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THE MONSTER UNLEASHED: HOW *HOBBY LOBBY* THREATENS
THE FREEDOM OF EMPLOYEES TO PRACTICE RELIGION

*Chad DeVeaux**

*“You are my creator, but I am your master; Obey!”*¹

From the earliest days of the Republic, our courts recognized that “the right to conduct business in the form of a corporation, and . . . to enter into relations of employment with individuals, is not a natural or fundamental right.”² Rather, “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of the law.”³ It is “presumed to be incorporated for the benefit of the public” and “receives certain special privileges” to effectuate this purpose.⁴ Thus, it was understood that the Government “may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that [a] corporation’s activities may not operate to the detriment of the rights of others with whom it may come in contact.”⁵

But somewhere along the way, the servants became the masters. In contemporary America, for-profit corporations have become “private lawmakers”⁶ that “control many aspects of [our] lives,” which in days past lied within the ambit of the State.⁷ These new-age sovereigns do not answer

* Associate Professor of Law, Concordia University School of Law; LL.M., Harvard Law School; J.D., University of Notre Dame Law School. This Essay was first delivered as a lecture entitled, *Hobby Lobby: The Debate*, sponsored by the Federalist Society at Concordia University School of Law on September 10, 2014. Jeff Mateer, General Counsel to the Liberty Institute, offered competing viewpoints. I am gratefully indebted to Mr. Mateer for his participation at the event, and to Anne Mostad-Jensen for her (always) invaluable help researching and preparing both my lecture and this Essay. Many thanks are also due the editors and staff of the *Concordia Law Review* for their hard work preparing it for publication. Any mistakes are mine.

¹ MARY SHELLEY, *FRANKENSTEIN* 149 (Signet Classic ed., Penguin Books 1983) (1831).

² *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 536 (1922); *accord* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

³ *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636.

⁴ *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906).

⁵ *Prudential Ins.*, 259 U.S. at 536.

⁶ *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174 (Iowa 1975).

⁷ *Casarotto v. Lombardi*, 886 P.2d 931, 940 (Mont. 1994) (Trieweiler, J., concurring);

to their constituents at the ballot box.⁸ Yet they exercise profound influence over the outcome of our elections.⁹ In fact, “their interests” all too often “conflict in fundamental respects with the interests of eligible voters.”¹⁰

In 1931, the late commercial-law scholar Maurice Wormser authored *Frankenstein, Incorporated*, a tome that compares the modern corporation to Mary Shelley’s gothic beast—an “artificially created and vitalized . . . monster which became the terror of ‘all living things.’”¹¹ Likewise, “[c]orporations are not natural living persons, but artificial beings, corpora ficta. They are created by the nation or state, which endows them with distinct personality in the eye of the law, special privileges and comprehensive powers.”¹² And just as “Frankenstein’s creature developed into a deadly menace to its creator,” Wormser prophetically warned that if efforts were not undertaken to “curb certain grave and vicious abuses” we, like Shelley’s nineteenth century anti-hero, will find ourselves at the mercy of our “corporate offspring,” which “like a cancerous growth,” threatens to “poison the body politic.”¹³

The Roberts Court’s decisions in *Citizens United*¹⁴ and *Hobby*

accord *C & J Fertilizer*, 227 N.W.2d at 174.

⁸ *C & J Fertilizer*, 227 N.W.2d at 174.

⁹ *Citizens United v. FEC*, 558 U.S. 310, 396 (2010) (Stevens, J., dissenting) (The influence that corporations currently possess in the political process “threatens to undermine the integrity of elected institutions across the Nation.”).

¹⁰ *Id.* at 394.

¹¹ I. MAURICE WORMSER, *FRANKENSTEIN, INCORPORATED* v (1931).

¹² *Id.*

¹³ *Id.* at vi.

¹⁴ *Citizens United*, 558 U.S. 310. Recognizing that “the special characteristics of the corporate structure require particularly careful regulation,” the pre-*Citizens United* case law recognized that the Constitution permitted the Government to limit for-profit corporations’ aggregate political expenditures. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982). These limits were viewed as necessary to protect the electoral process from “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). Precedent recognized that such protections are particularly important because for-profit corporations’ ability to impact the outcome of elections has “little or no correlation to the public’s support for the corporations’ political ideas.” *Id.* The *Citizens United* Court repudiated this well-settled anti-distortion principle and struck down federal laws restricting independent political expenditures by for-profit corporations. *Citizens United*, 558 U.S. at 349. In *Citizens United*’s aftermath, the United States’ elector system has witnessed unprecedented “[i]ncreased outside spending” which has “exacerbate[d] the ‘polarizing, attack orientation of contemporary political advertising’” and “heighten[ed] the potential capture of officials by interest groups—long the central concern of campaign finance regulation.” Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*,

*Lobby*¹⁵ represent the realization of Professor Wormser’s worst fears.

Christ warned us that “No one can serve two masters. . . . You cannot serve both God and money.”¹⁶ Apparently, this commandment applies only to mortals. *Hobby Lobby* says closely held for-profit corporations can do both at the same time.¹⁷ The decision also makes it much harder for the employees of such entities to honor their own religious precepts.

I make my living formulating and expounding ideas—usually controversial ones.¹⁸ I stand before you a practicing Catholic (albeit not

63 EMORY L.J. 781, 785 (2014). This transformation has fundamentally changed the electoral process:

Elected officials have different incentives now: If they say the right things and vote the right way, they gain access to a new unlimited mountain of campaign money; but if they act against outside-group interests, they face the prospect of that mountain supporting a challenger. This dramatically increases the influence of large donors over federal officials’ agendas.

Id. at 785–86. And, predictably, post-*Citizens United* America has been plagued by unprecedented hyper-partisanship and dysfunction. See Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 CONN. L. REV. 395, 425–31 (2014) [hereinafter DeVeaux, *The Fourth Zone of Presidential Power*] (arguing that recent congressional disregard for the historical norms that govern the relationship between the three branches of the federal government threatens the stability of American democracy).

¹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The *Hobby Lobby* Court found that a for-profit closely held corporation was exempt from a federal law dictating “that nonexempt employers are generally required to provide ‘coverage, without cost sharing’ for ‘[a]ll Food and Drug Administration . . . approved contraceptive methods, sterilization procedures, and patient education and counseling.’” *Id.* at 2762 (quoting 77 Fed. Reg. 8725). The Court concluded that this requirement “substantially burden[ed] the [corporation’s] exercise of religion.” *Id.* at 2759. The majority applied the “least-restrictive-means standard,” ultimately concluding that the requirement did not satisfy this “exceptionally demanding” standard because the Government itself could simply provide the contraceptives to employees at its own expense. *Id.* at 2780.

¹⁶ *Matthew* 6:24 (New American Bible).

¹⁷ *Hobby Lobby*, 134 S. Ct. at 2759.

¹⁸ See e.g., Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court’s State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1837–43 (2015) (arguing that Colorado’s decriminalization of marijuana has created an unconstitutional transboundary nuisance and Colorado should be required to pay damages to neighboring jurisdictions); DeVeaux, *The Fourth Zone of Presidential Power*, *supra* note 14, at 422–25 (arguing that if Congress fails to raise the debt ceiling before the Treasury exhausts its funds, Congress’s incompatible instructions invest the president with discretion to unilaterally borrow funds in excess of the debt ceiling, cancel federal programs, or raise taxes); Chad DeVeaux, *A Tale of Two Searches: Intrusive Civil-Discovery Rules Violate the Fourth Amendment*, 46 CONN. L.

exactly what some of my fellow parishioners would call a *practical* one), a political progressive, and an unrepentant gadfly.

Yet, in twenty-first century America, I do not harbor much fear that the authorities will come knocking at my door because of the ideas I profess.¹⁹ Rather, my concerns are more practical. I, like many Americans, worry far more about losing my job than running afoul of the Government. And, after *Hobby Lobby*, I would be concerned if I worked for a closely held, for-profit corporation—a denomination that encompasses ninety percent of American businesses²⁰—including such behemoths as Koch Industries, Cargill, and Chrysler.²¹ Such entities employ more than fifty-two percent of our work force.²²

The *Hobby Lobby* Court interpreted and applied the Religious

REV. 1083, 1101–06 (2014) (arguing that the Federal Rules of Civil Procedure’s permissive document-production provisions violate the Fourth Amendment); Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1055–63 (2011) (arguing that the certification of nationwide class actions under the law of a single state violates the dormant Commerce Clause).

¹⁹ I will be forced to reevaluate this view in the unlikely event that Donald Trump is elected president. As one commentator recently noted:

Since he announced his candidacy, Trump has threatened to ignore those who are carping about free speech and shut down parts of the Internet; he has promised to summarily deport those who are suspected of being illegal immigrants, without due process of law; he has endorsed extensive campaign-finance regulations that fly directly in the face of the First Amendment; he has vowed to restrict the Second Amendment rights of those on the terror watch list, again without due process; he has praised Franklin Roosevelt’s internment of American citizens, suggested that natural-born Americans can be deported against their will, and proposed that American Muslims be barred from reentering the country; he has described as “wonderful” a Supreme Court ruling that obliterated the “public use” limitations on the invocation of eminent domain; and he has refused to rule out registering Americans on the basis of their faith.

Charles C. W. Cooke, *Trump, the Anti-Constitutional Authoritarian—Liberty Lovers, Beware*, NAT’L REV. (Dec. 8, 2015, 5:01 PM), <http://www.nationalreview.com/article/428208/trump-anti-constitutional-authoritarian>.

²⁰ Aaron Blake, *A Lot of People Could be Affected by the Supreme Court’s Birth Control Decision—Theoretically*, WASH. POST (June 30, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-court-s-birth-control-decision/>.

²¹ Shlomo Reifman & Andrea D. Murphy, *America’s Largest Private Companies*, FORBES (Nov. 6, 2008, 6:00 PM), http://www.forbes.com/2008/11/03/largest-private-companies-biz-privates08-cx_sr_1103private_land.html.

²² Blake, *supra* note 20.

Freedom Restoration Act (RFRA).²³ Congress enacted RFRA in 1993 in response to the Supreme Court’s decision in *Employment Division v. Smith*²⁴ three years earlier, which repudiated the doctrine of *Sherbert v. Verner*.²⁵ *Sherbert* and its progeny—which were embraced by both the Warren²⁶ and Burger Courts²⁷—recognized that “governmental actions that substantially burden” an individual’s “religious practice must be justified by a compelling governmental interest.”²⁸ *Smith* rejected these precedents, positing that “the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²⁹ RFRA asserts that its purpose is to “restore the compelling interest test as set forth in *Sherbert v. Verner*”³⁰—which applied only to *individuals*.³¹ But despite Congress’s unambiguously stated intent to merely “restore . . . *Sherbert*,”³² *Hobby Lobby* concluded that the statute does “more than merely restore . . . *Sherbert*.”³³ The Court concluded that RFRA empowers *for-profit* corporations to disregard legal obligations to their employees.³⁴

²³ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488.

²⁴ *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488.

²⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁶ *Id.*

²⁷ *E.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

²⁸ *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03).

²⁹ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

³⁰ 42 U.S.C. § 2000bb-1(b) (2012).

³¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (“[N]o decision of this Court [has] recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law . . . under the Free Exercise Clause.”).

³² 42 U.S.C. § 2000bb-1(b) (2012).

³³ *Hobby Lobby*, 134 S. Ct. at 2761 n.3 (citing *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997)). In support of this argument, the Court disingenuously asserted that “RFRA’s ‘least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify.’” *Id.* (quoting *Flores*, 521 U.S. at 509). This is not so. The *Sherbert* line of cases explicitly recognized that governmental impairment of an individual’s religious exercise can only be justified “by showing that” the governmental action “is the least restrictive means of achieving some compelling state interest.” *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

³⁴ *Hobby Lobby*, 134 S. Ct. at 2769. “As enacted in 1993, RFRA applied to both the

By recognizing for the first time that the right to exercise religion can exempt a for-profit corporation from laws governing its obligations to its employees, the Court has opened a Pandora's box that undermines the stability of laws prohibiting employment discrimination and sexual harassment, and ultimately threatens the free-exercise rights of employees whose religious convictions differ from those of their employers. As a former professor of mine observed, by putting an employer's free-exercise rights above its employees, *Hobby Lobby* sent the clear message "that more money buys you more religious freedom—and more freedom to infringe on the choices of others."³⁵

"Implicit" in the Free-Exercise right afforded by the First Amendment is "a corresponding right to associate with others in pursuit of . . . religious . . . ends."³⁶ The "freedom . . . to worship . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."³⁷ This, in turn, affords a religious entity the right to disassociate itself from individuals "it does not desire"—to expel those who "may impair the ability of the group to express those views, and only those views, that it intends to express."³⁸ "Forcing [religious organizations] to accept [unwanted] members may impair the ability of the group to express those views, and only those views, that it intends to express."³⁹ "Protection of [a religious organization's] right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."⁴⁰

But historically the Court always recognized that this right is limited

Federal Government and the States." *Id.* at 2761. Congress relied on Section 5 of the Fourteenth Amendment for the authority to impose RFRA's requirements on state actors. *Id.* at 2769. But in 1997, the Supreme Court held that while RFRA's limitations upon federal actors were valid, "Congress had overstepped its Section 5 authority" in attempting to apply RFRA's restrictions to state actors. *Flores*, 521 U.S. at 533–34.

³⁵ Cathleen Kaveny, *'A Minefield': The Troubling Implications of the Hobby Lobby Decision*, COMMONWEAL (July 7, 2014, 6:38 PM), <https://www.commonwealmagazine.org/print/36155>.

³⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000).

³⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

³⁸ *Dale*, 530 U.S. at 648.

³⁹ *Id.*

⁴⁰ *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

to “expressive associations”—associations whose primary function is advocacy of political or religious beliefs.⁴¹ By contrast, a “commercial association,” an enterprise “engaged in [for-profit] commercial activity,” enjoys no “right to choose employees, customers, suppliers or those with whom [it] engages in simple commercial transactions.”⁴²

This distinction rested on the common-sense understanding that “[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith.”⁴³ This is “[n]ot so of for-profit corporations”— “[w]orkers who sustain the operations of those corporations commonly are not drawn from one religious community.”⁴⁴ Thus, “[o]nce it enters the marketplace of commerce in any substantial degree,” the Court recognized that an enterprise sheds certain First Amendment rights “that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”⁴⁵

The *Sherbert* line of cases that RFRA reinvigorated expressly recognized this distinction. “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”⁴⁶ Granting exemptions from neutral and generally applicable statutes governing obligations to employees “operates to impose the employer’s religious faith on the employees.”⁴⁷

But *Hobby Lobby* eviscerates this distinction. Half-heartedly acknowledging the historical principle that “nonprofit corporations are special because furthering their religious ‘autonomy often furthers individual religious freedom as well,’” the Court asserts that “this principle applies equally to for-profit corporations: furthering their religious freedom also ‘furthers individual religious freedom.’”⁴⁸ The revolution that began

⁴¹ *Id.*

⁴² *Id.* at 634–35; *accord* United States v. Lee, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”).

⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Roberts*, 468 U.S. at 636 (O’Connor, J., concurring).

⁴⁶ *Lee*, 455 U.S. at 261.

⁴⁷ *Id.*

⁴⁸ *Hobby Lobby*, 134 S. Ct. at 2769 (quoting *Corp. of Presiding Bishop v. Amos*, 483

with *Citizens United* thus reached its logical conclusion.⁴⁹ *Hobby Lobby* similarly concluded that the “profit-making objective” no longer provides a valid justification for distinguishing corporate First Amendment rights.⁵⁰ The Court proffers this remarkable proposition without any acknowledgment of its earth-shifting consequences.⁵¹

If for-profit corporations enjoy the same free-exercise rights as their non-profit counterparts, do they not also have the right to disassociate themselves from employees (and customers) that do not embody their religious beliefs; to fire those who exercise their rights to worship (or not worship), to vote, or to speak in a manner that contradicts the employer’s religious convictions; to deny service to patrons they view as *unclean*?⁵² During the 2004 presidential election, several bishops of my own faith threatened to deny communion to congregants who voted for John Kerry because he supported abortion rights.⁵³ After *Hobby Lobby*, do for-profit corporations with Catholic convictions have the right to terminate employees who vote or campaign for such candidates?

For its part, the *Hobby Lobby* majority attempts to deflect these concerns by noting that the decision does not sanction “discrimination in

U.S. 327, 342 (1987) (Brennan, J., concurring).

⁴⁹ The *Citizens United* Court proclaimed that “[i]t is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public’s support for the corporation’s political ideas.” *Citizens United v. FEC*, 558 U.S. 310, 351 (2010).

⁵⁰ *Hobby Lobby*, 134 S. Ct. at 2769–72.

⁵¹ See generally *id.* at 2751.

⁵² See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“Forcing” religious organizations “to accept” unwanted “members may impair the ability of the group to express those views, and only those views, that it intends to express.”).

⁵³ Laurie Goodstein, *Bishop Would Deny Rite for Defiant Catholic Voters*, N.Y. TIMES (May 14, 2004), <http://www.nytimes.com/2004/05/14/us/bishop-would-deny-rite-for-defiant-catholic-voters.html>. Ironically, other Catholic leaders might regard a vote for Mr. Kerry’s political adversaries to be morally illicit as well. As a prominent Benedictine theologian observed:

I do not believe that just because you’re opposed to abortion, that that makes you pro-life. In fact, I think in many cases, your morality is deeply lacking if all you want is a child born but not a child fed, not a child educated, not a child housed. And why would I think that you don’t? Because you don’t want any tax money to go there. That’s not pro-life. That’s pro-birth. We need a much broader conversation on what the morality of pro-life is.

Leslie Salzillo, *Catholic Nun Explains Pro-Life in a Way that Will Stun Many (Especially Republican Lawmakers)*, DAILY KOS (July 30, 2015, 5:00 AM), <http://www.dailykos.com/story/2015/07/30/1407166/-Catholic-Nun-Explains-Pro-Life-In-A-Way-That-May-Stun-The-Masses#>.

hiring . . . on the basis of *race*” because “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to *race*.”⁵⁴ But the opinion is conspicuously silent about the status of laws that prohibit discrimination in employment and public accommodations on the basis of *religion*.

The ability to exclude those who do not share a religious organization’s views is central to its free-exercise rights.⁵⁵ For this reason, federal law has long exempted non-profit religious corporations from laws that prohibit considering one’s faith when making employment decisions.⁵⁶ Yet courts uniformly recognized that by “engag[ing] in business for profit” a corporation has “passed over the line that affords them” the right to consider religion when making hiring or promotional decisions.⁵⁷ *Hobby Lobby* has erased this line.

The Court’s logic suggests that compelling a fundamentalist-run enterprise like Hobby Lobby to employ an otherwise-qualified, yarmulke-wearing Orthodox Jew or headscarf-wearing Muslim, at the very least, interferes with the exercise of a sincerely held belief.⁵⁸ At a minimum, this

⁵⁴ *Hobby Lobby*, 134 S. Ct. at 2783 (emphases added).

⁵⁵ As Justice Alito averred, advocating the Christian Legal Society’s right to limit membership to those of its own denomination:

Not all Christian denominations agree with CLS’s views on sexual morality and other matters. During a recent year, CLS had seven members. Suppose that 10 students who are members of denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group’s affiliation with the national organization, and changed the group’s message. The new leadership would likely proclaim that the group was “vital” but rectified, while CLS, I assume, would take the view that the old group had suffered its “demise.” Whether a change represents reform or transformation may depend very much on the eye of the beholder.

Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 740 (2010) (Alito, J., dissenting).

⁵⁶ 42 U.S.C. § 2000e-1 (2012).

⁵⁷ *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985); *accord* *United States v. Lee*, 455 U.S. 252, 261 (1982).

⁵⁸ “Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) . . . makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) ‘because of’ religion.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty Project, Inc.*, 135 S. Ct. 2507, 2533 (2015) (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015)). Title VII also requires employers to make “reasonabl[e] accommodat[ions]” to dress codes for an employee’s “religious observance or practice[s]”—like headscarves and yarmulkes—if

means that to enforce federal laws preventing a closely held for-profit corporation from terminating an employee on the basis of her faith, the Government must establish that the measure furthers “a compelling interest,” and that the requested remedy constitutes “the least restrictive means of achieving that interest”—strict scrutiny—“the most demanding test known to constitutional law.”⁵⁹ But it only gets worse. The Court cannot relieve the Government of this burden by simply upholding laws preventing religious discrimination in the first such case that reaches its docket.

Hobby Lobby “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose . . . exercise of religion is being substantially burdened.”⁶⁰ Thus, a reviewing court must “look[] beyond broadly formulated interests justifying the general applicability of [a] government mandate[]”; it must “scrutinize[] the asserted harm of granting specific exemptions to [the] particular religious claimants” before it.⁶¹ Thus, every employee challenging an employer’s action that discriminates on the basis of religion must make an *individualized showing* that the remedies the law afford her constitute the “least restrictive means” of achieving the Government’s interest as applied to her *particular employer* and its *particular practices*.⁶² Even if the courts rule for employees in a majority of cases, the transaction costs imposed upon plaintiffs and federal authorities charged with stifling workplace discrimination, like the Equal Employment Opportunity Commission, are mind-boggling.⁶³ Indeed, the prospect of the coming judicial onslaught led Texas Senator Ted Cruz to boast that *Hobby Lobby* has opened the door for “cases made by hundreds more plaintiffs” to “wend their way through the courts.”⁶⁴

they can do so “without undue hardship” to the “employer’s business.” *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031–32 (citing 42 U.S.C. § 2000e(j)).

⁵⁹ *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), *rev’d* 134 S. Ct. 2751 (2014).

⁶⁰ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (emphasis added).

⁶¹ *Id.* at 431.

⁶² *Id.*

⁶³ See Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(a) (2012) (tasking EEOC with enforcing laws prohibiting discrimination in the workplace).

⁶⁴ Kevin Horrigan, Editorial, *In Hobby Lobby, Court Rules Some Beliefs Are More Equal than Others*, ST. LOUIS POST-DISPATCH (June 30, 2014, 5:00 PM),

This is madness.

I am both a political advocate and a person of faith. I hold and espouse views that in some respects differ from my employer's. If I had any other job, I would be very worried now.⁶⁵

But I enjoy a privilege shared by very few American workers: I am blessed to be part of a profession that embraces the concept of academic freedom.⁶⁶ The first rule of the legal academy is that I can express my opinions—political, religious, and otherwise—free of fear that my employment will be threatened because my views do not comport with the sensibilities of my employer.⁶⁷

Questions regarding aspects of my private life—who I live with, what medical treatments I consent to, what church I attend, and my marital status—are none of my employer's business.⁶⁸

I owe this license to private benefactors: the American Bar Association,⁶⁹ the Association of American Law Schools,⁷⁰ and the constant

http://www.stltoday.com/news/opinion/columns/the-platform/editorial-in-hobby-lobby-court-rules-some-beliefs-are-more/article_5834140f-42f1-505c-afe1-2f3349da3b3f.html.

⁶⁵ I recognize that this sentiment might violate *Matthew* 6:25. See *Matthew* 6:25 (New American Bible) (“Therefore I tell you, do not worry . . .”). We lawyers have a difficult time heeding this command.

⁶⁶ Academic freedom is “[t]he right . . . to speak freely about political or ideological issues without fear of loss of position or other reprisal.” *Academic Freedom*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶⁷ Paul D. Carrington, *Freedom and Community in the Academy*, 66 TEX. L. REV. 1577, 1577 (1988) (“We members of the academic community are to be protected from the adverse consequences that persons may impose when they are hostile to the ideas we express.”); *2015–2016 Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_4.authcheckdam.pdf (last visited Sept. 1, 2015).

⁶⁸ See BYLAWS ASS'N AM. L. SCHOOLS, art. VI, § 6–3(a) (2008), <https://www.aals.org/about/handbook/bylaws/> (last visited Nov. 11, 2015) (directing law schools “shall provide equality of opportunity . . . for . . . faculty and employees with respect to hiring, continuation, promotion and tenure . . . without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation.”); see also *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (noting that “any reputable law school must seek to belong” to “the American Association of Law Schools [sic]” and lamenting that AALS “excludes from membership any school” that does not abide by the organization's exacting prohibitions against discrimination on the basis of familial status and private conduct); George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL'Y 165, 167 (2014) (noting that “AALS standards are de facto mandatory for serious law schools”).

⁶⁹ See *2015–2016 Standards and Rules of Procedure for Approval of Law Schools, Appendix 1: Statement on Academic Freedom and Tenure*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_ap

vigilance of my brothers and sisters in tweed.⁷¹ After *Hobby Lobby* though, I do not owe it to the Government.⁷²

Ironically, I am an employee of the Lutheran Church—an institution that likewise embraces the freedoms of conscience and of expression⁷³—but nonetheless just the sort of establishment upon whom the Framers actually *intended* to bestow a greater prerogative with respect to employment.⁷⁴ Yet,

pendices.authcheckdam.pdf (last visited Jan. 30, 2016) (stating law professors “are entitled to full freedom in research and in the publication of the results” and “in the classroom”).

⁷⁰ See BY-LAWS ASS’N AM. L. SCHOOLS, art. VI, § 6–6(d) (2008), <https://www.aals.org/about/handbook/bylaws/> (last visited Nov. 7, 2015) (“A faculty member shall have academic freedom . . .”).

⁷¹ See *Protecting Academic Freedom*, AM. ASS’N UNIV. PROFESSORS, <http://www.aaup.org/our-work/protecting-academic-freedom> (last visited Nov. 8, 2015) (“Protecting academic freedom is the AAUP’s core mission. Academic freedom is the indispensable requisite for unfettered teaching and research in institutions of higher education.”). The ABA’s law-school accreditation standards incorporate AAUP’s own academic-freedom standards. *2015–2016 Standards and Rules of Procedure for Approval of Law Schools, Appendix I, supra* note 69. These standards take an expansive view of academic freedom. For example, AAUP recently censured Louisiana State University for terminating a professor “known for . . . her use of profanity, poorly worded jokes, and sometimes sexually explicit jokes in her methodologies.” *Academic Freedom and Tenure: Louisiana State University, Baton Rouge, a Supplementary Report on a Censured Administration*, AM. ASS’N UNIV. PROFESSORS, <http://www.aaup.org/report/academic-freedom-and-tenure-louisiana-state-university-baton-rouge-supplementary-report> (last visited Nov. 13, 2015). Censuring LSU for violating the tenets of academic freedom, AAUP observed that the “University’s level of tolerance for speech that people may find offensive . . . seems astonishingly low . . .” *Id.*

⁷² As a private “expressive association,” AALS enjoys a First Amendment right to disassociate itself from law schools that do not abide by its academic freedom and antidiscrimination rules—to expel those who “may impair the ability of the group to express those views, and only those views, that it intends to express.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Because “any reputable law school must seek to belong” to AALS, the organization’s membership rules constitute de facto requirements for all United States law schools. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting); *accord* Dent, *supra* note 68, at 167 (noting that “AALS standards are de facto mandatory for serious law schools”).

⁷³ *Enhancing Faith-Based Cooperation for Religious Freedom and Expression*, LUTHERAN WORLD FED’N (Mar. 13, 2015), <https://www.lutheranworld.org/news/enhancing-faith-based-cooperation-religious-freedom-and-expression> (highlighting “humanitarian cooperation” between “[t]he Lutheran World Federation” and “the Islamic Relief Worldwide” to facilitate “meaningful actions that help to enhance open-mindedness and open-heartedness towards freedom of expression and freedom of religion in society”).

⁷⁴ See *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 697 (2012) (“Requiring a church to accept or retain an unwanted minister . . . intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”).

after *Hobby Lobby, I*, as a church employee, enjoy greater protections from the imposition of my employer's religious beliefs than do the 13,000 employees of Hobby Lobby, Inc.—a for-profit, big-box chain store, primarily engaged in the sale of cheap, foreign-made arts and crafts supplies⁷⁵; a company that enjoyed \$3.3 billion in revenues in 2013.⁷⁶

The Minnesota Supreme Court's decision in *State v. Sports and Health Club, Inc.*⁷⁷ illustrates the nature of the forbidden fruit sampled by the *Hobby Lobby* majority. The defendant there was a “closely held, for-profit . . . corporation” that operated seven health clubs in the Minneapolis area. The club restricted managerial positions to “born-again Christians” and frequently questioned all its employees about their church attendance and sexual behavior.⁷⁸ The club admitted that it would “not hire, and [would] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and [those it suspected might be] . . . fornicators and homosexuals.”⁷⁹ The club's owners predicated these practices on their sincerely held belief that they were “forbidden by God, as set forth in the Bible, to work with ‘unbelievers.’”⁸⁰

After it was cited for violating a myriad of employment

⁷⁵ *Company Overview of Hobby Lobby Stores, Inc.*, BLOOMBERG BUS., <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4165368> (last visited Sept. 1, 2015). Some have criticized Hobby Lobby's extensive dealings with Chinese manufacturers as inconsistent with its claimed Christian mission. Kim Bhasin, *Christians Call Out Hobby Lobby for Hypocrisy*, HUFFINGTON POST (July 1, 2014, 7:32 AM) http://www.huffingtonpost.com/2014/07/01/hobby-lobby-christian_n_5545618.html (“Products bearing ‘Made in China’ labels are found all over the shelves at Hobby Lobby, evidence that some of its wares come from Chinese factories that have a reputation for labor rights violations and rock-bottom wages. Employees at these facilities often end up working grueling hours in prison-like conditions and never earn enough to escape poverty.”). These practices are inconsistent with the tenets of my faith. See Leo XIII, *Rerum Novarum: Encyclical Letter on Capital and Labor* (May 15, 1891), in 2 THE PAPAL ENCYCLICALS 1878-1903, at 241 (Claudia Carlen ed., 1990) (recognizing that States have a moral obligation to recognize and protect the human dignity of workers).

⁷⁶ *Hobby Lobby Stores on the Forbes America's Largest Private Companies List*, FORBES, <http://www.forbes.com/companies/hobby-lobby-stores/> (last visited Sept. 21, 2015).

⁷⁷ 370 N.W.2d 844 (Minn. 1985).

⁷⁸ *Id.* at 846–47.

⁷⁹ *Id.* at 847.

⁸⁰ *Id.*

discrimination laws, the club asserted that the Free-Exercise Clause insulated it from liability.⁸¹

Relying on the for-profit/not-for-profit distinction long recognized by the Supreme Court's First Amendment jurisprudence, the Minnesota court rejected this argument: "[The club] is not a religious corporation—it is a . . . corporation engaged in business for profit. By engaging in this secular endeavor, [it] ha[s] passed over the line that affords [it] absolute freedom to exercise religious beliefs."⁸² *Hobby Lobby* affirmatively rejected this reasoning.

The *Hobby Lobby* Court's solicitous attitude toward the Free Exercise rights of for-profit corporations is particularly offensive given that the Court, in interpreting the body of law that RFRA purports to restore, often showed significantly less enthusiasm for the claims of actual human beings seeking much more modest exemptions from neutral laws of general applicability; individuals that I dare say offered much more sympathetic pleas than *Hobby Lobby*'s.

In 1986, the Court found that the Free-Exercise Clause did not empower Dr. Simcha Goldman, a clinical psychologist and Orthodox Jewish rabbi, to wear his yarmulke in his office at March Air Force Base.⁸³ The Court denied Rabbi Goldman relief because his headwear "would detract from the uniformity sought by the [Air Force's] dress regulations."⁸⁴

Two years later, in *Lyng v. Northwest Indian Cemetery Protective Association*,⁸⁵ the Court reversed a Ninth Circuit ruling that would have spared a six-mile-long tract of Northern California wilderness, sacred to the Yurok people, from destruction.⁸⁶ While the Court acknowledged that desecration of the site would "virtually destroy the . . . [Yurok's] ability to practice their religion,"⁸⁷ the Court concluded that the Free-Exercise Clause provided them no solace.⁸⁸

Human litigants fared no better in the lower courts. The Seventh Circuit afforded Moshe Menora, a high school basketball player and

⁸¹ *Id.*

⁸² *Id.* at 853.

⁸³ *Goldman v. Weinberger*, 475 U.S. 503, 504–05 (1986).

⁸⁴ *Id.* at 509–10.

⁸⁵ 485 U.S. 439 (1988).

⁸⁶ *Id.* at 442–43, 451.

⁸⁷ *Id.* at 451.

⁸⁸ *Id.* at 451–52.

Orthodox Jew, no exemption from an Illinois rule preventing him from wearing his yarmulke in state-sanctioned basketball games.⁸⁹

The Third Circuit, denied Alima Reardon, a public school teacher and devout Muslim, an exemption from Pennsylvania’s “garb statute”⁹⁰—a law that barred instructors from wearing “any . . . mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.”⁹¹ The court upheld this 1895 law, despite openly acknowledging that it was motivated entirely by anti-Catholic bigotry.⁹²

The Oregon Supreme Court affirmed a nearly identical law, likewise inspired by anti-Catholic bias,⁹³ upholding the termination of Janet Cooper, an adherent of the Sikh religion, for wearing the Dastaar, the distinct headwear of her faith, in her eighth-grade classroom.⁹⁴

I believe wholeheartedly that the Free-Exercise Clause affords *human beings* certain limited exemptions from generally applicable laws.⁹⁵ I believe Rabbi Goldman and Moshe Menora had the *right* to wear their

⁸⁹ *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1035–36 (7th Cir. 1982).

⁹⁰ *United States v. Bd. of Educ.*, 911 F.2d 882, 884 (3d Cir. 1990).

⁹¹ *Id.* at 885.

⁹² *Id.* at 894.

⁹³ *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298, 308 (Or. 1986). Oregon’s anti-garb statute “dates from the period of anti-Catholic intolerance that also gave us the initiative measure against private schools struck down in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).” *Id.* at 373. As Harvard Law School’s Dean, Martha Minow, observed, these laws were the product of a particularly dark period in Oregon’s history:

In the first part of the twentieth century, nativist anxieties about waves of immigrants and Bolshevism fueled movements to “Americanize” the children of newcomers. These sentiments took an extreme form in Oregon where the Ku Klux Klan, Federated Patriotic Societies, Scottish Rite Masons, and other groups pushed not only for compulsory schooling but also for required attendance at public schools in particular. The reformers sounded white supremacist, anti-Catholic, and anti-Semitic tones while pushing assimilation of immigrants into “American” culture—meaning white Protestantism. The relative homogeneity of Oregon may have contributed to the success of the initiative even as it prompted civil libertarians, African-Americans, Catholics, and Jews to build a coalition to challenge the law.

Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819 (2011).

⁹⁴ *Cooper*, 723 P.2d at 300, 313.

⁹⁵ See 42 U.S.C. § 2000bb(a)(5) (2012) (observing that *Sherbert v. Verner*’s protection of the Free-Exercise rights of *individuals* established “a workable test for striking sensible balances between religious liberty and competing prior governmental interests”).

yarmulkes; I likewise believe that Janet Cooper and Alima Reardon had the *right* to wear their respective head coverings in their classrooms. I believe that the destruction of the ancient Yurok worship sites violated the First Amendment.

But extending such license to for-profit corporations—to employers—simply does not further the individual’s right to live her life without shedding the articles of her faith. Instead, it empowers an employer “to impose [its] religious faith on [its] employees.”⁹⁶ By the logic of *Hobby Lobby*, a for-profit born-again Christian enterprise not only has the power to command an Orthodox Jewish employee to remove his yarmulke, it may also, as a term of his employment, have the “right” to compel him to replace it with a crucifix.

While this “right”—one that has never before been recognized in the 239 year history of our Republic⁹⁷—may incrementally expand corporate religious freedom, it does so at the expense of the religious freedom of employees and patrons of these businesses. Hobby Lobby’s exemption from a generally applicable federal law governing employee health care plans illustrates this problem.⁹⁸ *Hobby Lobby* is about much more than birth control.

Among the highest prerogatives recognized by my faith is the obligation of parents to care for their children.⁹⁹ Mary and Joseph fled their homeland and went into exile to protect Jesus from Herod.¹⁰⁰ This parental obligation entails the responsibility to seek life-saving care if one’s child becomes ill.¹⁰¹

⁹⁶ *United States v. Lee*, 455 U.S. 252, 261 (1982).

⁹⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (“Until this litigation, no decision of this Court [has] recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law . . . under the Free Exercise Clause.”).

⁹⁸ *See supra* note 15.

⁹⁹ 1983 CODE OF CANON LAW c.1136 (1st ed. 1999) (“Parents have the most grave duty and the primary right to take care as best they can for the physical, social, cultural, moral, and religious education of their offspring.”).

¹⁰⁰ *Matthew* 2:13–15 (New American Bible).

¹⁰¹ Catholic teaching recognizes that “parents . . . have a moral obligation to protect the life and health of their children.” *FAQ on the Use of Vaccines*, NAT’L CATHOLIC BIOETHICS CTR., <http://ncbcenter.org/page.aspx?pid=1284> / (last visited Jan. 30, 2016). And when no alternative treatment is available to protect their children from dangerous diseases, this can even necessitate inoculating their children with vaccines having a “historical association with abortion.” *Id.* This is so because “the risk to public health, if one chooses not to

The Government, by requiring that employers provide employees and their children minimum health-care coverage, set out to help parents heed this call. But *Hobby Lobby*—by interposing the religious beliefs of employers between employees and their own consciences (and their doctors)—substantially burdens individual employees’ free exercise of this religious mandate. Consider how *Hobby Lobby* may impair a parent’s obligation to care for his sick child.

If his employer—or rather its controlling shareholders—are Jehovah’s Witnesses, his child may be denied coverage for blood transfusions necessary to save her life.¹⁰²

If his employers are Muslim, his child may be denied certain vaccines utilizing ingredients taken from pigs.¹⁰³

If his employers are Scientologists, his child may be denied access to medications and psychiatric care if she succumbs to bipolar disorder.¹⁰⁴

vaccinate”—and the superseding parental “obligation to protect the life and health of . . . children”—is considered by the Church to “outweigh[] the legitimate concern about the origins of the vaccine.” *Id.*; see also Jennifer E. Chen, Note, *Family Conflicts: The Role of Religion in Refusing Medical Treatment For Minors*, 58 HASTINGS L.J. 643, 651 (2007).

¹⁰² Jehovah’s Witnesses believe that “[b]oth the Old and New Testaments clearly command [adherents] to abstain from blood [transfusions].” *Why Don’t Jehovah’s Witnesses Accept Blood Transfusions?*, JEHOVAH’S WITNESSES, <http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/> (last visited Jan. 30, 2016); accord *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (“Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses) . . .”).

¹⁰³ Some Muslim communities believe it is impermissible for adherents to receive inoculations containing pork gelatin, a common vaccine ingredient. Nailah Dossa, *New Influenza Vaccine Containing Pork Gelatine Has Created Outcry from Muslim Parents*, MUSLIM NEWS (Oct. 25, 2013), <http://www.muslimnews.co.uk/newspaper/health-and-science/new-influenza-vaccine-containing-pork-gelatine-created-outcry-muslim-parents/>; see also *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (“Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to . . . intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus) . . .”); *Al-Qur’an* 5:3 (consuming pork violates God’s law); *Leviticus* 11:7–8 (New American Bible) (“And the pig, though it has a divided hoof, does not chew the cud; it is unclean for you. You must not eat their meat or touch their carcasses; they are unclean for you.”).

¹⁰⁴ Scientologists reject psychiatric care in all forms. *Why is Scientology Opposed to Psychiatric Abuses?*, SCIENTOLOGY, <http://www.scientology.org/faq/scientology-in-society/why-is-scientology-opposed-to-psychiatric-abuses.html> (last visited Sept. 3, 2015); accord *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (“Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use

If his employers are Christian Scientists, she may be denied medical treatment all together.¹⁰⁵

Men and women striving with Parkinson's disease, like Michael J. Fox—a member of a Jewish congregation¹⁰⁶—may be denied access to treatments utilizing stem-cell research if their employers are guided by the teachings of my own Church.¹⁰⁷

Nothing in the Constitution—or the Warren¹⁰⁸ and Burger¹⁰⁹ era-precedents that RFRA purports to reanimate¹¹⁰—gives for-profit employers the right to impose their own religious prerogatives on their employees in this manner. Rather, these cases stand for the proposition that granting exemptions from neutral and generally applicable statutes that extend

of certain contraceptives extend to employers with religiously grounded objections to . . . antidepressants (Scientologists) . . .”).

¹⁰⁵ Christian Scientists generally eschew medical treatment, in favor of prayer. *FAQs on Christian Science*, PRACTICAL PRAYER, <http://practicalprayer.org/faqspage/> (last visited Nov. 7, 2015). They believe that “[a] spiritual idea in Mind cannot be affected by . . . counterfeit powers” such as “disease, injury, heredity, contagion, malfunction, deformity, age, deterioration. . . .” *Id.*

¹⁰⁶ MICHAEL J. FOX, ALWAYS LOOKING UP: THE ADVENTURES OF AN INCURABLE OPTIMIST 196 (2009) (“It’s fair to say that I have staked a claim in Judaism. I’ve married a Jewish girl, and we are raising our three children in the Jewish culture, and, moreover, in the Jewish faith—our three oldest have been *bar* and *bat mitzvah*.”); see also Nate Bloom, *Interfaith Celebrities: Michael J. Fox Receives Reform Award*, *Liev Schreiber Narrates Jewish-Americans*, INTER FAITH FAMILY (Jan. 8, 2008), http://www.interfaithfamily.com/arts_and_entertainment/popular_culture/Interfaith_Celebrities_Michael_J.shtml.

¹⁰⁷ Catholic teaching considers therapeutic research utilizing stem cells harvested from living human embryos “gravely illicit”:

The obtaining of stem cells from a living human embryo . . . invariably causes the death of the embryo and is consequently gravely illicit: “research, in such cases, irrespective of efficacious therapeutic results, is not truly at the service of humanity. In fact, this research advances through the suppression of human lives that are equal in dignity to the lives of other human individuals and to the lives of the researchers themselves. History itself has condemned such a science in the past and will condemn it in the future, not only because it lacks the light of God but also because it lacks humanity”

CONGREGATION FOR THE DOCTRINE OF THE FAITH 19 (quoting Pope Benedict XVI, Address to the Participants in the Symposium: *Stem Cells What Future for Therapy?* (Sept. 16, 2006).

¹⁰⁸ See generally *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁰⁹ See generally *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹¹⁰ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

privileges to employees based on the employer’s religious objections would “permit every [employer] to become a law unto [it]self.”¹¹¹ Worse, acceptance of such a principle would “operate[] to impose the employer’s religious faith on the employees.”¹¹² Respect for the democratic process—for laws governing the correlative rights and duties of employers and employees to one another—should be both familiar and desirable.

The Federalist Society’s most revered founding principle is a commitment to “*judicial restraint*.”¹¹³ *Hobby Lobby* flies in the face of this precept. It deems any act of the political branches of our Government “presumptively invalid” that compels a corporation to act in a manner that contradicts its professed religious beliefs, exempting for-profit enterprises “from civic obligations of almost every conceivable kind.”¹¹⁴ No less a conservative than Antonin Scalia recognized a generation ago that “[a]ny society adopting such a system would be courting anarchy.”¹¹⁵ Unfortunately, Justice Scalia did not heed his own warning. As his intellectual adversary, Justice Ginsburg, observed, the Court instead, “ventured into a minefield.”¹¹⁶

To complete Professor Wormser’s metaphor, *Hobby Lobby*, like *Citizens United* before it, empowers the for-profit corporation—a soulless, undead, profit-driven golem¹¹⁷—to say to the human beings and governments to whom it owes its very existence: “You are my creator, but I am your master; Obey!”¹¹⁸

¹¹¹ *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488.

¹¹² *United States v. Lee*, 455 U.S. 252, 261 (1982).

¹¹³ See generally AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 52 (2015) (discussing the notion that a founding principle of the Federalist Society is its dedication to themes of judicial restraint and Originalism).

¹¹⁴ *Smith*, 494 U.S. at 888.

¹¹⁵ *Id.*

¹¹⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

¹¹⁷ A golem is a soulless “artificial anthropoid[] created by mystical means according to the Jewish tradition.” Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503, 520 (1998). The *Torah* tells “of figures made from dirt brought to life by reciting one of the names of the Divine or by placing a piece of parchment with God’s name (or the word *emet* (‘truth’)) on the forehead.” *Id.*

¹¹⁸ SHELLEY, *supra* note 1, at 159.