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What Business do Businesses Have with the Free Exercise of Religion?[1]

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Abstract: Since Burwell v. Hobby Lobby (2014), federal and state religious freedom restoration acts now extend the right to free exercise of religion to businesses. But what does it mean for businesses to have such a right? In this paper, I identify three implications of these new rights: they shift the burden for fulfilling the right to private citizens, and they conflict with businesses' both commercial and democratic obligations. To illustrate how they become problematic, I draw on the case of In re Wathen (2015) where the owners of a bed and breakfast cited their business's religion as their reason for refusing to host a wedding reception for a same-sex couple, even though state law specifically prohibited commercial businesses from discriminating based on sexual orientation.

The recent spate of state religious freedom restoration acts (RFRAs)[2] grant free exercise rights to both individuals and—thanks to *Burwell v. Hobby Lobby* (2014)—"closely held businesses," i.e., businesses owned by small numbers of people. But what does it mean for *businesses* to have a right to the free exercise of religion? What happens when they assert these putative rights? In this paper, I explore these rights and their democratic implications. First, I argue that religious rights for businesses are well intended but unnecessary. Second, if nevertheless recognized, I show how these putative rights can conflict with businesses' prior obligations in the marketplace. Finally, I discuss how they facilitate the abrogation of businesses' democratic responsibilities.

To illustrate these problems, I draw on the dispute at issue in the administrative case of *In re Wathen* (2015). This clash provides a powerful example of the difficulties posed by extending the right of free exercise

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of religion (FER) to businesses. The case arose when the owners of a Bed and Breakfast in Paxton, IL cited their business's religion as their reason for refusing to host a wedding reception for a same-sex couple, even though state law specifically prohibited commercial businesses from discriminating based on sexual orientation. The couple challenged the proprietors, and the ensuing litigation provides a rich record demonstrating how the putative right to business proves problematic as matters of theory, law, and politics.

After introducing the *Wathen* case (*In re Wathen* 2015), I review the legal and political history of how businesses such as Timber Creek acquired the legal right to FER and the justifications for this extension. Then, after noting the limitations of ascribing an individual right of religion to businesses, I look at the implications of these rights for the public arena. In particular, I note how it flips the burden of honoring that right from the public to individual citizen(s). Next, I consider how recognizing these rights could make it difficult for these businesses to fulfill both their legal and, finally, democratic responsibilities. Throughout the paper, I aim to enrich our understanding of our mutual obligations in the marketplace, as well as to get a sense of the nature and limits of the right to FER.

TIMBER CREEK BED AND BREAKFAST

In 2011, IL residents Todd and Mark Wathen traveled to Massachusetts to get married. Upon their return, they wanted to hold a second, civil union ceremony for their local friends and family. They settled on the Timber Creek Bed and Breakfast in Paxton as the venue for their celebration, and approached the owner about reserving the facilities. When owner Jim Walder learned that they were a same-sex couple, he told them that they could not have the party on his property because homosexuality violated Timber Creek's religion. The Wathens filed a complaint with the Illinois Department of Human Rights, alleging that Walder's actions violated the IL Human Rights Act which provides, in pertinent part, that it is illegal to "[d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation" (IL Statutes, Chap. 775). The Commissioner agreed that the business had denied services due to discrimination, and fined the Bed and Breakfast. For their part, the Bed and Breakfast paid the fine but still refused to host same-sex events.

What is relevant about this case for the purposes of this paper is that it shows the clash between the government's conflicting duties, one to protect the FER (supported by federal and state law) and the other to prevent businesses from discriminating based on sexual orientation (supported by state law).

On one hand, the owners of the business seem sincere in believing that their religion prohibits homosexuality. Citing state and federal constitutional law as well as the state's new Religious Freedom Restoration Act (RFRA), the owner claimed that his business should not have to violate its religion. In response to Todd Wathen's e-mail correspondence, he replied that,

> We will *never* host same sex civil unions. We will *never* host same-sex weddings even if they become legal in Illinois. We believe that homosexuality is wrong and unnatural based on what the Bible says about it. If that is discrimination I guess we unfortunately discriminate (*In re Wathen* 2015. Emphasis in original).

In other words, the business's obligation to God overrides its obligation to the state to avoid discriminating. This is unavoidable, he contends, because, "The Bible … contains the highest laws pertinent to man. It trumps Illinois law, and Global law there ever be any [sic]. Please read John 3:16" (*In re Wathen* 2015). In short, "forcing it [the business] to hold a same-sex civil union ceremony that publicly communicates messages that conflict with its sincerely held religious beliefs would violate its … statutory and constitutional rights" to FER (*In re Wathen* 2015). The owners then changed their website to include the phrases that "We do not host civil unions" and "Civil Unions: not available at Timber Creek." They also began to describe the business as an "upscale Christian country Bed & Breakfast" (instead of an "upscale, sophisticated country Bed and Breakfast") (*In re Wathen* 2015)." At least as a *prima facie* matter, this putative right imposes on the government a correlative duty to permit Timber Creek to practice its religion.

On the other hand, IL law clearly prohibits discrimination in public accommodations against people on the basis of their sexual orientation. Since 1995, IL Human Rights Act states that it is unlawful to "[d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation" (Ill. Ch. 775, section 5/5-102(A)). By refusing to serve same-sex couples at a hotel that serves the public, the business is discriminating on the basis

of sexual orientation despite being a public accommodation. The government also has a duty to ensure that such discrimination does not occur.

It seems that the State of IL is faced with a difficult dilemma of honoring its duty to protect their citizens' rights to FER and protecting their citizens' rights to be free from discrimination. But subsumed within this conflict is Walder's assumption that the FER right he is asserting belongs to his *business*, as well as himself. Indeed he claimed that forcing him to rent his facilities to same-sex couples "violate[s] its [the business's] … statutory and constitutional rights." But how can a *business* meaningfully claim a right that seems to be inherently individual in nature?

HOW BUSINESSES ACQUIRED THE RIGHT TO FER

It is not unusual for the law to ascribe some rights to non-humans. Corporations, for example, enjoy both property rights and "liberty" rights such as speech (Winkler 2018). The Supreme Court handed down the first constitutional case recognizing corporate rights in 1809, *Bank of the United States v. Deveaux*, which gave corporations the right to access federal courts. After the Civil War, they were able to use that access to acquire rights as "persons" under the Fourteenth, including the right to equal protection regarding their property (*Santa Clara v. Southern Pacific* 1886; *Pembina v. Pennsylvania* 1888).[3] After *Lochner*, they also acquired rights we more often associate with individual liberty, including the right to free press (*Grosjean v. American Press* 1936), to free speech (*Buckley v. Valeo* 1976), to free speech on political matters (*First National Bank v. Bellotti* 1978), and to make campaign contributions (*Citizens United v. FEC* 2010).

According to Adam Winker, there are two kinds of justifications that support corporate rights under the Constitution. First, businesses have asserted constitutional rights in order to protect their company as an organization. For example, they need to be able to sue in order to protect their company property. Or, they need the right to speak out on issues that affect their company's health, whether by lobbying the government directly or by influencing policy indirectly through commercial speech that wins over the electorate. Ultimately, these justifications are about the company's bottom line, i.e., their core business functions. Advocating for themselves in court or through speech provides ways for them to protect their assets and enhance their profits.

Second, more recent justifications of corporate rights have taken the form of "pass-through" arguments, i.e., businesses' efforts to *pass through* the corporation itself so that they may reach their employees. Focusing on those who work for them, businesses exercise corporate rights in order to protect their owners' and employees' rights while at work. This can be for any number of reasons. The company might want to encourage certain kinds of activities and try to facilitate it by protecting the workers' right to engage in that behavior. For example, a company might want to ensure free political speech for their workers as a way to encourage their employees to engage themselves in partisan activities that benefits the company (workplace rallies, campaign contributions, canvassing while at work—all in support of candidates whose platforms advance the company's interests). Or perhaps the company' wants owners/employees to engage in partisan politics that the company believes will benefit the workers directly, i.e., sharing antiabortion information. Under this set of rationales, the companies view themselves as protectors of the individual rights of their workers/owners.

At other times, the Court relies on pass-through arguments because it views the business an association of individual rights-holders, and these individuals deserve the protection of their rights even though they present themselves in a group. This is the form that the argument took in *Citizens United*, for example, where the Court held that Congress may not "fine[] or jail[] citizens or associations of citizens for simply engaging in political speech." (*Citizens United* 2010). This Court contends that this particular right to free speech (including the right to make campaign contributions) deserves to be extended—even through corporations—because, "Political speech is indispensable to decision-making in a democracy and this is no less true because the speech comes from a corporation rather than an individual" (*Citizens United* 2010). In short, individual rights matter even at the workplace because they are essential to the healthy functioning of the democracy.

Taken together, these justifications of corporate rights suggest that businesses have rights for two reasons: to promote the health of both the capitalist economy and the democracy. But how well do either of these justifications support the extension of the FER to businesses? True, the very idea of a business having a right to FER seems inappropriate on its face. After all, businesses do not go to Church on Sunday. They do not atone for their sins on Yom Kippur nor prostrate themselves on a prayer mat for daily prayers. Beyond the fact that they do not practice religion in a literal sense, there is also the peculiarity about the business's

motivation to *be* religious and follow a religion's dictates. Good businesses do not aim to go to heaven, and bad businesses presumably end up in bankruptcy court rather than hell.[4] So what rationale could there be for this legal move?

As an empirical matter, two strands of legal development entwined to give small businesses the notion that they could use their right to the FER to justify discriminating in violation of otherwise applicable laws. Both relate to the development of Religious Freedom Restoration Acts (RFRAs). Congress and many states enacted the first set of RFRAs in reaction to a Supreme Court case that circumscribed the extent of religious freedom for individuals. Many years later, a group of states began to enact a new set of RFRAs in the wake of the *Hobby Lobby* case, a case that extends the right of free exercise to closely held businesses, presumably to permit religious businesses to withhold services from same-sex couples or others who are lesbians, gay, bisexual, transsexual, transgender, or queer (LGBTQ).

RFRAs, Round One

In a long string of cases, the Supreme Court has recognized that when the practices of individuals' religion conflict with the generally applicable law, the national government and the states may be required to "accommodate" these individuals. When granted, these exemptions permit individuals to practice their religion even though that practice involves activities that are otherwise illegal. For example, a Seventh Day Adventist was fired from her job for refusing to work on Saturdays, which is forbidden by her religion. When she tried to collect unemployment insurance, she was denied because she was fired for cause. The courts then ruled that firing her because of a religious practice was not firing for just cause, thus the state should accommodate her religious practice and allow her to collect unemployment payments (*Sherbert v. Verner* 1963). Similar accommodations have been granted in cases involving flag salutes (*West Virginia v. Barnette* 1943), distribution of religious material (*Martin v. Struthers* 1942; *Jamison v. Texas* 1943; *Marsh v. Alabama* 1946), withholding Amish children from public schools after the eighth grade (*Wisconsin v. Yoder* 1972) and animal sacrifices for religious rituals (*Church of the Lukumi Babalu Aye v. Hialeah* 1993). Of course, there are times when the courts decide *not* to grant these accommodations, e.g., in cases regarding polygamy (*Reynolds v. U.S.* 1879), Sunday

closing laws (*Braunfeld v. Brown* 1961; *McGowan v. Maryland* 1961), and wearing a yarmulke with military uniforms (*Goldman v. Weinberger* 1986). Whether the courts ultimately decide to award the accommodation or not, what is significant for our purposes is that, historically, the Court took seriously the possibility that religious claims *might* trump (part of) the generally applicable law, and accommodations *might* be in order.

Even the possibility of accommodations disappeared with the Supreme Court's decision in *Employment Division v. Smith* (1990), however. Another case about unemployment insurance, the two men at the center of this litigation had been fired from their jobs at a drug rehabilitation center because their urine tested positive for drug use. Oregon's Employment Division refused to pay the men unemployment insurance because they had been fired for cause. The men replied that their religion had led them to use peyote as part of a long-established ritual of the Native American Church, and they should never have been fired. They requested an accommodation so they could collect their unemployment checks.

The Supreme Court ruled against the men, and did so in an unusual way. Writing for the majority, Justice Antonin Scalia held that unless there is some other fundamental right that is also at stake, there should not be *any* accommodations for the FER—either you break the generally applicable law or you do not, and your reasons for so doing are irrelevant. In Scalia's words, "To make an individual's obligation to obey such a [generally applicable] law contingent upon the law's coincidence with his religious beliefs, except when the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'--… contradicts both constitutional tradition and common sense" (*Employment Division v. Smith* 1990). If the right to free exercise were to prevail, he argues, then it would be tantamount to "a private right to ignore generally applicable law" (*Employment Division v. Smith* 1990). Better to interpret the Free Exercise Clause to mean that individuals have an unlimited right to *believe* whatever they want, but they do not have a right—even if grounded in religion—to *act* on that belief in supersession of the law. The dissenters objected that this makes members of religious minorities vulnerable to hostile majorities who want to outlaw their religious practices. In response to this critique, Scalia noted that states were free to write accommodations into the legal code if they chose to be more generous than the Constitution required, but they need not. It is an "unavoidable consequence of democratic government," he wrote, that members of minority religions have trouble mustering the

majority needed to convince legislatures to adopt these preemptive accommodations.

Public reaction to the *Smith* decision was swift and critical. Large coalitions of religious groups lobbied Congress for protection of their members' individual right to FER even when it came into conflict with generally applicable laws. So too did secular civil liberties groups such as the American Civil Liberties Union. Congress heard the message loud and clear. Democrats and Republicans alike[5] opposed the law, viewing it as a threat to individual religious liberty (Pohlman 2005). The law passed with near unanimity and President Clinton signed it into law in 1993 (RFRA 1993). The law granted individuals a statutory basis for religious exemptions to generally applicable laws, replacing the need to look directly to the Constitution's First Amendment for protection.

In 1997, the federal RFRA hit a snag. In *Boerne v. Flores*, the Supreme Court ruled that the RFRA only protected individuals from *federal* laws that intruded on their rights (*Boerne v. Flores* 1997). Wanting protection from state governments, too, 14 states then passed their own versions of RFRAs, this time explicitly extending the protection to state-based citizens.[6]

Throughout this development, state legislatures focused on passing their own RFRAs to restore to and guarantee religious freedom for individuals.

RFRAs, Round Two

The free exercise landscape changed in 2014 with the case of *Burwell v. Hobby Lobby*. The family that owns Hobby Lobby craft stores opposes abortion on religious grounds and contended that the family business did so as well. When the federal government required them to provide healthcare insurance for their workers, the company balked at the notion that it should have to pay for health insurance that includes coverage for those forms of contraceptives it believes to be abortifacients. The Supreme Court ruled that because the company itself has religious freedom rights, and in order not to violate the company's religion, it need not provide insurance coverage for the alleged abortifacients.[7]

The Court's rationale in *Hobby Lobby* took the form of a pass-through justification, i.e., the Court wrote of protecting the individuals who formed the association of Hobby Lobby, not so much the idea of Hobby Lobby as a fictional "person" that possessed a religion. As Justice Alito wrote in his opinion, "A corporation is simply a form of organization used by human beings to achieve desired ends. … When rights, whether constitutional or

statutory, are extended to corporations, the purpose is to protect the rights of these people." In the context of FER, this means that "free-exercise rights of corporations … protect[] the religion liberty of the humans who own and control these companies … [They are to protect] the religious liberty of the Greens" (*Hobby Lobby* 2014). This pass-through justification contends that corporations need a FER to protect the individuals who work there, a justification that ultimately recognizes that these right help protect our democracy.

In the years since *Hobby Lobby*, the religious right has seen this expansion of free exercise as a promising method for protecting their faith (Hausknecht 2013). This has been particularly true in light of growing public acceptance of rights for same-sex couples and those who are LBGTQ (Sanchez 2016). While members of the religious right may be able to avoid same-sex couples and LBGTQs in their private lives, this is not always possible in civil society. There, LGBTQ people are consumers just as heterosexual and cis-gendered people are. When it comes time to purchase goods related to same-sex weddings, most people getting married tend to want the same things: a wedding cake, a photographer, a room/hall for a reception, etc. *Hobby Lobby* seems to empower "closely held businesses" that oppose same-sex marriage or homosexuality to believe that their businesses have a right to FER that can excuse them from the obligation to engage in commercial transactions with them. To get that right to apply against state governments, the religious right has pushed for *more* states to enact RFRAs—laws that can now be understood to protect businesses. In the wake of *Hobby Lobby*, two states successfully passed state RFRAs,[8] similar laws are pending in six states,[9] and efforts have failed in six.[10] In IN, for example, organizations representing the religious right spoke in favor of their state bill and stated that goal was to protect Christian businesses from having to engage in unchristian activities, even when those activities were part of their business and were required by state and/or federal constitutional law (Cook and Wang 2015).

As we see in the Timber Creek case in Illinois, the owner of the Bed and Breakfast relied in part on a "Hobby Lobby" right for his business to the FER, and moved to have that right protected by appealing to his state's RFRA. Even though Walder's claim makes sense in light of the recent legal developments just reviewed, it nevertheless seems odd against the backdrop of First Amendment history.

Traditionally, the right to free exercise had attached to individuals (Lupu 1989; McConnell 1990). Like many other rights, this claim was

grounded in the Constitution, which guarantees that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" (U.S. Constitution, 1st Amendment). Linguistically, this could apply to individuals or groups, but both historically and morally, the government's duty to avoid prohibiting free exercise stemmed from the recognition that *individuals* have logically prior duties to their deities—obligations that predate the social contract as both a matter of law and logic. As John Locke describes it, each individual has the obligation of self-preservation/life because each is created by God; the rights we have in the State of Nature are those that are necessary to fulfill this obligation to our Creator. In other words, the rights we carry into the social contract are those we have because each of us must fulfill our prior duty to God (Locke 1970).[11] Other justifications focused on individuals' needs for salvation that exist regardless of the nature of the government (*Reynolds v. U.S.* 1879).

None of these justifications for the right to FER seem to apply to businesses, especially when viewed as "persons" under the Fourteenth Amendment. First, no one claims that businesses are divinely created and therefore have logically prior duties deriving from that sacred status. Businesses are created by humans, for humans. They do not have souls that could end up in Hell if they do not follow the dictates of a particular religion. Businesses that thrive make a lot of money. Businesses that fail, fold or go into bankruptcy. Unlike individuals, the purpose of businesses is to make money for its owners, not to go to Heaven or avoid damnation. Second, it is unclear how extending this right could help a business make more money or better fulfill its core functions as a corporation. In short, extending the right to FER as a way to protect corporate "persons" does not make a lot of sense.

But as a constitutional matter, the FER might well make sense as a pass-through right for corporations. This is the argument the Court made in *Hobby Lobby* when it aimed to protect the free exercise of the Green family that runs the business. The family did not claim that the stores would be complicit in the sin of abortion by providing health care that paid for abortifacients. Rather, they worried that they themselves were implicated in this religious wrong. In extending the right to FER to businesses owned by small numbers of people, the Court specifically aimed to fulfill its duty to the Greens to let them fulfill their logically prior duty to their deity.

The problem with this argument is that it is not necessary to extend the right to FER to corporations in order to protect the Greens' rights. The

Court can merely determine whether it would be appropriate to offer them accommodations as individuals by applying RFRA. There are many examples where businesses already do this through "conscience clauses." Obstetricians may opt out of performing abortions if it violates their beliefs, for example. Or, pharmacists are allowed to ask other pharmacists to step in and fill a prescription to which they have a moral objection, i.e., the day-after pill. RFRA insists on these accommodations as individually tailored methods for protecting those persons. Framing the right to FER as a corporate matter merely obscures the real foundation for the rights: protection of the individual.

Worse, extending this essentially individual right to corporations, even using the pass-through justification, runs the risk that protecting this right for the company may actually be bad for democracy. This is the problem I take up in the remainder of the paper.

WHO MUST HONOR THE RIGHT TO FER?

The idea of ascribing the right of FER to businesses also proves problematic when considered in light of the theory undergirding civil rights. In short, the extension of the right from individuals to businesses involves shifting the duty that correlates with that right from the polity as a whole to specific, private individuals.

As we learn from Wesley Hohfeld, the logic of rights dictates that each legal right correlates with a duty. What this means is that every claim of a legal right entails the imposition of a duty on someone else. My right to free speech, for example, correlates with Congress's duty to "not make a law abridging the freedom of speech" (U.S. Constitution, Amendment 1). Or, my right to due process correlates with the government's duty to provide me with a fair experience in the criminal justice system (U.S. Constitution, Amendments 5 and 14). In Hohfeld's words, "A duty or legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated" (Hohfeld 1917). But upon whom are these duties imposed?

In the case of the FER, the right imposes a correlative duty on the government to avoid creating laws (and their applications) that burden an individual's religious practice. Indeed, the Constitution focuses not on the right *per se*, but on the government's duty: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof." (U.S. Constitution, Amendment 1, emphasis added). What this means is

that the people have a duty, acting through their legislatures, to refrain from passing laws that preclude religious practices. On some readings, it also means that when generally applicable laws inadvertently burden an individual's ability to practice his/her/their religion, the government has a duty to find a way to accommodate the religious practice, all things being equal, often by exempting them from the application of the onerous law.

Consider the *Yoder* case (*Wisconsin v. Yoder* 1972). Jonas Yoder is Old Order Amish and believes that it is against his religion for his children to be taught the worldly values promoted in high school. But in WI, students must attend school until they turn 16. He asks the government for an accommodation so that he can pull his children out of school after the eighth grade even though this violates the mandatory attendance law. He asserts an individual right to the FER, and he asserts that right against the state of WI, which he contends has the correlative duty not to infringe on his religious practice (by forcing him to send his children to high school). Or, consider the case of *Church of the Lukumi Babalu Aye v. Hialeah* (1993). There, the Supreme Court upheld the right of members of the Santerian religion to engage in animal sacrifice rituals even though Hialeah's city ordinances forbade the practice. Per the Court's ruling, Hialeah had a correlative duty to permit the Santerians to practice their religion, including their animal sacrifice rituals, because that obligation correlated with the Santerians' right to FER.

Nota bene that in both cases, it is the *government* that possesses the duty to honor the individuals' right to FER. It was the people of WI, through their government, that had the burden of exempting the Yoder children from the schools. And it was the people of Hialeah, through their government, that had the burden of permitting the Santerians to ritually slaughter their animals.

In contrast, however, when Timber Creek claims a right to FER, it is the *customer* who bears the burden for honoring that right. This is because when Timber Creek decides to decline service to the same-sex couple, *the customer/couple* pays the price by having to endure discrimination against them. By shifting the obligation from the government to individual citizens/customers, the burden established is essentially asymmetrical (Smith 2014).

In short, the problem is that by flipping the duty, the locus of the obligation shifts from one that falls on the whole community to one that falls on individual citizens. Worse, the onus for honoring this right would be incumbent on the party who is already being discriminated against—it further wrongs the wronged.

LEGAL DUTIES IN THE BUSINESS ARENA

Even if we were to bracket the problem of the having the wrong party pay the price for the business's opportunity to enjoy the FER, ascribing the right to the businesses would—at times—make it difficult for those businesses to fulfill their obligations to the rest of the community. Businesses have two kinds of special obligations to the public. The legal set is intrinsic to the duty of all businesses in the United States (Day and Weatherby 2017; Singer 2017).[12] The democratic set derives from the role business plays in our communities as a whole. Extending the right to FER to businesses would put to threat both kinds of responsibilities.

Under the Commerce Clause, Congress has authority to regulate business in the United States and in the various states. In theory, the constitutional language seems to apply only to interstate commerce, but as the courts have interpreted it, most businesses involve at least some interaction with businesses in other states. For example, a baker may make all of her cakes in her own shop, but the flour may be trucked in from other states, as may the eggs, the baking tins, etc. Even when there is demonstrably no interaction between states, the courts still justify congressional regulation on the theory that the commerce itself could be interstate (*Gonzales v Raich* 2005).

Among the governing regulations is Title VII of the Civil Rights Act of 1964 (CRA). This law provides that businesses may not discriminate against their customers on the basis of race, color, religion, or national origin.[13] The CRA was quickly put to the test by a motel that did not want to let rooms to African-American customers. The Supreme Court ruled that the motel had to accept all comers regardless of race using a straightforward application of the law: (1) the motel was engaging in interstate commerce, which Congress had constitutional authority to regulate. (2) the Congress had decided to regulate commerce by enacting the CRA; therefore (3) the CRA clearly applies to businesses that "serve the public" as a place of "public accommodation." It also forbids discrimination on the basis of race (among other factors). In sum, the Heart of Atlanta Motel was not allowed to discriminate against its customers on the basis of race. (Civil Rights Act 1964).

The case proves interesting for its delineation of both the "qualitative" and "quantitative" obligations businesses have when they "serve the public" in a place of "public accommodation." (*Heart of Atlanta Hotel v. U.S.* 1964).[14] Qualitatively, it is recognized (along with the U.S. Senate) that refusing to serve some customers, particularly when based

on race and the other classes, amounts to "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." (*Heart of Atlanta Hotel v. U.S.* 1964).[15] This is a vital point. Being turned away from a business is demeaning, dehumanizing, and frustrating. As Todd Wathen stated in the Timber Creek B & B case, he hoped that no other same-sex couple would have to experience "being turned away and belittled and criticized for who [they] are." (Fox News 2016). The harm cannot be measured easily, but it is a harm.

The Court also lists the difficulties of encountering businesses that refuse to serve particular customers. In the case of African-Americans seeking motel accommodations when they travel, these challenges include the need to travel greater distances to find hotels that will let them use their facilities and/or the need to stay with friends because no hotel will admit them. Not only does this make travel "inconvenient." It also makes it "unpleasant" and "discouraging" by generating a need to check with businesses that might reject them, and the nagging worry that they may not find the accommodations they need (*Heart of Atlanta v. U.S.* 1964). The same kinds of concerns apply in the Timber Creek B & B case. The intended couple has to endure the inconvenience of looking around for venues that will allow them to celebrate their union—perhaps having to settle for one that is not one they prefer. Moreover, after encountering the demoralizing rejection at their first choice location, the task of finding alternatives becomes fraught with the nagging concern that other businesses will treat them the same way. As Elizabeth Sepper observes, being turned away from a business is painful, but the hurt is not remedied by finding another business, and that is because the harm exceeds the mere access to the desired services (Sepper 2015).

For both of these reasons—respecting the customer's dignity and convenience—the Court concludes that discrimination against customers violates the CRA 1964. Undergirding both of these claims is the Court's recognition that discrimination by businesses is a "moral wrong" or "moral problem" that Congress has authority to remedy (*Heart of Atlanta* 1964). Yes, the Commerce Clause becomes relevant when there is "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." But it is also true that when faced with a "moral and social wrong," Congress has the authority to act. The moral weight of the wrong adds significantly to businesses' duty to avoid discrimination.

Andrew Koppelman places these arguments into the larger context of the antidiscrimination project. As he synthesizes it, the antidiscrimination law serves to "dismantle longstanding structures of dominance and subordination" (Koppelman 1998; 2015). Within this overarching goal are three subsidiary purposes: to ameliorate economic inequality, to prevent dignitary harm and promote social equality, and reshape culture to avoid stigmatizing prejudice (Koppelman 2015). Insofar as businesses are empowered by their right to the FER to seek accommodations from otherwise generally applicable antidiscrimination laws, all three of these purposes are put at risk. Refusing to serve LGBTQA customers curtails the would-be customers' economic opportunities, attacks their dignity, and further exacerbates social prejudice against them. In this way, these free exercise rights burden the businesses' ability to fulfill its legal obligations to the rest of the community.

DEMOCRATIC DUTIES IN THE BUSINESS ARENA

Extending the FER right to businesses also harms the community in an extra-legal way.

At their base, democracies are grounded on the assumption that their members are equal, both politically and in the opportunity to participate in their shared life. Hence, legal discrimination is bad because it undermines the essence of political equality. But social discrimination is also bad because it threatens the social fabric that makes democratic life possible. As Judith Shklar argues, in America, our citizenship reflects this multi-layer nature of our democratic life. On one hand, American citizenship means holding a U.S. passport and/or qualifying for the vote. But on the other, it also connotes membership and participation in American civil society (Shklar 1998). When democratic public life is undermined by systematic exclusion of some groups from the chance to partake in society's basic civic offerings, this extra-legal inequality can eat away at the moral foundation—equal citizenship–upon which the polity's legitimacy depends.

Economic activity is an important locus of some of the principal opportunities that define civic life in democracies. It is where people engage in the commerce that both sustains and defines their lives, whether in the form of work or purchasing (Shklar 1998). Discrimination damages equal citizenship in democratic civil society, hence its members, including

businesses, assume special public obligations to uphold civil society by eschewing such practices.

Most businesses do not conceive of themselves as public, of course, and might bridle at the notion that they have extra-legal duties owed to the polity as a whole. After all, they are owned privately, i.e., not by the state, and they are largely free to make their own decisions about how to run their operations.[16] Nevertheless, and despite the fact that it has not always been the case, the sphere of economic and commercial activity are arenas which—if not strictly public—are of intrinsic interest to the public.[17] Jurgen Habermas describes the development of the public sphere into what we recognize today, noting that economic activity that had been considered "private" became part of the emerging common space. Activities that were once "relegated to the framework of the household emerged from this confinement into the public sphere." Because the economic world is relevant to the public, "economic activity … had to be oriented toward a commodity market that had expanded under public direction and interest" (Habermas 1989). This sphere is now an arena "of general interest"—even if it is not, strictly speaking, public.

Since the community is able to determine the responsibilities of businesses owners toward their workers and the public, it follows that the government may set the terms upon which businesses must operate. In the post-Lochner Era, those obligations focused on obligations toward the workers, including considerations of wage and workplace safety. In the Civil Rights Era, those obligations grew into duties toward the public. Specifically, they emphasized that all customers must be treated as equals and may not be discriminated against on the basis of race. In the current decade, the obligation to avoid discrimination has begun to expand to protect customers based on their sexual orientation. In IL, this obligation is statutory, and is the primary reason why the Timber Creek B & B got into legal trouble.

One of the fundamental ideas behind these antidiscrimination laws is that the economic sphere is one that has to make space for interactions that reflect the democratic value of equal dignity.[18] Although vast economic disparities prevent us from being equally positioned as consumers, the relationship between businesses and their customers ought to reflect the democratic values of mutual acknowledgment and respect. These are the values that drive the antidiscrimination laws (Koppelman 1998; 2015), and they are the values that the public has decided will circumscribe how businesses may—and may not—treat their customers.

As quasi-public institutions, businesses play an important role. To the extent the public has an interest in them, they become the kind of "public things" that can serve as a locus of democratic citizenship. I borrow the term from Bonnie Honig, who explains that "Public things are part of the 'holding environment' of democratic citizenship; they furnish the world of democratic life. They do not take care of our *needs* only. They also constitute us, complement us, limit us, thwart us, and interpellate us into democratic citizenship." (Honig 2017). Were it not for the democratic things, there would be nowhere to *be* citizens, nothing about which to negotiate as we engage as citizens.[19] In important ways, businesses, though partially private, also serve this quasi-public function. Individual businesses take on meanings in the community, and those meanings become objects of democratic participation.

The Timber Creek B & B, for example, had a reputation in Paxton as a terrific place to hold a wedding celebration. Couples who married there could convey that meaning by saying they married there. But when the Wathens wanted to celebrate their union there, they contested that prior meaning and began to negotiate something new. Others wanting to use that business in the future noted that the location meant something different—both to them and to their community. It became a place that discriminated against LGBTQ, one that only served the needs of "traditional" couples (*In re Wathen* 2015). It is this reformulation and contestation of the meaning of a business that renegotiates its place in the democratic polity.

Honig (2017) argues that at the least, "public things press us into relations with others." These are objects and institutions we share—things whose meaning we shape and that shape us. The relationships we make with each other around public things can generate a healthy democratic public, as in a popular public park or a town's only grocery store. People who patronize businesses on a regular basis may come to know the other regular customers, and that in itself may generate connection and community. We also glean meaning from the rituals of the market—from exchange and interaction. These provide concrete opportunities to bind us together as workers and customers, and ideally to do so on terms of mutual respect.

But when we contest the meaning of those public things—and when those contests violate fundamental democratic values—the public things can lead to a weakening of our ties and commitments to each other. In Honig's words: "Public things bind citizens into the complicated affective circuities of democratic life. That is to say, public things act on publics not only expressively but also, disturbingly, in ways that bind and unbind us" (Honig 2017). Because businesses have this profound ability to help unite

or divide us, it is incumbent upon democracies to take heed of their operations and to regulate them in ways that keep them functioning in a healthy way for the continued benefit of the polity as a whole.

It is important to note that democracies are also committed to protecting individual religious freedom. But as argued above, that freedom is better protected by individual claims (which have a good chance of prevailing) than by the collective claim of businesses (which have multiple duties to fulfill simultaneously, and often must, by necessity, abrogate some of those duties in order to fulfill its obligation to protect the FER of its owners and workers).

CONCLUSION

These two kinds of obligations—legal and democratic—both suggest that businesses have obligations to avoid discriminating against some of their customers. On the legal side, the focus is on the ills to consumers. On the democratic side, the focus is on the ills to the polity as a whole. But both indicate that the *demos* has imposed antidiscrimination obligations on businesses.

The oddity of ascribing a right of FER to businesses stems from the fact that it puts businesses in a difficult position. Typically, businesses' obligations are mutually consistent. But once the business has a religion, it runs the risk that its religion renders its other obligations difficult to fulfill. For example, how can Timber Creek B & B fulfill simultaneously its obligations to obey generally applicable laws against discrimination and support democratic life on one hand, and honor its duties to religious businesses to keep same-sex couples from using its facilities on the other? When the religion directs the business to do things that violate the law, the business is faced with a difficult dilemma—one that did not exist when the right to FER remained an individual right, i.e., before the introduction of a business's right to FER.

The clash is further complicated by the fact that religion provides an alternative way of justifying an obligation, including that to obey the law. As Jim Walder put it in the Timber Creek B & B case, "The Bible … contains the highest laws pertinent to man. It trumps Illinois law, and Global law there ever be any [sic]" (In re Wathen 2015). Businesses with religions may well decide to follow their religious obligations instead of their pre-existing commercial and democratic obligations. This is exactly the conflict that Justice Scalia sought to avoid in the *Smith*

case: having people refer to their own religion as the authoritative source for deciding whether to obey generally applicable laws. Scalia was worried about individuals becoming a law unto themselves. In the *Smith* case, those seeking accommodations from the law were individuals—individuals who do not possess the commercial and democratic obligations incumbent upon businesses. Here, by exercising an independent right to free exercise, it is businesses that must navigate the conflict, and the damage they can inflict is magnified by their enhanced responsibilities.

In *Hobby Lobby*, the Court acts out of sympathy for the religious individuals who own and work in closely held businesses. And rightly so. Not wanting to force these individuals to engage in activities that violate their religion, the Court seems to have found a way to offer them a religious "accommodation"—but without actually granting the kind of exemptions that it ruled out of bounds in the *Smith* case. By extending religious rights to the businesses themselves, however, the Court seems to have created more problems than it solved.

In a democratic polity, business plays a quasi-public role. Businesses are privately owned, but because they serve the public, the community regulates them to ensure that they also serve the public interest. We are not accustomed to thinking systematically about the role businesses play in our democracy, either as particular businesses or as part of a network of institutions that function in our neighborhoods, cities, states, and country. But to the extent our laws have broached the subject, the Courts have ruled in cases like *Heart of Atlanta* that these quasi-public institutions cannot enter the public part of their lives unless they accept the public terms for their operation.

Political theory has been even less systematic about the role that businesses play in the life of the polity. But as Honig argues, democracies cannot exist without the things that center it, so it follows that we also need the businesses and institutions that give us places to exercise an important part of our civic life.

What seems most problematic, however, is the trouble generated by extending individual religious rights to businesses. Because businesses possess more responsibilities than individuals—as well as duties that individuals do not—their decisions to abrogate those responsibilities causes much more damage than do individual violations. At the least, they let down the whole democratic polity by refusing to fulfill their responsibilities toward the rest of us. As well, as was the case in Timber Creek, they potentially lay the burden for enduring that abrogation on the shoulders of private citizens such as the Wathens. This burden is not something that

falls only on the shoulders of the business (as would a similar violation by an individual). It is a harm that reaches the entire polity.

If we were able to scrap the businesses' right to FER, not all of our problems would be solved, of course. Individuals such as the owners of the Timber Creek Bed and Breakfast would still have their own religious obligations to uphold—obligations are at direct odds with the Bed and Breakfast's civil obligations. This is a very difficult conflict where there is no obvious solution. Perhaps the answer is to overrule *Smith* or turn to RFRA statutory grounds, drawing on either one to justify the extension of an accommodation to the religious individuals. As a general matter, this would be a better solution since individuals do not possess the same obligation to avoid discrimination that businesses do. This is the rationale behind "conscience" laws. It is an imperfect solution, however, since not all services are fungible, and not all businesses are large enough to ask others to perform the requested services in their stead. There are no real winners in this kind of conflict.

Scrapping the business right to FER would need to be done in a way that could ensure that the rights remain intact for institutions that are inherently religious in their purpose, i.e., churches or social service agencies. No one would want to require a church to hire a rabbi as their spiritual leader for fear they would be discriminating on the basis of religion. But of course, neither religious institutions nor social service agencies operate in the commercial marketplace. At least, in theory, they are not aiming to make a profit, as businesses are, nor do they operate in the commercial marketplace. So the special obligations that we ascribe to businesses do not apply here, making any ensuing conflict between one of these institutions and generally applicable law easier to navigate.

These caveats notwithstanding, it is important to rethink the coherence and justice of religious rights ascribed to businesses. To the extent that democratic theory has not yet delineated the public obligations of the business world, that enquiry is now past due. So too could it benefit from an evaluation of whether it is appropriate to extend the right to FER. The quasi-public business sphere proves a rich arena where there is much important work to be done.

CONFLICT OF INTERESTS

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NOTES

1. I gratefully acknowledge the wise advice I received while preparing this paper from Suzanne Dovi, David Orentlicher, Nick Tampio, and the anonymous reviewers. Remaining mistakes are all my own.

2. Alabama: Ala. Const. Art. I, §3.01; Arizona: Ariz. Rev. Stat. §41-1493.01; Arkansas: 2015 SB 975, enacted April 2, 2015; Connecticut: Conn. Gen. Stat. §52-571b; Florida: Fla. Stat. §761.01, et seq.; Idaho: Idaho Code §73-402; Illinois: Ill. Rev. Stat. Ch. 775, §35/1, et seq.; Indiana: 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015; Kansas: Kan. Stat. §60-5301, et seq. Kentucky: Ky. Rev. Stat. §446.350; Louisiana: La. Rev. Stat. §13:5231, et seq.; Mississippi: Miss. Code §11-61-1; Missouri: Mo. Rev. Stat. §1.302; New Mexico: N.M. Stat. §28-22-1, et seq.; Oklahoma: Okla. Stat. tit. 51, §251, et seq.; Pennsylvania: Pa. Stat. tit. 71, §2403; Rhode Island: R.I. Gen. Laws §42-80.1-1, et seq.; South Carolina: S.C. Code §1-32-10, et seq.; Tennessee: Tenn. Code §4-1-407; Texas: Tex. Civ. Prac. & Remedies Code §110.001, et seq.; Virginia: Va. Code §57-2.02.

3. In Santa Clara, the Court did not actually grant personhood to corporations, but the court reporter's headings indicated that it did. This error caused misreadings of the case's holding that have since become so deeply entrenched in subsequent intepretations that it now has the effective status of law. See Winkler 2018.

4. It would be an entirely different matter if the individuals running the business objected to their participation as *individuals*. Indeed, Wathen did claim that serving same-sex couples would violate both his and his business's religion. This raises a host of difficult questions about complicity and conscience that is beyond the scope of this essay (Greenawalt 2013; Wilson 2014; Nejaime and Siegel 2015; Sepinwall 2015). For example, people may well have a right not to violate their religion while they are at work. But the court handling the case focused on the recently discovered right of his *business*, and not his individual right to FER, and that is my focus here.

5. Newt Gingrich (R-GA) and Barney Frank (D-MA) in the House and Orrin Hatch (R-UT) and Edward Kennedy (D-MA) in the Senate led the fight for the legislation.

6. AL, AZ, FL, ID, IL, LA, MO, NM, OK, PA, SC, TN, TX, and VA. CT and RI had enacted their state RFRAs in the immediate aftermath of the federal RFRA, i.e., in 1993.

7. Because the Court recognized that the company has a right to FER, it is conceivable that those rights may or may not map onto the beliefs of those working in the company. The company itself is its own entity with its own rights (Churchill 2014; Luchenister 2015). Moreover, as happened in this particular case, the right to FER may trump those other obligations, setting the stage for other businesses to invoke their right to FER to override obligations toward other things they find irreligious, including insurance coverage for abortions and services for people who are LGBTQ.

8. IN and MS.

9. AR, GA, HI, MI, NV, and NC.

10. CO, MT, SD, UT, WV, and WY.

11. Madison also conceded that our duties to God come first in his "Memorial and Remonstrance against Religious Assessments" when he argued that they take "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" (Madison 1785).

12. These duties also fall upon state governments. *See* Ira C. Lupu 2015.

13. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation … without discrimination or segregation on the ground of race, color, religion, or national origin."

14. The Court uses the terms "qualitative" and "quantitative." I took them to be alluding to subjectively and objectively measured harms.

15. The Court is quoting the Senate Commerce Committee at S. Res. No. 872 at 16–17.

16. The Lochner Era cases illustrate the extent to which businesses have resisted any governmental regulation of daily operations. (*Lochner v. New York* 1905.)

17. This is clearly demonstrated in the famous Brandeis Brief filed in the case of *Muller v. Oregon,* 1908. This compilation of more than 2 dozen reports from all over the country by the National Consumers" League documents the many ways that women suffer when exploited by private businesses that are left unregulated. *West Coast Hotel v. Parrish,* 1937, overturns *Lochner* in upholding minimum wage laws because they prevent "exploitation of a class of workers who are in an unequal position … and are thus relatively defenseless." Moreover, the denial of a living wage

"detrimental to their health and well-being." Of significance here is, the court is emphasizing that businesses have an obligation to their workers, and that that the public as a whole takes interest in whether these obligations are fulfilled.

18. I bracket here the larger question of whether democracies require capitalist markets, but I believe that once such markets exist, they generate and reinforce the kinds of ties that reflect democracy's values of equality and dignity. Of course, the fact that poverty excludes many from the market shows the stark limits of the market as a sufficient unifying force. It is interesting to note that poor people are face reduced participation in the market, and it is worth wondering whether this reflects the lower political participation by poor people.

19. Honig's discussion focuses on completely public things, such as public libraries, railroads, sewage systems, roads, etc. I have extended it here to include commercial entities.

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