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HOBBY LOBBY AND THE PATHOLOGY OF *CITIZENS UNITED*

ELLEN D. KATZ*

INTRODUCTION

Four years ago, *Citizens United v. Federal Election Commission*¹ held that for-profit corporations possess a First Amendment right to make independent campaign expenditures. In so doing, the United States Supreme Court invited speculation that such corporations might possess other First Amendment rights as well.² The petitioners in *Conestoga Wood Specialties Corp. v. Sebelius*³ are now arguing that for-profit corporations are among the intended beneficiaries of the Free Exercise Clause⁴ and, along with the respondents in *Sebelius v. Hobby Lobby Stores*,⁵ that they also qualify as “persons” under the Religious Freedom Restoration Act (RFRA).⁶ Neither suggestion follows inexorably from *Citizens United*, and the role of the case in the pending disputes remains to be seen.⁷ Still, it seems fair to say that the Court’s fidelity to the concept of corporate personhood espoused in *Citizens United* will shape how it evaluates the pending religious liberty cases.

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1. 558 U.S. 310 (2010).

2. See, e.g., Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010, 6:45 PM), <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/>.

3. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. argued Mar. 25, 2014).

4. Brief for Petitioners at 25–26, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. Jan. 10, 2014).

5. 723 F.3d 1114, 1128 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013).

6. Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)); Brief for Petitioners, *supra* note 4, at 24–25; Brief for Respondents at 25–26, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Feb. 10, 2014).

7. Many of the briefs filed in the Patient Protection and Affordable Care Act (ACA) cases do not mention *Citizens United* at all, and others do so only in passing. See, e.g., Brief for Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

Setting aside the specific arguments about religious freedom, this Article focuses on a distinct way *Citizens United* promises to influence *Conestoga Wood Specialties*, *Hobby Lobby*, and a host of cases to come. Specifically, *Citizens United* approached precedent in a manner that will likely affect, and radiate well beyond, the current challenges to the Patient Protection and Affordable Care Act (ACA).⁸ In brief, *Citizens United* read a number of prior decisions to adopt rules that those decisions deliberately chose not to espouse. This is not an entirely new move for the Court as it has previously cast off a decision's doctrinal limits and stated normative claims.⁹ The contribution of *Citizens United*, however, is to normalize this stance. The Roberts Court seems increasingly comfortable approaching precedent just as it did in that case. This Article identifies this move as a consistent practice across a number of decisions, and explains both why it is likely to be used in the pending ACA cases and beyond, and why it is cause for deep concern.

I. THE PUZZLING USE OF PRECEDENT IN *CITIZENS UNITED*

In holding that for-profit corporations possess a First Amendment right to make independent campaign expenditures, *Citizens United* struck down a federal law as unconstitutional, overruled one prior decision in its entirety, and scrapped a substantial portion of another.¹⁰ The Court insisted that these earlier decisions had been anomalies and that other precedent dictated the holding in *Citizens United*. As a matter of reading precedent, this was puzzling.

Justice Kennedy's majority opinion, for example, credited *First National Bank of Boston v. Bellotti*¹¹ as the case in which the Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"¹² But *Bellotti* never rejected this argument. At issue in *Bellotti* was the constitutionality of a Massachusetts statute that prohibited corporations from making campaign contributions or expenditures

8. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

9. See *infra* notes 38–45 and accompanying text.

10. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and portions of *McConnell v. FEC*, 540 U.S. 93 (2003)).

11. 435 U.S. 765 (1978).

12. *Citizen United*, 558 U.S. at 343 (quoting *Bellotti*, 435 U.S. at 776).

“for the purpose of . . . influencing or affecting the vote” on a referendum.¹³ Several banking associations and corporations that wanted to spend money to oppose a proposed income tax challenged the state law on First Amendment grounds.¹⁴ The Court sustained the challenge, and in so doing rejected the notion that “speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.”¹⁵

The *Bellotti* Court, however, did not reject the argument that corporate political speech should be treated differently under the First Amendment from the political speech of “natural persons.”¹⁶ In fact, the *Bellotti* majority expressed no doubt whatsoever that political speech by corporations could be regulated more extensively than political speech by individuals.¹⁷ It never questioned the well-established principle, invoked by the *Bellotti* dissenters,¹⁸ that corporations were artificial, state-created institutions vested with special privileges that justified additional regulation in the political sphere. Instead, the *Bellotti* majority crafted what it described as a limited exception to that principle. It held that the State could not block corporate expenditures made in connection with referenda both because corporate influence posed less concern in such elections and because corporate expenditures in referenda served the First Amendment interests of others.¹⁹ In so holding, the Court stated explicitly that it was not ruling that corporations themselves possessed a First Amendment right to engage in such speech.²⁰

13. *Bellotti*, 435 U.S. at 767–68.

14. *Id.* at 769.

15. *Id.* at 784.

16. *Citizen United*, 558 U.S. at 343 (quoting *Bellotti*, 435 U.S. at 776).

17. *Bellotti*, 435 U.S. at 789 (noting the argument that “corporations are wealthy and powerful and their views may drown out other points of view,” and demonstrating a willingness to consider, on a proper evidentiary showing, whether “corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests”).

18. *See id.* at 809 (White, J., dissenting) (observing that the “special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process”); *id.* at 825–26 (Rehnquist, J., dissenting) (observing that “[i]t might reasonably be concluded” that the “blessings” state law grants to corporations, “so beneficial in the economic sphere, pose special dangers in the political sphere”).

19. *Id.* at 776, 790 (majority opinion).

20. *Id.* at 776 (stating that the “Constitution often protects interests broader than those of the party seeking their vindication” and that “[t]he proper question . . . is not whether corporations ‘have’ First Amendment rights” but whether the challenged statute “abridges expression the First Amendment was meant to protect”).

As has been widely observed, *Citizens United* disregarded these carefully crafted limits.²¹ The Court read *Bellotti* to support precisely what that decision disavowed, treating the case as authority for the proposition that a corporation is entitled to make unrestricted expenditures in connection with any election, not just a referendum, and that a corporation possesses a First Amendment right to do so.²² Reading *Bellotti* this way meant that the “special advantages” corporations enjoy no longer provided sufficient cause to regulate corporate political expenditures differently from expenditures made by individuals. But it was decidedly *Citizens United*, and not *Bellotti*, that created this rule.²³

Like *Bellotti*, *Buckley v. Valeo*²⁴ was modified by *Citizens United*. It was *Buckley*, of course, that famously recognized Congress’s power to regulate campaign finance practices in order to “stem corruption or its appearance.”²⁵ In so doing, the *Buckley* Court stated explicitly that Congress’s power to regulate campaign finance extended beyond efforts aimed at preventing outright bribery. The Court wrote that the appearance of corruption is of “almost equal concern as the danger of actual quid pro quo arrangements” and “the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”²⁶

Citizens United nevertheless baldly stated that “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”²⁷ This misreading of precedent was of great consequence. It meant that even if corporate expenditures could lead to ingratiation and preferential access—something Justice Kennedy’s majority opinion doubted—“[i]ngratiation and access . . .

21. See, e.g., *Citizens United*, 558 U.S. at 442 (Stevens, J., dissenting) (“The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority’s position.”); Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311, 348 (2010) (noting that *Citizens United* “mischaracterizes” *Bellotti*).

22. See *Citizens United*, 558 U.S. at 346–47.

23. See *id.* at 351 (noting that the advantages corporations enjoy under state law do not suffice “to allow laws prohibiting speech”).

24. 424 U.S. 1 (1976).

25. *Id.* at 80–81.

26. *Id.* at 27 (quoting *CSC Comm. v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

27. *Citizens United*, 558 U.S. at 359.

are not corruption”²⁸ within the meaning of the *Buckley* framework. Reading *Buckley* this way meant the problem Congress targeted in the Bipartisan Campaign Reform Act (BCRA)—namely, preferential access and the opportunity to secure influence by making various campaign-related expenditures—turned out not to be a cognizable problem at all.²⁹ This, in turn, rendered the BCRA provisions disputed in *Citizens United* invalid, given that they limited the way corporations and unions could fund certain types of advertisements so as to curb the influence these entities exerted over candidates.³⁰

This holding was new law.³¹ To be sure, the idea that the governmental interest *Buckley* identified might be “limited to *quid pro quo* corruption” did not originate in *Citizens United*. Several prior dissenting opinions read *Buckley* as *Citizens United* did,³² and by the time *Citizens United* was decided, this position had come to command a majority on the Court. *Citizens United* accordingly overruled the portion of *McConnell v. Federal Election Commission* that held otherwise, along with an earlier decision that endorsed the same principle.³³ In so doing, however, the Court avoided telling us why Congress lacked authority to address conduct that fell short of *quid pro quo* corruption. Instead, the decision scrapped statutory provisions that targeted access and influence simply by citing *Buckley* for a proposition that *Buckley* had not endorsed and even disavowed.

28. *Id.* at 360.

29. *See id.* at 359.

30. BCRA targeted congressional concerns about influence and preferential access in two ways: first, by blocking donations of “soft money” to state and national political parties, and second, by limiting the ability of corporations and unions to fund advertisements that were intended to endorse or condemn candidates, but that did so without using words such as “elect” or “vote” and hence that fell outside the preexisting regulatory framework. *See id.* at 439–40 (Stevens, J., dissenting). *Citizens United* involved the latter limitation, but its reading of *Buckley*, now confirmed in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), threatens the soft money ban as well. *See* Fred Wertheimer, *Symposium: The Supreme Court and the McCutcheon Decision*, SCOTUSBLOG (Apr. 4, 2014, 10:44 AM), <http://www.scotusblog.com/2014/04/symposium-the-supreme-court-and-the-mccutcheon-decision/>; *see also infra* note 56 and accompanying text.

31. *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009) (explaining the roots of the structural anticorruption principle in the Constitution and its historical interpretation).

32. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 296–98 (2003) (Kennedy, J., concurring in part and dissenting in part) (citing *Buckley v. Valeo*, 424 U.S. 1, 26–28 (1976)); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 423 (2000) (Thomas, J., dissenting).

33. *See Citizens United*, 558 U.S. at 365–66 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and portions of *McConnell*, 540 U.S. 93).

The *Buckley* Court, of course, might have justified its decision to invalidate expenditure limits by holding that the prevention of quid pro quo corruption is the only interest Congress may pursue in this realm. *Bellotti* might have similarly defended its decision to allow corporate expenditures in referenda by dismissing the state-granted “blessings” corporations enjoy as an insufficient cause to regulate corporate political activity. But that neither decision did so proved to be no obstacle to the Court in *Citizens United*. That those earlier cases might have held what the Court wanted them to have held was enough to treat them as though they had.

The Court, of course, knows how to distinguish dicta from holding and limited holdings from broader ones. Why *Citizens United* opted not to follow rather mainstream practice is puzzling. The Court might have hoped to make its decision look as if it charted less new ground than it did,³⁴ or maybe it was looking to collapse some analytic steps in an already lengthy opinion or avoid the difficulty of reasoning its way to a particular conclusion from first principles.

It is also possible that the way the Court approached precedent in *Citizens United* simply reflects a more general jurisprudential preference for bright light rules over muddier ones. That preference pervades *Citizens United*, which both jettisoned the case-specific, as-applied inquiry that the Court previously used in this realm³⁵ and reached out to protect entities that were not even subject to regulation under BCRA. Regarding the latter, the Court worried that exempt institutions might ultimately find themselves regulated absent the broad ruling it issued in the case, and deemed the mere prospect of regulation a distinct reason to strike down the BCRA provisions in dispute.³⁶ Rather than waiting to address such regulation with a targeted rule if and when the regulation actually materialized, the Court made clear the imagined regulation was foreclosed by a broad rule that invalidated BCRA’s present application to different institutions. The Court did so, moreover, not by announcing and defending its new rule, but instead by insisting that existing precedent

34. If so, it was unsuccessful. See *id.* at 441–46 (Stevens, J., dissenting) (explaining the misapplication of precedent by the majority in *Citizens United*); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 586–88 (2010); Kerr, *supra* note 21, at 322.

35. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

36. See *Citizens United*, 558 U.S. at 352 (describing BCRA’s exemption of media corporations as “all but an admission of the invalidity of the anti-distortion rationale” and as “a separate reason” for invalidating the law).

already established the rule. That precedent, of course, did no such thing, having itself emerged from a different era that was both more responsive to context and less committed to bright line rules.

Whatever its reason, reading precedent as the Court did in *Citizens United* eliminates the very foundation of what makes it precedent in the first instance. The practice strips prior decisions of their limits and the reason why they have normative force for future cases. It leaves precedent denatured and relegated to a kind of cameo appearance in a willful construction of decisional history. As such, this use of precedent is not unlike the abuse of legislative history, wherein the record of the past becomes little more than a narrative filled with data points that are mined for supporting arguments. The weight given to a particular statement or textual provision becomes purely a matter of perspective and desired outcome, as holdings become contingent explanations and dicta is transformed into binding rules.

II. THE PATHOLOGY OF *CITIZENS UNITED*

The Court's recasting of precedent in *Citizens United* might be readily dismissed were the practice simply an aberration or a tactic selectively employed to resolve a particularly contentious case. After all, *Citizens United* was not the first decision in which the Court read an earlier decision to endorse a proposition the prior case had not espoused.³⁷ As this Part shows, however, the way *Citizens United* treated precedent increasingly looks like standard practice for the Roberts Court. The approach is evident in several decisions that post-date *Citizens United*, and promises to (mis)shape decisions to come.

Consider, first, *Vance v. Ball State University*,³⁸ in which the Court held that an employee is a supervisor for purposes of establishing vicarious liability under Title VII only if the employee is authorized to take tangible employment action against the plaintiff.³⁹ Along the way, *Vance* also stated that if the harassing employee is not a supervisor and simply the victim's co-worker, the employer is liable only if it negligently failed to control working conditions.⁴⁰ Both propositions

37. One example is *Bush v. Gore*, 531 U.S. 98, 105–06 (2000), which attributed to the Florida Supreme Court an unwavering commitment to a proposition it never mentioned, much less endorsed. See also Larry D. Kramer, *The Supreme Court in Politics*, in *THE UNFINISHED ELECTION OF 2000* at 105, 149 (Jack N. Rakove ed., 2001) (describing this attribution as “nothing less than a deliberate, bold-faced lie”).

38. 133 S. Ct. 2434 (2013).

39. *Id.* at 2439.

40. See *id.* (“[T]he employer is liable only if it was negligent in controlling working

are new law, but *Vance* insisted that precedent had already established the latter. The Court cited *Burlington Industries, Inc. v. Ellerth*⁴¹ and *Faragher v. Boca Raton*,⁴² but those decisions simply noted that negligence had been the dominant approach in the lower courts.⁴³ Neither decision had occasion to resolve the question in *Vance* because both earlier cases involved harassment by a supervisor.⁴⁴ The Court itself subsequently recognized that “*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we.”⁴⁵

Vance nevertheless cited the earlier cases as if they had resolved just that question.⁴⁶ *Vance* now leaves no doubt that the negligence standard governs going forward. As my colleague Sam Bagenstos has explained: “One would think that the Court would have felt the need to offer some substantive defense of the negligence standard in terms of the policies that underlie Title VII. But *Vance* offered no such defense.”⁴⁷

The day after it decided *Vance*, the Court again asserted that precedent controlled open questions in the case at hand. *Shelby County v. Holder*⁴⁸ confronted a constitutional challenge to the Voting Rights Act that the Court had sidestepped four years earlier. *Northwest Austin Municipal Utility District No. One v. Holder*⁴⁹ had

conditions.”)

41. 524 U.S. 742 (1998).

42. 524 U.S. 775 (1998).

43. See *Burlington Indus.*, 524 U.S. at 749–52; *Faragher*, 524 U.S. at 799; Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII* 16 (Law & Econ. Research Paper Series, Working Paper No. 370, 2014) (“In its pre-*Vance* cases the Court never held that a negligence standard of employer liability applied to coworker-on-coworker harassment.”), available at <http://ssrn.com/abstract=2363095>.

44. See Bagenstos, *supra* note 43, at 16 (“*Faragher*, like *Ellerth*, was a case involving harassment by a supervisor, not a coworker, so the standard of employer liability for coworker harassment was not squarely presented.”).

45. Pa. State Police v. Suders, 542 U.S. 129, 143 n.6 (2004); see also Bagenstos, *supra* note 43, at 16 (explaining how the employer liability standard for co-worker harassment had not been presented in either *Ellerth* or *Faragher* and that any opinion expressed to that end would be mere dicta).

46. See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) (reasoning that “we have held that an employer is directly liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior,” and that *Faragher* and *Ellerth* “held that different rules apply where the harassing employee is the plaintiff’s supervisor”); see also Bagenstos, *supra* note 43, at 17 (describing this reading of *Ellerth* and *Faragher* as “simply . . . incorrect” and observing that “those cases did *not* hold that negligence is the baseline standard for employer liability under Title VII”).

47. Bagenstos, *supra* note 43, at 17.

48. 133 S. Ct. 2612 (2013).

49. 557 U.S. 193 (2009).

called the constitutional challenge a serious one, but did not resolve it, finding instead sufficient statutory grounds on which to dispose of the case.⁵⁰ By contrast, *Shelby County* issued a constitutional ruling, albeit not the one that was widely expected.⁵¹ In so doing, Chief Justice Roberts's majority opinion cited four points that *Northwest Austin* purportedly "emphasized," "require[d]," or "stated definitively," and that it thought Justice Ginsburg's dissent inappropriately resolved in a different way.⁵² The majority observed that the dissent "analyzes the question presented as if our decision in *Northwest Austin* never happened."⁵³

It is debatable whether anything the *Shelby County* dissent said was incompatible with the identified statements from *Northwest Austin*. But even if the dissent had flatly rejected them, those prior statements were not binding on the Court in *Shelby County*. Given *Northwest Austin*'s statutory ruling, its constitutional discussion was dicta. And yet, the Chief Justice's opinion chastised Justice Ginsburg's dissent for failing to adhere to *Northwest Austin*. Once again, fanciful precedent filled in for reasoned argument. By treating *Northwest Austin* as conclusive, the majority opinion offered no response to Justice Ginsburg's claims beyond referencing the prior decision.⁵⁴ Like *Vance* the day before, *Shelby County* relied on precedent in a manner that tracked *Citizens United*, notably, by excising dicta and presenting it as a binding rule.

This practice seems poised for further deployment in the pending ACA cases. The lead appellate opinion in *Hobby Lobby Stores* already reads as if *Citizens United* provided the template. A majority of the Supreme Court may soon agree that it should, particularly in light of the structural similarities between the precedent used in *Citizens United* and the decisions that bear on the ACA dispute.

The Court is likely to view the alterations *Citizens United* made to *Bellotti* as authority in the pending ACA cases to reject distinctions between corporations and individuals based on the "special advantages" corporations enjoy.⁵⁵ The Court's most recent campaign finance decision already treated the limits that *Citizens United* read

50. *Id.* at 205–07.

51. See generally Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248 (2014).

52. *Shelby County*, 133 S. Ct. at 2622, 2630.

53. *Id.*

54. See *id.*

55. See *supra* notes 21–23 and accompanying text.

into *Buckley* as black letter doctrine.⁵⁶ It seems probable that the ACA decisions will view the revisions *Citizens United* made to *Bellotti* as similarly settled law. Needless to say, these revisions provide a foundation on which to recognize corporate free exercise rights, should the Court be inclined to do so.

Even as revised, however, *Bellotti* provides no more than a foundation for such a holding. Standing alone, *Bellotti* is not sufficient authority to hold that for-profit corporations are persons under RFRA or that the Free Exercise Clause protects them. And yet, the Court may well find sufficient authority for these propositions in other precedent implicated by the ACA cases. This precedent appears acutely susceptible to revisionist reading along the *Citizens United* template, given that the prior cases on this point stand in a similar relation to *Conestoga Wood Specialties* and *Hobby Lobby Stores* as *Bellotti* did to *Citizens United*.

The precedent at issue in the ACA cases recognized free exercise claims brought by churches and related institutions organized as non-profit corporations under relevant state laws,⁵⁷ and by individuals engaged in for-profit business activities.⁵⁸ These decisions make clear that back in 1994, when Congress enacted RFRA, and indeed ever since, the Free Exercise Clause has been understood to protect both individuals and groups engaged in religious practices and individuals engaged in selected business activities. Free exercise claims have been pressed by a religious sect seeking an exemption from federal drug laws that banned sacramental use of a hallucinogenic tea,⁵⁹ a church challenging a city ordinance that banned ritual animal sacrifice,⁶⁰ an Amish carpenter seeking an exemption from paying Social Security

56. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (attributing to both *Buckley* and *Citizens United* the rule that, in the realm of campaign finance, “Congress may target only a specific type of corruption—‘quid pro quo’ corruption”).

57. See *Gonzales v. O Centro Espírita Beneficent União do Vegetal*, 546 U.S. 418, 427–39 (2006) (recognizing a free exercise claim brought by “a Christian Spiritualist sect” seeking an exemption from federal law so members could receive communion in the form of sacramental tea); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (recognizing a free exercise claim brought by a “not-for-profit corporation organized under Florida law” challenging an ordinance that banned ritual animal sacrifice, a practice required by the Santeria religion).

58. See *United States v. Lee*, 455 U.S. 252 (1982) (rejecting an Amish carpenter’s free enterprise claim seeking exemption from Social Security taxes on behalf of Amish employees); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting a free-exercise challenge brought by Jewish individuals running businesses and seeking exemption from Sunday closing laws).

59. See *O Centro*, 546 U.S. at 439.

60. See *Lukumi*, 508 U.S. at 541–43.

taxes on behalf of his Amish employees,⁶¹ and Jewish merchants pursuing relief from Sunday closing laws.⁶²

None of these cases, however, involved for-profit corporations and thus they did not address the specific questions presented in the ACA dispute. That is, they did not consider whether for-profit corporations are among the intended beneficiaries of the Free Exercise Clause⁶³ or whether they should be considered to be among the “persons” Congress meant to protect when it enacted RFRA.⁶⁴

The lead appellate opinion in *Hobby Lobby* nevertheless read these cases as if they did. The opinion specifically rejected the idea that the free exercise claims brought by the individual plaintiffs in *United States v. Lee*⁶⁵ and *Braunfeld v. Brown*⁶⁶ would have “disappeared” had their for-profit businesses been incorporated.⁶⁷ The supposition is that the plaintiffs would have been permitted to press their free exercise claims had they been for-profit corporations. That, of course, is the question presented in *Hobby Lobby* and *Conestoga Wood Specialties*, but *Lee* and *Braunfeld* did not come close to resolving it. On the day the Court decided *Braunfeld*, it also concluded specifically that it “need not decide” the question whether an incorporated supermarket pressing a free exercise challenge to a Sunday closing law had standing.⁶⁸ The Court observed that the individual plaintiffs in *Braunfeld* had lost on the merits despite bringing allegations that were more “grave” than those pressed by the supermarket, and hence concluded that it did not need to resolve whether a for-profit corporation might press a similar challenge.⁶⁹

In other words, *Braunfeld* fell well short of recognizing the Free Exercise Clause to protect for-profit corporations. Decisions like *Braunfeld* and *Lee* never intimated that for-profit corporations might

61. See *Lee*, 455 U.S. at 261.

62. See *Braunfeld*, 366 U.S. at 610.

63. Brief for Petitioners, *supra* note 4, at 25–26.

64. *Id.* at 24–25; Brief for Respondents, *supra* note 6, at 25–26.

65. 455 U.S. 252 (1982).

66. 366 U.S. 599 (1961).

67. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (arguing that the Court’s “analysis did not turn on the individuals’ unincorporated status” and that the Court did not “suggest that the Free Exercise right would have disappeared, using a more modern formulation, in a general or limited partnership, sole professional corporation, LLC, S-corp, or closely held family business like we have here”), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013).

68. *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 631 (1961).

69. See *id.*

resemble individuals for purposes of the Free Exercise Clause, or that free exercise rights necessarily attach to all types of profit-seeking activities. At most, they recognized that the Free Exercise Clause might extend beyond the narrow limits of individual religious practice and protect individuals engaged in other activities despite their profit-seeking motives. Read in conjunction with decisions recognizing free exercise claims brought by churches, these decisions do not foreclose the claims pressed in *Hobby Lobby* and *Conestoga Wood Specialties*. But they do not endorse them either.

In this sense, these decisions bear considerable resemblance to *Bellotti*. *Citizens United* notwithstanding, *Bellotti* itself never questioned that the political activities of corporations could be regulated more extensively than the political activities of individuals. Instead, *Bellotti* crafted what it described as a limited exception to that principle, making clear along the way that it was not ruling that corporations themselves possessed a First Amendment right to engage in political speech.⁷⁰

Lee and *Braunfeld*, of course, might have recognized the Free Exercise Clause to protect anyone engaged in a profit-seeking activity, be they individuals or for-profit corporations. Like *Bellotti*, however, these decisions were more limited. They do not preclude the Court from reasoning its way from constitutional free exercise principles to a broader rule in the pending cases. The Court, however, may see no need to do so. Insofar as the treatment of *Bellotti* in *Citizens United* is any indication, *Conestoga Wood Specialties* and *Hobby Lobby Stores* may simply read these earlier decisions as establishing the broader principles the Court would prefer they had endorsed. The lead appellate opinion in *Hobby Lobby Stores* already read *Lee* and *Braunfeld* this way. The Court, too, may be inclined to equate the Court's earlier failure to foreclose a particular possibility with a binding conclusion on that very point.

Should the ACA cases follow this path, they would likely replicate another defining feature of *Citizens United*, namely, the way the Court addressed its concern about institutions BCRA exempted from regulation. *Citizens United* deemed the possibility that BCRA-exempt institutions might one day be regulated sufficient reason to strike down BCRA's present application to other institutions.⁷¹ Like BCRA,

70. See *supra* notes 19–21 and accompanying text.

71. See *supra* note 36 and accompanying text.

ACA regulations exempt certain employers from some requirements and offer a temporary safe harbor to others. Tracking *Citizens United*, the lead appellate opinion in *Hobby Lobby* voiced concern that presently exempt institutions might one day lose their exemption, and thus read applicable precedent to accord constitutional protection both to those exempted and to those now subject to the requirements.⁷²

The Justices may similarly view the prospect that the ACA might be applied to exempt institutions to bolster or perhaps to provide a standalone reason to scrap its application to the plaintiffs in the pending cases. The Court might, moreover, insist this prospect is foreclosed because existing precedent already bars the ACA's extension to the plaintiffs in these cases. In other words, the Court might simply follow the template *Citizens United* provided.

CONCLUSION

Construing precedent is an essential part of what judges do. They routinely disagree about the precise meaning and scope of prior holdings. And yet, this debate neither includes nor allows the systematic treatment of dicta as holding to preclude reasoning and shed accountability. Put differently, the Court's use of precedent in *Citizens United* and in subsequent cases falls well outside responsible judicial practice.

During his confirmation hearings, then-Judge Roberts famously espoused the value of judicial minimalism and professed an abiding respect for precedent.⁷³ Several commentators have argued that minimalism in the Roberts Court has proven illusive.⁷⁴ Opinions that appear facially limited in scope are, in fact, remarkably far-reaching,

72. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125, 1143–44 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (Nov. 26, 2013)

73. See *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (noting that “[j]udges are like umpires. Umpires don't make the rules; they apply them. . . . I will remember that it's my job to call balls and strikes and not to pitch or bat,” and that “judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath”).

74. See, e.g., Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY. L. REV. 713 (2014); Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. TIMES, June 27, 2013, at A1; Emily Bazelon, *The Devastating, Sneaky Genius of John Roberts' Opinions*, SLATE (Apr. 2, 2014, 5:41 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/supreme_court_s_mccutcheon_ruling_john_roberts_opinion_wrecks_what_remains.html; Brianna Gorod, *The False Minimalism of John Roberts*, ELECTION LAW BLOG (Apr. 8, 2014, 8:24 AM), <http://electionlawblog.org/?p=60202>.

either because they allow for political or administrative action that will not be forthcoming, or because they postpone resolution of a critical question while leaving little doubt about how a majority of the Court will resolve it in the next case.⁷⁵ Either way, the seemingly limited nature of these holdings is misleading. In principle, subsequent action might minimize their impact, but in practice the decisions have sweeping consequences.

This Article has shown how the respect for precedent that then-Judge Roberts professed is systematically connected to the realization or destruction of the judicial minimalism he celebrated. Decisions that postpone resolution of a disputed question technically allow the Court to change course. At a minimum, they provide the opportunity to reflect upon the question, engage with new arguments and facts, and, at least in principle, reach unexpected results. But the prospect for such engagement exists only if the Court is willing to treat open questions as open. Increasingly, that is something this Court appears unwilling to do.

75. See, e.g., Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1 (2014); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2d 173 (2014).