that substantially burdens their religious beliefs.[49]

Hobby Lobby likewise jeopardizes the rights of the owners of Hobby Lobby and Mardel by oversimplifying the issue to only determine that Hobby Lobby and Mardel are persons capable of exercising religion.[50] This analysis similarly ignores the intermingling of the corporation and its owners and managers.[51] The rights of individual owners and managers *qua* owners and managers are overshadowed by, and made contingent on, the rights of the corporation.[52] While the outcome of *Hobby Lobby* enables the owners and managers to exercise their religious rights, it does so only incidentally, leaving this fundamental right dependent on the definition of corporations.[53]

46. *See* Tax on Conversion of Qualified Plan Assets to Employer, *supra* note 35.

47. *See generally* FLETCHER, *supra* note 17, at §§ 29 – 40 (discussing the "distinctness of the corporate entity").

48. Tax Treatment of S Corporations and Their Shareholders, I.R.C. §§ 1361, 1366 (2006). Conestoga is organized under Subchapter S of the Internal Revenue Code. Petitioner's Reply Brief at 7, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (U.S. filed March 12, 2014). S Corporations and their owners are treated as one entity for tax liability. I.R.C. § 1366.

49. *Contra* Conestoga, *supra* note 6, at 389-90 (in concluding that the Hahns lacked standing, the court never considered the merits of the Hahns' claim).

50. Hobby Lobby, *supra* note 5, at 1128.

51. *Id.* By concluding that the corporations are persons capable of exercising religion, the court never addresses the issue of whether the Greens' religious rights would be protected if the corporations do not have religious rights. *Id.*

52. *Id.*

53. *Id.*

IV. AN EQUITABLE SOLUTION

Although corporations are generally distinct legal persons from their owners and managers, the corporate entity doctrine has limitations.[54] Corporate theory only makes sense inasmuch as it is useful and equitable.[55] In certain applications, equity requires the corporate personality to be disregarded or "pierced."[56] The threshold issue that permits such disregard must be determined. There must be a middle ground between the positions adopted by the Third and Tenth Circuit courts that better conforms to reality and equity. The court in *Conestoga* rejected a Ninth Circuit precedent that beliefs of family owners of closely held corporations extend to the corporation, and that such corporations therefore have standing to assert the free exercise rights of their owners.[57] The dissent criticizes the opinion for tying religious sentiment to tax status.[58] Perhaps the threshold depends on the percentage of shareholders or officers who share a particular belief, or on the percentage of business that is religious in nature.[59] It seems clear that extension of the corporate form that results in *de facto* inequity – such as is demonstrated in Tenth Circuit's reasoning in *Conestoga* – goes beyond the limits of corporate reality. Nonetheless, the Third Circuit opinion that corporations are capable of religious beliefs poses obvious epistemological problems.[60]

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54. George F. Canfield, *The Scope and Limits of Corporate Entity Theory*, 17 COL. L. REV. No. 2 128, 129 (1917) ("[The corporate entity] is not an arbitrary assumption without regard to fact, and does not involve a false deduction or conclusion.").

55. FLETCHER, *supra* note 17. "The legal fiction of separate corporate entity was designed to serve convenience and justice. When it is invoked to subvert justice, it is ignored by the courts." *Id.*

56. FLETCHER, *supra* note 17, at §41.20.

57. Conestoga, *supra* note 6, at 387.

58. Conestoga, *supra* note 6, at 390 (Jordan, Circuit Justice dissenting) ("The government takes us down a rabbit hole where religious rights are determined by the tax code, with nonprofit corporations able to express religious sentiments while for profit corporations and their owners are told that business is business and faith is irrelevant."); *see also* Jonathon Tan, *supra* note 3, at 1357 ("The profit motive does not sufficiently distinguish a for profit corporation from a nonprofit corporation for RFRA purposes . . . .").

59. Transcript of Oral Argument, *supra* note 16, at 18-19 (Justice Sotomayor cynically suggests that a corporation's beliefs may be dependent on these seemingly arbitrary thresholds).

60. Hobby Lobby, *supra* note 5, at 1128. It seems that only rational beings have the ca-

Perhaps the threshold to be considered for RFRA and Free Exercise Clause claims should be whether a controlling majority of voting shareholders would pose religious objection to a particular statute affecting a corporation.[61] Because statutes affecting corporations can affect the individuals that control the corporations, a threshold that corresponds to ownership interest reflects the practical relations between the owners and the corporation while respecting the religious rights of individual owners.[62]

Further, this threshold clarifies the culpability problem; if a controlling majority does not object to a statutory requirement, then the minority nonetheless has the opportunity to express their concern. Here, the minority does not act in furtherance of what they deem to be immoral. The minority would not thereby be complicit with immoral activity, because it is the majority who act towards the end, which is deemed immoral. [63] On the other hand, if the controlling majority objects, on religious grounds, to a statute that controls corporations, then the Religious Freedom Guarantees ought to apply.[64] Such objection can be trumped, just as those of individuals, if the statute in question is determined to be the least restrictive means of furthering a compelling government interest, or if a court determines that the individual religious beliefs are not sincerely held.[65]

Such equitable limitations to the corporate form are nothing new; the

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pacity to form beliefs. *See Id.* Because corporations are legal fictions and not rational beings, they therefore lack the capacity to engage in or form beliefs in the proper sense of the word. *See id.*

61. *See* FLETCHER, *supra* note 17, at §2020 (discussing differing voting requirements).

62. *See supra* Section III.

63. *Cf.*, Ill. Bus. Corp. Act of 1983, 805 ILCS 5/8.65(b). This principle is analogous to statutory clauses that exculpate directors who affirmatively dissent to improper director actions.

64. RFRA, *supra* note 3. In such instance, RFRA would apply to the individual shareholders holding the majority interest.

65. *Id.*; *see* United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010) (finding claim that defendant belongs to the church of marijuana was a factual matter); Sourbeer v. Robinson, 791 F.2d 1094, 1102 (3d Cir. 1986) (upholding lower court's finding of insincerity based on defendant's sparse attendance at religious services.

corporate shield of liability can be pierced to avoid fraud or injustice.[66] Procedurally, associational standing permits corporations to assert the rights of its owners under certain circumstances.[67] This procedural mechanism achieves the same outcome as does the proposed threshold, by combining the interest of the two parties into one.

V. CONCLUSION

In the pursuit of better health care, ethics cannot be forgotten. The PPACA has jeopardized the moral integrity of many business owners by requiring employers to provide contraceptive coverage for their employees.[68] The practical implication of this requirement causes individuals to act in furtherance of an end they deem to be immoral.[69] The Courts' interpretations make the religious freedom of these business owners contingent on whether corporations are protected by RFRA and the Free Exercise Clause of the First Amendment.[70] Focusing on ownership interest, rather than on application of these religious protections to corporations, both reflects the interrelations of individuals and corporations, and respects the religious rights of individual owners. Such an application of the religious freedom guarantees would in fact secure religious freedom for individual business owners in a way that respects the distinct entity of the corporation.

66. FLETCHER, *supra* note 17, at §41.20.

67. Warth v. Seldin, 422 U.S. 490, 511 (1975). Indeed, some courts considering corporations' rights under RFRA for purposes of the contraception mandate found association standing. Legatus, *supra* note 13, at 988; Tyndale House Publishers v. Sebelius, 904 F. Supp. 2d, 106, 116-17 (D.D.C. 2012); Geneva Coll. V. Sebelius, Op. No. 2:12-cv-00207, 2013 WL 838238, at *20 (W.D. Pa. Mar. 6, 2013)

68. *See* PPACA, *supra* note 1; *see supra* text accompanying note 2.

69. *See supra* section IV.

70. *See supra* section IV.