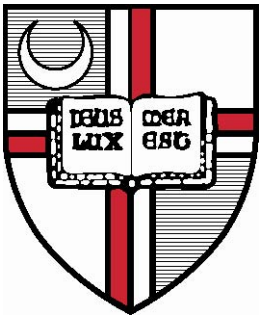

God and the Profits: Is there Religious Liberty for Money-Makers?

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"No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money."

—The Gospel According to Matthew, *circa* 80 A.D.[2]

"Hercules Industries' overriding purpose is to make money . . . . [T]here is nothing to indicate that Hercules Industries is anything other than a for-profit, secular employer. . . . By definition, a secular employer does not engage in any exercise of religion."

—United States Department of Justice, June 8, 2012.[3]

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[2] *Matthew*, 6:24 (New Int'l Version 1984).

[3] Defendants' Memorandum in Support of Their Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Newland, et. al v. Sebelius, et. al*, No. 1:12-cv-01123JLK (D. Colo., June 8, 2012) (Docket No. 17) (hereafter "DOJ Hercules Motion to Dismiss") at 17 (internal citations omitted).

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Abstract—Is there a religious way to pump gas, sell groceries, or advertise for a craft store?

Litigation over the HHS contraceptive mandate has raised the question whether a for-profit business and its owner can engage in religious exercise under federal law. The federal government has argued, and some courts have found, that the activities of a profit-making business are ineligible for religious freedom protection.

This article offers a comprehensive look at the relationship between profit-making and religious liberty, arguing that the act of earning money does not preclude profit-making businesses and their owners from engaging in protected religious exercise.

Many religions impose, and at least some businesses follow, religious requirements for the conduct of profit-making businesses. Thus businesses can be observed to engage in actions that are obviously motivated by religious beliefs: from preparing food according to ancient Jewish religious laws, to seeking out loans that comply with Islamic legal requirements, to encouraging people to "know Jesus Christ as Lord and Savior." These actions easily qualify as exercises of religion.

It is widely accepted that religious freedom laws protect non-profit organizations. The argument for denying religious freedom in the for-profit context rests on a claimed categorical distinction between for-profit and non-profit entities. Yet a broad examination of how the law treats these entities in various contexts severely undermines the claimed categorical distinction. Viewed in this broader context, it is clear that denying religious liberty rights for profit-makers would actually require singling out religion for disfavored treatment in ways forbidden by the Free Exercise Clause and federal law.

TABLE OF CONTENTS

I. INTRODUCTION

Religion and business have been closely intertwined throughout the American experience. The original corporate charter for the Virginia Company in 1606 addressed both commercial matters like the granting of mining rights,[4] and religious matters like the propagation of the Christian faith.[5] Puritan merchants in New England started each new ledger with the inscription "In the name of God and profit."[6] So long as God came first in their lives and businesses, they saw nothing wrong with pursuing financial success.[7]

Over the centuries, the nation's religious diversity has increased, so that the United States is now home to many different religious traditions, and many different religious views on money-making. Some groups profess God wants them to be fabulously wealthy,[8] while others seek God by adopting a life of poverty.[9] In a religiously pluralistic society, such a diversity of views on religion and money-making is hardly surprising.

One result of this religious diversity is that some participants in our market economy attempt to exercise religion and make money at the same time. This juxtaposition of religion and money-making raises potentially thorny questions of religious liberty law. Can a for-profit business—which today will often be organized as a corporation—engage in a protected "exercise of religion"? Can government regulation of that profit-making business be understood to impose a burden on the business owner's religion? Or is it the case that, to borrow a phrase from the Gospel of Matthew, one "cannot serve both God and Money"?[10]

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[4] The First Charter of Virginia, April 10, 1606, available at http://avalon.law.yale.edu/17th_century/va01.asp (last visited March 3, 2013) (granting the corporation the right "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper").

[5] *Id.* (referring to the corporation's "noble work" that would include "propagating of Christian Religion" so as to bring native Americans to "the true Knowledge and Worship of God"); *see also* JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC, 17 (1998) (noting that Virginia was founded by entrepreneurs who also viewed themselves as "militant protestants").

[6] JOHN STEELE GORDON, AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER, 27 (2004).

[7] *Id.* In fact, Puritans viewed prosperity as a sign one had been saved. *Id.*

[8] *See* David Van Biema and Jeff Chu, *Does God Want You to Be Rich?*, TIME, Sept. 10, 2006.

[9] P.D. Premasiri, *Religious Values and the Measurement of Poverty: A Buddhist Perspective*, Values, Norms and Poverty: A Consultation on WEDR 10/00/1: Poverty and Development, 4 (Jan. 1999), *available at* http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/Johannesburg/buddhist.pdf. (last visited February 19, 2013).

[10] *Matthew*, 6:24

These questions are not entirely new. The Supreme Court has previously recognized religious liberty rights for people earning a living,[11] including for some business owners.[12] And the Court has repeatedly recognized that the corporate form itself is not inherently incompatible with religious exercise, at least in the context of non-profit corporations.[13] But these decisions have not directly addressed the question of claimed religious exercise by for-profit business organizations and their owners.[14]

Recent litigation over the HHS contraceptive mandate has now placed this issue squarely before the courts. In at least 17 cases filed since the beginning of 2012, businesses and their owners have asserted that they have religious exercise rights while earning profits.[15] The federal government has taken the position that for-profit business organizations, and the individuals who own and operate those businesses, are not protected by federal religious liberty law.[16]

The crux of the government's argument is its claim that a for-profit business's "overriding purpose is to make money."[17] Making money is a goal the government labels "secular," so that "by definition" profit-making businesses "do not engage in any exercise of religion."[18] Business owners

[11] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963) (Seventh Day Adventist who was unable to accept jobs requiring Saturday work).

[12] *See, e.g.*, Braunfeld v. Brown, U.S. 599, 605 (1961) (recognizing religious burden imposed on Jewish store-owner by Sunday closing law).

[13] *See e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993) (Florida non-profit corporation awarded relief under the Free Exercise Clause); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), (New Mexcio corporation prevailing on RFRA claim).

[14] *Id.*

[15] *See* Part IV.A, *infra*. The cases concern the recently issued HHS requirement that employers provide coverage for all FDA-approved contraceptive drugs and devices. *Id.*

[16] Private parties and state governments have recently made similar claims that profit makers do not have a right to exercise religious liberty. *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009) ("Intervenors argue that Stormans, a for-profit corporation, lacks standing to assert a claim under the Free Exercise Clause."); Reply Brief of Defendants-Appellants, Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160 (Ill. App. 4th) (State of Illinois arguing: "A State-licensed community pharmacy is a secular entity that, by definition, does not 'exercise' a religion. And the individual plaintiffs' claims fare no better, as the rule imposes a burden . . . upon pharmacies, not pharmacists."). Additionally, several states have recently enacted same-sex marriage laws with conscience protections for nonprofit, but not for-profit, religious objectors. *See, e.g.*, CONN. GEN. STAT. § 46b-35a (2012); D.C. CODE § 46-406(e)(2) (2012); N.H. REV. STAT. ANN. § 457:37(III) (2012); N.Y. DOM. REL. LAW § 10- b(1) (2012); WASH. REV. CODE § 26.04.010(2)(4) (2012); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); *see also* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. LAW REV. 1417, 1442 (2012).

[17] DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

[18] *Id.* In the Hercules case, the government has emphasized the secular nature of the company's products. *Id.* at 16 ("Hercules Industries . . . is an HVAC manufacturer. The company's products and pursuits are not religious."). The government has pursued the same arguments, however, against for-profit businesses with clearly religious products and pursuits, such as Mardel Christian and Education Stores (a Christian bookstore) and

are also unprotected under this view, because they have "voluntarily chosen to enter into commerce" by operating a profit-making business as a distinct legal entity.[19] Any claim that owners experience pressure when the government penalizes their businesses is dismissed as a "type of trickle-down theory" of religious liberty for profit-makers that courts should reject out of hand.[20]

Over the past year, courts in the HHS mandate cases have split on the question of religious liberty for profit-making businesses and their owners, finding it to be an issue of first impression.[21] Perhaps owing to condensed schedules and the preliminary nature of the rulings, these opinions have not included detailed discussion about the relationship between profits and religious liberty. The courts adopting the government's theory have observed that a profit-making business corporation cannot say a prayer or attend mass, and that a business owner is legally distinct from his business.[22] However, neither the courts nor the parties have provided a comprehensive exploration of why the act of earning a profit should, or should not, have an impact on the availability of religious liberty rights.

This article aims to fill that gap by looking more broadly at the relationship between profit-making and religious exercise. The analysis will begin with the question whether, as a factual matter, for-profit business organizations and their owners engage in religious activities. This section will consider some examples of religious rules from various faiths concerning profit-making activities, and examples of businesses that appear to operate based on such religious principles.

Next, the article will examine how our legal system generally treats for-profit businesses and their owners in other contexts. The goal is to test the underlying assumptions of each side's argument. The claim that for-profit business organizations can actually engage in legally-protected "religious exercise" would require the law to recognize the organization

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Tyndale House Publishers (a Bible publisher). *See, e.g.,* Defendants' Brief in Opposition to Motion for Preliminary Injunction, Tyndale House Publ'r., Inc. v. Sebelius, 2012 WL 5903966 (D.D.C. Oct. 22, 2012). Despite the obvious religious focus of these businesses, the government has argued that their profit-making nature automatically renders them "secular" and therefore incapable of religious exercise. *Id.*

[19] *Id.*

[20] *Id.*

[21] *Compare, e.g.,* Korte v. Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting preliminary injunction to business owner and business) *with* Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir. Dec. 28, 2012) (denying preliminary injunction to business owner and business); *see also* Newland v. Sebelius, 881 F.Supp.2d 1287, 1296 (D. Colo. 2012) ("These arguments pose difficult questions of first impression.").

[22] *See, e.g.,* Hobby Lobby Stores, Inc. v. Sebelius 870 F. Supp.2d 1278, 1291 (W.D.Okla. 2012) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.").

itself as capable of forming and acting upon a religious belief.[23] In other contexts, do our laws treat for-profit businesses as capable of forming and acting on subjective religious, philosophical, or ethical beliefs? Those opposing religious liberty rights for profit-makers build their argument on a categorical distinction between non-profit and for-profit entities and a strict separation between business owners and their businesses.[24] Do we treat the distinction between non-profits and for-profits as categorical and determinative in other areas of the law? Do we generally treat business owners themselves as completely insulated from penalties imposed on their businesses?

This analysis will be conducted across five different contexts: corporate ethical decision-making, criminal law, Title VII discrimination law, tax law, and constitutional law. Understanding how the law treats for-profit businesses in these varied contexts will shed light on whether there is something inherent in the nature of operating a for-profit business that precludes religious liberty claims by businesses and their owners.

When this type of broad analysis is conducted, a very strong argument emerges that profit-making businesses and their owners are capable of engaging in protected religious exercise under federal law. For-profit businesses are widely understood as capable of forming subjective intentions for their actions.[25] The law recognizes this capability in various ways, from allowing businesses to act on ethical principles, to finding them capable of forming mental intent for crimes, to holding them liable for racial, sexual, or religious discrimination, to acknowledging that they can speak with a particular viewpoint.[26] There is no basis to view these same entities as incapable of forming and acting upon beliefs about religion. Observable facts confirm that at least some businesses take actions based on religious beliefs, from closing on the Jewish Sabbath, to seeking out loans that comply with Islamic law, to urging the public to accept Jesus Christ as Lord and Savior.[27] These actions are manifestly exercises of religion.[28]

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[23] *See, e.g.,* Ronald Colombo, *The Naked Private Square*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173801 (last visited March 4, 2013) at 79 ("It is time to connect the dots, and explicitly recognize the ability of for-profit corporations to invoke the protections of the Free Exercise Clause."); Robert K. Vischer, CONSCIENCE AND THE COMMON GOOD: PRESERVING THE SPACE BETWEEN PERSON AND STATE (2009) (arguing for conscience rights in for-profit businesses).

[24] *See, e.g.,* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1547 (2012) (arguing that "[w]ithin for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking").

[25] *See* Part III, *infra*.

[26] *Id.*

[27] *See* Part II.C, *infra*.

[28] *See, e.g.,* Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 876-878 (1990) (noting that the free exercise of religion "first and foremost" includes "the right to believe and profess whatever religious doctrine one believes").

The fact that the organization urging the public to accept Jesus Christ as Lord and Savior also generates profits does not make the proselytizing any less an exercise of religion. In fact, the for-profit/non-profit distinction carries little or no weight in most areas of the law, including constitutional law.[29] Where the distinction matters at all, it is often just one factor among many, and it does not operate in ways that suggest profit-making is categorically incompatible with religious exercise.[30] Moreover, many areas of the law—including corporate criminal law, Title VII, and tax law—operate on the assumption that business owners will be sensitive to pressures imposed on their businesses.[31] There is no reason to believe for-profit businesses behave any differently in the religious liberty context, or that religious business owners will not feel pressure to abandon their religious practices when the government penalizes their businesses.

For these reasons, the argument against religious liberty for profit-making businesses and their owners should be rejected. Denying religious liberty in this context would require abandoning longstanding legal principles, breaking with our usual treatment of for-profit businesses and their owners, and ignoring the real world practice of many religions and businesses. The better course, and in truth the only course permitted under the Free Exercise Clause and federal religious freedom laws, is to protect religious exercise wherever it occurs and regardless of the identity, ownership structure, or tax status of the party engaged in the exercise.

Part II of this article will address the factual question whether for-profit businesses and their owners engage in the exercise of religion, looking at examples of actual businesses and religious teachings. Part III will explore how the law treats for-profit businesses, their owners, and the for-profit/non-profit distinction in other areas of the law to determine whether there is something about for-profit businesses that is incompatible with religious exercise. In light of Parts II and III, Part IV will consider the argument from the HHS Mandate cases that for-profit businesses and their owners cannot exercise religion. Part IV will conclude that both for-profit businesses and their owners can exercise religion and are protected by federal religious liberty laws.

[29] *See* Part III, *infra*.
[30] *Id.*
[31] *Id.*

II. RELIGION AND BUSINESS IN PRACTICE

This Part will examine whether for-profit businesses actually do "exercise" religion as that concept is generally understood in religious liberty law. The analysis will proceed in three parts. Part II.A will address the legal understanding of religious exercise as an act or abstention based on a religious belief. Part II.B will briefly consider three religious traditions to examine whether they in fact impose religious requirements on believers' profit-making activities. Part II.C. will present three examples of modern for-profit businesses that take actions which seem to qualify as religious exercise under federal law.

A. What is a "Religious Exercise" Under Federal Law?

Both the First Amendment and federal religious liberty laws protect the "exercise" of religion.[32] The Supreme Court has explained that the free exercise of religion "means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[33] Thus the Free Exercise Clause prohibits the government from compelling affirmation of any particular religious belief,[34] punishing expression of disfavored religious doctrines,[35] or giving its power to any side of controversies over religious authority or dogma.[36]

The "exercise of religion," however, is broader than the freedom of belief and profession. The Court has explained that exercising religion often involves "not only belief and profession but the performance of (or abstention from) physical acts" including "proselytizing" or "abstaining from certain foods or certain modes of transportation."[37] The Court has thus upheld as religious "exercise" religiously-motivated decisions to abstain from working on the Sabbath,[38] to keep one's children out of public schools after a certain age,[39] and to refrain from manufacturing items that other people may later use in war.[40] The exercise of religion is not limited to actions or abstentions *required* by a person's religion, but rather includes actions and abstentions *motivated* by religion.[41] Federal

[32] U.S. CONST. amend. I; 42 U.S.C. §§ 2000bb (2006) (Religious Freedom Restoration Act) (imposing compelling interest test when government imposes "substantial burden" on religious exercise); 42 U.S.C. § 2000e (2006) (Title VII) (barring employers from discriminating against an employee based on his or her religious practices or beliefs).
[33] *Smith*, 494 U.S. at 876-878.
[34] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961).
[35] *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86-88 (1944).
[36] *See, e.g.*, Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969).
[37] *Smith*, 494 U.S. at 876-878.
[38] Sherbert v. Verner, 374 U.S. 398 (1963).
[39] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[40] Thomas v. Review Bd., 450 U.S. 707 (1981).
[41] *See, e.g., Smith*, 494 U.S. at 877 ("acts or abstentions . . . engaged in for religious reasons, or . . . because of the religious belief that they display"); *id.* at 881 ("religiously

statutory law makes clear that "religious exercise" is not limited to actions compelled by religion, but rather extends to "*any* exercise of religion, *whether or not compelled by*, or central to, a system of religious belief.'"[42]

Thus the key to determining whether a particular action is a religious exercise is determining whether the action is motivated by a religious belief.[43] If the conduct or abstention occurs because of the actor's religious beliefs, it is a religious exercise.[44] If the action is not based on religious beliefs, it is not a religious exercise.[45]

B. Religious Teachings on Religious Exercise, Profit-Making, and Corporations

In order for a profit-making business and its owner to plausibly assert that they are engaged in religious exercise, they must first show that their religious beliefs have something to say about the conduct of business. If the owner's religion imposes no requirements on business conduct, a claim of religious exercise in that sphere becomes significantly less likely.[46]

The United States is home to a wide variety of different faiths.[47] While it would be impossible to catalogue the full range of views on

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motivated action"); *id.* at 882 ("conduct . . . accompanied by religious convictions"). Other decisions by the Court confirm that religious exercise extends to religiously-motivated conduct. *See, e.g.,* Cleveland v. United States, 329 U.S. 14, 20 (1946) ("motivated by a religious belief"); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("action . . . in accord with one's religious convictions"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("following the precepts of her religion"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("rooted in religious belief"). These decisions are discussed in a letter from the Congressional Research Service submitted during Congressional consideration of RFRA. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 230-236 (1994) (discussing meaning of religious exercise under Free Exercise Clause and RFRA) (citing Letter from the American Law Division of the Congressional Research Service to the Honorable Stephen J. Solarz (June 11, 1992)).

[42] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Similarly, Title VII defines "religion" to "include[] all aspects of religious observance and practice, as well as belief." *See* 42 U.S.C.A. § 2000e(j).

[43] *Yoder*, 406 U.S. at 215 (asserting that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

[44] *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 232 (1994) (noting that RFRA's "legislative history is relatively clear" that both "supporters and opponents agreed that the bill would protect conduct that was religiously 'motivated.'").

[45] *Yoder*, 406 U.S. at 215.

[46] *See supra* note 40.

[47] *See* THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, 10, February 2008 ("The Landscape Survey details the great diversity of religious affiliation in the U.S. at the beginning of the 21st century. The adult population can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups.").

religion and money-making across the American religious spectrum—or even within any particular religious tradition—this section will briefly examine some teachings on the subject from Judaism, Christianity, and Islam. The goal here is not to be comprehensive about any of the faiths described, but simply to examine whether there are teachings within these traditions that impose requirements on their adherents' money-making activities, such that claims of religious liberty in the profit-making context are plausible.

While the teachings below differ in many respects, important similarities emerge. First, each of these faiths imposes religious obligations on the conduct of business. Second, each religion rejects the notion of separation whereby a business owner is not morally responsible for the actions of the business. Third, each prohibits businesses from providing harmful products or services that others would use to engage in harmful conduct.

1. Judaism

In the Old Testament, financial success at times appears to be a manifestation of divine favor, a reward for those who faithfully followed God's will.[48] Judaism's founding thus reflects a connection between religion and wealth, as God made Abraham, Isaac, Jacob, and Solomon wealthy, at least in part because they obeyed God.[49]

Judaism views earning a living as a necessary aspect of the human experience.[50] The Jewish faith dictates that wealth, as a blessing from God, must be earned and used in accordance with religious laws.[51] Therefore, Jewish businesses must be conducted with honesty and integrity.[52] Some Jewish authorities believe this means that Jewish businesses must avoid providing materials that are harmful to human health, such as tobacco, for others to use.[53] Additionally, Jewish law prohibits working, as well as causing others to work, during the Sabbath.[54] Thus, a religiously observant Jew must close his business from Friday at sundown until Saturday at sundown, and may not circumvent Jewish law

[48] Ronald M. Green, *Guiding Principles of Jewish Business Ethics*, 7 BUS. ETHICS QUARTERLY 21, 23 (1997); *see also* Genesis 24:35 ("The Lord has greatly blessed [Abraham] and he has become wealthy").

[49] Meir Tamari, *The Challenge of Wealth: 'Jewish Business Ethics'*, 7 BUS. ETHICS QUARTERLY, 45, 48 (1997).

[50] Green, *supra* note 47, at 22-23.

[51] *See* Tamari, *supra* note 48, at 48 ("Holders of wealth are not possessors but stewards"). In recognition that all wealth stems from God, an old ritual required Jewish farmers to present their first fruits of the season to God. *Id.* at 49.

[52] Green, *supra* note 47, at 23.

[53] *Id.* at 29.

[54] *See The Shabbat Laws*, ChabadOrg, http://www.chabad.org/library/article_cdo/aid/95907/jewish/The-Shabbat-Laws.htm (last visited Feb. 28, 2013).

by hiring non-Jews to work these hours.[55] Following these religious requirements while engaging in profit-making activities is viewed as critically important.[56] The Talmud, a sacred Jewish text, "suggests that the first question asked in the world to come is—'have you been honorable in business?'"[57]

In applying religious principles to profit-making, Judaism does not distinguish between the actions of a business owner and those of the business itself.[58] Rather, Jewish law emphasizes that the profit-making business corporation is not separate from the individual shareholder or owner.[59] Judaism rejects this notion of "separation of identity" on religious matters because such separation "creates moral problems since the same person who in his private life would not think of stealing or robbing or breaking the law sees nothing wrong with doing exactly those things in his role as a director or an official of a corporation."[60]

In similar fashion, Judaism prohibits even Jewish *consumers* from facilitating a business owner's violation of Jewish law.[61] For this reason, Jews are instructed not to purchase bread from Jewish-owned businesses immediately after Passover—the Jewish business owner should not possess grains during Passover, and the Jewish customer is forbidden from rewarding a violation of that law by a Jewish business.[62] Moreover, just

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[55] Rabbi Elliot N. Dorff, *Jewish Businesses Open on Shabbat and Yom Tov: A Concurring Opinion*, at 2, New York: Rabinnical Assembly (OH 243.199c) (1995) (stating that "it would be forbidden for the Jew to gain from the non-Jew's sales on that day.").

[56] *Id.*

[57] Moses L. Pava, Developing a Religiously Grounded Business Ethics: A Jewish Perspective, 8 Business Ethics Quarterly 65 (1998) (quoting Shabbat 31a).

[58] *Id.* at 80.

[59] *Id.*

[60] *Business Ethics: The Role of Wealth*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/ jsource/judaica/ejud_0002_0004_0_03774.html (last visited Feb. 19, 2013) ("Judaism . . . cannot accept the separation between the corporation and the individual when it comes to abrogate the responsibilities of the latter as seen in Jewish business law. Two examples may suffice to demonstrate this (*Minḥat Yizḥak*, Part 3, section 1; Part 4, sections 16 and 18). Jews are not allowed to own leavened bread during Passover, so a corporation which has a majority of Jewish shareholders would likewise be forbidden from possessing such leavened bread. In the same way, the view that since the corporation is not a human being, the biblical injunction against interest does not apply to loans between two corporations or between an individual and a corporation has been rejected by most rabbinic authorities. So, a corporation whose shareholders are Jewish would suffer the same restriction on lending money at interest as do individual Jews. This means that the limitations on business activities imposed by Jewish moral teachings and rabbinic law, and the social obligations flowing from the possession of wealth, which apply to the individual, are binding on the corporation as well.").

[61] *See* Young Israel Shomrai Emunah of Greater Washington, *Chometz After Pesach*, February 20, 2013, available at http://wp.yise.org/chometz-after-pesach/ (last visited February 20, 2013).

[62] *See id.* (Noting that "[a]ll Jews are prohibited from benefitting from chametz owned by another Jew over Pesach. . . .One should not purchase bread or other chametz for 2 weeks after Pesach from a store owned by Jews that did not sell their chametz before Pesach or

as the corporate form does not insulate the Jewish business owner from the conduct of the business, nor does it insulate the Jew as customer; just as she cannot purchase bread from an individual Jewish storeowner, nor can she purchase from a large corporate store owned by Jewish shareholders.[63]

These teachings suggest that at least some members of the Jewish faith do not view profit-making as inherently separate from religious exercise. To the contrary, some observant Jews are likely to feel required to follow a host of religious requirements on their profit-making activities. And these requirements apply equally to both a Jewish business owner and the Jewish-owned business itself.

2. Christianity

Christian scriptures offer a variety of messages about the proper relationship between profit-making and religion. In one part of Matthew's Gospel, for example, Jesus tells the parable of the talents, in which a wealthy man leaves three servants in charge of varying sums of money.[64] Two of the servants "put his money to work" and doubled their sums.[65] The third "went off, dug a hole in the ground, and hid his master's money."[66] When the master returns, the two profit-making servants are celebrated, while the third is cast out "into the darkness, where there will be weeping and gnashing of teeth."[67]

Other parts of the same Gospel, however, indicate a much less favorable view of profit-seeking, such as when Jesus expels people who are "buying and selling" from the temple, and warning them not to make the temple a "den of robbers."[68] Jesus also preaches that it is not possible to "serve both God and money,"[69] that it is exceedingly hard for a rich person to enter heaven,[70] and that his followers should sell off all their possessions and give the money to the poor.[71]

As might be expected, these very different statements in the Gospels give rise to a variety of approaches to religion and profit-making amongst modern Christian groups. Christian approaches to the issue run the gamut from preaching that God wants to show his people how to be wealthy,[72] to religious orders that take a vow of poverty believing that

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from a store which purchases chametz from Jewish distributors that did not sell their chametz before Pesach. This currently includes Giant, Safeway, Superfresh and Target").

[63] *Id.*

[64] *Matthew* 25:14-30

[65] *Id.* at 25:16-17.

[66] *Id. at* 25:14-18.

[67] *Id.* at 25:21-28.

[68] *Id.* at 21:12-13

[69] *Id.* at 6:24

[70] *Id.* at 19:23-24

[71] *Id.* at 21:21

[72] Prosperity Theology is one example of this belief. *See also* http://www.freewebs.com/godswealth/ ("Welcome to God's Promise of Wealth. . . . [T]he underlying principle for this site is at Deuteronomy 8-18. His words are very easy to

forsaking worldly wealth makes it easier for them to commune with God.[73] Intense discussion of the proper relationship between Christianity and profit-making remains ongoing.[74]

One group with a particularly well-developed set of teachings on this issue is the Catholic Church, the largest Christian denomination in the United States.[75] Catholic teaching makes clear that business and profit-making are not viewed as inconsistent with religious exercise.[76] Rather, the "vocation of the businessperson is a genuine human and Christian calling."[77] When properly managed, profit-making businesses "actively enhance the dignity of employees and the development of virtues such as solidarity, practical wisdom, justice, discipline, and many others."[78] In this regard, Christian business leaders are urged to "pursue their vocation, motivated by much more than financial success."

The Church views the business leader's development of the corporate business organization as vocational: "Business leaders have a

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understand and lay the foundation for us amassing wealth. He tells us, "But remember the Lord your God, for it is He who gives you the ability to produce wealth."); Roberts, Oral; Montgomery, G. H. *God's Formula for Success and Prosperity* (1966); Osteen, Joel, *Your Best Life Now: 7 Steps to Living at Your Full Potential* (2004).

[73] *See, e.g.,* Sisters of Charity, Vows, *available at* http://sistersofcharity.com/vows (last visited Feb. 10, 2013) ("By her vow of poverty, following in the footsteps of Christ, a Sister professes to live a life that is poor in fact and in spirit. It is a life of labor lived in moderation and simplicity, rejecting the lure of earthly riches, a life that proclaims to the world that God is the *one* thing necessary.").

[74] For example, Rick Warren, a popular evangelical pastor, presented a series of sermons on the subject titled "Doing Business With God" in late 2012. *See* http://www.saddleback.com/mc/m/80759/ (last visited Feb.10, 2013); *see also* Randy Alcorn, MONEY, POSSESSIONS AND ETERNITY 86 (2nd ed. 2003) (encouraging Christians to "say no to prosperity theology, obey Christ, and share your abundance with others"); Larry Burkett, BUSINESS BY THE BOOK: COMPLETE GUIDE OF BIBLICAL PRINCIPLES FOR THE WORKPLACE (2nd ed. 2006) (promoting a business philosophy that is "more concerned with eternity than with profits"); Timothy Keller, EVERY GOOD ENDEAVOR: CONNECTING YOUR WORK TO GOD'S WORK (2012) ("[O]ur work can be a calling only if it reimagined as a mission of service to something beyond merely our own interests.").

[75] *See* Pew Forum, *U.S. Religious Landscape Survey*, available at http://religions.pewforum.org/affiliations (last visited Feb. 10, 2013).

[76] *See generally*, Vatican Pontifical Council for Justice and Peace, *Vocation of the Business Leader: A Reflection* (2010) [hereinafter *Vocations of the Business Leader]*, available at http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf (last visited Feb. 13, 2013) (summarizing Catholic teaching on religion and business). Pope Benedict XVI also addressed the relationship between business and religion in his 2009 papal encyclical "Charity in Truth." Under the heading of "The Development of People—Rights and Duties—The Environment" the Pope explained that the "Church's social teaching is quite clear on the subject" that "the economy, in all its branches, constitutes a sector of human activity" and therefore subject to religious ethical norms. *Caritas-in-Veritate*, available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_benxvi_enc_20090629_caritas-in-veritate_en.html (last visited Feb. 10, 2013) at ¶ 45.

[77] *Vocation of the Business Leader, supra* note 74 at 5.

[78] *Id.* at 4.

special role to play in the unfolding of creation . . . [by] help[ing] to shape organizations which will extend this work into the future."[79] By creating and sustaining corporate entities, business leaders "are participating in the work of the Creator through their stewardship of productive organizations" which the Church views as an "awesome responsibility of their vocation."[80] At the same time, Catholic business leaders are to avoid thinking of themselves as morally separate from the actions of their businesses.[81] Church teaching urges business leaders to overcome this divide and "integrate the gifts of the spiritual life" into their business dealings.[82]

The Vatican teaches that these business organizations should be guided by principles of justice, rather than mere profit-maximization.[83] Businesses and their leaders are therefore also urged to "find ways to make a just distribution" of wealth—not only to shareholders—but also "to employees (following the principle of the right to a just wage), customers (just prices), owners (just returns), suppliers (just prices) and the community (just tax rates)."[84] Businesses must avoid actions which undermine the common good, such as by providing others with harmful products, because "we are all really responsible for all."[85] Therefore, "[a]t

[79] *Id.* at 5.

[80] *Id.* The Church views corporations and companies as "communit[ies] of persons." *Id.* at 18 ("[T]he purpose of business, [as] Blessed John Paul II states 'is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society." . . .When we consider a business organization as a community of persons, it becomes clear that the bonds which hold us in common are not merely legal contracts or mutual self-interests, but commitments to real goods, shared with others to serve the world.").

[81] *Id.* at 6 ("Dividing the demands of one's faith from one's work in business is a fundamental error" and leads to a "divided life" which is "fundamentally disordered, and thus fails to live up to God's call.").

[82] *Id.* at 2. *See also* Rick Warren, *Doing Business With God*, available at http://saddleback.com/mc/m/80759/ (last visited Feb. 10, 2013) (explaining that profits should not be an end in themselves and that Christians should avoid separating their faith from their business dealings).

[83] *Vocation of the Business Leader*, *supra* note 74 at 17 ("While profitability is an indicator of organizational health, it is neither the only one, nor the most important by which business should be judged. Profit is necessary to sustain a business; however, 'once profit becomes the exclusive focus, if it is produced by improper means and without the common good as its end, it risks destroying prosperity and creating poverty." Profit is like food. An organism must eat, but that is not the overriding purpose of its existence. Profit is a good servant, but it makes a poor master.").

[84] *Id.* at 18 (stating that "[w]hile financial resources are important, so too is stewardship of the environment, both physical and cultural. . . . As collaborators with god in the unfolding of creation, we have a duty to respect and not to attack the world around us.").

[85] *Id.* at 11 (internal quotation marks omitted); *see also id.* (asserting that "each of us has a duty to avoid actions which impede the flourishing of others…"). In explaining how businesses should seek human flourishing, the Church teaches as a "foundational ethical principle for business" that "each person, regardless of age, condition, or ability, is an image of God and so endowed with an irreducible dignity, or value. Each person is an end in him or herself, never merely an instrument to be valued only for its utility—a *who*,

the very least, a good business carefully avoids any actions which undermine, locally or globally, the common good."[86] This includes avoiding providing products that can "be detrimental to human well-being, as for example, in the sale of non-therapeutic drugs, pornography, gambling, violent video games, and other harmful products."[87]

Thus, as with Judaism, these teachings suggest that at least some Christians do not view profit-making as inherently separate from religious exercise. To the contrary, at least some Christians presumably feel required to follow a host of religious requirements on their profit-making activities, and understand those requirements to extend to the corporations they own and operate.

3. Islam

Like Judaism and Christianity, Islam imposes religious requirements on business owners and their for-profit businesses. These requirements extend to issues concerning pricing and profits, general treatment of customers, sales of forbidden goods, and borrowing or lending money at interest.

Islam views business as having not merely economic functions, but also social and religious functions as well.[88] Thus, while pursuit of profits is permitted and encouraged,[89] profitability must always be balanced with other social and religious needs such as providing service that is efficient and courteous, and providing only beneficial, good quality, and reasonably

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not a what; a *someone*, not a something. This dignity is possessed simply by virtue of being human. It is never an achievement, nor a gift from any human authority; nor can it be lost, forfeited, or justly taken away." *Id.*

[86] *Id.* at 12. The obligation to avoid having any involvement at all in someone else's sinful acts has long been the subject of Protestant Christian teachings as well. *See, e.g.*, John Calvin, COMMENTARY ON GALATIONS AND EPHESIANS (1548) *available at* http://www.ccel.org/ccel/calvin/comment3/comm_vol41/htm/iv.vi.iii.htm (Christian Classics Ethereal Library 1999) ("It is not enough that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance; for in all these ways, we have fellowship.").

[87] *Vocation of the Business Leader, supra* note 71**,. at 14.

[88] NIK MOHAMED AFFANDI BIN NIK YUSOFF, ISLAM & BUSINESS 85 (Ismail Noor ed., 2002).

[89] *Id.* at 8 ("Islam exhorts the believers to excel in this life no less than in the life hereafter. It urges them to engage in almost every material pursuit, especially trade and eulogizes profit and God's bounty."). The Qur'an encourages Muslims to generously spend their wealth. *See* Surah 2:254 ("Spend out of (the bounties) We have provided for you"); Surah 104—Al Humazah ("Woe to the miser who blocks up the channels/ Of use and service and dams up his wealth,/ As if he could remain in possession/ For all time! The Fire of Wrath will envelop them/ And wither up their hearts and minds, and consume/ That largeness of life which is the portion of mankind.").

priced goods to consumers.[90] Practiced in this manner, Islamic business "is an essential and indispensible service to mankind."[91]

One of these requirements is the obligation to conduct business with absolute honesty.[92] Muslims must observe "absolute honesty in all business transactions in order to obtain Allah's blessings."[93] Muslim business owners who conduct business honestly "not only create economic prosperity and social harmony but also bring them[selves] closer to Allah."[94] Prices charged to customers are fixed by Allah through the market mechanism of supply and demand.[95] Islamic religious teachings also impose limitation on the types of loans Muslims may offer or accept. In particular, the Qur'an prohibits lending or borrowing money at interest.[96]

Islamic rules for business also include a prohibition on providing illicit goods to others. This is because "whatever is conducive towards what is prohibited is itself forbidden."[97] Muslim businesses cannot be "avenues for what is forbidden."[98] Thus, a Muslim is not permitted to sell alcohol to others in his store, because Allah prohibits the use of alcohol.[99] Likewise, Islam prohibits providing other illicit goods such as pigs and improperly slaughtered animals. "Business is meant by Allah to provide

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[90] YUSOFF, *supra* note 87 at 85. *See also*, Zubair Hasan, *Theory of Profit: The Islamic Viewpoint*, J. Res. Islamic Econ. 1:1, 8 (1983) ("Islam aims at shaping all exchange relations among people on the principle of cooperation, mutual benefit, and fair play.").

[91] YUSOFF, *supra* note 87 at 85.

[92] ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QUR'AN 112 (1997) ("Islam will have nothing to do with tainted property. Its economic code requires that every gain should be honest and honourable.").

[93] YUSOFF, *supra* note 87 at 88; Hasan, *supra* note 89 at 8 ("[Islam] advocates absolute honesty in business to the extent that one is enjoined not to falsely praise his merchandise, but to reveal to the customer.").

[94] YUSOFF, *supra* note 87 at 85.

[95] *Id.* at 88 ("This is a concept of business also accepted by the West. The difference is that Western economists regard the forces of supply and demands as 'an invisible hand' whereas Islam recognizes it as Allah's Will.").

[96] Hasan, *supra* note 89 at 9 ("Barring a few discordant voices, learned opinion in the Muslim world holds, as an axiom, that the prohibition on *riba* is total and complete in Islam."); YUSOFF, *supra* note 87 at 115 ("usury is condemned and prohibited in the strongest possible terms" because "a dependence on usury would merely encourage a race of idlers, cruel blood-suckers, and worthless fellows."); *but see* Mohammad F. Fadel, Riba, *Efficiency, and Prudential Regulation: Preliminary Thoughts*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115875 (last visited March 5, 2013) at 4 ("It is now generally recognized, at least among scholars, that Islamic law permits numerous transactions which at the very least incorporate implicit interest in their structure.")

[97] YUSOFF, *supra* note 87 at 231.

[98] *Id.*

[99] *Id.* at 230 ("'The prophet stated: 'When Allah prohibits a thing, He prohibits (giving and receiving) the price of it as well.' (Ahmad and Abu Daud) 'Surely Allah and His Messenger have prohibited the sale of wine, the flesh of dead animals, swine and idols.' (Al-Bukhari and Muslim).").

goods and services beneficial to mankind," and therefore "prohibits transactions in forbidden goods and services" with others.[100]

C. Three Examples of Religious Exercise By Profit-Making Corporations and Their Owners

In light of the religious teachings set forth above, it is not surprising that there are some businesses and business owners who engage in religiously-motivated actions during their profit-making activities. Some of these examples are unsurprising. Tyndale Publishing House, Inc., for example, publishes Bibles.[101] Mardel Christian and Education is a Christian-themed bookstore.[102] Although not legally organized as non-profit entities, these businesses are religious in nature, and thus, necessarily involve some religiously motivated conduct. Everyday decisions, such as which Bible translations to publish, or which religious products to carry or feature in a religious store, seem very likely to be motivated by religious beliefs.

This subsection will consider three somewhat less obvious examples of profit-making businesses that purport to exercise religion: a gas station, a grocery store, and a craft store. Is it possible for businesses of this nature to exercise religion in the course of their profit-making endeavors? The business descriptions set forth below suggest that it is possible, and that at least some profit-making businesses engage in what can only fairly be called exercises of religion.

1. Rio Gas Station and Heimeshe Coffee Shop, Brooklyn, New York

As described above, Jewish religious sources impose several religious requirements for the conduct of business. Observant Jews seeking to comply with such requirements necessarily have to take certain actions and avoid certain actions in accordance with religious requirements. Rio Gas Station in the Borough Park section of Brooklyn, New York is conducted according to such requirements. Borough Park is an area heavily populated with Hasidic Jews. When the owner, an observant Jew, purchased the gas station in 2005, he turned one bay of the garage into a kosher coffee shop, Heimeshe Coffee Shop.[103]

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[100] *Id.* at 230.

[101] Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635(RBW), 2012 WL 5817323, at *3 (D.D.C. Nov. 16, 2012).

[102] *See* Mardel Christian & Education, About Us, http://www.mardel.com/about/ (last visited March 5, 2013).

[103] *See* http://matzav.com/1brooklyn-gas-station-serves-kosher-meals-at-heimeshe-coffee-shop. "Heimeshe" (or "heimish") is Yiddish for "homey," in reference to the atmosphere, although its meaning and usage has evolved. *See* The Yeshiva World News, Heimish: What Does it Mean to You,

The gas station/kosher coffee shop is run according to at least two religious requirements. First, it serves only food prepared according to Jewish kosher restrictions.[104] Second, it shuts down on for the Sabbath.[105] These requirements are followed because the owner is an observant Jew who understands that his faith requires him to run his business in this manner.[106]

2. Abdi Adem, Afrik Grocery, Inc., and Minneapolis' Alternative Financing Program

Abdi Adem is a Somali immigrant who lives in Minneapolis, Minnesota.[107] In 1998, he fled a civil war in Somalia that had killed some of his family members.[108] After traveling thousands of miles to Minneapolis, Adem set out to establish a small grocery store, just as he had owned in Mogadishu.[109]

Adem now owns Afrik Grocery and Halal Meat through a for-profit corporation, Afrik Grocery, Inc., which he established in 2004 and of which he is the sole shareholder and chief executive officer.[110] Adem operates Afrik Grocery in accordance with his Muslim religious beliefs.[111] Adem's religious obligations prohibit him from allowing his business to participate in activities that would violate Islamic law.[112] Thus, the halal meat at Afrik is prepared in accordance with Islamic requirements derived from the Qur'an.[113] Likewise, Afrik Grocery cannot sell items like liquor, pork, or pornographic magazines[114] because Adem's Muslim faith forbids him from providing these products to anyone else, as well as from personally consuming them.[115]

Adem's obligation to run Afrik Grocery according to his Muslim faith also controls the types of business loans his corporation may

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http://www.theyeshivaworld.com/coffeeroom/topic/heimish-what-does-it-mean-to-you (last visited Feb. 28, 2013)

[104] *Id.*

[105] *Id.*

[106] Telephone interview with Manager, Rio Gas Station, Brooklyn, N.Y. (Feb. 26, 2013).

[107] Telephone interview with Abdi Adem, Owner, Afrik Grocery, Inc. in Minneapolis, MN. (Feb. 26, 2013) [hereinafter Telephone Interview with Adem].

[108] Gwendolyn Freed, *Moving Back in Work to Get Ahead in Life: East African Immigrants Often Work Far Below Their Skills to Get a Start Here*, Minneapolis Star-Tribune, June 30 2003, at 1A, *available at* 2003 WLNR 14268362.

[109] Mark Anderson, *Nonprofit Lenders Boost Immigrant Entrepreneurs*, Duluth News-Tribune, June 3, 2008, available at 2008 WLNR 10455846.

[110] *See* Minn. Bus. & Lien Sys., Office of the Minn. Sec. of State, http://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=c661d22d-88d4-e011-a886-001ec94ffe7f (corporate record, showing formation of Afrik as a "domestic business" corporation in 2004) (last visited Feb. 26, 2013).

[111] Telephone interview with Adem, (Feb. 26, 2013).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

accept.[116] In particular, due to his religious obligations, Adem is not permitted to allow Afrik Grocery, Inc. to take a loan which would require payment of interest.[117]

Fortunately for Adem, Minneapolis is home to a large number of Muslim immigrants, and the city has taken steps to make loans available that comply with Islamic law.[118] Minneapolis has partnered with a local non-profit, the African Development Center, to create the Alternative Financing Program.[119] The Alternative Financing Program matches loans provided by small lenders and structures the loans in a way that is permissible under Islamic law.[120] The program is not limited to Muslims, but is open to applicants of any faith or no faith at all.[121] However, the loans are structured in a way that avoids the Islamic prohibition on earning or paying interest, while still providing a fair market rate of return for the lender.[122] According to the city, most loans are for between $5,000 and $10,000, and are repaid within three years.[123]

In 2005, Adem wanted to move Afrik Grocery down the street and expand his store to better serve his customers.[124] In particular, Adem wanted to be able to expand his halal meat offerings, but needed a loan that would both fund the expansion and comply with Islamic religious requirements.[125] Accordingly, Afrik Grocery took out a loan from Minneapolis's Alternative Financing Program.[126] Adem was able to both secure the financing his business needed and to keep his business compliant with Islamic law.[127] Adem borrowed $42,000, expanded and relocated his store, and paid back the loan in full in 2009.[128] Adem and Afrik Grocery clearly benefited from the availability of a business loan program recognizing that some for-profit businesses engage in religious

[116] *Id.*
[117] *Id.*
[118] *See* Rachel Stassen-Berger, *Banking on Trust: Immigrant Entrepreneurs Are Working With Lenders and the Minneapolis Community Development Agency to Bridge Cultural and Language Gaps Over How to Build Their Businesses,* St. Paul Pioneer Press, April 20, 2000, *available at* 2000 WLNR 2239313 (noting "evidence points to a huge boom" of immigrant businesses in Minneapolis).
[119] Nick Sudheimer, *Minneapolis Helps Muslim Businesses Follow Sharia Law: Loans that collect interest are considered by some to be sinful under Sharia law*, Minnesota Daily, February 7, 2012 *available at* http://www.mndaily.com/2012/02/07/minneapolis-helps-muslim-businesses-follow-sharia-law (last visited Feb. 26, 2013).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

exercise by conducting themselves in accordance with religious requirements.[129]

3. The Green Family and Hobby Lobby Stores, Inc.

Like Abdi Adem, David Green started his business with a small loan from a local bank. Green used his $600 loan to start a small frame company in 1970, which he originally operated out of his garage in Oklahoma. Today, Hobby Lobby Stores, Inc. is a craft store empire, with more than 500 stores, and more than 25,000 employees, spread over 42 states.[130] The stores are enormously successful financially, with annual sales over $2 billion. In 2012, Green was listed number seventy-eight in Forbes Magazine's list of the wealthiest people in America, with a net worth of $4.5 billion.[131]

From its inception, Hobby Lobby has been a family business, run by the Greens, according to their Christian beliefs.[132] The company's statement of purpose announces its commitment to "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[133] The family members who run the company each sign a statement of faith and commitment, obligating them to conduct the business according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries."[134]

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[129] Not incidentally, the City of Minneapolis also benefits from this program. According to the City, as of 2009, the Alternative Financing Program had made 54 loans, only one of which ended in default. *Id.* This compares favorably with the much higher default rate on small business loans, which the Small Business Administration estimated at approximately 12% in 2009. *Id.* Furthermore, these loans presumably help individual businesses, their owners, their employees, and their families to be more prosperous and productive citizens, and less likely to need government assistance in other ways.

[130] *Our Company*, Hobby Lobby, http://www.hobbylobby.com/our_company/our_company.cfm (last visited Feb. 28, 2013).

[131] *Forbes, 400 Richest Americans*, available at http://www.forbes.com/profile/david-green/ (last visited Feb. 26, 2013).

[132] *See* Verified Complaint at 3, Hobby Lobby v. Sebelius, 870 F.Supp.2d 1278 (W.D.Okla. 2012) (No. CIV-12-1000-HE) (hereinafter "Hobby Lobby Complaint") (stating that the Green family's business operations "reflect their Christian faith in unmistakable and concrete ways" because they "believe[] they are obligated to run their businesses in accordance with their faith."). *See also* DAVID GREEN, MORE THAN A HOBBY, 198 (2005) ("There is a God, and he's not averse to business. He's not just a 'Sunday deity.' He understands margins and spreadsheets, competition and profits. . . . Pleasing customers is important, but pleasing God through the way I run the business is even more important.").

[133] *See Statement of Purpose*, Hobby Lobby, http://www.hobbylobby.com/our_company/purpose.cfm (last visited Feb. 26, 2013).

[134] Hobby Lobby Complaint, *supra*, note 131. GREEN, *supra* note 131, at 196 ("In order to keep giving, we need to keep growing Hobby Lobby and its affiliate companies. This is what energizes my day-to-day work in retailing now—the knowledge that if we can

Hobby Lobby frequently takes action based on the Greens' Christian religious beliefs.[135] All stores close on Sundays, at a cost of millions per year, to allow employees a day of rest.[136] Christian music is played in the stores.[137] The company pays for all employees to have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses.[138] Company profits provide millions per year to Christian ministries around the world.[139]

Hobby Lobby also frequently abstains from certain business practices precluded by the Greens' religious beliefs. Because the Greens are religiously prohibited from promoting or facilitating alcohol use, Hobby Lobby does not sell shot glasses.[140] When a liquor store offered to assume a building lease in a deteriorating neighborhood, Hobby Lobby had to refuse—even though it would cost the company $3.3 million dollars over the life of the lease.[141] The Greens' religious beliefs preclude them from allowing their trucks to "back-haul" beer, forcing them to forego substantial profits when they refuse offers from distributors.[142] And while the Greens have no religious objection to standard contraception, they are forbidden by their religion from providing insurance coverage for abortion or emergency contraception, and so exclude those items from the company's health insurance offerings.[143] As a matter of faith, the Greens cannot engage in these actions themselves or through the actions of their businesses.

Perhaps Hobby Lobby's most public religious exercise is its series of holiday ads, which began in 1997. The ads stem from David Green's belief that if his store spends money on advertising to sell its products 50 weeks a year, it should also be willing to spend money twice a year to tell

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add stores and thereby boost profits, we can give away that much more money and make a difference eternally. I'll *definitely* get out of bed in the morning to see that happen!").

[135] Hobby Lobby Complaint, *supra* note 131, at 3 (stating that the Green family diligently "monitor[s] their merchandise, marketing and operations to make sure all are consistent with" their religious obligations).

[136] *Id.* at 13-14.

[137] *Id.*

[138] *Id.* at 14-15.

[139] *Id.* at 12.

[140] *Id.* at 13.

[141] GREEN, *supra* note 131, at 143 ("I thought to myself, 'You know, that's just about the last thing this neighborhood needs. It's already got a bunch of problems—they don't need another big provider of alcohol in the community.").

[142] *Id.* at 144 ("[O]ur trucks returning from our Colorado stores could have back-hauled Coors beer to Oklahoma City on a long-term contract that would have netted us $300,000 a year. It was at a time when we really could have used the cash. But again, we said no thank you, preferring to let our trucks come back empty until we could find an alternative. Let someone else haul the beer and take the responsibility for what people do with it.").

[143] This is the religious exercise that has led to Hobby Lobby's current lawsuit against the federal government. If Hobby Lobby and the Greens do not cease this religious exercise by July 2014, they face fines that could run as high as $1.3 million per day. Hobby Lobby Complaint, *supra* note 131 at ¶144.

people about the religious meaning of Christian religious holidays.[144] The corporation's first ad, which appeared at Easter 1997, encouraged readers to "accept the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE!."[145] The ad was placed, paid for, and signed by the corporation, "Hobby Lobby Stores, Inc."[146]

The corporation has continued placing such ads each Easter and Christmas since that time, encouraging people to "know Jesus as Lord and Savior," and to call a phone number they provide for religious counseling.[147]

Thus, as with Rio Gas Station and Afrik Grocery, Hobby Lobby demonstrates that some businesses are conducted according to religious beliefs. Actions taken or abstained from based on sincere religious beliefs are "religious exercises" under federal law. When Afrik Grocery makes a decision not to sell pork, or not to take out standard and easily available loans, the business is clearly taking action based on religious beliefs. Indeed, it is difficult to fathom why the corporation would take these actions *other than* for a religious reason. Likewise, when Rio Gas Station serves food prepared in accordance with ancient Jewish laws, and stops serving food and pumping gas for the Sabbath, it too is taking actions based on religious beliefs.

Hobby Lobby's decisions about what products to sell and what activities the company will conduct are similarly based on religious beliefs. When the company creates advertisements encouraging people to know and love Jesus Christ, the business is engaged in the quintessential exercise of religion, namely, profession of faith. Indeed, it is difficult to think of a clearer example of a profit-making business engaging in a religious exercise than Hobby Lobby's holiday ads: if encouraging people to "know Jesus as Lord and Savior" is not an "exercise of religion," nothing is.[148]

For these reasons, it is clear that many religions impose, and at least some businesses follow, religious requirements for their profit-making activities.

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[144] GREEN, *supra* note 131, at 160 ("Every week I was already paying money to put out my message about the coming week's sale items. Couldn't I spend more of my money to spotlight the eternal importance of Christmas?").

[145] *Id.* at 161. The full ad read as follows: "For God so loved the world he gave acceptance, peace, mercy, confidence, purpose, forgiveness, simplicity, hope, relief, comfort, equality, life, his Son. This Easter, we encourage you to believe in the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE! Hobby Lobby Stores, Inc." *Id.*

[146] *Id.*

[147] *Holiday Messages*, Hobby Lobby, http://www.hobbylobby.com/assets/pdf/holiday_messages/current_message.pdf. (last visited Feb. 11, 2013) (featuring a complete collection of Hobby Lobby's advertisements).

[148] Emp'l Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 876-878 (1990) (noting that the free exercise of religion "first and foremost" includes "the right to believe and profess whatever religious doctrine one believes").

III. THE PROFIT DISTINCTION AND THE LAW

As Part II establishes, the argument against religious liberty for profit-makers cannot be based on a factual claim about either the demands of religion or the actions of religious business-owners and their businesses. As a legal matter, however, the government argues that profit-making businesses cannot engage in the "exercise of religion" sufficient to come within the protection of the First Amendment's Free Exercise Clause or the federal Religious Freedom Restoration Act.[149] In advancing this argument, the government relies on Title VII of the 1964 Civil Rights Act as its source for the categorical rule that profit-making entities cannot engage in religion.[150]

This Part of the article explores the significance of the distinction between for-profit and non-profit entities more broadly. The goal is to determine how, when, and whether the law treats the for-profit/non-profit distinction as determinative of an organization's legal rights and capabilities. Is there something about how the law treats profit-making businesses and their owners that is incompatible with recognizing religious liberty rights for profit-makers? To that end, the significance of the profit distinction will be examined in five different areas: ethical decision-making by businesses (Part III.A); criminal law (Part III.B); Title VII discrimination law (Part III.C); tax law (Part III.D); and constitutional law (Part III.E).

Three important principles emerge. First, for-profit businesses are generally treated as capable of making subjective decisions based on values other than mere profit-seeking. Second, in most areas of the law, the for-profit/non-profit distinction has no bearing on the rights and capabilities of an organization. In the few areas where the profit distinction seems to matter, it does not suggest the kind of categorical rule the government proffers here, namely that profit-making and religious exercise are fundamentally incompatible. Third, business owners are regularly treated as responsive to, and capable of being pressured by, penalties imposed on their businesses.

A. Ethical Decision-Making By Profit-Making Businesses

There is no doubt that non-profit organizations may organize around ethical, philosophical or religious commitments other than profit-making.[151] Can profit-making businesses incorporate such principles into their decision-making as well?

Famed economist Milton Friedman once proclaimed that "[t]here is one and only one social responsibility of business—to use its resources

[149] DOJ Motion to Dismiss, *supra* note 5, at 17 (internal citations omitted).
[150] *See, e.g.*, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013); Hercules App. Br. At 16.
[151] *See* 26 U.S.C. § 501(c)(3) (exempt status permitted for groups pursuing, *inter alia*, religious, charitable, literary, or educational goals).

and engage in activities designed to increase profits."[152] This view is not unique to Friedman. In fact, several courts embracing the government's theory that business cannot engage in religious exercise have made the same claim: the only goal of a profit-making business is making profits.[153]

On the other hand, in common parlance, we often ask and expect businesses to "do the right thing" and avoid "irresponsible" behavior.[154] We regularly hear about businesses being "greedy"[155] or "generous,"[156] "ethical" [157] or "unethical." [158] For nearly a century, scholars have discussed the role of "corporate social responsibility" or "CSR" in business management.[159] The idea behind CSR is that directors of a business corporation should not focus exclusively on profit-making but instead should consider the impact of the business's actions on a variety of stakeholders, such as the company's employees, customers, community, or the environment.[160] CSR's are not limited to corporations, but rather

[152] *See* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine (Sept. 13, 1970), *available at* http://www.umich.edu/~thecore/doc/Friedman.pdf.

[153] *See, e.g., Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) slip op. at 3 (the mission of Conestoga "like that of any other for-profit, secular business, is to make money in the commercial sphere.").

[154] *See, e.g.*, President Barack Obama, Weekly Address (Jan. 26, 2013), (transcript *available at* http://www.whitehouse.gov/the-press-office/2013/01/25/weekly-address-two-nominees-who-will-fight-american-people) (citing the need to "make sure businesses and individuals who do the right thing aren't undermined by those who don't.").

[155] *See, e.g.*, John Hendren, *Obama: Wall Street 'Arrogance and Greed' Won't Be Tolerated* (Jan. 31, 2009), http://abcnews.go.com/Politics/CEOProfiles/story?id=6778419&page=1 (quoting President Obama saying the American people will not excuse "arrogance and greed" from "Wall Street firms" which have acted "shamefully" by paying large bonuses after accepting taxpayer bailout).

[156] *See, e.g.*, Matthew Kirdahy, *America's Most Generous Corporations* (Oct. 16, 2008), *available at* http://www.forbes.com/2008/10/16/most-generous-corporations-corprespons08-lead-cx_mk_1016charity.html (citing research by the *Chronicle of Philanthropy* about the "giving habits" of 78 of the nation's largest corporations).

[157] *See, e.g.*, http://www.forbes.com/sites/jacquelynsmith/2012/03/15/the-worlds-most-ethical-companies/ (last visited Jan. 23, 2013) (ranking 150 of the world's "most ethical companies").

[158] *See, e.g.*, Beth Braverman, *"Unethical Behavior" to blame for gas prices—poll*, June 11, 2008 ("A poll released Wednesday finds that 62% of Americans blame "unethical behavior" by industry players.") http://money.cnn.com/2008/06/11/news/economy/gas_poll/index.htm

[159] *See generally*, Wells, C.A. Hartwell, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002) (dating scholarly debate to the 1920s); *see also* Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* (Princeton University Press, 2011); Lynn Stout, *On The Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003).

[160] Wells, *supra* note 158, at 78; *see also* J. MARK RAMSEYER, BUSINESS ORGANIZATIONS 113 (2012) ("[M]any of the people with the most lucrative business plans discover those plans because they love what they do. They do not work to make money. They work to have fun or do good. . . . Some of the most wildly creative and profitable ideas in

extend to any business entity "regardless of the specific form of the business - partnership, contractual joint venture, entity joint venture, or even e.g. loosely affiliated individuals coming together in a temporary constellation for a particular project." [161] Vigorous debates remain ongoing about how and whether CSR should become a legally required part of business decision-making.[162]

Regardless of whether businesses do or should have a legal duty to consider broader interests when making decisions, it is clear that, as a practical matter, many profit-making businesses do.[163] State corporate laws broadly allow for-profit businesses to pursue any lawful purpose,[164] and several states and the federal government have taken steps to ensure their laws expressly embrace the notion of the conscientious profit-making business.[165]

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business, in other words, come from men and women who do not self-consciously try to maximize their profits.").

[161] Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. LAW & PUB. POL'Y. 334 (2009).

[162] *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (suggesting that corporate boards are required to balance interests of shareholders with those of management and employees); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (suggesting that the SEC require business corporations to provide a public social disclosure).

[163] *See, e.g.*, Z. Jill Barclift, *Too Big to Fail, Too Big Not to Know: Financial Firms and Corporate Social Responsibility*, 25 J. CIV. RTS. & ECON. DEV. 449, 467 (2011) ("In the U.S and internationally, CSR is now recognized as a part of overall corporate business strategy, as evidenced by the many organizations and companies touting CSR as an appropriate business model, the increased number of consultants advising businesses on the appropriate CSR focus, and the number of companies advertising CSR initiatives. Business leaders have embraced CSR as a moral imperative because corporations have significant economic and political power in society. Firms are expected to utilize corporate powers in a socially responsible way.").

[164] *See, e.g.*, 1A FLETCHER CYCLOPEDIA OF CORPORATIONS § 102, Incorporation For Any Lawful Purpose or Business ("[A]ll jurisdictions permit the formation of a corporation for any lawful purpose or business"). For example, Oklahoma's corporations statute is "applicable to every corporation, whether profit or not for profit" and allows corporations to "promote any lawful business or purposes." 18 OKL. ST. ANN. §§ 1002, 1005 (2012). The State of Oklahoma recently filed a brief in the Hobby Lobby litigation arguing that, under this provision, Hobby Lobby is permitted under state law to exercise religion while earning profits. *See* Brief of the State of Oklahoma as *Amicus Curiae* at 7, *available at* http://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/07a9ac25e371cb9986257b170079b412/$FILE/Amicus%20in%20Support%20of%20Hobby%20Lobby%20(file%20stamped).pdf (last visited February 19, 2013) ("[A] lawful purpose of *any* corporation organized under the Oklahoma General Corporation Act may be to express the views and even the religious beliefs and actions of its owners and the persons who operate it.").

[165] For example, since the 1980s, more than thirty states have enacted "constituency" statutes, expressly permitting directors to consider broader interests than mere shareholder profit-maximization. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (1999). More recently, states have been experimenting with new corporate forms to further encourage the use of profit-making entities to pursue publicly beneficial goals. *See, e.g.*, Felicia R.

Many for-profit businesses voluntarily operate in a socially conscious manner. Whole Foods Market, Inc., for example, strives "balance our needs with the rest of the planet" by promoting "environmental stewardship so that the earth continues to flourish for generations to come."[166] The store has adopted a set of "animal welfare standards" concerning the treatment of animals used for meat in their stores.[167] Chipotle Mexican Grill, Inc. takes similar stands, promising to serve only foods "that are grown or raised with respect for the environment, animals and people who grow or raise the food." [168] NOOCH Vegan Market, LLC in Denver sells no animal products at all because its owners "believe that animals have the right to be free from human use and see NOOCH as an extension of that ideology."[169]

Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 92 (2012) ("In a growing number of states, lawmakers have passed legislation creating various new business entities to house social enterprise and organizations that blend for-profit and not-for-profit purposes."). Ronald Colombo discusses these changes to corporate law in detail in his article, *The Naked Private Square*, in which he argues for free exercise rights for corporations. *See* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173801 (last visited March 4, 2013). The Securities and Exchange Commission recently promulgated regulations concerning trade in "conflict minerals" to address Congressional concerns about their role in fueling a humanitarian crisis in the Democratic Republic of the Congo. 77 C.F.R. § 56274 (Sept. 12, 2012) (to be codified at 17 C.F.R. §§ 240 & 249b) ("To accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict, Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.").

[166] *See* http://www.wholefoodsmarket.com/mission-values/core-values/declaration-interdependence.

[167] *See* http://www.wholefoodsmarket.com/about-our-products/quality-standards/animal-welfare-standards ("It's often easy to forget that the burger, steak or drumstick on your plate was once an animal. How was that animal raised? How was it treated? Where did it come from? What about added hormones and antibiotics? Was its growth artificially accelerated to get to market sooner and reduce feed cost?"). Under these standards, there are certain types of meat that the store simply will not sell based on its beliefs about animal treatment. Further, when the company does sell meat, it is carefully labeled according to a color-coded system to reflect how well the animal was treated during its life. The company has partnered with an independent auditor to oversee and verify that it does not purchase meat from animals that have not met the company's animal welfare standards. *Id.*

[168] http://www.chipotle.com/en-US/chipotle_story/steves_story/steves_story.aspx. As Chipotle Mexican Grill, Inc. explains in the company's most recent 10-K filing with the SEC, "food with integrity" means the company seeks ingredients "that are grown or raised with respect for the environment, animals and people who grow or raise the food." *See* http://ir.chipotle.com/phoenix.zhtml?c=194775&p=irol-reportsAnnual (last visited Jan. 26, 2013).

[169] NOOCH Vegan Market, About, http://noochveganmarket.tumblr.com/about (last visited Feb. 11, 2013).

In addition to such profit-making businesses making subjective, values-based decisions, there are also non-profit organizations which use investment in for-profit businesses as a way of advancing socially beneficial goals. *See, e.g.*, Acumen Fund, For example, the Healthstore Foundation is a non-profit entity which invests in for-profit businesses "to improve access to medicine and basic healthcare services for children and

Although none of these businesses purports to be exercising religion, the examples are important to the religious liberty question because they suggest that we regularly encounter and accept the notion of profit-making businesses taking actions based on ethical, philosophical, and moral commitments. If profit-making businesses are capable of forming subjective beliefs about such issues and acting on them, it is difficult to see how or why they would be precluded from forming and acting upon subjective beliefs about religion. In short, the example of these companies suggests that there is nothing inherent in the nature of for-profit businesses that forces those businesses to pursue profit and forsake all other values.[170]

B. Profit-Making Businesses and Criminal Liability

Generally speaking, criminal law assigns punishment in accordance with moral responsibility. While other values are of course at work, we deem criminal punishment acceptable because of a belief that the perpetrator was morally responsible for doing wrong.[171] This notion of moral responsibility explains why our criminal laws treat children differently from adults, and the mentally ill differently from the unimpaired.[172]

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families in the developing world." A 2012 Harvard Business School case study suggests the organization is considering becoming a for-profit enterprise based on the belief of some in the organization that "only a for-profit could attract investor capital . . . to rapidly grow the business and ultimately enable HSF to scale to the size of large commercial franchise businesses." *See* V. KASTURI RANGAN & KATHERINE LEE, CFW CLINICS IN KENYA: TO PROFIT OR NOT FOR PROFIT 1 (2012). Acumen Fund is a non-profit investment fund investing in profit-making enterprises in the developing world because of its belief that "[m]arket-based approaches have the potential to grow when charitable dollars run out, and they must be part of the solution to the big problem of poverty." *See* http://www.acumenfund.org/about-us.html (last visited March 6, 2013). These entities further demonstrate the use of the profit-based model for purposes other than wealth maximization.

[170] *See also*, ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2009) at 54 (arguing for corporate conscience and discussing Wal-mart's various conscience-based decisions, including a now-abandoned decision not to sell emergency contraceptives for moral reasons).

[171] *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 187-88 (1997) (noting that a criminal prosecutor must not only prove facts, but must do so in a way sufficient "to implicate the law's moral underpinnings and a juror's obligation to sit in judgment . . . and to convince the jurors that a guilty verdict would be morally reasonable"); Furman v. Georgia, 408 U.S. 238, 342-43 (1972) (Marshall, J., concurring) ("Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law."); Tison v. Arizona, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting) (noting "the relation between criminal liability and moral culpability on which criminal justice depends) (quoting People v. Washington, 62 Cal.2d 777, 783 (1965)).

[172] *See* Atkins v. Virginia, 536 U.S. 304, 320 (2002) (capital punishment impermissible for mentally impaired because "cognitive and behavioral impairments make these defendants less morally culpable"); Roper v. Simmons, 543 U.S. 551, 570 (2005) (capital

Can a for-profit entity have "moral" responsibility for its actions, such that it is appropriate to hold the entity criminally liable? Do our laws treat organizations as capable of acting with the relevant mental state or *mens rea* required for criminal liability? Is there a categorical distinction between for-profits and non-profits in this field?

After some early disputes on the matter, the modern answers are clear: both for-profit and non-profit entities can be held criminally liable for their actions. Some early Supreme Court decisions rejected the notion that corporations could be treated similarly to natural persons, even for purposes of suing and being sued in federal court under diversity jurisdiction. For example, Chief Justice Marshall explained in 1809 that a corporation is "an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person."[173] Therefore Marshall concluded that a corporation "cannot come within the description of those who are entitled to sue in the circuit courts of the United States."[174]

By 1853, the Court reversed itself and held that corporations can be citizens for diversity purposes.[175] And as business corporations grew in prominence throughout the 1800s, so too did efforts to regulate corporations with criminal law.[176] The issue reached the Supreme Court again in *New York Central & Hudson River Railroad Co. v. United States*.[177] The case concerned a New York criminal law punishing the railroad for paying illegal rebates. The Court noted early authorities finding that a corporation could not be held liable for a crime but found that "[t]he modern authority, universally, so far as we know, is the other way."[178] Rejecting corporate criminal liability could only be supported by "the old and exploded doctrine that a corporation cannot commit a crime."[179]

Today, for-profit businesses can be held liable for a wide variety of crimes.[180] By definition, this means that the law recognizes that it is

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punishment impermissible for juveniles because "[t]he susceptibility of juveniles to immature and irrational behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'") (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

[173] Bank of U.S. v. DeVaux, 9 U.S. 61, 73 (1809).

[174] *Id.*

[175] Marshall v. Balt. & Ohio R.R. Co., (1853).

[176] *See* George Skupski, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE WESTERN LAW REV. 263, 266-67 (2011) ("Throughout the nineteenth century, the 'corporation as fiction' view was progressively rejected as the corporation became more dominant in American society.").

[177] 212 U.S. 481, 495-496 (1909).

[178] *Id.* at 306.

[179] *Id.*

[180] *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 HARV. L. REV. 1477, 1488-89 (1996) ("The scope of corporate criminal liability in the United States is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.").

possible for a corporation to form the relevant criminal law *mens rea* for various crimes.[181] There are two predominant models for such corporate criminal liability. First, and most commonly, courts sometimes find the corporation liable for the criminal actions taken by their employees through the doctrine of *respondeat superior*.[182] In this manner, the mental state of the employee acting within the scope of his or her employment and for the company's benefit is imputed to the corporation itself.[183] Some jurisdictions take a somewhat narrower view, and hold the corporation liable only if the mental state is formed by an officer or manager of the company.[184]

An entity's status as a for-profit or non-profit organization has no bearing on whether the entity can be held liable under criminal law. For example, the Colorado Supreme Court has rejected claims that a non-profit corporation should be considered categorically incapable of violating a state criminal statute prohibiting gambling.[185] The non-profit had argued that its status was dispositive, and that its fundraising gala could not have violated the criminal law, because it could not form the requisite intent to profit from gambling. The court rejected that claim,

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For example, the federal government recently filed an information against British Petroleum, accusing the corporation of negligent homicide during the Deepwater Horizon accident. *See* Mike Scarcella, *BP Agrees to Record Criminal Penalty in Gulf of Mexico Oil Spill*, Nat'l L. J., Nov. 15, 2012, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202578529316&et=editorial&bu=National%20Law%20Journal&cn=20121116nlj&src=EMC-Email&pt=NLJ.com-%20Daily%20Headlines&kw=BP%20agrees%20to%20record%20criminal%20penalty%20in%20Gulf%20of%20Mexico%20oil%20spill&slreturn=20130128000200 (last visited February 27, 2013) ("The explosion of the rig was a disaster that resulted from BP's culture of privileging profit over prudence; and we allege that BP's most senior decisionmakers onboard the Deepwater Horizon negligently caused the explosion," Assistant Attorney General Lanny Breuer, the head of the DOJ Criminal Division, said in a statement.").

[181] William Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1059 (1992) ("[I]t is axiomatic that theories of criminal punishment require the finding of mens rea."); *see also* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. PUB. POL'Y 833, 848-49 (2000) ("The modern corporation also can be substantively distinguished from its owners, managers, and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms.").

[182] Federal law tends to follow this *respondeat superior* theory of corporate criminal liability. *See* William Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1058 (1992) ("Courts interpreting federal statutory law find corporations criminally liable for the conduct of employees acting within the scope of employment or with apparent authority, and with an intent to benefit the corporation.").

[183] *Id.*

[184] This approach is taken in some states, and is the approach suggested by the Model Penal Code. *See* Laufer, *supra* note 180 at 1058 (Under state law, liability is available either through respondeat superior theory, or where 'the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.'") (quoting MODEL PENAL CODE).

[185] Charnes v. Cent. City Opera House Ass'n 773 P.2d 546, 553 -554 (Colo.,1989).

finding that even a non-profit entity could form the requisite mental intent to be found guilty of profiting from illegal gambling.[186]

Notably, the organization's criminal liability does not have any impact on the liability of the employees or officers involved, who may also be separately held liable under criminal law.[187] Thus, in the criminal realm, if an actor engages in a criminal act, the law's approach is often to treat *both* the actor and the entity as criminally responsible.[188] A business owner who commits a crime for the business may find that both he and his business are criminally liable. In fact, many states have statutes expressly addressing the subject and clarifying that an individual who commits a crime for a corporation remains personally liable for the offense.[189]

Why would the law impose liability on both the organization and the individual actor? Liability for the employees or managers imposes an individualized deterrent on that particular actor. Liability for the corporation, however, reduces the corporation's net worth, and thereby can impose substantial pressure on the corporation's owners (i.e., shareholders).[190] Shareholders will then have an incentive to encourage

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[186] *Id.* ("The fact that the revenues generated by the Gala were not distributed to members, directors, or officers of the association did not preclude the association from realizing or from intending to realize a 'benefit,' and thus a profit, from the Gala. We thus conclude that the Opera House Association aided the Gala invitees in gambling, that it did so with the intent to realize a direct profit therefrom, and that it thereby participated in "professional gambling.").

The Rhode Island Supreme Court has likewise indicated that non-profit corporations can violate criminal law. *See In re Rule Amendments to Rule 5.4(a) and 7.2(c) of Rules of Professional Conduct*, 815 A.2d 47, 52 (R.I., 2002) (noting that an agreement by a nonprofit corporation unauthorized to practice law to receive a share of attorneys fees would be impermissible in its own right and "as a conspiracy, a separate criminal offense that is committed at the very moment the agreement is made.").

[187] *See* AM. JUR. 2D §1841 (2013) ("Although corporate crime is based on the acts of its employees or agents, the corporation is a separate legal entity and is severally liable . . . for its crimes. . . . [B]ecause its liability is separate from that of its officers or employees, both the corporation and the individual who committed the act may be found guilty, and the conviction of the responsible officers is not a bar to the prosecution of the corporation itself.").

[188] *Id.*; *see also* Department of Justice Press Release, *Canadian Citizen Sentenced in Scheme to Defraud Consumers Purchasing Pharmaceuticals Online*, Jan. 9 2013, available at http://www.justice.gov/opa/pr/2013/January/13-civ-035.html (noting that target was sentenced to four years in prison for "conspiracy to commit mail fraud in connection with his role as owner and president of Mediplan Health Consulting, Inc., a Canadian company.")

[189] *See, e.g.,* KY. REV. STAT. ANN. § 502.060 (2012) ("A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if the conduct were performed in his own name or behalf."); *see also* COLO. REV. STAT. ANN. § 18-1-607 (West 2012) ("A person is criminally liable for conduct constituting an offense which he performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him in his own name or behalf."). ALA. CODE § 13A-2-26 (2012) (same).

[190] V.S. Khanna, Corporate *Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1495 (1996) ("Direct liability, as its name indicates, directly influences

managers not to engage in the proscribed behaviors.[191] As Richard Posner has explained, "if shareholders bear no responsibility for a manager's crime, they will have every incentive to hire managers willing to commit crimes on the corporation's behalf."[192] In this respect, the entire concept of criminal liability for for-profit corporations depends on the view that a corporation's owners can be pressured by penalties imposed upon the business.[193]

Thus it is clear that for-profit and non-profit businesses can be held liable for their crimes, and are understood as able to form the subjective mental intent necessary for criminal liability. This application of criminal law is driven, at least in part, by a view that the criminal corporation has done something morally wrong[194] and by a desire to impose pressure on shareholders to encourage more responsible behavior. Moreover, this criminal liability for the business is in addition to liability faced by the natural persons who engaged in criminal activity on behalf of the corporation.[195]

Engaging in religious exercise, of course, is not a criminal offense. Still, the fact that our criminal law treats for-profit businesses and their owners in this way is relevant to the religious liberty question. It is unclear what principled reason would justify viewing a corporation as capable of forming and acting upon criminal intentions, but incapable of forming and acting upon religious ones. Moreover, it is at the very least

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managers' or employees' behavior by imposing penalties on these agents whenever they commit certain undesirable acts. Corporate liability works more indirectly. Imposing sanctions on a corporation for the acts of its managers or employees presumably decreases the corporation's net worth. Shareholders, who bear the brunt of such a decrease, have an incentive to encourage managers not to commit undesirable acts (assuming that any benefits from the acts do not outweigh the costs to the shareholders). Shareholders can influence the behavior of corporation managers and employees in a number of ways, such as by modifying employment contracts to provide incentives not to engage in certain types of activities."); *id.* at 1494 (noting that many commentators and judges view deterrence, not retribution, as the aim of corporate criminal and civil liability).

[191] *See, e.g.*, S.E.C. v. Med. Comm. For Human Rights, 404 U.S. 403 (1972) (addressing a shareholder proxy proposal to prohibit Dow Chemical Company from selling napalm during the Vietnam War). KATHERINA GLAC, CENTER FOR ETHICAL BUSINESS CULTURES THE INFLUENCE OF SHAREHOLDERS ON CORPORATE SOCIAL RESPONSIBILITY 11 (2010) *available at* http://www.cebcglobal.org/uploaded_files/Glac_paper_on_Social_Investment_FINAL.pdf (describing how "faith-based" institutional investors use shareholder proposals to influence companies); *see also* Resonsible Endowments Coalition, available at http://endowmentethics.org ("Responsible investment means recognizing that our finances have major social and environmental impacts worldwide—from peoples' working conditions, to their health, to the very land they live on.").

[192] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 397-98 (3d ed. 1986).

[193] *Id.*

[194] *See, e..g,* Dan Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998) ("The public demands moral condemnation of criminal wrongdoers, whether natural persons or corporations.").

[195] *See supra* 186.

odd to think that our criminal laws would deem a business and responsible individuals *both* criminally responsible for their crimes, but that our religious liberty law would treat *neither* as capable of asserting civil rights under religious liberty law. Finally, the very existence of corporate criminal law as a system designed to penalize companies, and thereby create incentives for owners to behave in particular ways, suggests that we generally understand the owners of businesses as responsive to penalties imposed on their businesses. Thus it is not clear why we would not also understand, in the religious liberty context, that the threat of a penalty against the business is likely to create substantial pressure on the business owner.

C. Title VII Discrimination Law

The government relies on a reference to Title VII discrimination law as the basis for treating for-profit businesses as incapable of exercising religion.[196] The argument is that because there are no decisions finding that for-profit businesses qualify under Title VII's "religious organization" exception (which allows organizations to discriminate based on religion when hiring employees)[197] for-profit businesses must be categorically incapable of religious exercise of any kind, under any federal law.[198] This section will explore whether Title VII discrimination law actually treats for-profit businesses as incapable of exercising religion, and whether Title VII supports the broad exclusion of for-profit businesses from other religious liberty laws.

1. Title VII's Prohibition on Religious Discrimination Against Employees

Title VII generally prohibits employment discrimination based on certain protected traits, including religion.[199] Title VII's broad definition of "religion" includes not just religious belief or identity, but "all aspects of religious observance and practice, as well as belief."[200] Employers must reasonably accommodate all religious practices by their employees unless accommodations would cause undue hardship.[201] In this respect, Title VII's primary impact on religious liberty is to ensure that employees can earn money without facing discrimination and unnecessary burdens on their religious practices and beliefs.

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[196] DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.
[197] 42 U.S.C. § 2000e-1(a)
[198] *Id.*
[199] 42 U.S.C. § 2000e-2.
[200] 42 U.S.C. § 2000-e(j).
[201] *Id. See also,* Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 742 (1996) (noting that religion is the only trait singled out for this type of accommodation under Title VII).

To achieve this goal, Title VII imposes liability on the employer, rather than the individual supervisor engaged in religious discrimination.[202] Why impose liability on the employer? The answer is the same as in the corporate crime analysis: imposing liability on the company puts pressure on the company's owners to take action to eliminate discrimination.[203] As the Supreme Court has explained, the prospect of damages awarded against the company under Title VII is designed to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[204] Over the years since Title VII was first enacted, when Congress has found that the law provided insufficient deterrence to spur employers to take such action, it has increased the penalties on the company in order to increase the pressure on owners to root out impermissible discrimination.[205]

2. The Religious Organization and BFOQ Exceptions

Within broad this protection of religious liberty for money-making employees, Title VII recognizes two limited exceptions in situations where the employee's right to earn money without facing religious discrimination comes into conflict with an employer's right to exercise religion in hiring decisions. First, Title VII's prohibition on religious discrimination does not apply at all to "a religious corporation, association, educational institution or society" if that organization seeks to hire and fire based on religion.[206] Second, even for employers who are not covered by this "religious corporation" exemption, Title VII provides that

[202] *See generally* Tammi J. Lees, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law*, 54 CASE W. RES. L. REV. 861, 861 (2004) (explaining that federal law does not include individual liability, but that some state laws do).

[203] *See, e.g.*, Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 201 (2012) (discussing purpose of heightened damages awards against employers "to deter discriminatory employers by more severely punishing unlawful conduct."); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) ("The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.").

[204] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973)).

[205] *See* H.R. Rep. No. 102-40, pt. 2 at 25 (punitive damages remedy added to Title VII by Civil Rights Act of 1991 "needed to deter unlawful harassment and intentional discrimination in the workplace").

[206] 42 U.S.C.A. § 2000e(1) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

religious discrimination can be permissible if religion is a "bona fide occupational qualification" or "BFOQ."[207]

On its face, the text of the religious corporation exemption does not distinguish between non-profit and for-profit employers. Thus, nothing statutorily precludes an exempted "religious corporation" from earning profits while practicing or preaching religion. Further, the BFOQ provision expressly states that it is designed to include "businesses," thereby suggesting that Congress viewed profit-making businesses as capable of engaging in at least some religious exercises.[208] Thus from the face of the statute, it is clear that businesses are entitled under Title VII to exercise religion in at least one respect, namely by having jobs for which particular religious beliefs constitute a BFOQ.

The government observes that there are no reported cases in which for-profit companies successfully obtained the right to engage in religious discrimination under the exception.[209] While this observation is correct, it is also incomplete. The government points to only one reported case in which a for-profit employer actually *sought* the Title VII religious employer exemption.[210] In that case, *EEOC v. Townley Eng'g & Mfg. Co.*,[211] the Ninth Circuit determined that Townley was not a religious employer.[212] Notably, although Townley was a for-profit employer, the court did not articulate a categorical rule. Rather, the court determined that the outcome of "each case must turn on its own facts" and "[a]ll significant religious and secular characteristics" should be considered.[213] In other words, the court in *Townley* did not apply categorical rule that profit-making businesses can never receive the Title VII exemption. Nor did it suggest that, having failed to qualify for that one exemption, Townley was categorically incapable of religious exercise in other contexts. To the contrary, even while denying Townley's request for the exemption, the court *did* permit the company to assert Free Exercise rights to act according to the religious beliefs of its owner.[214] *Townley* thus

[207] 42 U.S.C. § 2000e-2(e) ("Businesses . . . with personnel qualified on the basis of religion … [may hire] on the basis of religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").
[208] *Id.*
[209] DOJ Hercules, *supra* note 5, at 16.
[210] EEOC v. Townly Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).
[211] *Id.*.
[212] *Id.*
[213] *Id.*
[214] *Id.* at 619-620 ("Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. . . . [Thus] Townley has standing to assert Jake and Helen Townley's Free Exercise rights"); *see also* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120-21 (9th Cir. 2009) ("a corporation has standing to assert the free exercise right of its owners").

suggests that Free Exercise rights are not limited only to those entities permitted to hire and fire based on religion under Title VII.

Moreover, there do not appear to be any courts in the Title VII area that approach the religious organization exception with anything like a blanket rule prohibiting religious exercise by profit-makers.[215] Two Justices referenced the issue of profit-making activities by religious organizations in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,[216] but those concurrences do not suggest a blanket rule and emphasize that the question was left open. The discussion of the issue in *Amos*, in fact, strongly suggests that the Justices understood that religious institutions *would* sometimes engage in profit-making activities, which suggests that religious exercise and profit-making are not fundamentally incompatible.[217] Furthermore, the federal government's own EEOC Compliance Manual suggests that profit-making is one factor to consider, but notes that "[a]ll significant religious and secular characteristics" must be considered and that "*no one factor is dispositive*."[218]

[215] *See* LeBoon v. Lancaster Jewish Comty. Ctr. Ass'n, 503 F.3d 217 (3rd Cir. 2007) (noting profit-making status as just one of nine factors to be considered because "whether an organization is "religious" for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case.").

[216] 438 U.S. 327 (1987).

[217] *Id.* Justice Brennan's concurrence expressly notes that "[it] is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases." *Id.* at 345 n.6 (Brennan, J., concurring). Justice O'Connor explained that the decision left the Title VII/profit question open and expressed her uncertainty as to whether "activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization." *Id.* (O'Connor, J., concurring).

Justice O'Connor's uncertainty as to how profit-making activities of a religious non-profit should be analyzed is telling. Just three years earlier, in *Roberts v. U.S. Jaycees*, Justice O'Connor wrote a concurrence suggesting that she believed the presence of substantial commercial activity would completely disqualify a group from treatment as an "expressive association" under the First Amendment's freedom of association. 468 U.S. 609, 635-636 (O'Connor, J., concurring); *but see* Colombo, *supra* note 22 at 55-57 (noting that no other justices joined in Justice O'Connor's *Roberts* opinion, and that her approach "betrays quite narrow and unimaginative thinking" about the range of possible commercial organizations). Justice O'Connor's unwillingness to assert a similar blanket rule in *Amos* suggests a possible softening from her position in *Roberts*.

[218] EEOC Compliance Manual, Section 12 (Religious Discrimination), *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359493 (last visited Feb. 28, 2013) (emphasis added).

3. For-Profit Businesses As Victims and Perpetrators of Religious Discrimination

Rather than reaching out to help immigrant Muslim business owners like Abdi Adem, suppose the City of Minneapolis instead vowed that it would never conduct business with Afrik Grocery, Inc. or any other Muslim-owned business. Or suppose a state government does not like Hobby Lobby's advertisements inviting people to "know and love Jesus" and penalizes the company in some way. In those circumstances, it would be fairly easy to see the for-profit business as the victim of religious discrimination. Generally speaking, our laws recognize that businesses can be victimized by such discrimination in the race context, and our government regularly adopts programs designed to eradicate such discrimination against businesses.[219] Although it seems less frequent, businesses discriminated against based on religion can similarly bring claims for unconstitutional discrimination.[220] This suggests that both legally and socially, we understand businesses to be capable of having a religious identity if that identity is relevant to their status as a victim of discrimination.[221]

We likewise appear to have no difficulty believing that a for-profit business can form and act upon subjective views about religion when

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[219] *See, e.g.*, United States Small Business Association, About the 8(a) Business Development Program, *available at* http://www.sba.gov/content/8a-business-development-0 (last visited Feb. 28, 2013) ("The 8(a) program offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals."); *id.*, Socially Disadvantaged Eligibility, available at http://www.sba.gov/content/socially-disadvantaged-eligibility (last visited Feb. 28, 2013) ("Under federal law, socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias"); *see also* Exec. Order No. 11625, 36 C.F.R. 19967 (Oct. 13, 1971 (creating Minority Business Development Agency) ("The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy."); *cf.* 4 Atheists, http://www.4atheists.com/atheist-market.html (last visited Feb. 28, 2013) ("Supporting the atheist community and atheist owned businesses;" urging readers to "please give these folks your support by simply doing business with them rather than theist firms.").

[220] *See, e.g.*, Sherwin Manor Nursing Cent., Inc. v. McAuliffe, 37 F.3d 1216, 1221 (7th Cir. 1994) ("Sherwin presents a cognizable equal protection claim since it alleges that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus."); *see also* Amber Pyramid, Inc. v. Buffington Harbor Riverboats, L.L.C., 220 Fed. Appx. 292, 295 (7th Cir. 2005) (holding that a "minority-owned corporation, like Amber–Pyramid, assumes an 'imputed racial identity' from its shareholders.").

[221] The recognition that a business may be targeted based on the religious beliefs of its owners is, sadly, one with a long history. For example, in the Kristallnacht attacks of 1938, Nazis not only attacked Jewish homes and synagogues, but also destroyed thousands of Jewish-owned businesses. *See* LOUIS L. SNYDER, ENCYCLOPEDIA OF THE THIRD REICH, 201 (1989). The attackers obviously expected that attacking a business would put pressure on its owners.

those views are used to discriminate against an employee on religious grounds. That is, if a large publicly-traded corporation decided it would no longer hire Muslims or Catholics because it disagrees with their religion, it would be easy to see that the for-profit business has reached a subjective belief about religion, and had acted on that belief in a way the law deems impermissible. Indeed, courts have no trouble accepting that for-profit businesses can form and act on subjective beliefs about religion in these contexts.[222]

Thus, discrimination law recognizes that a for-profit business can have a religious identity when it is discriminated against, and can form and act on beliefs about religion when it is found guilty of religious discrimination. Viewed in combination with Title VII's broad protection of the right to earn money without undue religious burdens, and its express inclusion of "businesses" within the religious BFOQ provision, religious discrimination law seems to support the notion that there is no fundamental incompatibility between profit-making and religious exercise. The only place a for-profit/non-profit distinction appears to have any weight is in courts' analysis of Title VII's religious organization exemption. But even there, all courts to address the question and the EEOC have rejected the idea that profit-making makes an organization categorically ineligible for the exemption. And none suggest that ineligibility for that particular exemption renders a business incapable of all other forms of religious exercise.

These facts severely undermine any claim that any categorical for-profit/non-profit distinction exists within Title VII, or can be borrowed from Title VII and applied as a categorical bar to all other religious freedom claims by for-profit businesses and their owners.

D. Tax Law

The federal tax code provides a statutory basis for at least one categorical distinction between non-profits and for-profits: eligibility for tax-exempt status under 26 U.S.C. § 501(c)(3). Even this distinction, however, does not suggest any type of categorical rule that religious exercise and profit-making can never coexist. Moreover, the tax code's allowance for pass-through taxation for most for-profit business organizations undermines any claim that business owners are not receptive to pressures imposed on, or incentives offered to, their businesses.

[222] *See, e .g.*, Fischer v. Forestwood Company, Inc., 525 F.3d 972, 987 (10th Cir. 2008) (allowing claim that for-profit business corporation refused to hire plaintiff unless he would join particular church); Ollis v. Hearthstone Homes, Inc., 495 F.3d 570, 573 (8th Cir. 2007) (affirming jury verdict for plaintiff in religious discrimination case against for-profit corporation).

1. Tax Exempt Status and Profit-Making

Organizations are eligible for tax-exempt status under Section 501(c)(3) if they are organized for certain approved purposes[223] and "no part of the net earnings" of the organization "inures to the benefit of any private shareholder or individual."[224] Many exempt organizations are religious in nature.[225] The profit distinction is categorical in the sense that even an organization with approved purposes would not be exempt from taxation if it pays out earnings to owners.[226]

There are important ways, however, in which the profit distinction in this context does not suggest a categorical incompatibility between religious exercise and making money. For example, religious organizations are required to pay taxes if they earn what the IRS calls "unrelated business income."[227] According to the IRS: "Churches and religious organizations, like other tax-exempt organizations, may engage in income-producing activities unrelated to their tax-exempt purposes."[228] If the religious organization makes money from these activities, it must pay taxes on that money if the income-producing activity is "unrelated" to the mission.[229]

This tax treatment for religious non-profits is clearly built on the assumption that there is nothing fundamentally incompatible between religion and making money. Indeed, the IRS even acknowledges that some income-producing activity may be so closely tied to a religious mission that it is not taxed at all, *i.e.*, because it is "substantially related"

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[223] 26 U.S.C. § 501(c)(3) (organization must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals").

[224] *Id.* Exempt organizations under 501(c)(3) must also comply with certain limitations on their activities: "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." *Id.*

[225] *Id.* (noting that "religious" purposes are permissible.) For example, the Little Sisters of the Poor run nursing homes for the elderly and poor and have exempt status. *See* http://www.littlesistersofthepoordelaware.org/index.php?option=com_content&view=article&id=63&Itemid=58 (last visited Feb. 28, 2013) ("As Little Sisters of the Poor we care for the elderly poor in the spirit of humble service we have received from our foundress, Saint Jeanne Jugan. We welcome the elderly as we would Jesus Christ himself and serve them with love and respect until God calls them home.").

[226] 26 U.S.C. 501(c)(3).

[227] *See* 26 U.S.C. §§ 511, 513*; see also* I.R.S. Pub. 598 (revised March 2012).

[228] Internal Revenue Service, *Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law*, available at http://www.irs.gov/pub/irs-pdf/p1828.pdf (last visited Feb. 20, 2013) (hereinafter "IRS Religious Organization Tax Guide").

[229] *Id.* (Examples: "Many tax-exempt organizations sell advertising in their publications or other forms of public communication. Generally, income from the sale of advertising is unrelated trade or business income."); *see also* 26 U.S.C. § 512.

to that mission.[230] The tax code clearly suggests that religious exercise and taxable money-making are not mutually exclusive or even unusual.

In a way, the same treatment applies to for-profit businesses themselves. If a company earns profits and distributes them as profits, that money is subject to ordinary corporate income taxes. But if the company instead makes a decision to donate those profits to a church or other qualifying organization, the profits are no longer taxed.[231] In fact, the tax code is somewhat biased in favor of corporate charitable giving compared to shareholder giving: money donated by the corporation avoids corporate income taxes, while money donated by the shareholder does not.[232]

Thus the federal tax treatment of both non-profit and for-profit organizations suggests that the IRS understands that the same entity may both engage in religious exercises and earn profits.

2. Pass-Through Taxation and Incentives for For-Profit Businesses and Business Owners

Most businesses do not pay income tax directly, but rather use what is known as "pass through" taxation, where taxes are paid by the owners rather than the business entity itself. For example, the tax code provides that "[a] partnership shall not be subject to the income tax" but that "partners shall be liable for income tax only in their separate or individual capacities."[233] Limited liability companies may elect to pay their taxes as partnerships,[234] and most do so. [235]

Even as to corporations, most for-profit corporations file their tax returns as "S corporations." S corporations are corporations "that elect to pass corporate income, losses, deductions and credit through to their

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[230] 26 U.S.C. § 513(a); *see also* IRS Religious Organization Tax Guide, *supra* note 227; *see also* United States v. American Bar Endowment, 477 U.S. 105, 109-110 (1986) (applying the "substantially related" test to determine that income from group insurance products offered to members by non-profit bar association was taxable as unrelated business income).

[231] *See* 26 U.S.C. § 170(b)(2)(C)(2)(b) (deduction available for corporate contribution to organization "organized and operated exclusively for religious . . . purposes"). This deduction is available so long as contributions do not exceed ten percent of the company's taxable income. 26 U.S.C. § 170(b)(2)(A).

[232] *See* Linda Suggin, Encouraging Corporate Charity, 26 VA. TAX REV. 125, 129 (Summer2006) ("The tax law has long contained a bias in favor of charitable giving by corporations compared to charitable giving by individual shareholders following distributions by corporations. In a system with a separate corporate tax, a charitable contribution made by a corporation and deducted at the corporate level can generally be larger than a contribution that an individual shareholder can make out of a corporate distribution of the same available funds because the corporate tax burdens the funds distributed to shareholders, but not the funds contributed to charity.").

[233] 26 U.S.C. §702.

[234] 26 C.F.R. § 301.7701–3(b)(1)(i).

[235] *See* Thompson v. U.S., 87 Fed.Cl. 728, 730 (Fed.Cl., 2009) ("most LLCs elect partnership taxation").

shareholders for federal tax purposes."[236] Like partners in a partnership, shareholders of S corporations report the flow-through of income and losses on their personal returns, rather than on corporate returns, and then pay taxes only once, at individual rates.[237] As of 2006, more than 66% of all corporate tax returns were for S corporations.[238]

This tax treatment of most for-profit businesses suggests that we do not view the owners of businesses as completely separate from their businesses.[239] Not surprisingly, policy-makers across the political spectrum have recognized that because of this flow-through arrangement, the owners of these for-profit businesses can be incentivized in various ways by government treatment of their companies.[240]

Thus while the tax code suggests one way in which the for-profit/non-profit distinction can be categorical (the availability of tax exempt status), it also makes clear that religion and profit-making are not considered mutually exclusive, and non-profit religious organizations actually are permitted to take part in unrelated money-making activities, so long as they pay taxes. Further, it suggests that there is not an absolute separation between most businesses and their owners for purposes of taxation, and that we regularly expect owners of businesses to respond to pressures imposed upon, or incentives offered to, their businesses.

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[236] IRS Small Business & Self-Employed Website, S Corporations, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations (last visited Feb. 28, 2013). *See also* 26 U.S.C. 1361(2)(b) (limiting participation to corporations with fewer than 100 shareholders).

[237] *Id.* ("This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income.").

[238] Internal Revenue Service, *Statistics of Income Bulletin*, Summer 2009, at 92 (2009), available at http://www.irs.gov/pub/irs-soi/09sumbul.pdf (last visited Feb. 28, 2013).

[239] Susan Kalinka, Unresolved *Issues Regarding Passthrough Entities, Community Property, and Federal Tax Law Create Headaches for Spouses in Louisian*a, 69 LA. L. REV. 861, 861 (2009) ("Because a disregarded entity is disregarded as a separate entity from its owner, transactions between the disregarded entity and its owner are not taken into account and have no tax consequences. Thus, distributions from a disregarded entity to its owner are not subject to income tax.").

[240] *See, e.g.*, NFIB Thanks U.S. Senate for Approving Bipartisan Stimulus Package, 2/7/08 USFEDNEWS (National Federation of Independent Business praising "stimulus package that includes tax incentives small business owners can use to invest in their companies and hire new employees . . . .One of the most important provisions included in the stimulus package is increasing the dollar amount for small business expensing limits from $125,000 to $250,000. This will allow small business owners to immediately write off business purchases and will help small business owners expand their businesses and hire new employees."); Karen G. Mills, *Encouraging Small Business Hiring Through Tax Credits*, Jan. 29, 2010, *available at* http://www.whitehouse.gov/blog/2010/01/29/encouraging-small-business-hiring-through-tax-credits (last visited Feb. 28, 2013) (noting proposed legislation to "provide a $5,000 tax credit to over a million small businesses for every new employee they hire, with other tax incentives for increasing wages.").

E. Profit-Making Businesses and Constitutional Analysis

The Supreme Court's 2010 decision in *Citizens United v. Federal Elections Comm'n*[241] highlighted the issue of whether corporations can exercise constitutional rights. The *Citizens United* decision confirms that corporations can exercise such rights[242] and, in the process, has prompted efforts to amend the constitution to strip them of those rights.[243]

The question presented here, however, is not so much whether corporations have constitutional rights as a general matter, but whether non-profit organizations have different and greater constitutional rights than for-profit organizations. With the exception of some discussion of the matter in the Title VII context discussed above, the answer is a clear: the profit distinction generally has no impact on constitutional analysis. In fact the courts have repeatedly and expressly rejected the notion that any categorical distinction exists between non-profits and for-profits in several areas of constitutional analysis.

1. Commerce Clause

Both the Supreme Court and lower courts have emphasized that an entity's status as for-profit or non-profit has no bearing on whether its activities constitute "commerce" under the Commerce Clause. In *Camps Newfound/Owatonna v. Town of Harrison, Me.*, the Court explained that application of the Commerce Clause turns on the nature of the activities conducted, not on the for-profit or non-profit nature of the entity engaged in the activities. [244]

The *Camps Newfound/Owatonna* case concerned two non-profit church camps from Maine, who were challenging a property tax exemption that favored institutions serving mostly Maine residents.[245] The non-profit camps, which served predominantly out-of-state campers, alleged the exemption was invalid under the dormant Commerce Clause.[246] In finding the exemption invalid, the Court explained that the camps' non-profit status did not control the Commerce Clause analysis. Rather, "the argument in favor of a *categorical* exemption for nonprofits is

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[241] 130 S. Ct. 876 (2010).
[242] *Id.* at 898-900.
[243] *See* http://www.peoplesrightsamendment.org/ (last visited February 23, 2013) (proposing "People's Rights Amendment."). The proposed amendment would declare that "rights protected by this Constitution" are "the rights of natural persons." *Id.* Furthermore, the amendment would provide a rule of construction that "[t]he words people, person, or citizen as used in this Constitution do not include corporations." *Id.*

Notably, even the proposed People's Rights Amendment does not distinguish between for-profit and non-profit corporations, as it strips rights from all organizations, regardless of their profit structure. *Id.*
[244] Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me. 520 U.S. 564, 584-585 (1997).
[245] *Id.*
[246] *Id.*

unpersuasive,"[247] and there is "no reason why the nonprofit character of an enterprise should exclude it from the coverage" of the Commerce Clause.[248] Other courts have found the same.[249]

2. Free Speech Clause

As demonstrated by *Citizens United*, the Court takes a similar approach to First Amendment rights with respect to the Free Speech Clause. That is, the constitutional analysis does not turn on the identity of the speaker, whether that be an individual, a for-profit corporation, or a non-profit corporation. Rather, the crux of the analysis is whether the speaker is engaged in protected speech.

The Court first articulated this principle as to profit-making corporate speakers in *First National Bank of Boston v. Bellotti*.[250] There, the Court explained that "[t]he proper question … is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect."[251] The Court reiterated and expanded on this proposition in *Citizens United*, which explained that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[252] The Court also made clear that its ruling

[247] *Id*. at 588 n.21.

[248] *Id.* at 584-585. The Court further explained that it had "similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations" and that "the National Labor Relations Act [] applied to the Associated Press' (A.P.'s) news gathering activities . . . despite the fact that the A.P. 'does not sell news and does not operate for a profit." *Id.* at 583-584 (quoting Associated Press v. N.L.R.B., 301 U.S. 103, 129 (1937)).

In the labor context, some courts have included profits as part of their analysis for determining whether a religious school is a "church-operated school" within the meaning of *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). *See, e.g.*, Univ. Great Falls v. N.L.R.B., 278 F.3d 1335, 1343-44 (D.C. Cir. 2002). Perhaps not surprisingly, however, there do not appear to be any reported cases in which courts actually analyze the case of a for-profit church-operated schools seeking exclusion from the N.L.R.A. based on *Catholic Bishop*, presumably because virtually all churches and church-operated schools are non-profits.

[249] *See* Edwards v. California, 314 U.S. 160, 172 n.1 (1941) ("it is immaterial whether or not the transporation is commercial in character"); Virginia Vermiculite Ltd. v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998) (explaining "the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial").

[250] 435 U.S. 765, 776 (1978).

[251] *Id. See also* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd. 502 U.S. 105, 117 (1991) (rejecting argument that an "entity" should have lesser First Amendment rights: "The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.").

[252] *Citizens United*, 130 S. Ct. at 899-900 (quoting *Bellotti*, 435 U.S. at 784).

reached the speech of corporations *regardless* of their status as for-profit or non-profit entities.[253]

Because the law at issue had an exception for media corporations, the Court considered whether the government could accord different speech rights to different corporations.[254] The Court rejected such differentiation among corporate speakers as impermissible under the First Amendment:

> [T]he [media corporation] exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. . . . This differential treatment cannot be squared with the First Amendment.[255]

Thus, in the Free Speech context generally, the Court permits neither distinctions between corporate and non-corporate speakers, nor distinctions between different types of corporations.

3. Commercial Speech Doctrine

Nor do courts treat the for-profit/non-profit distinction as significant when making determinations as to whether speech qualifies as "commercial speech" for First Amendment purposes. The Supreme Court has explained that what "defines" commercial speech is that it does no more than "propose a commercial transaction," or that it "relates solely to the economic interests of the speaker and its audience."[256] Notably, this test turns on the content of the speech itself, rather than the nature or identity of the speaker.[257]

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[253] *Id.* at 913 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). The Court further explained that it overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), because that decision allowed the government to "suppress[] the speech of manifold corporations, both for-profit and nonprofit" thereby "prevent[ing] their voices and viewpoints from reaching the public." *Id.* at 906-07.

[254] *Id.* at 905.

[255] *Id.* at 906.

[256] Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-62 (1980).

[257] *See Fox*, 492 U.S. 469, 482 (1989) ("[S]ome of our most valued forms of fully protected speech are uttered for a profit."); Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (Stevens, J., dissenting) ("[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors or artists who sell their works would be correspondingly disadvantaged."); Adventure Communications, Inc. v. Kentucky Registry of Election Finance, 191 F.3d 429, 440–442 (4th Cir.1999) ("In and of itself, profit motive on the speaker's part does not transform noncommercial speech into commercial speech.").

The Supreme Court has applied this test to determine whether speech is commercial or not, even when the speaker is a non-profit.[258] Lower courts applying this test have expressly recognized that whether speech is commercial does not depend on the speaker's status as a for-profit or a non-profit entity.[259] For example, in *Aitken v. Communications Workers of America*,[260] a union claimed that its speech could not be commercial speech because it was organized as a non-profit entity. The court rejected the claim because "status as a for-profit or non-profit entity cannot control whether [speech] is commercial speech in First Amendment terms."[261]

4. Establishment Clause

Although the Court has never discussed the issue directly, it is clear that the Establishment Clause of the First Amendment also can be invoked by both for-profit and non-profit entities. For example, last Term the unanimous Court found that the Establishment Clause provides a "ministerial exception" for Hosanna-Tabor Lutheran Church and School, a non-profit corporation.[262]

Other cases demonstrate that the Court does not limit its Establishment Clause jurisprudence to non-profits. In fact, many of the Court's paradigmatic Establishment Clause cases involved for-profit businesses as plaintiffs, including *Larkin v. Grendel's Den, Inc.*[263], *Estate of Thornton v. Caldor, Inc.*[264], and *Texas Monthly, Inc. v. Bullock*.[265] It is clear that the for-profit/non-profit distinction does not operate to bar for-profit businesses from asserting rights under the Establishment Clause.

As with the Commerce Clause, Free Speech Clause, and commercial speech doctrine, the Establishment Clause treatment of profit-making businesses confirms that the profit distinction does not generally drive constitutional analysis. Courts repeatedly reject the notion that any

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[258] *See, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (performing commercial speech analysis to determine whether solicitation by non-profit corporation is commercial speech).

[259] *See, e.g.*, O'Brien v. Mayor and City Council of Baltimore, 768 F.Supp.2d 804, 814 n.9 (D.Md., 2011).

[260] 496 F.Supp.2d 653, 663 -664 (E.D.Va., 2007).

[261] *Id.*

[262] *See* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., ---U.S.---,132 S.Ct. 694, 703 (2012) ("The Establishment Clause prevents the Government from appointing ministers. . ."). As explained by the Sixth Circuit, Hosanna-Tabor is "an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod." E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School 597 F.3d 769, 772 (6th Cir., 2010), *rev'd* 132 S.Ct. 694.

[263] 459 U.S. 116, 127 (1982) (state may not delegate power over liquor licenses to churches).

[264] 472 U.S. 703, 711 (1985) (state may not grant Sabbath observers an absolute and unqualified right not to work on their Sabbath).

[265] 489 U.S. 1, 14 (1989) (state may not grant entangling sales tax exemption for religious periodicals).

categorical rules about for-profits and non-profits should be applied to control constitutional analysis. Instead of relying on the profit distinction, they focus on the nature of the activity at issue, which governs the availability of constitutional rights. Thus any argument to invest the profit distinction with determinative force in the religious liberty context would need to explain why a distinction that apparently carries no weight in other parts of the First Amendment—even within the Religion Clause—should be viewed as categorical and dispositive where religious exercise rights are concerned.

IV. THE PROFIT DISTINCTION AND THE HHS MANDATE

The federal government's recent arguments in the HHS Mandate cases provide the most prominent and comprehensive articulation of the argument against religious liberty for profit-makers. In light of the information set forth in Parts II and III above, this portion of the article will examine the government's argument that for-profit businesses "do not engage in the exercise of religion" and that the owner of a for-profit businesses can never experience a substantial burden on his religion when the government punishes his business.

A. The Government's Argument Against Religious Liberty for Profit-Makers in the HHS Mandate Context

1. The HHS Contraceptive Mandate

The government's argument regarding the relationship between profits and religious liberty has been made in the preliminary stages of 17 cases concerning what is popularly called the "HHS Mandate."[266] The HHS Mandate refers to a regulatory requirement issued under the Patient Protection and Affordable Care Act (the "ACA").[267] The ACA requires that all "group health plan[s]" cover "preventive care and screenings" for women without cost-sharing.[268] The Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service have adopted guidelines defining "preventive care" to include "[a]ll [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[269]

[266] "HHS" stands for the U.S. Department of Health and Human Services, the Agency that issued the administrative rule.

[267] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[268] 42 U.S.C § 300gg–13(a)(4).

[269] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 4, 2012). FDA-approved contraceptives include the drugs *levonorgestrel* (commonly known as Plan B or the

Under the ACA, employers with more than fifty employees must provide insurance coverage for these products and services.[270] Failure to include this coverage triggers an assessment of $100 per "affected individual" per day.[271] Moreover, plan participants and beneficiaries may sue if a plan fails to cover the mandated products or services.[272] Dropping employee health coverage altogether would subject the plan provider to an annual penalty of $2,000 per employee.[273]

2. Exemptions and Accommodations For Non-Profits

From the outset, the HHS Mandate raised religious liberty concerns.[274] Certain employers objected to the Mandate, claiming their religion precluded them from offering the required insurance coverage.[275] In an attempt to address these concerns, the government has created two categories of religious objectors who will receive some protection. First, certain "nonprofit organization[s]," as described in the Internal Revenue Code, are deemed to be "religious employers," and therefore entirely

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"morning-after pill") and *ulipristal acetate* (commonly known as Ella or the "week-after pill"), both of which can prevent implantation of a fertilized egg in the womb, thereby inducing an early-term abortion. *See* FDA Birth Control Guide (Oct. 19, 2011), http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm282014.pdf (last visited Oct. 4, 2012) (describing action of various FDA-approved contraceptives, including the emergency contraceptives Plan B and Ella). The Mandate also includes copper intrauterine devices or IUDs, which are widely acknowledged to interfere with implantation. *See* Pam Belluck, *Abortion Qualms on Morning After Pill May Be Unfounded*, N. Y. TIMES, June 5, 2012, *available at* http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?_r=0 (last visited Feb. 19, 2013) (noting scientific arguments that emergency contraceptive drugs may not interfere with conception, but acknowledging that copper IUDs "can work to prevent pregnancy after an egg has been fertilized.").

[270] 42 U.S.C. §§ 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv).

[271] 26 U.S.C. § 4980D(b). *See also* Employer Responsibility Under the Affordable Care Act, The Henry J. Kaiser Family Found., http://healthreform.kff.org/~/media/Files/KHS/Flowcharts/employer__penalty_flowchart_1.pdf (last visited Feb. 27, 2013).

[272] 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B).

[273] 26 U.S.C. §§ 4980H(a), (c)(1).

[274] *See, e.g.,* President Barack Obama, Remarks on Preventative Care (Feb. 10, 2012) (noting that "the principle of religious liberty, an inalienable right that is enshrined in our Constitution" was at stake, and emphasizing it as a right he cherishes both "[a]s a citizen and as a Christian….").

[275] *See* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

exempt from the Mandate.[276] This classification is limited to entities treated as churches or religious orders for tax purposes.[277]

Second, the government plans to offer other religious non-profits an "accommodation" by which the coverage will not be mentioned in their insurance policies, but will be directly provided by their insurer to their employees as a result of the issuance of the policy.[278] Mechanically, the coverage would actually be part of a separate policy issued by the employer's insurer to the employee as an automatic consequence of the employer providing non-compliant health insurance.[279] The goal of this approach is to "protect the eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds."[280]

The government has emphasized that the exemption and accommodation described above are only available for *non-profit* entities. The government explained that because "the exemption for religious organizations under Title VII of the Civil Rights Act of 1964" does not apply to for-profit organizations, it would be "appropriate" to accommodate non-profit, but not for-profit, employers.[281] In limiting the accommodation to non-profit entities, the government expressly stated that the profit or non-profit taxpaying status of an organization, rather than its particular corporate form, is the controlling factor.[282] Whereas any for-profit business, no matter what form it takes, is compelled to comply with the Mandate, "an organization that is organized and operated as a nonprofit entity is not limited to any particular form of entity…."[283] Thus, corporate form, sincerity of religious conviction, and any other

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[276] *See* The Internal Revenue Code of 1986, as amended; §§ 6033(a)(3)(A)(i) & (iii) (2006) (exempting "churches, their integrated auxiliaries, and conventions or associations of churches [and] the exclusively religious activities of any religious order"); 45 C.F.R. § 147.130(a)(1)(iv)(B); *see also* 77 Fed. Reg. 8725, 8730 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

[277] On February 6, 2013, the government issued a notice of proposed rulemaking that, if issued, would eliminate prior requirements that a "religious employer" focus exclusively on indoctrination in the faith and hire and serve primarily members of that faith. 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (to be codified at 45 C.F.R. pt. 147). The government explained that eliminating these requirements "would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.* at 8462.

[281] *Id.* Consistent with the government's positions in court, the Notice of Proposed Rulemaking appears to divide religious objectors into two types of organizations: "non-profit religious" organizations and "for-profit secular" organizations. *Id.* This is a shift even from the spring of 2012, in which the same government entities publicly sought comments on "whether, as some religious stakeholders have suggested, for-profit religious employers with such objections should be considered as well." *See* 77 F. R. 16501-01. The 2013 NPRM contains no mention of the existence of a "for-profit religious employer," as if such an entity does not exist.

[282] 78 F. R. 8456, 8462.

[283] *Id.*

conceivable consideration are completely eclipsed by a single factor: profits.

3. The Government's Two-Part Argument Against Religious Liberty for Profit-Makers

Because for-profit entities are not eligible for either the religious employer exemption or the accommodation, at least seventeen for-profit businesses and their owners have filed federal lawsuits seeking exemptions from the Mandate.[284] In defending these suits, the government has argued that for-profit businesses and their owners are not eligible for religious freedom protection against the Mandate.[285]

The government's argument against religious liberty for profit-makers has two separate components. First, the government argues that a for-profit business corporation cannot itself exercise religion. And second, the government argues that business owners are sufficiently separated from the business that they cannot allege a "substantial burden" on their religion sufficient to state a claim under federal religious freedom laws.

a. The Argument That a For-Profit Business Is Incapable of Engaging in Religious Exercises

The government's argument against religious liberty for for-profit businesses is straightforward and simple: earning a profit is fundamentally incompatible with engaging in religious exercise. If an entity earns profits then, by definition, it cannot also engage in religious exercises.[286] Profit-making always crowds out religion.

The *Hercules* case provides a useful example.[287] Hercules Industries, Inc. is a closely-held Colorado corporation owned and operated

[284] *See, e.g.*, Korte v. Sebelius, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); O'Brien v. U.S. Dep't of Health & Human Servs., __ F.Supp.2d __, 2012 WL 4481208 (E.D.Mo. Sept. 28, 2012), *stayed pending appeal*, No. 12-3357 (8th Cir. Nov. 28, 2012); Triune Health Grp., Inc. v. HHS, No. 12 C 6756, (N.D. Ill. Jan. 3, 2012); Sharpe Holdings, Inc. v. HHS, No. 2:12-CV-92 (E.D. Mo. Dec. 31, 2012); Monaghan v. Sebelius, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744 (E.D. Pa. Dec. 28, 2012); Am. Pulverizer Co. v. HHS, No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012); Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012); Newland v. Sebelius, 881 F.Supp.2d 1287 (D. Colo. 2012); Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir., Dec. 28, 2012); *Hobby Lobby*, 870 F.Supp.2d 1278; Grote Indus. v. Sebelius, No. 4:12-cv-00134, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012); Annex Medical, Inc. v. Sebelius, 2013 WL 10192 (D.Minn. Jan. 8, 2013).

[285] *See infra* Part IV.A.III.a

[286] *See* DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

[287] Newland v. Sebelius, 881 F.Supp.2d 1287 (D. Colo. 2012).

by four Catholic siblings, the Newlands.[288] Hercules manufactures and distributes HVAC systems.[289] The Newlands and Hercules asserted that their religion forbids them from complying with the HHS Mandate.[290] The government responded that the company's goal of making money precluded Hercules from engaging in any exercise of religion.[291] The government asserted that "there [was] nothing to indicate that Hercules Industries [was] anything other than a for-profit, secular employer."[292] Under this one-size-fits-all approach, the government argued that profit-making status should be considered "conclusive."[293]

This argument is completely contingent upon the presence or absence of profits, rather than by any particular characteristics of the business at issue.[294] Thus, for example, the government advanced the same argument against Mardel Christian and Education, a chain of Christian bookstores, and Tyndale House Publishers, a Bible publisher directing 96.5% percent of profits to a Christian non-profit foundation.[295]

The government derives this profit-based distinction from Title VII of the Civil Rights Act of 1964.[296] As discussed above, Title VII prohibits employers from discriminating against employees and applicants on the basis of certain protected characteristics, including religion.[297] However, the government argues that the exemption from Title VII for a "religious

[288] *See id* at 1292.
[289] *Id.* "HVAC" is an acronym for heating, ventilation and air-conditioning.
[290] *Id.* at 1292-93 (stating that the Newlands "seek to run Hercules in a manner that reflects their sincerely held religious beliefs.") (internal quotation marks omitted) (citations omitted).
[291] DOJ Hercules Motion to Dismiss, *supra* note 5, at 17. The government's intense focus on the issue of profits appears to be a relatively new strategy. Although prior cases such as *United States v. Lee*, the government did not argue that profit-making was fundamentally inconsistent with religious exercise; indeed the word profit was not mentioned a single time. *See* Brief for the United States, United States v. Lee, 455 U.S. 252 (1982) (No. 80-767) 1981 WL 389829. In contrast, the government's brief in the Hercules case mentions "profits" more than 30 times. Nor has the government offered this categorical argument in other recent cases arguably touching on religious liberty for profit-makers. *See, e.g.*, Brief for Secretary of Labor, Tony and Susan Alamo Foundation v. Donovan, 571 U.S. 290 (1985) (No. 83-1935), 1985 WL 669832; Brief for the United States, Corp. of Presiding Bishop v. Amos, 483 U.S. 237 (1987) (Nos. 86-179, 86-401), 1987 WL 864781.
[292] DOJ Hercules Motion to Dismiss, *supra* note 5, at 17. This argument "ignores the [the Newlands] are also plaintiffs." Korte v. Sebelius, No.12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012).
[293] DOJ Hercules Motion to Dismiss, *supra* note 5, at 17
[294] *Id.* (where the government asserts that "[b]y definition, a secular employer does not engage in any exercise of religion . . . .").
[295] *See* Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012); Hobby Lobby, Inc. v. Sebelius, 870 F.Supp.2d 1278 (W.D.Okla. 2012) (which includes Mardel, Inc., d/b/a Mardel Christian and Education).
[296] *See* Hercules App. Br. at 14-15; *see also* 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013).
[297] 42 U.S.C. § 2000e (2006) (providing, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees or applicants for employment, because of such individual's … religion…").

corporation, association, educational institution, or society"—allowing such groups to engage in religious discrimination in hiring[298]—is part of the "special solicitude to the rights of religious organizations" under the Free Exercise Clause.[299]

The government argues that only "religious organizations" permitted by Title VII's exemption to hire and fire based on religion under Title VII may exercise religion under federal law.[300] Because "[n]o court has ever found a for-profit corporation to be a religious organization"[301] for Title VII purposes, the government concludes that profit-makers are also categorically barred from engaging in any other exercise of religion under religious freedom laws such as the Religious Freedom Restoration Act (RFRA).[302] Instead, RFRA must be interpreted to include this distinction from Title VII.[303]

At least at the preliminary injunction stage of the HHS Mandate litigation, some courts have accepted the argument that for-profit businesses cannot exercise religion.[304] For example, the *Hobby Lobby* court observed that businesses do not hold or exercise religious beliefs "separate and apart from … their individual owners or employees….."[305] The court found that corporate entities are unable to "pray worship, observe sacraments or take other religiously-motivated actions" independent of their business-owners.[306] The court then concluded that the personal nature of religious exercise precluded a business from any form of legal religious protection.[307]

b. The Argument That Owners of For-Profit Businesses Cannot Engage in Religious Exercises During Profit-Making

Plaintiffs in HHS Mandate cases generally include both the businesses and their owners.[308] The owners typically assert that the

[298] 42 U.S.C. § 2000e-1(a) (2006).
[299] Hercules App. Br. at 14-15 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 706 (2012)).
[300] *Id.* at 16.
[301] DOJ Hercules Motion to Dismiss, *supra* note 5, at 17.
[302] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb (2006)).
[303] DOJ Hercules Motion to Dismiss, *supra*, note 5, at 17 (with the government arguing that "when Congress enacted RFRA in 1993, it did so against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion in setting the terms and conditions of employment.").
[304] *See, e.g.*, Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, 2013 WL 140110, at *15 (E.D. Pa., Jan. 11, 2013).
[305] Hobby Lobby Stores, Inc. v. Sebelius 870 F.Supp.2d 1278, 1291 (W.D.Okla. 2012).
[306] *Id.*
[307] *Id.* (concluding that "[r]eligious exercise is, by its nature, one of those 'purely personal' matters referenced in *Belotti*, which is not the province of a general business corporation.").
[308] *See, e.g., Hobby Lobby*, 870 F.Supp.2d at 1285, 1293.

Mandate constitutes a "substantial burden" under RFRA and the Free Exercise Clause. A substantial burden exists where the government imposes "substantial pressure" on an adherent to engage in conduct contrary to a sincerely held religious belief.[309] The owners argue that the Mandate creates substantial pressure on them by imposing severe financial penalties on their religious exercise of excluding certain services from insurance coverage.[310] By forcing business owners to use their property (namely, the business) to include these services in insurance coverage, the owners argue the Mandate imposes substantial pressure on them to forfeit their religious objections and comply with the law.[311]

The government's response targets the plaintiffs' use of a for-profit company to earn their living. The government argues that the owners voluntarily chose to conduct their business through a for-profit corporation, which is a separate legal entity.[312] Accordingly, the owners have no right to complain about pressures imposed on them through that entity.[313] The government essentially argues that because the plaintiffs enjoy limitations on liability and other benefits from the corporate form, they should not be permitted to "selectively contend—when it suits their interests—that they and the corporation are one and the same."[314] The government further criticized the notion that a business owner can have a legitimate claim against government pressure imposed through a sanction on the business itself, arguing that a substantial burden may not be established "by invoking this type of trickle-down theory."[315]

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[309] *See, e.g.,* Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010). This test is widely shared among the circuit courts applying RFRA. The Supreme Court has not yet needed to define "substantial burden" under RFRA, but has used similar language when describing actionable burdens under the Free Exercise Clause. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

[310] *See* Brief of Appelles, Newland v. Sebelius, 881 F.Supp.2d 1287 (D. Colo. 2012) (Feb. 22, 2013) *available at* http://www.adfmedia.org/files/NewlandAppelleesOpeningBrief.pdf (last visited Feb. 28, 2013) at 28.

[311] *Id.*

[312] DOJ Hercules Motion to Dismiss, *supra* note 5, at 19.

[313] *Id.*

[314] *Id.*

[315] *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 14, Tyndale House Publishers, Inc. v. Sebelius, No. 1635-RBW (D.D.C. Oct. 22, 2012), 2012 WL 5903966.

B. The Argument That Profit-Making Corporations and Their Owners Have Religious Liberty in the HHS Mandate Context

The government's argument against religious liberty for profit-makers purports to borrow the profit distinction from other areas of the law and apply it to religious freedom claims. In light of the information presented in Parts II and III above, the government's argument fails for four principal reasons.

1. For-Profit Businesses Exercise Religion

First, there can be no serious question about whether for-profit corporations "exercise" religion. As discussed in Part II.A, a religious exercise is simply an action or abstention based on a religious belief. As a matter of observable fact, for-profit corporations do sometimes act based on religious beliefs, as described in Part III.C. Closing for the Sabbath, taking out certain types of loans to comply with Islamic law, and urging others to "know Jesus Christ as Lord and Savior" are all obvious religious exercises.[316]

Comparison with the treatment of for-profit corporations in other areas confirms that such entities are regularly understood as being capable of acting on a wide range of subjective beliefs or intentions: ethical views, philosophical views, criminal intentions, anti-religious animus, etc.[317] A shopping trip to Whole Foods, or a lunch at Chipotle confirms that businesses frequently have ethical, moral, or philosophical commitments beyond mere profit-maximizing. Our law recognizes that businesses can form and act on these types of subjective beliefs, and often encourages such behavior.[318]

There is no basis in law or logic to say that corporations can form moral views about ethics and philosophy and the environment, but not about religion. If NOOCH Vegan Market can choose not to sell pork because of ethical commitment to not killing animals, it makes no sense to say Afrik Grocery, Inc. is incapable of making a similar choice based on

[316] *See* Part II.C *supra*. In fact, the Affordable Care Act recognizes that a "facility" can have a conscientious objection providing or referring for abortions, without requiring the facility to be non-profit. 42 U.S.C. § 18023(b)(4); *see also* 745 Ill. Comp. Stat. Ann. 70/10 (protecting any "person, association, or corporation" operating a "facility" from being forced to provide any healthcare services "which violates the healthcare facility's conscience," with no requirement that the facility be non-profit); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1174 (applying 745 ILL. COMP. STAT. ANN. 70/10 to protect for-profit corporate pharmacy from regulation forcing it to dispense emergency contraceptives in violation of pharmacy's conscience). The alternative financing program designed by Minneapolis (discussed in Part II.C.3, *supra*) further demonstrates that governments often recognize that some for-profit businesses are conducted according to religious requirements.

[317] *See* Part III, *supra*.

[318] *See, e.g.*, Part III.A, *supra.*

religious commitments. And it makes even less sense to say that a corporation is capable of forming and acting on beliefs about religion when holding the corporation liable for religious discrimination,[319] but not when the corporation engages in other, more positive actions based on beliefs about religion. Indeed, efforts to limit permissible corporate purposes to exclude religion have been rightly rejected as unconstitutional.[320] Such discrimination against religious motivations would be a clear violation of *Smith*, in which the Court said it would "doubtless be unconstitutional" to target "acts or abstentions only when they are engaged in for religious reasons."[321] Thus the far better reading of these data points, and the only constitutional reading, is that for-profit businesses are quite capable of forming and acting upon religious beliefs, and therefore engaging in religious exercise.

2. The Free Exercise Clause and RFRA Protect Religious Exercise by Profit-Makers

Neither the Free Exercise Clause nor the Religious Freedom Restoration Act (RFRA) refers to profit-making status. Rather, the Free Exercise Clause broadly establishes that "Congress shall make no law . . . prohibiting the free exercise" of religion, with no language to suggest limits as to whose free exercise is protected, or that it will be protected only in certain circumstances.[322] Likewise, RFRA broadly restricts all government actions that "substantially burden a person's exercise of religion" with no indication that its protections are only available in non-profit settings.[323]

Supreme Court cases decided under the Free Exercise Clause and RFRA suggest that neither profit-making nor the corporate form has been understood by the Court to interpose a categorical bar on religious liberty. For example, the Court has twice allowed commercial proprietors to assert religious claims against business regulation. In *United States v. Lee*,[324] the Court allowed an Amish employer to assert religious objections to paying social security taxes.[325] The Court found that Amish religious beliefs forbade both payment and receipt of social security benefits, and therefore that "compulsory participation in the social security system interferes with

[319] *See* Part III.C.3, *supra*.
[320] *See* Fallwell v. Miller, 203 F.Supp.2d 624, 630 (W.D. Va. 2002) (invalidating Virginia corporate statute prohibiting churches from incorporating). This makes sense. A law allowing a corporation to make decisions on other factors, but prohibiting it from making decisions based on religion, would obviously "impose special disabilities on the basis of religious views or religious status." *Id.* (quoting *Smith*, 494 U.S. at 877).
[321] *Smith*, 494 U.S. at 877-78.
[322] U.S. CONST. amend. I.
[323] 42 U.S.C. § 2000e (2006).
[324] *See United States v. Lee*, 455 U.S. 252, 256-57 (1982).
[325] *Id.*

their free exercise rights."[326] Likewise, in *Braunfield v. Brown*,[327] the Court allowed Jewish merchants to challenge a Sunday closing law because it "ma[d]e the practice of their religious beliefs more expensive."[328] In each case, the Court found that the particular burdens at issue satisfied the compelling interest test. In neither did the Court suggest any bar on profit-makers asserting religious liberty claims, or suggest that the particular arrangement of ownership under state law (which was presumably sole proprietorship) had any impact on the reach of the federal Free Exercise Clause.[329]

To the extent those cases left doubt about the relevance of the corporate form, the Court's decisions in *Lukumi, Inc.* and *Gonzales* appear to have resolved the doubt: the corporate form does not foreclose assertion of Free Exercise and RFRA rights.[330] The *Gonzales* Court's implicit reading of RFRA's reference to "person" to include corporations is consistent with the federal statutory presumption that "person" usually includes corporations.[331] As the Supreme Court explained in *Monell*, this presumption is nothing new: "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[332]

Furthermore, as discussed in Part III.E, courts have routinely rejected arguments for categorical distinctions between non-profit and for-profit entities for constitutional questions. That distinction carries no weight in Commerce Clause, Free Speech Clause, commercial speech, or Establishment Clause jurisprudence. There is no valid reason to invest the distinction with controlling weight only where the exercise of religion is concerned.

As a statutory matter, accepting the government's argument would require selectively interpreting the word "person" in RFRA to include some corporations (non-profits) but not others (for-profits). Yet nothing in statute's text suggests that religious freedom rules are supposed to vary in this regard. To the contrary, the legislative history of RFRA strongly

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[326] *Id.*

[327] *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

[328] *Id*

[329] The Court's application of the Free Exercise Clause in *Lee* and *Braunfeld* is also consistent with cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and Thomas v. Review Bd., 450 U.S. 707 (1981), both of which protect the Free Exercise right to earn a living without facing government-imposed penalties on religious exercise.

[330] *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (Florida non-profit corporation awarded relief under the Free Exercise Clause); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), (New Mexcio corporation prevailing on RFRA claim).

[331] *See* 1 U.S.C. § 1 ("person" ordinarily "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

[332] Monell v. Department of Social Services of City of New York 436 U.S. 658, 687-688 (1978).

suggests that one goal of RFRA was to impose a single, uniform standard for religious freedom claims across all contexts.[333] In fact, when faced with a proposed amendment that would have lessened protection for prisoners, several Representatives and Senators argued that RFRA's uniform application of the compelling interest test must extend equally to everyone, even to people who are incarcerated.[334] It is difficult to imagine that the same Congress that was concerned about ensuring uniform application of RFRA to prisoners was simultaneously using the term "person" to selectively exclude some law-abiding businesses and their owners, simply because they earn profits.

3. Title VII Law and the Tax Code Suggest Profit-Makers Can Exercise Religion (and RFRA Would Trump Them If They Did Not)

The government's attempt to use Title VII of the Civil Rights Act of 1964 to limit religious liberty for profit-makers undermines the statute's principal function—protecting religious liberty for people earning a living.[335] The statute provides no support for the government's argument that failure to qualify for Title VII's religious corporation exemption disqualifies an employer from all other exercises of religion. To the contrary, Title VII's religious exemption makes no reference to profit-making at all.[336] Courts interpreting that provision have not used profit-making as a categorical bar but instead have emphasized that all aspects of an organization must be considered.[337] Moreover, Title VII's "BFOQ" provision expressly includes "businesses," an inclusion that would be

[333] *See, e.g.,* Amicus Brief of Sen. Orrin Hatch *et al.* at 20, Hobby Lobby v. Sebelius, No. CIV–12–1000–HE (10th Cir. 2013) (noting RFRA's "one-rule-for-everybody principle reflected in RFRA's text and structure"); *id.* at 16 ("RFRA's statutory structure – a single rule with a single exception – reflects the principle that Government should apply the same protective standard to all exercises of religion, by all persons."); *id.* at 18 ("Congress plainly wrote RFRA to include corporations.").

[334] Senators of both parties opposed what Senator Lieberman termed the "dramatic proposal" to create "two separate standards for the protection of religious freedoms: protections afforded citizens out of jail and protections afforded incarcerated citizens." 139 Cong. Rec. S14462 (Oct. 27, 1993); *see also* 139 Cong. Rec. S14465 (Oct. 27, 1993) (Sen. Hatch) ("[T]his amendment sets a dangerous precedent for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about exempting anyone from the principle of the free exercise of religion. Today we are asked only to exempt prisoners. Tomorrow, however, we will be asked to exempt others. . . . How far we will venture is a legitimate unanswered question."); 139 Cong. Rec. S14466 (Oct. 27, 1993) (Sen. Danforth) ("Congress should not codify group exceptions to fundamental freedoms."); 139 Cong. Rec. S14467 (Oct. 27, 1993) (Sen. Kennedy) ("As we vote today to restore broad protection for religious freedom envisioned by the Framers of the Constitution, let us not deny this fundamental right to persons in prison.").|

[335] *See* Part III.C.1, *infra*.

[336] *See* 42 U.S.C.A. § 2000e-1.

[337] *See* Part III.C.2, *infra*.

incoherent if Congress understood businesses as categorically incapable of religious exercise.[338] This presumably explains why the EEOC's Compliance Manual recognizes the possibility of for-profit religious exercise, viewing profit-making as simply one factor among many, none of which are dispositive.[339] There simply is no categorical prohibition on religious exercise by profit-makers in Title VII.

The IRS takes a similar approach to the profit-distinction in tax law: non-profit churches and religious organizations are permitted to sometimes earn profits, as long as they pay their taxes.[340] To take the most basic example, the IRS views ad sales on a church bulletin as an income-producing activity subject to taxation.[341] Obviously the tax code recognizes the possibility that a tax-exempt religious non-profit such as a church is capable of making money and paying taxes. If the tax code treated religion and profit-making as fundamentally incompatible, these provisions would make no sense.

Furthermore, even if these other areas of the law suggested a categorically different treatment for non-profit and for-profit entities, borrowing such distinctions from either Title VII or the Internal Revenue Code is particularly problematic in light of RFRA's express language stating that it trumps both pre-existing and future federal law. RFRA is a "super-statute,"[342] expressly designed by Congress to control over other federal laws: "This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."[343]

Since other areas of federal statutory law do not treat religion and profit-making as categorically incompatible, the profit distinction cannot create a categorical bar in the religious liberty context, particularly where federal law expressly requires RFRA to control over other statutes.

4. Owners of For-Profit Businesses Can Assert Religious Liberty Claims Under the Free Exercise Clause and RFRA

Nor is there support for the claim that owners of a corporate business can never suffer a burden on their religion by virtue of penalties imposed on that business. Under RFRA, all that is necessary for a

[338] *See* 42 U.S.C. § 2000e-2(e).
[339] *See* Part III.C.2, *infra.*
[340] *See* Part III.D, *infra.*
[341] *Id.*
[342] "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253-54 (1995).
[343] 42 U.S.C.A. § 2000bb-3.

"substantial burden" is that the government impose "substantial pressure" on a person to change a religious exercise.[344]

The government argues that the benefit of limited liability means business owners cannot experience pressure from punishment of their businesses. As a matter of logic, however, it is difficult to see how the imposition of large fines on a business would not create substantial pressure on the owner of that business, even though of course the owner and the business are separate entities.[345] Threatening to harm a person's business seems a very obvious way of imposing pressure on the person. This logic is confirmed by our laws which use punishments imposed on corporations or incentives offered to corporations as ways of imposing positive or negative pressure on business owners.[346]

The separation argument is particularly inadequate in light of the tax treatment accorded to most corporations in the country as S corporations.[347] If the government does not regard an owner as wholly separate from his closely-held corporation for the important purpose of taxes, there is no reason to treat them as wholly separate when the same government is imposing tax penalties, which is how most of the HHS Mandate punishments are exacted.[348]

V. CONCLUSION

For the reasons set forth above, there is no basis for treating religion and profit-making as mutually exclusive. For-profit businesses and their owners can both assert religious freedom rights. Existing religious freedom law, observable facts about the behavior of businesses and business owners, and the general treatment of for-profit business organizations in a variety of circumstances all confirm that our system permits and protects religious exercise by profit-making businesses and their owners.

Denying religious liberty rights in the profit-making context requires treating religion as a special and disfavored activity at every turn. Businesses would have to be deemed able to act on subjective motivations about ethics, the environment and other non-financial beliefs, but unable to act on beliefs about religion. Business owners would have to be viewed as responsive to penalties imposed on their businesses through criminal law, tax policy, and discrimination law, but as completely immune from pressure created by direct punishment of those same businesses for

[344] *See* note 291, *supra.*

[345] Indeed, the Court has previously recognized that far smaller financial penalties impose substantial burdens on religion. *See, e.g., Yoder* 406 U.S. at 208, 218 (*five* dollar fine on religious practice created "not only severe, but inescapable" pressure).

[346] *See* Parts III.B, III.C, and III.D, *infra*.

[347] *See* Part III.D, *infra.*

[348] *See, e.g.*, 26 U.S.C. §§ 4980D, 4980H (penalties for failure to provide required insurance coverage).

religious exercise. The Constitution would need to be read to ignore the profit distinction for every other type of analysis but to strictly embrace that same distinction as controlling in the Free Exercise Clause, but not the rest of the First Amendment. Title VII would need to be read not as broadly protective of the right to exercise religion while making money, but as the source of a broad incapacity of all profit-makers to exercise religion in any context whatsoever.

There is no principled or permissible reason to treat religious exercise in this specially disfavored manner. Doing so turns religious liberty law on its head, singling out religious exercise for special burdens rather than special protections. The government has no such power to discriminate against acts on the basis of the religious motivation behind those acts.

A categorical rule prohibiting religious exercise during profit-making would impose a one-size-fits-all approach to religious liberty that is incompatible with the nation's religious diversity. The far better approach, and indeed the only approach permissible under our Constitution and religious freedom laws, is for the law to recognize that different people will engage in different religious exercises in a nearly limitless variety of contexts, including the profit-making context. Whether a particular act is protected as religious exercise turns not on the tax-paying status of the actor, but on whether the action is based on a sincere religious belief.

Of course, as a matter of religious belief, individuals and religious groups may still choose to adopt a strict interpretation of the theological statement that one "cannot serve both God and Money." But as a matter of religious freedom, the government may not.