DUTY OR DIGNITY? COMPETING APPROACHES TO THE FREE EXERCISE RIGHTS OF FOR-PROFIT CORPORATIONS

INTRODUCTION

Corporate free exercise[1] has garnered much attention since the Department of Health and Human Services issued a regulation under the Affordable Care Act[2] requiring most employers to include coverage of preventive health services including contraceptives in their employees' health insurance policies.[3] Given the rhetorical characterization of the regulation as a "contraception mandate," a position on corporate free exercise is easily mistaken for a position on contraception. Yet neither of the corporations currently challenging the regulation before the Supreme Court object to contraception, and the government's arguments prove not only that it may require corporations to provide coverage of contraceptives but also that it may force

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1. The phrase "corporate free exercise" is used in this note in accordance with convention and for purposes of simplicity. It is worth noting at the outset, however, that what is called the question of corporate free exercise is narrower than the question: "Do corporations have standing to make free exercise claims?" The standing of at least some nonprofit corporations to bring free exercise claims has been recognized repeatedly. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524–25 (1993); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.29 (1983). At the same time, the question is broader than the question: "Do corporations have rights under the Free Exercise Clause of the First Amendment?" Claims for exemptions that facilitate the free exercise of religion are often made under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2006). In fact, *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, No. 13-356 (argued Mar. 25, 2014) has presented the Supreme Court with arguments rooted in RFRA as well as First Amendment arguments, and *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (argued Mar. 25, 2014) has focused solely on the RFRA claim. To be more precise, then, the "question of corporate free exercise" is understood in this Note to ask whether for-profit corporations should be categorically ineligible to seek religious exemptions in a court of law.

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 42 U.S.C.).

3. 45 C.F.R. pt. 156 (2013).

for-profit corporations to facilitate what their owners view as an immoral taking of human life.[4] Whatever position one takes on contraception, the question of corporate free exercise deserves to be assessed in its own right. As this Note goes to press, the Supreme Court is deliberating on two corporate free exercise cases: *Sebelius v. Hobby Lobby Stores, Inc*.[5] and *Conestoga Wood Specialties Corp. v. Sebelius*.[6] This Note uses the arguments in *Hobby Lobby* and *Conestoga Wood* to explore the implications for corporate free exercise of the scholarly debate between leading advocates of religious liberty whose positions it characterizes as originalist and liberal.[7]

Part I of this note lays the necessary groundwork for this analysis, explaining how and why the Note categorizes the legal arguments that have been presented in these cases as either originalist or liberal. Part II shows that the originalist and liberal frameworks cannot lead to agreement on whether corporations, as such, have free exercise rights. Part III shows that these frameworks can, but do not necessarily, reach consensus on the conclusion that corporations have standing to vindicate the free exercise rights of individuals. Part IV concludes with general observations about the contrasting approaches of the originalist and liberal frameworks.

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4. The government has stated that the contraceptives that the corporations claim they cannot cover for religious reasons may prevent implantation of a fertilized egg, and it has accepted that the owners of the corporations believe preventing implantation is taking human life. Brief for the Respondents at 9–10, *Conestoga Wood*, No. 13-356 (Oct. 21, 2013); Petition for a Writ of Certiorari at 10–11, *Hobby Lobby*, No. 13-354 (Sept. 19, 2013). During oral argument, the government emphasized that the law does not view prevention of implantation as abortion but conceded that its theory of the case would apply to mandatory coverage of abortions. Oral Argument at 76:09, *Hobby Lobby*, No. 13-354 (argued Mar. 25, 2014), *available at* http://www.oyez.org/tos/acknowledge?source=/api/media/sites/default/files/audio/cases/2013/13-354_20140325-argument.mp3, [http://perma.cc/5P9D-95MB].

5. No. 13-354 (argued Mar. 25, 2014).

6. No. 13-356 (argued Mar. 25, 2014).

7. "Originalist" is used in this Note as an umbrella term covering the family of ideas consistent with a conception of free exercise grounded in duties owed to a deity with authority higher than that of the state. "Liberal" is used in this Note not in the political sense but as a name for the family of ideas consistent with a conception of free exercise grounded in liberty, which is grounded in human dignity. *See* discussion *infra* Part I.

I. ORIGINALIST AND LIBERAL ARGUMENTS

Originalists and liberals provide fundamentally different answers to a question prior to that of corporate free exercise: What is the reason for religious exemptions of any sort? The originalist approach outlined by Michael McConnell makes a historical argument that the Free Exercise Clause was written in light of a belief that the exercise of religion is conformity with a set of duties owed to a deity with higher authority than the state.[8] Religious exemptions therefore served to resolve conflicts between religion and the state that "were conceived not as a clash between the judgment of the individual and of the state, but as a conflict between earthly and spiritual sovereigns."[9] This duty-driven and God-centered justification of religious exemptions applies with equal force to any entity that could be subject to duties imposed by a deity, which is to say, any entity that could exercise religion. In this framework, the nature of the entity making a free exercise claim is of interest only if it makes the claimant inherently incapable of exercising religion. The justification for a free exercise claim is that an exercise of religion, understood as an action taken in conformity with a duty to God, is burdened.

The liberal approach outlined by scholars such as Douglas Laycock takes the focus off of duty and deity and turns it toward human dignity.[10] In this view, free exercise is based on

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8. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445–55 (1990).

9. *Id.* at 1496. This view is described as originalist although it is of course possible to take this position for religious or philosophical reasons without accepting McConnell's historical argument. *See, e.g.*, *id.* at 1516–17 (arguing that the originalist view of the Free Exercise Clause "makes an important statement about the limited nature of governmental authority"); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 742 (1992) (arguing that the originalist view of the Free Exercise Clause is the view most logically consistent with the existence of the Establishment Clause). It is also possible for an originalist to read the historical record in a way that would lead to a different understanding of the Free Exercise Clause. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that religious exemptions were historically provided at the discretion of legislatures but were not originally seen as constitutionally compelled).

10. In assessing the perspective that religious liberty reflects a more general value of liberty or autonomy, this note focuses on Douglas Laycock's view of reli-

the recognition that attempting to control religious beliefs and actions threatens liberty, embroiling the state in questions that matter little for purposes of civil government but implicate strong feelings and beliefs for individuals.[11] This justification of religious exemptions applies only to an entity whose liberty is of equal value to that of an individual human being—either because the entity's own feelings and beliefs are as intense as those of a human or because the entity's actions are inseparably linked to the religious liberty of humans. Religious liberty is derived from dignity, and dignity is derived from the capacity to hold a belief with such strong commitment that being forced to violate the belief would evoke strong and negative feelings. In the dignity-driven and individual-focused liberal framework, the justification for a free exercise claim is that the regulation from which the claimant seeks an exemption applies to an actor that has the capacity for strong beliefs and emotions.[12]

Practical implications follow from the fundamental difference between the originalist framework and the liberal framework.[13] The originalist framework posits that free exercise pro-

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gious liberty. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEM. LEGAL ISSUES 313 (1996). Although it is possible to value liberty or autonomy for reasons other than human dignity derived from the capacity for strong belief and emotion, almost any argument for religious liberty that depends on the value of liberty in general would have a similar structure. Because few people will argue that the liberty of every entity is equally important whether it is a human, an animal, a legal construct, or some other type of entity, almost any argument based on the importance of liberty must explain what characteristics distinguish actors whose liberty should be protected from those whose liberty need not be protected or need not be protected as rigorously. Regardless of whether these characteristics are strong belief and emotion or some other set of factors, an actor's ability to claim a liberty-based right such as free exercise would depend on the actor possessing these attributes and not on the characteristics of the action being taken.

11. *Id.* at 317–19.

12. As will be seen, it is possible that this application of regulation to an actor with the capacity for strong belief and feeling may occur indirectly, through the claimant.

13. The purpose of this Note is not to argue that one framework is preferable to the other, but to show how the originalist and liberal positions on free exercise lead to distinct approaches to the question of corporate free exercise. Although this Note shows that the originalist's principles are more inclusive than those of the liberal in approaching free exercise claims by claimants who are not human, this greater breadth may be seen as a virtue or a fault. Inclusivity seems to promote freedom, but a serious argument can be made that recognizing "for-profit businesses as free exercise claimants could diminish protections for all free exercise claimants, including churches . . . . " Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013).

tects a certain type of action—religious action. By contrast, the liberal framework posits that free exercise protects a certain type of actor—an actor with dignity equal to or greater than that of a human in all ways relevant to the exercise of religion. The originalist focus on the action protected justifies the presumption that every actor, whether human or not, has free exercise rights. This presumption may be rebutted only by evidence that an actor is intrinsically incapable of performing duties imposed by a deity, that is, incapable of exercising religion.[14] By contrast, the presumption that flows from the liberal focus on dignity is that an entity other than a human does not have free exercise rights. This presumption may be rebutted by evidence that an actor is capable of acting in a manner that commands the same respect as a human's exercise of religion.[15] Judge Matheson wrote in his *Hobby Lobby* opinion, "[T]he majority asks, 'Where did Hobby Lobby and Mardel lose their Free Exercise rights?' But this begs the question of whether these entities acquired such rights."[16] This observation reflects how the competing presumptions of originalists and liberals lead to fundamentally different approaches not only in scholarship but also in litigation and in judicial decisionmaking.

Legal battles are not always fought on the terms that shape academic debates. For this reason, it may not be immediately

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14. Although, in principle, this presumption may be overcome by a showing that an entity is incapable of exercising religion, no argument has been presented to the Supreme Court attempting to make this showing, nor would any such argument have been likely to succeed. *See* discussion *infra* Part II.D. It is worth noting that such a showing would exclude an actor from asserting free exercise rights without compromising the position that free exercise covers (without necessarily protecting) every religious action.

15. Such rebuttal is possible. *See* discussion *infra* Part III. This may help explain why some liberal proponents of free exercise, including Douglas Laycock, have filed briefs supporting corporate free exercise. *See* Brief of Christian Legal Society et al. as Amici Curiae Supporting Hobby Lobby and Conestoga Wood, et al., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't. of Health & Human Servs., No. 13-356 (Jan. 28, 2014), Hobby Lobby Stores, Inc. v. Sebelius, No. 13-354 (Jan. 28, 2014). To the extent that some arguments presented by liberals support corporate free exercise without reubutting the liberal presumption, they seem to be legal interpretations of RFRA rather than policy-oriented defenses of the law.

16. *Hobby Lobby*, 723 F.3d at 1182 n.5 (Matheson, J., concurring in part and dissenting in part) (internal citation omitted). Eric Rassbach and Matthew Bowman, counsel for Hobby Lobby and Conestoga Wood, respectively, emphasized to the author the centrality of whether free exercise protects actions or actors.

apparent that the legal arguments regarding corporate free exercise can be categorized as originalist or liberal. A conventional categorization of arguments according to their reliance on textualism, originalism, purposivism, living constitutionalism, or precedent may seem more apt, and for some purposes it might be. Nevertheless, the legal arguments concerning corporate free exercise can be assessed in terms of their consistency with an underlying assumption that free exercise protects a certain type of action, as the originalists say, or that free exercise protects a certain type of actor, as the liberals say. Categorizing arguments based on these underlying assumptions facilitates exploration of the practical ramifications of the debate between originalists and liberals.

II. DO CORPORATIONS THEMSELVES HAVE FREE EXERCISE RIGHTS?

The natural starting point in assessing a for-profit corporation's ability to seek a religious exemption is to ask whether corporations, as such, have free exercise rights. Three originalist arguments that corporations do have free exercise rights have been presented. First, corporations enjoy all First Amendment rights under *First National Bank of Boston v. Bellotti*, [17] which recognized that the First Amendment protects rights, not actors. Second, the Free Exercise Clause applies to for-profit corporations in the same way that it applies to nonprofit corporations because its text makes no distinction between the two types of actors. Third, corporations are persons under the Religious Freedom Restoration Act (RFRA)[18] and the principles of corporate law. Liberal counterarguments are made at each point, suggesting that religious liberty is a personal right under *Bellotti* that corporations cannot share, that the rights of nonprofit corporations do not shed light on the rights of for-profit corporations, and that corporations cannot reasonably be treated as persons for purposes of free exercise. The arguments presented in *Hobby Lobby* and *Conestoga Wood* suggest an irreconcilable disagreement: Originalists can make

17. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

18. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

no cognizable argument against the free exercise rights of corporations as such and liberals can make no plausible argument for the free exercise rights of corporations as such.

A. Originalist and Liberal Disagreement on the Argument from First National Bank of Boston v. Belloti

According to Conestoga Wood, the Supreme Court established as a general matter in *Citizens United*[19] that "First Amendment protection extends to corporations"[20] even if they seek a profit.[21] Although this proposition theoretically could have been based on a liberal view that equated the dignity of corporations with that of individual humans, the Supreme Court's citation to *First National Bank of Boston v. Bellotti*[22] in support of its statement[23] clarifies that it was in fact based on the view, consistent with the originalist framework, that the claimant's identity as a corporation is irrelevant to its claim to have First Amendment rights. *Bellotti* established that the proper question to ask in determining whether a First Amendment right is at stake is "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," but "whether [the law] abridges [a right] that the First Amendment was meant to protect."[24] In other words, the argument is that the First Amendment protects rights, including the right to engage in religious conduct, without regard to whether the actor asserting them is an individual or a corporation.[25]

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

20. *Id.* at 342.

21. Petition for a Writ of Certiorari at 25, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (Sept. 19, 2013) (quoting *Citizens United*, 558 U.S. at 342).

22. 435 U.S. 765 (1978).

23. *Citizens United*, 558 U.S. at 342.

24. Petition for a Writ of Certiorari at 22, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 766 (1978)) (internal quotations omitted) (the quotations around the word "have" appear in *Belloti* for emphasis).

25. At least as a textual matter, this characterization of the First Amendment may be overly broad in its formulation. Although the text of the First Amendment guarantees the freedom of religion without any explicit reference to a class of actors, it guarantees the freedoms of assembly and petition as a "right of the people," U.S. CONST. amend. I, opening the door to debate about whether "peo-

The Third Circuit rejected this argument in its *Conestoga Wood* decision and emphasized *Bellotti*'s statement that some constitutional rights may be identified as "purely personal" and unavailable to corporations based on "the nature, history, and purpose of the particular constitutional provision."[26] Regarding the nature of the Free Exercise Clause, the Third Circuit joined Chief Judge Briscoe's *Hobby Lobby* opinion in employing the liberal focus on the nature of the entity making the claim, stating that free exercise is an "inherently 'human' right"[27] and questioning "whether a corporation can 'believe' at all."[28] Regarding the history of the Free Exercise Clause, the court stated, "we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights."[29] The Third Circuit then employed the liberal presumption against the enjoyment of free exercise rights by entities other than individuals, making an argument from silence that "total absence of caselaw" implies that free exercise is a purely personal right.[30] Regarding purpose, the court again focused on the actor in question, stating that the Free Exercise Clause serves "to secure religious liberty *in the individual*."[31] At each point, the Third Circuit's reasoning employed the liberal assumption that the Free Exercise Clause protects only a certain type of actor.

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ple" should be understood to include corporate persons for purposes of assembly (however that might look) and petition.

26. *Conestoga Wood*, 724 F.3d at 383 (quoting *Bellotti*, 435 U.S. at 778 n.14).

27. *Id.* at 385.

28. *Id.* (quoting Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174–75 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part)) (internal quotations omitted). This query may appear to raise the originalist's question whether an exercise of religion is involved. Yet its focus on whether the actor has the capacity to be religious in the particular manner that justifies the protection of the law reflects a liberal impulse at odds with the originalist focus on whether the action is a response to the authority of a deity. The argument based on the inability of corporations to "believe" implicitly rejects the originalist definition of religion as duty to God and substitutes a definition of religion for purposes of free exercise that is consistent with the liberal conception.

29. *Id.* at 384.

30. *Id.* at 384–85.

31. *Id.* at 385 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (internal quotations omitted)).

B. Originalist and Liberal Disagreement on the Argument by Analogy to Nonprofit Corporations and Profit-Seeking Individuals

Conestoga Wood has also argued that two lines of precedent, taken together, show that the Free Exercise Clause of the First Amendment protects for-profit corporations.[32] One line of precedent shows that there is nothing about being a corporation that makes an actor incapable of exercising religion. The other shows that there is nothing about seeking a profit that makes an actor incapable of exercising religion. Like the more general argument about the First Amendment as a whole, this argument about the Free Exercise Clause follows naturally from the originalist presumption that the legitimacy of a free exercise claim does not hinge on the nature of the entity making the claim but instead turns on whether an exercise of religion is involved.

The Supreme Court has repeatedly recognized the ability of nonprofit corporations to make claims under the Free Exercise Clause,[33] a position that makes intuitive sense given that some nonprofit corporations are churches. Conestoga Wood has argued that this position is not only intuitive, but also grounded in the text of the Free Exercise Clause itself, which has no provision excluding corporations from its protection.[34] The originalist, believing that free exercise rights are justified for any entity exercising religion, sees no reason to deny these rights to nonprofit corporations when the First Amendment is silent. Because the First Amendment is just as silent about the rights of for-profit corporations as it is about the rights of nonprofit corporations, the principles that the originalist sees underlying the free exercise rights of nonprofits also justify the free exercise rights of for-profit corporations.[35]

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32. Petition for a Writ of Certiorari at 20–25, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013).

33. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525–26 (1993); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.29 (1983).

34. Petition for a Writ of Certiorari at 21, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013).

35. This originalist argument from the free exercise rights of nonprofit corporations is similar to but distinct from the arguments by analogy discussed *infra* Part III.C. *See infra* note 72.

In an originalist framework, the free exercise rights of for-profit corporations could only be distinguished from those of other corporations if being for-profit prevented them from exercising religion. Conestoga Wood has argued that individuals have a recognized right to exercise religion at the same time that they seek a profit in part because the text of the Free Exercise Clause does not exclude for-profit activities from its protection.[36] The same observation about the text of the Free Exercise Clause should prompt the Court to recognize in corporate claimants the ability to simultaneously seek profit and exercise religion. Because seeking a profit does not render a person incapable of performing religious duties, a distinction between for-profit and nonprofit corporations would allow free exercise rights to be arbitrarily "determined by the tax code"[37] although "[t]he First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion."[38] Because the originalist sees a free exercise claimant's corporate status and for-profit status as irrelevant to its capacity to engage in protected activity, the originalist concludes that the Free Exercise Clause covers for-profit corporations.

The liberal rejects this argument, holding that the religious nonprofits whose free exercise rights have been established by the Supreme Court constitute a category of actors distinct from for-profit corporations and that any new type of actor raises a new question about the Free Exercise Clause's applicability.[39] Thus, the Third Circuit explicitly refused to "draw the conclusion that, just because courts have recognized the free exercise

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36. Petition for a Writ of Certiorari at 23, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (citing United States v. Lee, 455 U.S. 252, 254, 257 (1982); Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (plurality op.); *id.* at 610 (Brennan, J., concurring in relevant part and dissenting on other grounds); *id.* at 616 (Stewart, J., dissenting on other grounds)).

37. *Conestoga Wood*, 724 F.3d at 390, 405 (Jordan, J., dissenting) (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting)).

38. *Id.*; *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) ("What if Congress eliminates the for-profit/non-profit distinction in tax law? . . . . Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise rights?").

39. *See* Reply Brief for the Petitioners at 8, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (Mar. 12, 2014) (stating that for-profit corporations "simply are not equivalent to an ecclesiastical corporation").

rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion."[40] Churches, the court argued, are a "means by which individuals practice religion," and the fact that they have rights under the Free Exercise Clause is "not determinative of the question of whether for-profit, secular corporations should be granted these same protections."[41] Without applicable precedent to demonstrate that for-profit corporations have free exercise rights, the liberal presumption that entities other than individual human beings lack such rights determines the outcome.

C. Originalist and Liberal Disagreement on the Arguments from Personhood

The Supreme Court has been presented with two arguments from personhood for the free exercise rights of for-profit corporations. First, corporations are persons for purposes of RFRA's protection of "a person's exercise of religion."[42] Second, corporations are persons who, as a matter of corporate law, have the right to pursue all legal purposes, including religious purposes. Both of these arguments are consistent with the originalist idea that actors of any sort have free exercise rights when they act religiously but do not overcome liberal skepticism about the dignity of actors—whether they are called persons or not—who are not individual humans.

1. The Argument from Personhood Under RFRA

Hobby Lobby and Conestoga Wood have both argued that corporations are "persons" for purposes of RFRA[43] and, consistent with the originalist idea that corporations and individuals are identical for purposes of the right to religious liberty, should be treated no differently than human beings. Under the

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40. *Conestoga Wood*, 724 F.3d at 385.

41. *Id.* at 386. The Third Circuit did not address the possibility that Conestoga Wood, or any other corporation, could fall into a category consisting of for-profit, religious corporations. For an argument that this category not only exists but is growing rapidly, see Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 16–24 (2013).

42. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 (2006).

43. Brief for Respondents at 23–36, *Hobby Lobby*, No. 13-354 (Oct. 21, 2013); Petition for a Writ of Certiorari at 20–25, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (Sept. 19, 2013).

Dictionary Act, "unless the context indicates otherwise," the word "person" for purposes of federal law includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[44] Hobby Lobby argues that context "means the text of the Act of Congress surrounding the word at issue, or the text of other related congressional Acts" and that the text surrounding the word "person" in RFRA does not suggest an exclusion of for-profit corporations.[45] In addition, Hobby Lobby and Conestoga Wood have argued that the pre-*Smith* Free Exercise Clause jurisprudence that formed the background context for RFRA's enactment established principles that justify free exercise rights for corporations that seek a profit, incorporating the argument by analogy to the rights of nonprofit corporations and profit seeking individuals discussed in Part II.B.[46] That argument by analogy, like the argument from RFRA's silence regarding for-profit corporations, is persuasive support for corporate free exercise only in an originalist framework that believes a protection of religious liberty would naturally include for-profit corporations unless otherwise specified.

From a liberal perspective, the originalist arguments mischaracterize RFRA's context and fail to meet the burden of proof needed to justify corporate free exercise under RFRA. The government has argued that the text surrounding RFRA's use of the word "person" indicates that the actor in question must be one that is capable of exercising religion for purposes of RFRA.[47] The liberal framework presumptively excludes for-profit corporations from this category unless it can be proven that they are capable of practicing religion with dignity like that of human beings. Given this background assumption, it may never have occurred to Congress that it would have to explicitly exclude for-profit corporations from RFRA's protection. From this per-

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44. 1 U.S.C. § 1 (2012) (quoted in Brief for Respondents at 23, *Hobby Lobby*, No. 13-354 (Oct. 21, 2013) and in Petition for a Writ of Certiorari at 21, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013)).

45. Brief for Respondents at 23–24, *Hobby Lobby*, No. 13-354 (Oct. 21, 2013) (quoting Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993)).

46. Brief for Respondents at 24–27, *Hobby Lobby*, No. 13-354 (Oct. 21, 2013); Petition for a Writ of Certiorari at 20–25, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013).

47. Brief for the Petitioners at 21–22, *Hobby Lobby*, No. 13-354 (Jan. 10, 2014).

spective, the fact that RFRA's legislative history contains many references to religious individuals and institutions but is silent with regard to for-profit corporations may be persuasive evidence that Congress did not intend RFRA to protect for-profits.[48] Similarly, the originalist argument that the Supreme Court's pre-*Smith* jurisprudence followed the text of the First Amendment by making no distinction between individuals and nonprofit corporations also misses the point, failing to show that for-profit corporations have the same dignity as individuals for purposes of exercising religion under the First Amendment.[49] Without an explicit Congressional statement or a pre-*Smith* precedent showing that for-profit corporations are protected, the liberal may be unable to overcome the presumption that for-profits lack the dignity to claim a religious exemption.

2. The Argument from Personhood Under Corporate Law

Conestoga Wood has argued that corporations should enjoy the same free exercise rights as individual human beings because corporate law states that business corporations are persons who share "the legal capacity of natural persons to act" in pursuit of lawful purposes.[50] This argument may be viewed as the state law counterpart to the argument about RFRA based on the Dictionary Act's definition of persons to include corporations.[51] With respect to the principle that corporations can act as natural persons, the law makes no distinction between for-profit and nonprofit corporations and does not exclude reli-

48. Petition for a Writ of Certiorari at 19, *Hobby Lobby*, No. 13-354 (Sept. 19, 2013) (citing Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1169 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part)). This would only be the case, of course, if "religious institutions" and "for-profits" are not overlapping categories. Colombo, note 41, argues that they are overlapping categories, a possibility not examined by the government.

49. *See supra* at Part II.B.

50. Petition for a Writ of Certiorari at 23, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting 15 PA. CONS. STAT. § 1501 (2012)).

51. *See supra* Part II.C.1. Much of the argument about the Dictionary Act, however, hinges on interpretation of the context provided by the language surrounding RFRA's use of the word "person" and by the Supreme Court's pre-*Smith* jurisprudence. The corporate law argument engages the debate between originalists and liberals more directly.

gious purposes from the lawful ends that may be pursued.[52] The assumption that any exercise of religion is protected and that the nature of the actor is irrelevant enables the originalist to infer a right of for-profit corporations to enjoy freedom in pursuing religious purposes from the right of corporations to pursue lawful ends.

The liberal avoids this inference by explaining that religious purposes did not need to be explicitly excluded from the ends that corporations may pursue because corporations inherently lack the capacity to pursue religious ends in a way that commands legal recognition. The liberal may base an argument against corporate free exercise on the inability of corporations to hold religious beliefs apart from the individuals of whom they are comprised.[53] Thus, the government has emphasized that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs."[54] The government has argued that it was the corporation's owners who had religious objections to funding certain contraceptives, that the contraception mandate applied to corporations and not to their owners "per-

52. Petition for a Writ of Certiorari at 23, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting 15 PA. CONS. STAT. § 1501).

53. Conestoga Wood has made two arguments before the Supreme Court to counter this line of reasoning. First, it does not follow from the fact that the law of liability treats individuals and corporations as distinct that religion must therefore also treat them as distinct. If a religion treats their obligations as indistinguishable, the rights that they derive from religious obligations in an originalist framework should also be indistinguishable. Second, there are many respects in which individuals and corporations are not treated as distinct. This observation suggests only that there is no reason individuals and corporations must have distinct free exercise rights, but does not provide a reason why their free exercise rights should be the same. *Id.* at 28–29. The originalist presumption could perhaps be interpreted in such a manner as to provide this reason, completing the argument. Although the first argument relies on the originalist conception of the reason for religious exemptions and the second must work in conjunction with the originalist presumption, both arguments are intended to counter an argument made from within a liberal framework. These arguments are not treated in the body of this Note as originalist arguments for corporate free exercise because, although informed by an originalist perspective, they address a problem that arises only in the liberal framework.

54. Brief for the Petitioners at 13, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (Jan. 10, 2014) (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)).

sonally," and that a ruling in favor of corporate free exercise would wrongly conflate the beliefs of individuals with those of corporations.[55] In short, corporations lack free exercise rights because, as persons distinct from individual human beings, they do not have beliefs, at least in the same dignity-providing sense that individuals have them.

This argument does not operate within an originalist framework, although it may appear to address the originalist presumption that corporations have free exercise rights if they can exercise religion by showing that they in fact cannot exercise religion. At the heart of the argument is an implicit rejection of the originalist definition of the exercise of religion as the execution of duties owed to a deity. In place of this definition is a conception that recognizes an action as an exercise of religion only if it is undertaken in conformity with the belief of an individual or of some entity with a capacity for belief like that of an individual. This definition of an exercise of religion is simply a restatement of the liberal question whether an actor has adequate dignity to justify an exemption and does not address the originalist's question of whether an action is taken pursuant to a duty imposed by a deity. The argument therefore is not an attempt to engage and overcome the originalist presumption. Rather, it is grounded on the liberal presumption, placing the burden of proof on the advocate of corporate free exercise to show that a corporation is capable of performing an act that is equal in dignity to an individual's religious acts.

D. Why Originalists and Liberals Cannot Agree on the Rights of Corporations as Such

The inability of originalists and liberals to agree on any of the arguments that have been presented to the Supreme Court surrounding the free exercise rights of corporations as such is not an accident, but a reflection of the fact that no originalist arguments can be made against the rights of corporations as such and no liberal arguments can be made in favor of these rights that the Court would likely accept. An originalist argument for categorically barring for-profit corporations from making cor-

55. *See* Petition for a Writ of Certiorari at 24–25, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (Sept. 19, 2013).

porate free exercise claims would have to show that for-profit organizations are inherently incapable of exercising religion—of being bound by a deity to perform or refrain from certain actions. Yet the Supreme Court is unlikely to accept an argument that a deity cannot place duties on corporations. There is no principled reason that an actor subject to legal duties could not also be subject to religious duties, and any entity subject to duties imposed by God may make a free exercise claim. Whether a deity does in fact place obligations on corporations is a religious question rather than a legal question. If there are religions that believe corporations owe duties to a deity, the Court will not question the validity of that belief.[56] There are, in fact, religions that hold that at least some of a deity's principles apply to corporations, and the number of religious for-profit corporations is growing.[57] Because the Court will not hold that it is categorically impossible for a deity's authority to extend over the actions of for-profit corporations, the originalist cannot argue against corporate free exercise.

A liberal argument for the free exercise rights of for-profit corporations as such would have to show that corporations are capable of holding convictions and having emotions that command the same respect as those of individual human beings. As the Third Circuit and Chief Judge Briscoe of the Tenth Circuit agreed, an argument that corporations possess religious beliefs in any familiar, dignity-providing sense seems implausible.[58] This is why the argument that the First Amendment and

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56. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of those creeds.").

57. Mark Rienzi, *God and the Profits: Is there Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59, 66–73 (2013) (explaining that Judaism, Christianity, and Islam all impose obligations on the conduct of business, hold business owners morally responsible for the actions of their businesses, and prohibit businesses from providing harmful products or services). *See also* Colombo, *supra* note 41, at 16–24. As an example of a corporation following religious principles, Hobby Lobby bought ad space to follow the Great Commission, donated millions to support God's work, gave up millions to provide employees the opportunity to observe the Sabbath, provided employees with chaplains and spiritual counseling, and more. Brief for Respondents at 2–3, *Hobby Lobby*, No. 13-354 (Oct. 21, 2013).

58. *Conestoga Wood*, 724 F.3d at 385; Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1169 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part); s*ee also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires.").

RFRA cover corporations does not share the liberal focus on belief, but posits a broader definition of religion focused on action.[59] The debate over a belief-action distinction is simply another way of articulating the disagreement between originalists and liberals about free exercise as a protection of actions that are religious or of actors that are capable of strong beliefs and feelings. There is no legally cognizable way for originalists to argue that corporations should lack free exercise rights given their understanding that all religious actions are protected, and no philosophically plausible way for liberals to argue that corporations as such should enjoy these rights given their understanding that free exercise protects only strongly held beliefs.

III. DO CORPORATIONS HAVE STANDING TO VINDICATE INDIVIDUAL FREE EXERCISE RIGHTS?

The liberal could reject the idea that corporations themselves have free exercise rights and nevertheless support corporate free exercise as a way of protecting the free exercise rights of individuals. Three arguments have been presented to the Supreme Court attempting to show that respect for the exercise of religion by individuals can justify corporate exemptions. First, the free exercise rights of individuals include a right to associate in the exercise of religion. Second, the free exercise rights of individuals may be indirectly burdened by regulations of corporations. Third, whatever free exercise rights of individuals justify exemptions for nonprofits also justify exemptions for profit-seeking

59. Michael McConnell articulated this shift in focus in the Brief of the Christian Booksellers Association at 23, *Hobby Lobby*, No. 13-354 (Jan. 28, 2014) ("[T]he essence of religious *exercise*—consistent with the original meaning of the term—is not just subjective belief, but *religiously motivated conduct*."). Belief is relevant to a free exercise claim in the originalist framework as well as in the liberal framework. Nevertheless, the originalist framework considers belief relevant in a different way—a way that allows a more flexible definition of belief. In the liberal framework, beliefs pertain to coverage and justify the attempt to make a free exercise claim. In the originalist framework, beliefs pertain to the merits and explain the content of a claim. As a justification of exemptions in the liberal framework, belief must be understood to mean a conviction strong enough to cause intense pain when violated. As a clarification of what exemption is sought in the originalist framework, belief might be meant in some looser sense that could include a corporation's decision to be governed by religious commands. In this context, beliefs need not have anything to do with feelings but could simply be determinations of what religious principles will guide action.

corporations. These indirect arguments for religiously based corporate exemptions are necessary only in a liberal framework,[60] but are ambiguous enough about the basis of individual free exercise rights that originalists and liberals could both accept them. Liberals, however, could only embrace these arguments if they rejected the equally feasible liberal argument discussed in Part II.C.2, that corporations and individuals should not be conflated in a way that allows attribution to corporations of the rights and beliefs of individuals. Ambiguity makes consensus in favor of corporate free exercise possible but does not guarantee agreement between originalists and liberals.

A. Possible Consensus on the Argument from the Associative Rights of Individuals

Corporate free exercise may be defended as a mechanism for protecting the right of individuals under the First Amendment and RFRA to exercise their religion corporately—an exercise of religion by individuals that has adequate dignity to justify religious exemptions.[61] As Conestoga Wood argued and the Tenth Circuit held, "[a] religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values."[62] In fact, the exercise of religion is, in at least some cases, an inherently corporate activity in which individuals cannot engage on their own.[63] Because the Supreme Court has noted

60. Originalists, however might see value in this line of questioning once the focus shifts from whether corporations should be categorically barred to what religion is relevant to a given corporation's claim.

61. For a scholarly argument along these lines, see Colombo, note 41, at 36 ("[F]ailure to recognize the religious liberty rights of religious entities, including religious corporations, amounts to a restriction on the religious liberty of individuals as well. Depriving corporations of religious liberty simultaneously deprives individuals of the right to freely exercise their religion by means of a for-profit, corporate undertaking.").

62. Petition for a Writ of Certiorari at 25, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (Sept. 19, 2013) (quoting *Hobby Lobby*, 723 F.3d at 1135) (internal quotations omitted).

63. *See, e.g.*, *Conestoga Wood*, 724 F.3d at 400–01 (Jordan, J., dissenting) ("[Christians could understand] 'where two or three are gathered together in my name, there am I in the midst of them,' Matt. 18:20, to be not only a promise of spiritual outpouring but also an organizational directive."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991) ("[F]or many individuals, free exercise is inherently associational."); Vischer, *supra* note 13, at 20 ("[The

that "[a]n individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed,"[64] Conestoga Wood has argued that protecting corporations, whether nonprofit or for-profit, is protecting the right of individuals "to associate for the purpose of engaging in those activities protected by the First Amendment."[65] This creates the equivalence between corporate and individual rights that a liberal needs to justify corporate free exercise without expressly stating whether individual rights are grounded in duty or dignity.[66]

B. Possible Consensus on the Argument from Compelled Individual Action

The argument from compelled individual action uses the principle that corporations are legally distinct from the individuals who own and operate them to show that corporations are incapable of complying with governmental regulations without individuals taking action. These individuals have religious beliefs and free exercise rights that may be threatened by the regulation of corporations. At the heart of the argument from compelled individual action is the observation made in Conestoga Wood's petition for certiorari: "When a religious family runs a business, the family itself is impacted by what the business does, or what it is required to do."[67] Because corporations cannot take action without individuals taking action, corporate rights are linked to individual rights. Recognition of free exercise claims by

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Catholic laity's] witness is not just facilitated through their personal behavior, but through the organizational structures in which they labor and the ends toward which they labor.").

64. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added).

65. Petition for a Writ of Certiorari at 21, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting *Roberts*, 468 U.S. at 618) (internal quotations omitted).

66. This argument is distinct from the argument in Part III.B. The argument here is that individual rights include the right to exercise religion corporately as a matter of First Amendment law. The argument in Part III.B is that regulations on a corporation include regulations on the corporation's individual owners as a matter of corporate law. This argument does not require that individuals have a right to exercise religion corporately.

67. Brief for Petitioners at 17, *Conestoga Wood*, No. 13-356 (Jan. 10, 2014).

corporations can therefore be justified in the liberal framework as a means of respecting individuals' religious freedom.[68]

To this the government has objected that regulations of corporations do not truly compel any individual to violate his religious convictions: Regulations of corporations only impact religious individuals who choose to take advantage of the corporate form and should accept the costs of that choice together with its benefits.[69] Yet the Supreme Court has established that individuals' free exercise rights may be violated by indirect but substantial pressures, including the pressure presented by "a choice between fidelity to religious belief or cessation of work."[70] Conestoga Wood has therefore argued that a regulation of a corporation that requires religious individuals to violate their religious beliefs, accept "ruinous" fines on their corporations, or else abandon their business enterprises is a regu-regulation that implicates individuals' free exercise rights.[71] Like the associative rights argument, this argument that the rights of individual human beings underlie the rights of corporations but takes no position on whether these individual rights are justified by duty or dignity.

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68. This is not the only means of protecting individual free exercise against infringement by regulations of corporations. Some courts have recognized corporate free exercise rights as a means of protecting individual free exercise as this argument suggests. *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119–20 (9th Cir. 2009); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988); McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 850–51 (Minn. 1985). Other courts, however, have used an alternative method of protecting individuals' free exercise, giving the proprietors of a corporation standing to make free exercise challenges to regulations of that corporation. *See, e.g.*, Gilardi v. Dep't. of Health & Human Servs., 733 F.3d 1208, 1214–16 (D.C. Cir. 2013). Hobby Lobby has presented the Supreme Court with an argument for this alternative course. Brief for Respondents at 27–29, Hobby Lobby Stores, Inc. v. Sebelius, No. 13-354 (Oct. 21, 2013). This argument is beyond the scope of this Note as it is not an argument about the ability of corporations to make free exercise claims but an argument about the standing of a corporation's proprietors.

69. Petition for a Writ of Certiorari at 25, *Hobby Lobby*, No. 13-354 (Sept. 19, 2013) (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't. of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013)).

70. Petition for a Writ of Certiorari at 27, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981)).

71. *Id.* at 27.

C. Possible Consensus on the Argument by Analogy to Nonprofits

Although the argument by analogy to nonprofits discussed in Part II.B is distinctly originalist, Conestoga Wood has articulated a more general argument by analogy that could appeal to liberals.[72] This argument asserts that, although the law distinguishes nonprofit and for-profit corporations, the distinctions between nonprofits and for-profits have to do with corporate governance structures and tax benefits, and are not pertinent to an organization's pursuit of religious purposes.[73] For-profit corporations therefore enjoy the same rights as nonprofit corporations. Of course, this argument depends on acceptance of the precedents establishing the free exercise rights of nonprofits. If a liberal accepted these precedents, it would be because nonprofit corporations have dignity that is equal to that of individuals in the sense that it is inseparable from that of individuals.[74] An originalist could accept them for other reasons and join the liberal in embracing the argument by analogy

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72. Both this argument by analogy and the originalist argument by analogy discussed in Part II.B are based on the same precedents and reach the conclusion that for-profit corporations should enjoy free exercise rights. However, they find the precedents establishing the rights of nonprofit corporations relevant to the question for different reasons. The originalist argument in Part II.B is that the precedents establishing the free exercise rights of nonprofits reflect the original principle of the Free Exercise Clause that religious actions by actors of any kind, including for-profits, should be protected. The liberal argument is that these precedents establish the capacity of entities that are identical to for-profits in every relevant way to pursue religious ends with dignity.

73. Petition for a Writ of Certiorari at 24 n.4, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013) (quoting Spencer v. World Vision, 619 F.3d 1109, 1130–31 (9th Cir. 2010) (Kleinfeld, J., concurring)). For an argument that corporations that are churches are at the core of the Free Exercise Clause and may deserve more rights than for-profit corporations, see Vischer, *supra* note 13, at 23–24 ("Corporations may function as vehicles for the expression and implementation of religious commitments, but unlike churches, they are not transcendent sources of those commitments."). Note, however, that this argument may be criticized for treating churches and for-profit corporations as distinct categories when in fact some churches do not enjoy tax-exempt status. *See* Petition for a Writ of Certiorari at 24, *Conestoga Wood*, No. 13-356 (Sept. 19, 2013).

74. A liberal argument by analogy to the rights of nonprofits could not base the rights of nonprofits on their inherent dignity. The argument by analogy requires that the rights of nonprofits and for-profits have a common basis. To the extent that this is the case, the ultimate basis for corporate free exercise must be some argument applicable to for-profit corporations other than the analogy to nonprofits. Thus, the argument by analogy to nonprofits ultimately incorporates the entire argument about corporate free exercise rather than substantively furthering the debate.

without agreeing with the liberal on the ultimate justification for a corporation's claim.

IV. CONCLUSION

Action and actor may appear difficult to divorce in a practical sense, but the distinction between religious actors and religious actions as a basis for religious exemptions is more than academic. The originalist framework understands a free exercise claim to be legitimated by the religious nature of an action—the fact that the action is taken to discharge a duty owed to a deity. It looks to the actor only to define the content of the claim—to explain what duty the actor seeks to have the state accommodate. The liberal framework moves in the opposite direction. It understands a claim to be legitimated by the religious nature of an actor—the actor's capacity for strong conviction and deep emotion. It looks to the action only to define the content of the claim—to explain what conduct the actor seeks to have exempted.

These fundamentally different perspectives have practical implications for corporate free exercise. In the originalist framework, categorical bars based on the identity of a free exercise claimant are unjustified because a claimant's identity has nothing to do with whether the claimant is acting according to a religious duty imposed by a deity. Corporations therefore have free exercise rights, and the first question in any case is not whether the claimant has standing, but what duties the actor believes it owes to a deity. The relevant religious duties may be those which bind the corporation itself or those which bind an individual whose actions are impacted by corporate regulation. The originalist has no difficulty legitimating the claim but may struggle to identify the relevant religion when a corporation formally states its intention to follow the principles of one religion although its shareholders are religiously diverse.

The liberal framework has more difficulty legitimating the claim but less difficulty determining what religious beliefs would be relevant if the claim were recognized. In the liberal framework, evaluating the possibility of a categorical bar to free exercise claims by for-profits requires evaluating whether categories of corporate law coincide with categories of claimants who have (or lack) dignity equal to that of a human being.

In this analysis, a categorical bar on free exercise claims designed to vindicate the rights of corporations as such is justified. However, it is unclear in a liberal framework whether corporations should be able to seek exemptions for the purpose of vindicating individual rights. A liberal who accepted corporate free exercise would consider only the beliefs of individuals to be relevant and would likely reject claims by corporations whose shareholders are religiously diverse.

The liberal framework has been described as broader than the originalist because it is perceived to embrace a wider range of action—actions motivated by secular conscience in addition to actions motivated by religious conscience.[75] With respect to the range of actors capable of making a claim for a religious exemption, however, the principles of the originalist framework are more inclusive than those of the liberal framework. The originalist believes in principle that free exercise protects religious actions by any actor, including corporations and their shareholders. By contrast, the liberal approach cannot justify protections for corporations as such. Insofar as it can justify corporate claims to protect shareholders, it protects corporations only because a category of corporate law happens not to align with the category of actors—those with dignity unequal to that of a human being—that liberal principles would exclude from the enjoyment of religious liberty. The originalist's religious freedom is not a subcategory of the liberal's freedom of conscience. Rather, religious freedom and freedom of conscience are overlapping but distinct concepts. One recognizes duty to God. The other recognizes dignity in man. Both are important. But which lies at the heart of free exercise?

Spencer Churchill

75. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? 6 (2013) (stating that an explicit protection of religion is redundant where a protection of "conscience more generally" exists and is enforced).