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Seema Mohapatra  
*Barry University*

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# TIME TO LIFT THE VEIL OF INEQUALITY IN HEALTH-CARE COVERAGE: USING CORPORATE LAW TO DEFEND THE AFFORDABLE CARE ACT

*Seema Mohapatra\**

## INTRODUCTION

Under the Affordable Care Act (“ACA”), large employers, except for religious organizations, must provide employees with health insurance coverage, including health care related to reproduction, from birth-control pills to pregnancy screening.<sup>1</sup> This reproductive health-care provision goes a long way to help close the inequality gap that exists between insured women and men. However, some corporations, owned or operated by religious families, have successfully argued that these reproductive health services mandated by the ACA conflict with their religious beliefs and their rights under the Religious Freedom and Restoration Act (“RFRA”).<sup>2</sup> In *Burwell v. Hobby Lobby, Inc.*<sup>3</sup> (“*Hobby Lobby*”), the Supreme Court held, in a 5–4 opinion authored by Justice Alito, that this reproductive health care provision was unlawful as applied to the for-profit corporations that felt that four of the forms of birth control that were to be offered violated their religious beliefs and thus violated the RFRA.<sup>4</sup> In making this determination, the Court first found that the RFRA does apply to for-profit, closely held corporations.<sup>5</sup> Although the majority opinion acknowledged that it is a legal fiction, Alito wrote that

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\* Associate Professor of Law, Dwayne O. Andreas School of Law, Barry University, Orlando, Florida. B.A., Johns Hopkins University (1995); J.D., Northwestern University School of Law (2000); M.P.H., Yale University (1997). I thank the commentators and participants at the 2014 University of Baltimore Applied Feminism Workshop and the 2014 Law and Society Annual Conference where an earlier version of this Article was presented. Much gratitude to Dean Leticia Diaz for winter research grant support, and to Kati Haupt, James Smeriglio, Beth Peterson, and Rachel Mattie for their excellent research assistance.

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014); see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001–18121 (2012)).

2. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997); see, e.g., *Hobby Lobby*, 134 S. Ct. at 2766.

3. 134 S. Ct. 2751.

4. *Id.* at 2775.

5. *Id.* at 2759.

a for-profit corporation could have religious beliefs.<sup>6</sup> The majority argued that the companies do “[not forfeit] all RFRA protection when they [decide] to organize their businesses as corporations rather than sole proprietorships or general partnerships.”<sup>7</sup> After determining that the RFRA applies, the majority argued that the “HHS [U.S. Department of Health and Human Services] regulations substantially burden [the corporation’s] exercise of religion.”<sup>8</sup> This case, based on two circuit court cases involving the contraceptive mandate—*Hobby Lobby Stores, Inc. v. Sebelius*<sup>9</sup> (“*Hobby Lobby I*”) and *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health & Human Services*<sup>10</sup> (“*Conestoga Wood I*”). *Conestoga Wood I* was heard by the Supreme Court in late March 2014.<sup>11</sup> Both cases involved claims by corporations that the preventative care requirements implemented by the ACA, particularly the contraceptive care requirements, are unconstitutional as applied to the corporations.

In *Hobby Lobby*, the Supreme Court interpreted the RFRA and ruled that for-profit, closely held corporations could exercise religion.<sup>12</sup> This Article disagrees with the *Hobby Lobby* majority opinion and examines this issue through a corporate law lens. This Article argues that a shareholder’s constitutional right to freely exercise religion does not, and normatively should not, extend to the corporation itself, even in a closely held corporation.<sup>13</sup> Furthermore, this

6. *Id.*

7. *Id.*

8. *Id.*

9. (*Hobby Lobby I*), 723 F.3d 1114 (10th Cir. 2013), *aff’d sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

10. (*Conestoga Wood I*), 724 F.3d 377 (3d Cir. 2013), *rev’d sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

11. Transcript of Oral Argument, *Sebelius v. Hobby Lobby Stores, Inc.*, *decided sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_5436.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf).

12. *Hobby Lobby*, 134 S.Ct. at 2759. In the oral arguments in the *Hobby Lobby* case, Justice Kennedy seemed to indicate his preference to decide these cases narrowly without having to answer the question about whether corporations can “exercise” religion under the Constitution. Transcript of Oral Argument, *supra* note 11, at 7–8. Justice Kennedy asked:

Do I think of this as a statutory case? Of course, the First Amendment is on the stage at some point here, but I take it you can prevail just on the question of statutory interpretation, and if that is so, are there any statutory rules that work in your favor, that is to say, avoiding a constitutional question or how do we think about this case, primarily as a statutory case?

*Id.*

13. This Article does not address additional issues brought up by the *Hobby Lobby* case, such as whether the ACA Contraceptive Mandate “substantially burdens” the “exercise of religion” within the meaning of the RFRA, and whether *Citizens United v. FEC*, 558 U.S. 310 (2010), which concerned the First

Article argues that in the ACA context, allowing employers to opt out of certain provisions of the ACA harms female employees, and that this harm trumps the argument that somehow the beliefs of the owners pass through to the corporation itself. To support this assertion, Part I of this Article reviews the *Hobby Lobby* case and the lower court *Hobby Lobby I* and *Conestoga Wood I* cases, upon which *Hobby Lobby* was based. In addition, Part I reviews other recent cases where for-profit corporations claim that certain ACA provisions violate the religious rights of not just the owners and shareholders of the corporation, but of the corporation itself (referred to collectively as the “ACA Mandate cases”).

Part II of this Article reviews theories of the corporation that have historically been adopted by the Supreme Court and concludes that regardless of the theory one ascribes to, the corporate-plaintiff assertions in the ACA Mandate cases run counter to the prior precedent of the Court.

Part III of this Article discusses corporate doctrine, declaring that a corporation is a separate entity from its shareholders, even in a closely held corporation. This Part also argues that a “pass-through-beliefs” approach would be misguided and begin a slippery slope that could lead to many additional inequalities in the workplace.

Part IV of this Article explains the concept of Corporate Social Responsibility (“CSR”) and disputes the notion that some scholars have asserted—that the CSR movement somehow “proves” that corporations may indeed have religious beliefs. Rather, this Part explains that CSR is a normative concept that advocates for shareholders and directors of corporations to make socially responsible decisions that lead to a better society, including environmental benefits and equality for women, minorities, and other discriminated-against groups. In fact, the theory behind CSR comports with the rationale for rejecting the notion that a corporate entity can have religious beliefs that pass through from its owners. This Part also examines how an employer providing contraceptive access could be seen as a part of a corporation’s corporate social responsibilities.

Finally, Part V of this Article describes how the ACA helps eliminate gender-based disparities that exist in current health insurance coverage and the health-care system. It also addresses how the focus on the contraceptive provision has taken attention away from the nonreproductive health-care provisions, which promote better health care for women from disadvantaged groups. The public dis-

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Amendment’s Free Speech Clause, has any bearing on the outcome of *Hobby Lobby*’s and *Conestoga*’s RFRA claims; this Article is only focused on the corporate law aspects of the Contraceptive Mandate cases. Additionally, this Article will only specifically address for-profit corporations like *Hobby Lobby* and *Conestoga Wood*, not nonprofit corporations, limited liability companies, or partnerships.

course of the ACA has essentialized women by focusing on their capacity as baby-making machines. In reality, the ACA covers a whole host of preventative care services that will go a long way in closing the gap in health-care outcomes for poor and minority women. Women make up a larger part of the workforce in the United States each year, and as employees, deserve equal treatment in all benefits, including health-care coverage. The owners of the for-profit corporations who oppose certain contraception for religious reasons are not required to use them, nor are they advocating their use when they comply with the provisions of the ACA.

### I. THE ACA CONTRACEPTIVE MANDATE CASES

Under the ACA, group health plans provided by employers and covered by the Employee Retirement Income Security Act must provide specific types of health services, which encompass preventative health maintenance.<sup>14</sup> The ACA was enacted in March 2010, with the legislative intent of expanding health-care coverage to include numerous people who were then unprotected.<sup>15</sup> When the ACA was enacted, there was a lack of standardization about preventative care for women prescribed by the Health Resources and Services Administration (“HRSA”).<sup>16</sup> The United States Department of Health and Human Services (“HHS”) wished to decrease the number of unwanted pregnancies and thus increase the number of intended pregnancies from fifty-one to fifty-six percent.<sup>17</sup> Therefore, the HHS relied on recommendations by the Institute of Medicine, adopting such recommendations to include coverage for “[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity” as prescribed by a doctor.<sup>18</sup> Accordingly, the coverage of the ACA extends to give access to family planning services to all women, regardless of socioeconomic status, thereby helping to reduce the amount of unwanted pregnancies and facilitating a fade in the discrepancies between public and private health insurance plans.<sup>19</sup>

With the enactment of the ACA, and through the directives from HHS, employee group health plans must include the twenty

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14. *Hobby Lobby I*, 723 F.3d at 1122–23 (citing 42 U.S.C. § 300gg-13 (2012) and 29 U.S.C. § 1185d (2012)).

15. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001–18121 (2012)); Chad Brooker, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 175 (2012).

16. *Hobby Lobby I*, 723 F.3d at 1123.

17. Brooker, *supra* note 15, at 174.

18. *Hobby Lobby I*, 723 F.3d at 1123 (quoting 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)) (internal quotation marks omitted).

19. See Brooker, *supra* note 15, at 195.

FDA approved contraceptive methods, including sixteen methods that function by preventing fertilization and four methods that work by preventing implantation of fertilized eggs.<sup>20</sup> The latter methods include two types of intrauterine devices (“IUDs”) and the two emergency contraceptives known as Plan B and Ella.<sup>21</sup> There are four enumerated types of organizations that are exempt from covering the twenty contraceptives, including religious employers, nonprofit religious institutions or higher education organizations maintaining religious objections, organizations that qualify under 42 U.S.C. § 18011(a)(2) to be grandfathered, and businesses with fewer than fifty employees.<sup>22</sup> There is no exemption listed for for-profit organizations.<sup>23</sup> As of May 2014, there were forty-eight cases pending, which were filed by for-profit organizations challenging the contraceptive mandate, including the Supreme Court cases *Hobby Lobby* and *Conestoga Wood*.<sup>24</sup> Of the cases that received rulings on the merits by May 2014, thirty-four had preliminary injunctions granted, while only six had their injunctions denied.<sup>25</sup> In June 2014, the Supreme Court decided the *Hobby Lobby* case, which consolidated the *Hobby Lobby I* and *Conestoga Wood I* decisions. In this Part, I first outline the lower court cases that led to *Hobby Lobby*, and then detail the reasoning of the *Hobby Lobby* Court.

#### A. Hobby Lobby I

The most (in)famous of the Contraceptive Mandate cases is the case brought by Hobby Lobby, a chain of arts and crafts stores and a related business Mardel, a Christian bookstore chain.<sup>26</sup> Both corporations are S corporations, privately held by the Green family.<sup>27</sup> However, Hobby Lobby is not a typical “mom-and-pop” operation. Hobby Lobby has over 30,000 full time employees and operates 626 stores in forty-seven states.<sup>28</sup>

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20. See *Hobby Lobby I*, 723 F.3d at 1123.

21. See *id.*

22. See *id.* at 1123–24.

23. See *id.* at 1124.

24. See *HHS Mandate Information Center*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral/> (last visited Feb. 10, 2015).

25. See *id.*

26. *Hobby Lobby I*, 723 F.3d at 1121.

27. *Id.*

28. *Our Stores*, HOBBY LOBBY, <http://www.hobbylobby.com/stores/stores.cfm> (last visited Feb. 10, 2015). Twenty-eight of the states Hobby Lobby operates in require contraceptive coverage by insurers. Lara Cartwright-Smith, *Benefit or Burden? Religious Employers and the Patient Protections and Affordable Care Act's Contraception Coverage Mandate*, 18 NEXUS: CHAPMAN'S J.L. & POLY 29, 32 (2013). The states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *Id.* at 32–33. These states have laws that man-

In *Hobby Lobby I*, the large, privately held, for-profit corporation and its owners the Greens sought a declaratory judgment and injunctive relief, claiming that requiring them to provide health insurance coverage for what they dubbed abortion-inducing drugs and procedures, educational materials, and counseling violated their rights of religious freedom.<sup>29</sup> The Tenth Circuit Court of Appeals began by examining whether Hobby Lobby and Mardel had standing to sue in federal court and concluded that standing existed because the companies both faced an “imminent loss of money, traceable to the contraceptive-coverage requirement” and because both would “receive redress if a court holds a contraceptive-coverage requirement unenforceable as to them.”<sup>30</sup>

The Tenth Circuit held that the corporations “absorbed” the religious convictions of their owners because the businesses are run according to the Greens’ religious beliefs.<sup>31</sup> To that end, “Hobby Lobby closes on Sundays, refuses to promote alcohol consumption, funds full-page ads ‘inviting people to know Jesus as Lord and Savior,’ and has a statement of purpose endorsing biblical principles.”<sup>32</sup> According to the Tenth Circuit, such behavior helped give both companies protection under the RFRA, which provides that if a law, which applies to everyone regardless of religious affiliation, burdens a person’s exercise of religion then it should not apply to that person.

Under the Tenth Circuit’s reading of the RFRA, a corporation is a person under the RFRA and thus has a right to exercise its religion.<sup>33</sup> Judge Tymkovich opined that even though Hobby Lobby is a craft store, “a religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values . . . as a court, we do not see how we can distinguish this form of evangelism from any other.”<sup>34</sup> Thus, according to the Tenth Circuit, there does not appear to be a limiting point for what corporations choose to, or choose not to do, because of their religion. In the wake of this opin-

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date that insurers covering prescription drugs must also cover the FDA-approved contraceptives. *Id.* at 32. The state laws do include some exemptions for religious organizations to abandon such requirements, but the qualifications for exemptions vary by state. *Id.*

29. See *Hobby Lobby I*, 723 F.3d at 1123–25, 1141.

30. *Id.* at 1126.

31. Crystal Sheppard, *Do Corporations Have a Right to Religious Expression?*, CARE2 (Aug. 9, 2013, 10:00 AM), <http://www.care2.com/causes/do-for-profit-corporations-have-a-right-to-religious-expression.html>.

32. *First Amendment—Free Exercise of Religion—Tenth Circuit Holds For-Profit Corporate Plaintiffs Likely To Succeed on the Merits of Substantial Burden on Religious Exercise Claim—Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), 127 HARV. L. REV. 1025, 1026 (2014) (quoting *Hobby Lobby I*, 723 F.3d at 1122(internal quotation marks omitted)).

33. *Hobby Lobby I*, 723 F.3d at 1132.

34. *Id.* at 1135.

ion, some are concerned about the slippery slope this reasoning could create.<sup>35</sup>

### B. *Conestoga Wood I*

In *Conestoga Wood I*, the Third Circuit Court of Appeals analyzed the identical issue very differently from the Tenth Circuit in *Hobby Lobby I*, and concluded that a for-profit, secular corporation cannot engage in the exercise of religion and the owners did not have viable claims against the contraception mandate because the mandate did not actually require them to do anything.<sup>36</sup> In rejecting the pass-through theory, the *Conestoga Wood I* court held that “[s]ince *Conestoga* cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a ‘person’ under the RFRA.”<sup>37</sup>

The opinion in *Conestoga Wood I* reminds us that general business corporations do not exercise religion, even if its owners are devout.<sup>38</sup> They do not pray, worship, observe sacraments, or take other religiously motivated actions separate and apart from the intention and direction of their individual actors.<sup>39</sup> Corporations have no consciences, no beliefs, no feelings, no thoughts, and no desires.<sup>40</sup> The corporation was created as a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the individuals who created it or who own it.<sup>41</sup> Corporations are separate entities from their owners.<sup>42</sup> Corporations are not people.<sup>43</sup> The court therefore concluded that as a for-profit corporation, Con-

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35. See Margaret Carlson, *Say a Prayer for Hobby Lobby's Employees*, BLOOMBERG VIEW (Mar. 25, 2014, 5:08 PM), <http://www.bloombergview.com/articles/2014-03-25/say-a-prayer-for-hobby-lobby-s-employees> (“In Arizona, bakers and photographers could have refused to make cakes or take pictures of same-sex couples because the practice offended their religious beliefs . . . . What else could businesses refuse to do in the name of freedom of religion? Hire divorced people, maybe, or atheists, or even pay the minimum wage. After all, didn’t Jesus say something once about how hard it was for a rich man to get into heaven?”).

36. *Conestoga Wood I*, 724 F.3d 377, 388–89 (3d Cir. 2013), *rev’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

37. *Id.* at 388 (“The Hahn family chose to incorporate and conduct business through *Conestoga*, thereby obtaining both the advantages and disadvantages of the corporate form. We hold . . . that the free exercise claims of a company’s owners cannot ‘pass through’ to the corporation.”).

38. See *id.* at 385.

39. *Id.* (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev’d en banc*, 723 F.3d 1114 (10th Cir. 2013)).

40. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part)).

41. *Id.* at 387.

42. BLACK’S LAW DICTIONARY 415 (10th ed. 2014).

43. See *Conestoga Wood I*, 724 F.3d at 385, 389.



estoga Wood Specialties could not engage in the exercise of religion.<sup>44</sup>

### C. Other Contraceptive Mandate Cases Prior to Hobby Lobby

One of the first supporters of the idea of pass-through corporate standing, such as the owners of Hobby Lobby and Conestoga Wood suggest, was *EEOC v. Townley Engineering & Manufacturing Co.*<sup>45</sup> In *Townley*, the Ninth Circuit Court of Appeals decided that the corporation was an “extension of the beliefs” of its owners when the corporation was facing an Equal Employment Opportunity Commission claim for requiring its employees to attend devotional services.<sup>46</sup> Although the court held that the company had standing to assert the shareholders’ personal free exercise rights, it failed to provide any standard to be applied in the future.<sup>47</sup>

This idea was again asserted in *Beckwith Electric Co. v. Sebelius*,<sup>48</sup> where the court wrote that “any action that debases, or cheapens, the intrinsic value of the tenet of religious tolerance that is entrenched in the Constitution cannot stand,” and therefore the preliminary injunction was granted.<sup>49</sup> Additionally, in a similar Contraceptive Mandate case, *Korte v. Sebelius*,<sup>50</sup> the court took a narrow approach. The court noted that because the RFRA does not define “person,” the Dictionary Act<sup>51</sup> must be consulted.<sup>52</sup> Thus, the court held that by operation of the definition, the term “person” in

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44. *Id.* (“We do not see how a for-profit, ‘artificial being, invisible, intangible, and existing only in contemplation of law,’ that was created to make money could exercise such an inherently ‘human’ right . . . . We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself. A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners.” (citing *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 346 (2002) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819)))).

45. 859 F.2d 610, 619–20 (9th Cir. 1988); see also *Conestoga Wood*, 724 F.3d at 386–87 (describing the factual predicate of the *Townley* case in which the defendant corporation claimed its free exercise rights were violated by a provision of Title VII requiring employers “to accommodate employees asserting religious objections to attending . . . mandatory devotional services”).

46. *Townley*, 859 F.2d at 619–20 (quoting Brief for the Appellant at 35, *Townley*, 859 F.3d 610 (No. 87-2272)).

47. *Id.* at 620 & n.15.

48. 960 F. Supp. 2d 1328 (M.D. Fla. 2013).

49. *Id.* at 1351.

50. 735 F.3d 654 (7th Cir. 2013), cert. denied sub nom. *Burwell v. Korte*, 134 S. Ct. 2903 (2014).

51. 1 U.S.C. §§ 1–8 (2012). The Dictionary Act provides general definitions and interpretive instructions that apply throughout the United States Code, both prospectively and retrospectively, unless otherwise indicated. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2110 (2002).

52. *Korte*, 735 F.3d at 674.

the RFRA includes corporations, unless the context indicates otherwise.<sup>53</sup> Thus, the court's reasoning aligned with the Tenth Circuit majority, remanding the case for the entry of a preliminary injunction on behalf of the plaintiffs.<sup>54</sup>

Though the emerging trend has been to grant preliminary injunctions, there are courts that have taken a strong stance against this concept of a free-exercise right, specifically as it would apply to secular for-profit corporations.<sup>55</sup> For example, in *Gilardi v. U.S. Department of Health & Human Services*,<sup>56</sup> the co-owners of the Freshway companies alleged the contraceptive mandate violated their rights under the RFRA.<sup>57</sup> The district court denied the request for a preliminary injunction, determining that the corporation could not "exercise" religion, and thus no substantial burden on religious exercise was demonstrable under the RFRA.<sup>58</sup> The court found that any burden on the Gilardis' religious beliefs was indirect.<sup>59</sup> However, the appellate court reversed the denial of the preliminary injunction for the individual owners (the Gilardis), but the denial for the preliminary injunction was affirmed with respect to the Freshway companies.<sup>60</sup>

Similarly, in *Autocam Corp. v. Sebelius*,<sup>61</sup> the Sixth Circuit Court of Appeals concluded that the decision to comply with the mandate fell on the corporation, not the owners, and that Congress did not intend the term person to cover corporate entities like Autocam when it enacted the RFRA.<sup>62</sup> In *Autocam*, the court relied on the Third Circuit's analysis in *Conestoga Wood I* and held that a for-profit corporation "is not a 'person' capable of 'religious exercise' as

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53. *See id.* ("In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ." (emphasis added) (quoting 1 U.S.C. § 1)).

54. *Id.* at 687 ("Lifting a regulatory burden is not necessarily a subsidy, and it's not a subsidy here. The plaintiffs are not asking the government to pay for anything. They are asking for relief from a regulatory mandate that coerces them to pay for something—insurance coverage for contraception—on the sincere conviction that doing so violates their religion. They have made a strong case that RFRA entitles them to that relief.").

55. *HHS Mandate Information Center*, *supra* note 24.

56. 733 F.3d 1208 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2013) (mem.).

57. *Id.* at 1210.

58. *Id.* at 1210–11.

59. *Id.* at 1211.

60. *Id.* at 1224.

61. 730 F.3d 618 (6th Cir. 2013), *vacated sub nom.* *Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014), *abrogated by* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

62. *Id.* at 627 (holding that solely "because courts have recognized the free exercise rights of churches and other religious entities," it does not necessarily follow "that for-profit, secular corporations can exercise religion" (quoting *Conestoga Wood I*, 724 F.3d 377, 386 (3d Cir. 2013), *rev'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

intended by RFRA.”<sup>63</sup> Subsequently, plaintiffs Eden Foods and Michael Potter attempted to distinguish their challenges to the applicability of the ACA’s Contraceptive Mandate from those raised by the plaintiffs in *Autocam*.<sup>64</sup> However, the court again held that Eden Foods, a secular, for-profit corporation, could not establish that it was capable of exercising religion and that the owner could not establish his standing to challenge obligations placed only upon the corporation, not upon him as an individual.<sup>65</sup>

D. *Burwell v. Hobby Lobby Stores, Inc.*

In *Burwell v. Hobby Lobby Stores, Inc.*<sup>66</sup> the Supreme Court held that the RFRA requires that closely held corporations whose owners have religious objections be exempt from compliance with the portion of an HHS regulation with which their religious beliefs conflict.<sup>67</sup> Justice Alito wrote for the majority and was joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas.<sup>68</sup> The majority held that the regulation’s application to the corporations in question violated the RFRA because it burdened a person’s exercise of religion and was not the least restrictive means of furthering the governmental interest asserted to justify the burden on religious exercise.<sup>69</sup>

1. *Standing*

Justice Alito wrote that the RFRA applies to regulations of for-profit corporations like the plaintiffs and thereby “protects the religious liberty of the humans who own and control those companies.”<sup>70</sup> Justice Alito held that for-profit corporations are persons within the meaning of the RFRA by referencing the Dictionary Act to show that persons are defined to include corporations.<sup>71</sup> He also argued that because nonprofit corporations have established rights under the RFRA, he could not justify excluding for-profits.<sup>72</sup>

The opinion addresses the corporate form.<sup>73</sup> The majority interprets HHS’s position to be that

if these merchants chose to incorporate their businesses—  
without in any way changing the size or nature of their busi-

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63. *Id.* at 625.

64. *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 633 (6th Cir. 2013), *vacated sub nom.* *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014).

65. *Id.*

66. 134 S. Ct. 2751 (2014).

67. *Id.* at 2783, 2784 n.43.

68. *Id.* at 2759, 2785, 2787.

69. *Id.* at 2785.

70. *Id.* at 2768.

71. *Id.* (citing 1 U.S.C. § 1 (2012))

72. *Id.* at 2769.

73. *Id.*

nesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.<sup>74</sup>

The majority also seems to accept the legal fiction that a corporation can have religious beliefs, and that somehow the religious beliefs of the owners can pass through the corporate form.<sup>75</sup> Alito writes that this is a necessary fiction, as “corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”<sup>76</sup>

### 2. *Capable of Practicing Religion*

The majority disagreed with the argument that the “RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot ‘exercise . . . religion.’”<sup>77</sup> The majority argued that these parties “offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because [the] RFRA indisputably protects nonprofit corporations.”<sup>78</sup> Alito pointed to the recognized right of nonprofit corporations to exercise religion to dismiss the argument that corporations in general cannot exercise religion.<sup>79</sup> Alito cited that state law authorizes corporations to act for any lawful purpose, including religious purposes, and that many corporations engage in religious and charitable activities that do not maximize profit.<sup>80</sup> Additionally, the advent of “benefit corporations,” which seek a public benefit and a profit at the same time, supports this conclusion.<sup>81</sup> The majority did not seem concerned that this opinion was going too far. Because this finding was limited to closely held corporations (which the Court never defined), the majority seemed sure that there would be no slippery slope here.<sup>82</sup>

### 3. *Substantial Burden on Religion*

The majority opinion found that HHS had made accommodations to “religious nonprofits that have religious objections to the contraceptive mandate, [and] HHS has provided no reason why the

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74. *Id.* at 2767.

75. *Id.* at 2768.

76. *Id.*

77. *Id.* at 2769.

78. *Id.* at 2756.

79. *Id.* The majority rejects the argument that for-profit corporations in particular cannot exercise religion because their purpose is to seek profit. *Id.* The Court points to the right of sole proprietorships to exercise religion while seeking profit to show that profit and religion may be jointly pursued. *Id.*

80. I address this later in Part IV on corporate social responsibility. Corporations can do more than they need to do even if it sacrifices profit, not less.

81. *Hobby Lobby*, 134 S. Ct. at at 2770–72.

82. *Id.* at 2775.

same system cannot be made available when the owners of for-profit corporations have similar religious objections.”<sup>83</sup> It went on to hold that the accommodation “constitutes an alternative that achieves all of the government’s aims while providing greater respect for religious liberty” and that “under [the] RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.”<sup>84</sup> The Court then stated that their “holding is very specific.”<sup>85</sup> As such, the HHS regulation burdened the exercise of religion by directing “the Hahns and Greens and their companies” to violate their religious beliefs, and that exercising this religious belief would have caused Hobby Lobby to endure fines up to \$475 million per year.<sup>86</sup> Therefore, the Court found that this was a substantial burden.<sup>87</sup>

Justice Alito rejected the argument that the plaintiffs could follow their convictions (and also spend less than the fine) by forgoing providing insurance altogether and paying a \$2000 annual penalty per employee.<sup>88</sup> He noted that this argument had not been addressed by any of the parties, and was only brought up by amici, but nonetheless found that such a ruling would ignore the plaintiffs’ religious conviction that they should not provide health insurance.<sup>89</sup> Additionally, he rejected the argument that the nexus between providing insurance coverage for medications that can destroy embryos and the moral wrong of an embryo’s destruction was too remote to constitute a substantial burden.<sup>90</sup>

Ultimately, the Court found that the application of the contraceptive regulation to the plaintiffs substantially burdened an exercise of religion protected by the RFRA and was not the least restrictive means of furthering the government’s interest.<sup>91</sup> Thus, the Court held that the law required an exemption for the plaintiffs under the RFRA.<sup>92</sup>

#### 4. Concurrence

In a concurring opinion, Justice Kennedy stated that the Court’s decision was based upon the compelling nature of the government’s interest in protecting the health of female employees.<sup>93</sup> Justice Kennedy argued that the government was unable to justify “distinguishing between different religious believers” by refusing to use in

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83. *Id.* at 2759.

84. *Id.* at 2759–60.

85. *Id.* at 2760.

86. *Id.* at 2774–76.

87. *Id.* at 2776.

88. *Id.*

89. *Id.* at 2776–77.

90. *Id.* at 2777.

91. *Id.* at 2785.

92. *Id.*

93. *Id.* at 2786 (Kennedy, J., concurring).

the case of for-profit corporations the same less restrictive means of furthering its interests that it employed to accommodate nonprofit corporations.<sup>94</sup>

### 5. *Dissent*

Justice Ginsburg authored a dissenting opinion, and Justice Sotomayor joined her.<sup>95</sup> Justice Breyer and Justice Kagan joined in part but would have decided the case on the merits without addressing whether for-profit corporations have standing under the RFRA.<sup>96</sup> Justice Ginsburg called the decision one of “startling breadth” that allows commercial enterprises to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”<sup>97</sup> Justice Ginsburg argued that the majority Court misinterpreted the RFRA as a radical, blanket requirement of exemptions in all cases, “no matter the impact that accommodation may have on third parties.”<sup>98</sup> Justice Ginsburg would have held that the RFRA does not apply to for-profit corporations because no pre-*Smith*<sup>99</sup> decision recognized a for-profit corporation’s eligibility for a religious exemption.<sup>100</sup> Also because corporations are artificial legal entities<sup>101</sup> and religious nonprofits hold a special and different place in the United States than do commercial organizations.<sup>102</sup> Ginsberg argued that for-profit corporations are different from religious nonprofits because the employees are not typically of one faith and are legal entities distinct from their owners that exist for the purpose of making a profit.<sup>103</sup>

Further, Justice Ginsburg would have held that the connection between the religious objections and the HHS regulation “is too attenuated to rank as substantial.”<sup>104</sup> She also found that the government’s asserted interest in establishing “comprehensive preventive care for women furnished through employer-based health plans” was compelling.<sup>105</sup> Ginsberg’s dissent also argued that the Court’s proposed less restrictive means, which provide care outside of employer-based plans, fail to promote that interest.<sup>106</sup> Justice Ginsburg warned that the Court’s interpretation of the RFRA would lead to future litigation raising more difficult questions, including how

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94. *Id.*

95. *Id.* at 2787 (Ginsburg, J., dissenting).

96. *Id.* at 2806 (Breyer, J., dissenting).

97. *Id.* at 2787 (Ginsburg, J., dissenting).

98. *Id.*

99. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

100. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

101. *Id.*

102. *Id.* at 2795–96.

103. *Id.* at 2795–97.

104. *Id.* at 2799.

105. *Id.* at 2803.

106. *Id.* at 2802.

the religious beliefs of a publicly traded corporation could be determined and how disputes among a corporation's owners should be resolved.<sup>107</sup>

### 6. *Critical Aftermath*

The reaction to the *Hobby Lobby* case has been varied and polarized.<sup>108</sup> An editorial in the *New York Times* deemed that

the Supreme Court violated principles of religious liberty and women's rights [in *Hobby Lobby*] which allowed owners of closely held, for-profit corporations (most corporations in America) to impose their religious beliefs on workers by refusing to provide contraception coverage for employees with no co-pay, as required by the Affordable Care Act.<sup>109</sup>

Some argue that allowing corporations to decline to follow laws will lead to unfair competition among business, as the assumption was that corporations would obey the law and not claim legal waivers unavailable to competition.<sup>110</sup> Additionally, the decision will allow those who oppose a federal law to avoid it, by simply alleging conflicting religious beliefs.<sup>111</sup> Further, a condition of incorporation

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107. *Id.* at 2797 & n.19.

108. Compare Susan Berry, *Pro-Life Community Celebrates SCOTUS Hobby Lobby Decision*, BREITBART (June 30, 2014), <http://www.breitbart.com/Big-Government/2014/06/30/Pro-Life-Community-Celebrates-SCOTUS-Decision-For-Religious-Freedom-Against-Obamacare-HHS-Abortion-Pill-Mandate>, and Steven Ertelt, *Supreme Court Rules Obama Admin Can't Make Hobby Lobby Obey Pro-Abortion HHS Mandate*, LIFENEWS.COM (June 30, 2014, 10:17 AM), <http://www.lifenews.com/2014/06/30/supreme-court-rules-obama-admin-cant-make-hobby-lobby-obey-pro-abortion-hhs-mandate/>, and Travis Weber, *Hobby Lobby Symposium: The Exercise of Religion Is Inseparable from Human Activity—Including Supporting One's Family*, SCOTUSBLOG (June 30, 2014, 10:20 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-the-exercise-of-religion-is-inseparable-from-human-activity-including-supporting-ones-family/>, with Kent Greenfield, *Hobby Lobby Symposium: Hobby Lobby, "Unconstitutional Conditions," and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014, 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes/>, and Wendy Mariner, *Hobby Lobby—Part 2: Do Religions Get Their Own Facts?*, HEALTHLAWPROF BLOG (July 2, 2014), [http://lawprofessors.typepad.com/healthlawprof\\_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-2-do-religions-get-their-own-facts.html#more](http://lawprofessors.typepad.com/healthlawprof_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-2-do-religions-get-their-own-facts.html#more), and Lauren Paulk, *"Hobby Lobby" Decision Means Rights for Corporations, but Not for Vulnerable Citizens*, RH REALITY CHECK BLOG (June 30, 2014, 5:57 PM), <http://rhrealitycheck.org/article/2014/06/30/hobby-lobby-decision-means-rights-corporations-vulnerable-citizens/>.

109. Editorial, *Hobby Lobby's Disturbing Sequel*, N.Y. TIMES, July 9, 2014, at A24.

110. Greenfield, *supra* note 108.

111. Mariner, *supra* note 108 ("If the courts leave it to these opponents to decide when they are being substantially burdened, it will be difficult to enforce

is that corporate entities act with “lawful purposes.”<sup>112</sup> However, Hobby Lobby is asking the opposite—to not obey the law and also not be held responsible for any consequences of the disobedience.<sup>113</sup>

Thus, opponents advocate that generalizations of clearly applicable corporate law should have led the Court to reach the opposite conclusion in *Hobby Lobby*.<sup>114</sup> The question should have been “whether the nature of the government benefit—the corporate form—is best seen as closely connected to the exercise of shareholders’ religious beliefs.”<sup>115</sup> Additionally, opponents contend that the Court’s extension of religious liberties to for-profit corporations has substantially changed the principle that “appeals to religious liberty can never be used to justify harms to third parties.”<sup>116</sup> As the dissent pointed out, these changes are “startling” and “radical,” disregarding the need to ensure equality for women.<sup>117</sup>

### 7. *Closely Held Corporations*

Opponents claim that an additional mistake made by the Supreme Court is assuming that the decision will be limited to closely held corporations.<sup>118</sup> The majority stated in its opinion that “[n]o known understanding of the term ‘person’ includes some but not all corporations,” and additionally the Court noted that the limitation of the decision as applied to closely held corporations is not definitional, but practical.<sup>119</sup> The Court stated, “it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring.”<sup>120</sup>

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the law fairly and uniformly. Employees—especially women—will be deprived of government protection”).

112. Greenfield, *supra* note 108.

113. *Id.*

114. *Id.*

115. *Id.*

116. Paulk, *supra* note 108.

117. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787–88 (2014) (Ginsburg, J., dissenting); see Paulk, *supra* note 108 (“[T]hey betray a shocking disregard for the need to ensure the equality and full participation of women, LGBT people, and other vulnerable minorities in our society. Those who say that employees who do not like it can simply ‘find another job’ have clearly never struggled to find work, or been discriminated against on the basis of characteristics like race, gender, national origin, disability, sexual orientation, or gender identity.”).

118. See Greenfield, *supra* note 108.

119. *Id.* (“Walmart, for example, is publicly traded. But a majority of its stock is owned by the Walton family, and they could impose their religious beliefs on the company with ease. Nothing in the logic of today’s opinion would limit the company’s ability to claim a *Hobby Lobby* waiver from, for example, state laws like those existing in Massachusetts and a number of other states requiring the company to not discriminate against LGBT employees.”).

120. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).



However, even assuming that the decision applies only to closely held corporations, an estimated ninety percent of businesses in the United States are closely held.<sup>121</sup> The IRS outlines a closely held corporation as five or fewer individuals owning more than half the value of the corporation's stock.<sup>122</sup> In her dissent, Justice Ginsburg noted that "closely held" is not the same as "small."<sup>123</sup> Although many closely held companies are small, some are extremely large, well-known companies, such as Mars, Inc. with approximately 70,000 employees and Cargill, Inc. with over 140,000 employees.<sup>124</sup> Thus, even when assessing the decision's effects through the *Hobby Lobby* lens, it is clear to see that the closely held analysis is not a proper measure for a court to use in determining whether a corporation has religious freedom. Hobby Lobby itself operates over 600 stores, has approximately 30,000 employees, and is incorporated as a for-profit company under Oklahoma law.<sup>125</sup> Although family run, the decision allows the family's personal, religious views to be imposed on all the employees that work for the corporation. Additionally, although the majority's ruling states that the decision is applicable to contraception only, as other health services such as vaccinations are governed by "different interests," "[w]hat this . . . decision truly says when it juxtaposes 'different interests' with the health interests of women and their dependents, is that women's interests are not compelling, in their opinion."<sup>126</sup>

#### 8. *Influx of Cases*

Additionally, it is important to note that the decision did not put a restriction on claims against coverage for all of the contraception mandated by the ACA.<sup>127</sup> These claims have already begun, with four lower court decisions being ordered for review since *Hobby Lob-*

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121. Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does "Closely Held" Mean?*, WALL ST. J. (June 30, 2014, 2:56 PM), <http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577>.

122. *Frequently Asked Questions on Entities*, IRS, <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5> (last updated Jan. 1, 2014).

123. *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting) (noting that there may be many future claims involving these large, complex enterprises because the Supreme Court's majority failed to "offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations").

124. *Id.*

125. Armour & Feintzeig, *supra* note 121.

126. Katerina Souliopoulos, *Can a For-Profit Corporation Exercise Religion?*, CHLPI BLOG (July 2, 2014), <http://www.chlpi.org/can-a-for-profit-corporation-exercise-religion/>.

127. *Id.*

by.<sup>128</sup> Although it is not yet clear if the *Hobby Lobby* ruling will have a dramatic effect on the implementation of the ACA, the interpretation of the RFRA clearly allows for an array of claims that may disadvantage employees, especially women.<sup>129</sup>

This is highlighted in Ginsburg's dissent where she asks:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?<sup>130</sup>

Regardless of the disclaimer by the majority, if there is not a less restrictive alternative that does not offend an employer's religion, these claims also may hold weight on the same principle.<sup>131</sup> Although the majority states that the decision is to be narrowly applied to the facts of the cases before them, the reasoning behind the cases will likely invite a host of new lawsuits that will result in different consequences.<sup>132</sup>

### 9. *Post-Hobby Lobby Effects*

In April 2013, Michael Potter, the sole shareholder of Eden Foods, sued the HHS alleging that the ACA's Contraceptive Mandate was an "unconstitutional government overreach" as he is a devout Catholic.<sup>133</sup> The U.S. Court of Appeals for the Sixth Circuit

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128. *Id.*

129. Wendy Mariner, *Hobby Lobby—Part 1: Five Supreme Court Justices Write Corporate Fiction*, HEALTHLAWPROF BLOG (July 1, 2014), [http://lawprofessors.typepad.com/healthlawprof\\_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-1-five-supreme-court-justices-write-corporate.html#more](http://lawprofessors.typepad.com/healthlawprof_blog/2014/07/guest-blogger-professor-wendy-mariner-hobby-lobby-part-1-five-supreme-court-justices-write-corporate.html#more).

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

131. Mariner, *supra* note 129.

132. See Alex Park, *How Hobby Lobby Undermined the Very Idea of a Corporation*, MOTHER JONES (July 3, 2014, 2:50 PM), <http://www.motherjones.com/mojo/2014/07/hobby-lobbys-other-problem>.

133. Complaint, *Eden Foods, Inc. v. Sebelius*, No. 2:13-cv-11229-DPH-MAR (E.D. Mich. Mar. 20, 2013), available at <http://www.thomasmore.org/sites/default/files/files/Eden%20Foods%20Complaint-%20Filed%20032013.pdf>, *aff'd*, 733 F.3d 626 (6th Cir. 2013), *vacated sub nom.* *Eden Foods, Inc. v. Burwell*, 234 S. Ct. 2902 (2013); Clare O'Connor, *Hobby Lobby Fallout: Catholic Soy Milk Mogul Won't Cover Drugs That "Prevent Procreation"*, FORBES (July 3, 2014, 2:07 PM), <http://www.forbes.com/sites/clareoconnor/2014/07/03/hobby-lobby-fallout-catholic-soy-milk-mogul-wont-cover-drugs-that-prevent-procreation> (quoting Michael Potter, *Statement from the President of Eden Foods*, EDEN ORGANIC (Apr. 25, 2013), [http://www.edenfoods.com/articles/view.php?articles\\_id=219](http://www.edenfoods.com/articles/view.php?articles_id=219)).

ruled that Eden Foods could not exercise religion as a for-profit corporation.<sup>134</sup> However, the day after the *Hobby Lobby* decision, the Supreme Court vacated the judgment and remanded the case back to the appellate court for further consideration consistent with the *Hobby Lobby* ruling.<sup>135</sup>

Additionally, in *Wheaton College v. Burwell*,<sup>136</sup> a few days after the decision in *Hobby Lobby*, in another split decision, the Court temporarily exempted a Christian college from part of the regulations that provide contraceptive coverage under the ACA.<sup>137</sup> In its decision, the court said that all Wheaton had to do was notify the government in writing “that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraception services.”<sup>138</sup>

It is unclear what the full implications of the *Hobby Lobby* decision will be for some time.<sup>139</sup> However, the immediate effect, as noted by the dissent, is to allow other “for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faiths,” as already evidenced by the decisions following *Hobby Lob-*

134. *Eden Foods*, 733 F.3d at 633, *vacated sub nom.* *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902; *see also* O'Connor, *supra* note 133.

135. *Eden Foods*, 134 S. Ct. 2902; *see also* O'Connor, *supra* note 133.

136. 134 S. Ct. 2806 (2014).

137. *Id.* at 2807; *see also* Adam Liptak, *Birth Control Order Deepens Divide Among Justices*, N.Y. TIMES, July 3, 2014, at A1.

138. *Wheaton Coll.*, 134 S. Ct. at 2807; *see also* Liptak, *supra* note 137.

139. One example of an interpretation of *Hobby Lobby* since the opinion was published is the Satanic Temple, which indicated on its website that the ruling gives women the option to opt out of state laws requiring a person to first read informative materials (referring to “right-to-know” laws mandating women must first read through literature containing alternative options to abortion) in the abortion process. Cheryl K. Chumley, *Satanists to Use Hobby Lobby Rule to Skirt State Abortion Laws*, WASH. TIMES (July 29, 2014), <http://www.washingtontimes.com/news/2014/jul/29/satanists-use-hobby-lobby-rule-skirt-state-abortio/> (“Thirty-five states have these laws, 33 of which require that the women receive specific information on the gestational age of the baby.”). The Temple’s theory is “that any state-mandated information on personal health that is not rooted in what its members see as scientific fact is a violation of its own ‘religious’ beliefs.” *Id.* Further, it was stated by the Temple’s spokesperson that

[w]hile we feel we have a strong case for an exemption regardless of the *Hobby Lobby* ruling, the Supreme Court has decided that religious beliefs are so sacrosanct that they can even trump scientific fact . . .

This was made clear when they allowed Hobby Lobby to claim certain contraceptives were abortifacients, which in fact they are not.

*Id.* The group created a website whereby a woman can print out a letter to give to medical providers to escape the informed consent requirements mandated by state laws. *See id.* (“[W]omen who share our deeply held belief that their personal choices should be made with access to the best available information, undiluted by biased or false information, are free to seek protection with this exemption whether they are members of the Satanic Temple or not.”).

by.<sup>140</sup> Health-care providers and other business have previously tried to use religious freedom arguments to justify discrimination against employees and consumers based on personal religious beliefs.<sup>141</sup> How the *Hobby Lobby* case will affect these decisions is to be seen. As stated by the *New York Times* editorial board, “Mr. Alito’s ruling and a concurrence by Justice Anthony Kennedy portray the decision as a narrow one without broader application, like denying vaccine coverage or job discrimination. But that is not reassuring coming from justices who missed the point that denying women access to full health benefits is discrimination.”<sup>142</sup>

### 10. *Post-Hobby Lobby Changes*

After the decision in *Hobby Lobby*, the White House sent out communications stating that employers that do not cover birth control are required to be transparent about their objections.<sup>143</sup> The website for the Department of Labor was updated to state that for-profit corporations are required to include “a description of the extent to which preventive services (which includes contraceptive services) are covered under the plan.”<sup>144</sup> If the company chooses not to cover any of the contraceptives mandated by the ACA, it has sixty days to tell employees.<sup>145</sup> This was in response to a U.S. Senate bill that did not pass, which would have required employers to cover all of the FDA approved contraception.<sup>146</sup> The website information does not give a new rule, it just reinforces existing law and gives new guidance on the ACA and disclosure requirements for corporations.<sup>147</sup> The attempt was to make “clear that if a corporation like Hobby Lobby drops coverage of contraceptive services from its health plan, it must do so in the light of day by letting its workers and their families know.”<sup>148</sup>

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140. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting); see also Chumley, *supra* note 139.

141. See Paulk, *supra* note 108.

142. Editorial, *The Court Limits Americans’ Rights*, N.Y. TIMES, July 1, 2014, at A20.

143. Laura Bassett, *White House: Employers Must Disclose Objections to Covering Birth Control*, HUFFINGTON POST (July 17, 2014, 4:59 PM), [http://www.huffingtonpost.com/2014/07/17/white-house-employers-mus\\_n\\_5595613.html?1405613322](http://www.huffingtonpost.com/2014/07/17/white-house-employers-mus_n_5595613.html?1405613322).

144. *FAQs About Affordable Care Act Implementation (Part XX)*, U.S. DEP’T OF LABOR (July 17, 2014), <http://www.dol.gov/ebsa/faqs/faq-aca20.html>.

145. *Id.*; see also Bassett, *supra* note 143.

146. *Protect Women’s Health from Corporate Interference Act of 2014*, S. 2578, 113th Cong. § 2; see also Bassett, *supra* note 143 (“The bill would have overridden a recent Supreme Court decision that allowed Hobby Lobby, a craft supply company owned by evangelical Christians, to opt out of covering certain contraceptives to which the owners religiously object.”).

147. *FAQs About Affordable Care Act Implementation (Part XX)*, *supra* note 145; see also Bassett, *supra* note 143.

148. Bassett, *supra* note 143 (quoting a senior administration official).

The *Hobby Lobby* decision was decided on ostensibly narrow RFRA grounds but stated that a corporation is capable of practicing religion.<sup>149</sup> The majority was misguided in presuming that the religious beliefs of a closely held corporation would somehow pass through to its owners. Such a conclusion is contrary to corporate law, and the next two Parts of this Article attempt to examine this issue through a corporate law lens.

## II. THEORIES OF THE CORPORATION, CORPORATE PERSONHOOD, AND THE CORPORATION'S CONTRACEPTIVE MANDATE ARGUMENT

As noted in Part I, the *Hobby Lobby* decision brings up the issue of whether a corporation is essentially capable of personhood that will be afforded the same constitutional protections as individuals.<sup>150</sup> This issue is familiar in both the *Hobby Lobby* and *Conestoga Wood* cases, as each in turn argues that the Contraceptive Mandate of the ACA violates the RFRA and the Free Exercise Clause of the First Amendment as applied to corporations.<sup>151</sup> However, neither corporation will be afforded protections under the RFRA or the Free Exercise Clause unless the corporation is deemed to have personhood.<sup>152</sup> Part II of this Article examines the different theories of corporate personhood that have been adopted by the Supreme Court and analyzes whether a corporation may practice religion under these different theories. The Supreme Court held in *Citizens United v. Federal Election Commission*<sup>153</sup> that corporations are entitled to First Amendment protections regarding engaging in political speech, thus allowing in some instances for a corporation to assert the same rights as a natural person.<sup>154</sup> Yet, in its decision, the Court did not specifically define or explain why or when a corporation can assert such rights.<sup>155</sup> This Part details the history of Supreme Court decisions, noting that that the Court has never conclusively decided the corporate personhood issue, although there are many references in Supreme Court precedent from the late nineteenth century that suggest that the issue had been “definitively settled.”<sup>156</sup> Particularly, when the prior decisions alluded to the existence of corporate personhood, the Supreme Court did not clarify its capacity or mean-

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149. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014).

150. Malcolm Harkins, *Hobby Lobby, Conestoga Wood, the ACA, and the Corporate Person: A Historical Myth Bedevils the Law*, HEALTH AFF. BLOG (Apr. 18, 2014), <http://healthaffairs.org/blog/2014/04/18/hobby-lobby-conestoga-wood-the-aca-and-the-corporate-person-a-historical-myth-bedevils-the-law/>.

151. *Id.*

152. *Id.*

154. 558 U.S. 310 (2010).

154. *Id.* at 365.

155. Harkins, *supra* note 150.

156. *Id.*

ing or address why corporations hold some of the same rights as a natural person.<sup>157</sup>

Since the late nineteenth century, there has been little change in the Supreme Court's view of corporate personhood.<sup>158</sup> The Supreme Court still recognizes corporate personhood in exercising constitutional rights, but has never explained why or when corporations can claim equal rights of a natural person.<sup>159</sup> The failure to define the boundaries of such personhood, and the case-by-case approach in its application, has led to confusion and conflicting opinions among courts, particularly when deciding controversial issues such as ACA Contraceptive Mandate challenges.<sup>160</sup>

The introduction of the corporate form has led to much discussion about the extent to which corporations should have the same rights and duties as individuals.<sup>161</sup> There are three basic perspectives concerning this discussion: (1) the fictional entity theory, (2) the nexus of contracts theory, and (3) the real entity theory.<sup>162</sup>

#### A. *The Fictional Entity Theory*

The fictional entity theory, also known as the concession theory, is the earliest theory of the corporation and posits that the corporation is merely a creation of the State.<sup>163</sup> This theory suggests that a corporation exists at the allowance of the State, and thus is not entitled to any rights not prescribed by statute.<sup>164</sup> The theory asserts that "corporations are artificial, juridical fictions created by the government."<sup>165</sup> Therefore, this theory maintains that corporations are subject to government regulations, and thus, as "creatures of the [S]tate," they are based on a legal fiction—to be incorporated is a concession provided by the State.<sup>166</sup>

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 891 (2012).

162. *Id.* at 891–92.

163. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 737 (2011); see also David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 437 (1998) ("Any history of the corporation that ignores the strong interest of the state in the development of corporate law will necessarily be incomplete.")

164. Ellis, *supra* note 163.

165. Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 224 (2011).

166. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635 (2011). Reification is the process of regarding something intangible "as a material or concrete thing." *Reification Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/reifying> (last visited

The early decisions of the Supreme Court reflect the idea that the corporation is an artificial entity. In 1809, the corporation was “defined as a mere creature of the law, invisible, intangible, and incorporeal.”<sup>167</sup> It was also noted that “[y]et, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.”<sup>168</sup> In 1819, the Supreme Court stated that a “corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>169</sup>

In 1839, the Court again recognized in *Bank of Augusta v. Earle*<sup>170</sup> that the corporation only exists in the contemplation of law, but the Court also stated that “yet it is a person for certain purposes, in contemplation of law; and has been recognized as such by the decisions of this Court.”<sup>171</sup> However, the Court held that when corporations make a contract, the contract is for the artificial legal entity, and not a contract of the individual members of the corporation. The court further stated, “The only rights it [the corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.”<sup>172</sup>

The fictional or concessionary theory was dominant in the late eighteenth and nineteenth centuries, but in many respects has fall-

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Nov. 30, 2014). Reification takes the abstract category of a corporation and treats it as a tangible entity. Dmitry N. Feofanov, *Luna Law: The Libertarian Vision in Heinlein's The Moon Is a Harsh Mistress*, 63 TENN. L. REV. 71, 97 (1995). Viewing the corporation as an entity or “legal fiction” is a type of reification. G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 890 (2000). Critics of reification argue that although it may be a useful concept to consider the firm as transacting as an entity, one cannot ignore the fact that firms can only transact through individuals. *Id.* Reification has been criticized and labeled as a “fallacy,” because recognizing these separate entities leads to ignoring that these entities do not in fact exist apart from the people who comprise the organization. Feofanov, *supra*. Therefore, these entities cannot have rightful power that exceeds the power of the people who constitute it. *Id.* By presuming the corporation “is both natural and apolitical,” there is a presumption that corporations are “good” or “bad,” which further naturalizes the artificial entity. Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1456 (2006). Thus, framing the issue in terms of the “good” or “bad” corporation individualizes any substantive harm, which is labeled as “morality divorced from serious politics” that confuses the matter of an individual intention to do harm with an “unjust public power institutionalized in law.” *Id.* at 1457.

167. *Bank of U.S. v. Deveaux*, 9 U.S. 61, 88 (1809).

168. *Id.*

169. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

170. 38 U.S. 519 (1839)

171. *Id.*

172. *Id.*

en into modern disfavor.<sup>173</sup> Arguably however, the theory emphasizes the obligations of the corporation to follow generally applicable laws, and a reintroduction of this theory would reproduce a sense of public duty to the corporation.<sup>174</sup>

Under the fictional entity theory, the corporations in the Contraceptive Mandate cases absolutely have an obligation to follow the rules of the State, including all provisions of the ACA. As an artificial entity with positive obligations to the State, the corporations would not be able to succeed in a claim that the ACA violates their religious beliefs. Rather, the corporation would be deemed to have a responsibility to the State, not to the owners of the corporation. That said, the Supreme Court is unlikely to return to this theory despite many scholars advocating that corporations have obligations to the State and to its employees.<sup>175</sup>

### B. *Nexus of Contract Theory*

The nexus of contract theory, which has gained popularity especially among law and economics scholars and jurists, describes the corporation as a legal fiction that is purely a central hub for a series of contractual relationships.<sup>176</sup> The theory asserts that the corporation is simply a network of contractual relationships between and among a range of individuals, such as managers, employees, and customers.<sup>177</sup> The corporation itself is said to not really exist, rather it is a nexus, or a connection, between such corporate and contractual relationships.<sup>178</sup> This approach evolved from the emphasis on the freedom of contract and was stimulated by a transformation in the economy.<sup>179</sup>

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173. Marcantel, *supra* note 165, at 225.

174. Harper Ho, *supra* note 161, at 914.

175. *Id.*

176. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1129–30 (2011).

177. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1160 (2012).

178. Hayden & Bodie, *supra* note 176, at 1129.

179. Harper Ho, *supra* note 161, at 893. Proponents of the contractarian model, such as Butler and Ribstein, argue that anti-contractarians underappreciate the extent of private controls on managerial conduct; mischaracterize the role of liability rules as a limitation on, instead of a part of, corporate contracts; underestimate the power of market forces as a constraint on the development of optimal contracts; and fail to evaluate the inefficiencies of their regulatory approach. David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility, and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 433 (1998) (citing Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 7 (1990)).



The nexus of contract theory of the corporation strips away the “personhood” argument to demonstrate how contractual relationships between individuals form the core of a corporation.<sup>180</sup> Therefore, this theory rests not on a corporation’s distinct legal existence or separate legal status, but rather it rests solely on the rights of the people involved in the background contracting for the corporation.<sup>181</sup>

However, the nexus of contracts theory has been criticized for lacking well-defined boundaries in the definition of the group it purports to describe.<sup>182</sup> Opponents of this theory argue that if employees, customers, or stakeholders are thought of as part of the corporation, or if the corporation is only seen as a nexus of contracts, the boundaries of the corporation are not clear.<sup>183</sup> Therefore, some believe that the theory is not realistic in its picture of the corporation and how the corporation should be viewed.<sup>184</sup>

Some supporters of the employers in the Contraceptive Mandate cases believe that under a nexus of contracts theory, the corporate plaintiffs will succeed.<sup>185</sup> That is, they argue that the corporation and the employers are one in the same and thus should necessarily win the argument that the corporation’s religious rights are the same as those of the employer, especially in a closely held corporation.<sup>186</sup> This view is incomplete, however, because when the corporation is a nexus of contracts, the contract between the employers and the employees is also an obligation of the corporation.

In the case of an enormous closely held corporation, like Hobby Lobby with over 30,000 employees, the contract between the corporation and its employees is at least as important as the religious beliefs of the employer-owners, the Green family. In looking at the burden on Hobby Lobby, the corporation, the owners, the Green family, and the employees when Hobby Lobby fails to comply with the ACA, it is clear that the employees are the losers in this web of contracts. The Green family is objecting to covering contraceptives, which they believe to be abortion inducing.<sup>187</sup> Congress did not

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180. Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 475–76 (2013). Nexus of contract theorists like Klein critique the reification concept, arguing that it “is a device for making something that is in fact complex seem simple, and that can be dangerous. In reality, only individuals enjoy the benefits, or bear the burdens and the responsibilities, of actions affecting other individuals.” WILLIAM A. KLEIN ET AL., *BUSINESS ORGANIZATION AND FINANCE* 117–18 (2010).

181. Matambanadzo, *supra* note 180, at 476.

182. Pollman, *supra* note 166, at 1668.

183. *Id.*

184. Hayden & Bodie, *supra* note 176, at 1134.

185. See generally Stephen M. Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1 (2014), [http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge\\_Final.pdf](http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge_Final.pdf).

186. *Id.*

187. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014).

write a requirement in the ACA that the Green family use contraception, and it does not require the Green family to hand out contraceptives.<sup>188</sup> In fact, the ACA does not even require Hobby Lobby to provide health-care coverage.<sup>189</sup> Hobby Lobby can decide to pay a tax penalty instead of covering health-care coverage if it is so opposed to the Contraceptive Mandate.<sup>190</sup> The link between the ACA Contraceptive Mandate and the Green family's religious beliefs is tenuous at best. However, to the 15,000 employees who would receive comprehensive health-care coverage were it not for these religious objections, the harm is palpable, immediate, and immense.

When weighing which "contract" is more important in this scenario, it is plain that the burden on employees facing lack of health-care coverage is much greater than the largely theoretical and symbolic objection by the Green family. In fact, prior to filing its lawsuit in opposition to the ACA's requirements of health-care coverage to include family planning services, Hobby Lobby's employee insurance plan already included sixteen of the twenty contraceptives required by the ACA, including Ella and Plan B.<sup>191</sup> Plan B is one of the contraceptives that the lawsuit involves, and the CEO of Hobby Lobby describes the contraceptive as "abortifacient."<sup>192</sup> Thus, Hobby Lobby was previously covering the drug its lawsuit condemns, and the company responded that the decision was initially made by mistake, and then later removed the coverage, prior to filing suit.<sup>193</sup>

Additionally, it can be argued that the owners of Hobby Lobby, as directors and officers of a corporation, owe a fiduciary duty to the corporation, including the employees themselves.<sup>194</sup> If the Hobby Lobby employees lose their health-care coverage due to the Green family's beliefs, that would harm a greater number of people—all of the employees—and the harm would be more immediate and tangible than those claimed by the Green. Thus, even if one accepts the

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188. See generally Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-48, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.).

189. See *id.*

190. See *id.*

191. Anastasia Golovashkina, *Hobby Lobbying Against Obamacare*, CHI. MAROON (Apr. 15, 2014), <http://chicagomaroon.com/2014/04/15/hobby-lobbying-against-obamacare/>.

192. *Id.*

193. Paul Monies, Hobby Lobby, *Government Ask for Delay in Case over Health Care Law, Contraception*, OKLAHOMAN (Dec. 11, 2012, 8:47 PM), <http://newsok.com/hobby-lobby-government-ask-for-delay-in-case-over-health-care-law-contraception/article/3736644>.

194. Some have argued that employers have an even greater duty. Margaux Hall contends that employees may be seen to have an entitlement to health care under the ACA and that employers can be seen as owing a fiduciary duty to their employees to provide such health-care coverage. See Margaux J. Hall, *A Fiduciary Theory of Health Entitlements*, 35 CARDOZO L. REV. 1729, 1729 (2014), <http://www.cardozolawreview.com/content/35-5/HALL.35.5.pdf>.

nexus of contract theory, I believe the employees' case is stronger than the Greens'. Regardless of what the Supreme Court decided, under the nexus of contracts theory, the government's argument concerning the contractual obligations of an employer to an employee is more compelling than the corporation's argument that its religious beliefs against abortion are offended by contraceptives that they believe to be abortifacients.<sup>195</sup>

### C. *The Real Entity Theory*

In contrast to the nexus of contracts theory, the real entity theory conceives a corporation to be a separate, distinct, real person that is greater than the sum of its individual parts.<sup>196</sup> This theory is also known as the natural entity or person theory and regards the corporation as existing separately from its shareholders and from the State.<sup>197</sup> The real entity theory suggests that as a corporation is separate and apart, the corporation has a "collective consciousness" that is separate and apart from those who manage its operations.<sup>198</sup> Therefore, it is said that a corporation may then be considered a person under the law and entitled to legal rights that would naturally flow to any person.<sup>199</sup>

The question of the corporation having the status of a person under the Fourteenth Amendment went before the Supreme Court in 1886 in *Santa Clara County v. Southern Pacific Railroad*<sup>200</sup> where the parties argued the status of a corporation.<sup>201</sup> However, prior to oral argument, Chief Justice Waite was quoted as saying:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person with-

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195. There is no scientific support for the contention that any of the covered contraceptives, including Plan B, Ella, and the copper and hormonal IUDs, are actually abortifacients. Julie Rovner, *Morning-After Pills Don't Cause Abortion, Studies Say*, NPR SHOTS BLOG (Feb. 21, 2013, 5:04 PM), <http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say>. The religious beliefs of the Greens, however sincere, do not comport with the science. *Id.* ("In federal law and medical terms, pregnancy does not begin with a fertilized egg, but with a fertilized egg that has implanted in the uterus. The contraceptives in question—Plan B, Ella, copper and hormonal IUDs—do not cause abortions as the plaintiffs maintain, because they are not being used to terminate established pregnancies.")

196. Teneille R. Brown, *In-corp-o-real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. REV. 1, 37 (2013).

197. Pollman, *supra* note 166, at 1641–42.

198. Ellis, *supra* note 163, at 739.

199. *Id.*

200. 118 U.S. 394 (1886).

201. Philip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 308–09 (1990).

in its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.<sup>202</sup>

Thus, there is disagreement among courts and scholars on whether the Supreme Court had actually decided the question of corporate personhood in *Southern Pacific*, affording Fourteenth Amendment protections to corporations.<sup>203</sup> The argument against being that the Court was not declaring that corporations were equal to individuals in regard to constitutional rights, but rather, the Court was merely asserting that the corporate interests were equal to those of the shareholders, and as such, the Court sought to give the corporation the same protections as shareholder.<sup>204</sup> However, even though there was no discussion of corporations as persons in the decision—the reporter deposited the Chief Justice’s statement in the headnote to the case—and therefore, the *Southern Pacific* decision is relied upon as having given corporations constitutional Fourteenth Amendment protections.<sup>205</sup>

In a decision two years later, the Supreme Court voiced the idea that was impliedly adopted in *Southern Pacific*, corporate personhood regarding the Fourteenth Amendment.<sup>206</sup> In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,<sup>207</sup> the Court stated, “Under the designation of ‘person’ there is no doubt that a private corporation is included.”<sup>208</sup> Additionally, numerous cases following and citing *Santa Clara* relate that the Supreme Court had held that corporations are “persons” for the purpose of the Fourteenth Amendment.<sup>209</sup> In 1896, the Court stated, “It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”<sup>210</sup>

In the years following *Southern Pacific*, the Supreme Court continued to expand on the idea that corporations had some of the same

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202. *Southern Pacific*, 118 U.S. at 396.

203. Blumberg, *supra* note 201, at 309.

204. *Id.* (citing Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 178 (1985)).

205. Tom R. Tyler & Avital Mentovich, *Punishing Collective Entities*, 19 J.L. & Pol’y 203, 204 (2010).

206. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

207. 125 U.S. 181.

208. *Id.*

209. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 50 (1906) (“A corporation is entitled to the same immunities as an individual.”), *overruled in part on other grounds by* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889) (“[C]orporations are persons.”).

210. *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896).

constitutional protections as individuals.<sup>211</sup> The Court first held in 1896 that corporations are afforded the due process protections and equal protections of the law.<sup>212</sup> The Court has also extended protections under the First Amendment for freedom of the press.<sup>213</sup> In *Grosjean v. American Press Co.*,<sup>214</sup> the Court stated that it was a necessary protection as the press is a vital source of information, that “the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern,” and that “[a] free press stands as one of the great interpreters between the government and the people . . . to allow it to be fettered is to fetter ourselves.”<sup>215</sup>

Additionally, the Court again addressed the extension of constitutional protections for corporations in 1963 in *NAACP v. Button*,<sup>216</sup> stating that under the First Amendment, and absorbed into the Fourteenth Amendment, the freedom of speech and freedom of assembly were not to be denied to the corporation.<sup>217</sup> In *Button*, the Court held that since the NAACP was defending civil rights, the “petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail.”<sup>218</sup>

In 1978, the Court again addressed the extension of First and Fourteenth Amendment privileges to corporations, detailing when such protections are purely personal or when these protections will be afforded to corporations.<sup>219</sup> In *First National Bank of Boston v. Bellotti*,<sup>220</sup> the Supreme Court once more extended rights to a corporation, holding that corporations have a First Amendment right to political expression.<sup>221</sup> In its reasoning, and in citing *Southern Pacific*, the Court also stated that freedom of speech, encompassed by the First Amendment, always has been viewed as a necessary component within the Due Process Clause and that there has not been a separation of such as applied to corporations.<sup>222</sup> The test laid out by the Court is that “[w]hether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason de-

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211. Tyler & Mentovich, *supra* note 206.

212. *Covington & Lexington Tpk. Rd. Co.*, 164 U.S. at 592.

213. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936).

214. 297 U.S. 252.

215. *Id.* at 250.

216. 371 U.S. 415 (1963).

217. *Id.* at 428.

218. *Id.*

219. Zachary J. Phillips, Note, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 CONN. L. REV. ONLINE 39, 44–45 (2014).

220. 435 U.S. 765 (1978).

221. *Id.* at 802.

222. *Id.* at 780.

pends on the nature, history, and purpose of the particular constitutional provision.”<sup>223</sup>

More recently, the Supreme Court in *Citizens United* quoted the *Bellotti* Court to reaffirm the notion that political speech is “indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation.”<sup>224</sup> The Court relied on the decision in *Bellotti* to uphold the understanding that the government cannot silence political speech because the speaker is a corporation, as there is no governmental interest in limiting the political speech of either a for-profit or nonprofit organization.<sup>225</sup> The majority’s approach in the *Citizens United* opinion implied a real entity theory of corporations, indicating that corporations are “like” individuals.<sup>226</sup>

However, the theory is not without opposition. The argument being that even depicting a corporation as a real entity does not explain why corporations are afforded the same constitutional protections as people.<sup>227</sup> Additionally, some suggest that the Court should consider the purpose of the right at issue and whether it would promote the objectives of the right if it were given to a corporation.<sup>228</sup> When applied to religious rights, it is not at all clear that a corporation is practically capable of having such rights. There is a whole jurisprudence on “corporate speech,” so *Citizens United* was just extending this jurisprudence.<sup>229</sup> However, there is no counterpart to corporate speech as “corporate religion.” If the Supreme Court grants Hobby Lobby such a right, it would be creating new corporate rights, not extending existing ones.

The Court has adopted the real entity approach in recent decisions and has refused to extend the constitutional protections in certain situations, where the protection is seemingly only “personal.”<sup>230</sup> For example, in *Hale v. Henkel*,<sup>231</sup> the Court held that a person’s Fifth Amendment right to refuse to incriminate himself is “purely a personal privilege of the witness” and that “it was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.”<sup>232</sup> In addressing the Fifth Amendment and self-incrimination

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223. *Id.* at 779 n.14.

224. *Citizens United v. FEC*, 558 U.S. 310, 349 (2010).

225. *Id.* at 365.

226. *Id.* at 342–43 (observing that corporations should not be treated differently under the First Amendment only because corporations are not natural persons).

227. Pollman, *supra* note 166, at 1630.

228. *Id.* at 1631.

229. *Id.* at 1655–57.

230. Phillips, *supra* note 219.

231. 201 U.S. 43 (1906), *overruled in part on other grounds by* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964).

232. *Id.* at 69–70.

in *United States v. White*,<sup>233</sup> the Court noted that “the constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals . . . . Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.”<sup>234</sup>

The Supreme Court has also addressed a corporation’s right to privacy, and has held that “corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>235</sup> Also, in reliance on Supreme Court precedent, such as the decision in *Bellotti*, courts have held that corporations do not hold a right to vote, stating that “[t]he very nature of a corporation prevents it from sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic.”<sup>236</sup>

Additionally, the Supreme Court has addressed the issue of extending the First Amendment protections regarding religious beliefs.<sup>237</sup> In *Smith*, two employees of a drug rehabilitation program were fired for using peyote and sought unemployment compensation.<sup>238</sup> When the request was denied, they sued, claiming that they had used the peyote as part of a religious ceremony at their Native American church.<sup>239</sup> Therefore, they argued that the denial violated their First Amendment right to freely practice their religion.<sup>240</sup> Justice Scalia, the author of the majority opinion, argued that a ruling in favor of employees “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws . . . .”<sup>241</sup>

In her concurrence, Justice O’Connor concluded that “the Free Exercise Clause does not require the State to accommodate respondents’ religiously motivated conduct,” as that “religiously motivated conduct” unnecessarily interfered with fulfilling governmental purposes.<sup>242</sup> Thus, the Court would not require selective exemptions from generally applicable laws for religious beliefs.<sup>243</sup> Justice Scalia further wrote that “[a]ny society adopting such a system would be

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233. 322 U.S. 694 (1944).

234. *Id.* at 698–99.

235. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

236. *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 150 (N.C. 1980).

237. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

238. *Id.* at 874.

239. *Id.*

240. *Id.* at 878.

241. *Id.* at 888–89.

242. *Id.* at 906 (O’Connor, J., concurring).

243. *Id.* at 888 (majority opinion).

courting anarchy . . .”<sup>244</sup> Conclusively, the Court held that to rule in favor of the respondents “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”<sup>245</sup> The opinion stated overall that the Court could not hold every law invalid based on individual religious objections, nor could it hold every regulation invalid that does not protect an individual’s highest interests.<sup>246</sup> Congress reacted to Scalia’s *Smith* opinion by passing the RFRA three years later, which according to its legislative history was supposed to incorporate the Court’s pre-*Smith* jurisprudence.<sup>247</sup>

Corporations are also not exempt from the generally applicable laws, and they are consistently held to higher requirements regarding public service, accountability, and social responsibility. First, this has been shown through corporations being subjected to more regulation.<sup>248</sup> Second, there is an idea in the legal culture of theoretical discourse about corporate power and the proper mechanisms for control of that corporate power.<sup>249</sup> There is “sharp disagreement” over what legal rights should go along with the modern understanding of corporate personhood.<sup>250</sup> The concept of corporations as distinct persons facilitated wide-ranging regulation of corporations themselves, and this dimension seems not to have been a step to corporate formation, but instead reflected in a shared belief about the proper focus of corporate activity.<sup>251</sup> The Supreme Court has stated that “only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.”<sup>252</sup>

As applied to modern corporations, there is seemingly no consensus as to the approach taken when analyzing the application of rights to corporations based on theories of entity or contract, although the dominant underlying theme seems to be approached with a real entity application. Although different amicus briefs took varying approaches to this in the *Hobby Lobby* cases, many amicus briefs supporting the government’s position endorsed the real entity

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244. *Id.*

245. *Id.*

246. *Id.*

247. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997); S. REP. NO. 103-111, at 2-3 (1993); Carlson, *supra* note 35.

248. Johnson, *supra* note 177, at 1137.

249. *Id.*

250. *Id.* at 1141.

251. *Id.* at 1143-44.

252. *Liggett Co. v. Lee*, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).



theory of corporations.<sup>253</sup> Such briefs deemed a corporation a legal entity separate and distinct from its shareholders.<sup>254</sup> The briefs noted that “the corporate entity is distinct in its legal interest and existence from those who contribute capital to it.”<sup>255</sup> The briefs argued:

It is well established that a corporation is a distinct and separate entity, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person, nor does he thereby become the owner of all the property of the corporation. The shares of stock of a corporation are essentially distinct and different from the corporate property.<sup>256</sup>

Additionally, shareholders do not conduct business as the corporation, but rather, the corporation does business as a distinct legal being.<sup>257</sup>

In fact, the Supreme Court has observed that “[i]ncorporation’s basic purpose is to create a distinct legal entity with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”<sup>258</sup> Thus, the corporation and its officers, shareholders, and directors are legally distinct from each other and therefore do not share equal rights and responsibilities.<sup>259</sup> “Traditional corporate entity doctrine draws a line between the owner and the corporation. No matter how fuzzy that line becomes, the line separating the two entities always exists.”<sup>260</sup> Accordingly, the existence of such a line of distinction be-

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253. Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of the Government at 13–15, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 334440 at \*13–14; Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 3–4, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 333889 at \*4.

254. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 3.

255. *Id.* at 4; see *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954); see also *Kurtz v. Clark*, 290 P.3d 779, 785 (Okla. Civ. App. 2012) (recognizing “the legal concept of corporate entity under which stockholders as such lose their individualities in the individuality of the corporation as a separate and distinct person” (quoting *Dobry v. Yukon Elec. Co.*, 290 P.2d 135, 137 (Okla. 1955))).

256. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 5 (quoting *Barium Steel*, 108 A.2d at 341) (internal quotation marks omitted).

257. Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 18 (2014).

258. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

259. Rutledge, *supra* note 257, at 23.

260. Michael J. Gaertner, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667, 667 (1989).

tween a corporation and a person is a fundamental theory of corporate law.

The purpose behind establishing a corporation is to create a separate and distinct legal entity that will afford limited liability to the individual owners.<sup>261</sup> Hobby Lobby and the similarly situated businesses involved in the litigation were asking to keep the benefits and protections of corporations, but also to receive special protections afforded to individuals and religious entities. The Court now allows corporations to have it both ways via the decision in *Hobby Lobby*.<sup>262</sup> However, employees and corporations are separate persons, even if the employee is the sole owner of the corporation.<sup>263</sup> As the Court previously noted above, "After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."<sup>264</sup>

The *Hobby Lobby* decision puts into question the function of the "corporate veil."<sup>265</sup> The Supreme Court allowed the owners of a for-profit corporation to profess their individual, personal religious views and rights as applicable to a corporation, which "has poked a major hole in the veil."<sup>266</sup> The next Part of this Article discusses the so-called values pass-through approach and how it comports with traditional notions of corporate law. The values pass-through approach essentially dissolves the line between the corporation and its owners, which seems counter to the notion of a corporation as a real entity.<sup>267</sup>

### III. CORPORATE VEIL PIERCING AND THE PASS-THROUGH APPROACH: HAVING YOUR VEIL AND EATING IT TOO

As the last Part noted, the more common vision of the corporation according to the Supreme Court is as a separate and distinct legal entity from its owners, officers, directors, and shareholders, with separate obligations.<sup>268</sup> However, in instances of fraud or wrongful purpose, the courts look past the corporate entity and re-

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261. David Gushee, *Do For-Profit Corporations Have Religious Liberties?*, BAPTIST NEWS GLOBAL (Apr. 8, 2014), <http://baptistnews.com/news/item/28547-do-for-profit-corporations-have-religious-liberties>.

262. *See id.*

263. *King*, 533 U.S. at 163.

264. *Id.*

265. Alex Park, *How Hobby Lobby Undermined the Very Idea of a Corporation*, MOTHER JONES (July 3, 2014, 2:50 PM), <http://www.motherjones.com/mojo/2014/07/hobby-lobbys-other-problem>.

266. *Id.*

267. Gaertner, *supra* note 260.

268. *See* Socrates Peter Manoukian, *Reverse Corporate Veil Piercing in California Courts*, ABTL REP. 1, 6 (May 26, 2010, 9:21 AM) <http://www.abtl.org/report/nc/abtlncorcalvol19no2.pdf> (citing *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993 (1995)).

gard the actions to be those of the operators of the corporation, usually the owners in equity.<sup>269</sup> This is also known as “piercing the corporate veil,” where the abuse of the corporate privilege allows the owners to be liable for the actions of the corporation.<sup>270</sup> The reverse “piercing of the corporate veil” is different, and “strikes at the heart” of the established corporate entity theory.<sup>271</sup> Under the reverse pierce, the corporation and its owner are seen as one legal entity, and the line of distinction between the two becomes seemingly non-existent.<sup>272</sup>

A brief was filed in response to the *Hobby Lobby* and *Conestoga Wood* cases addressing the religious values of shareholders passing through to the corporation itself.<sup>273</sup> The brief argues that the “values pass[-]through” concept should be rejected, as to do otherwise would be contrary to the established principles of corporate law, and thus the concept of “reverse veil piercing” should be considered inapplicable to the facts of *Hobby Lobby*.<sup>274</sup> The privilege of limited liability, which is protected by the corporate veil, is a corporation’s “most precious characteristic,” and even if a single shareholder owns one hundred percent of the corporation’s shares, without significant misconduct or fraud on the part of the shareholder, the corporate veil cannot be pierced.<sup>275</sup>

The brief further asserts that the corporation is an instrument of the State and is incorporated for the benefit of the public.<sup>276</sup> Thus, allowing a corporation to assert the religious beliefs of its shareholders in order to avoid having to comply with a generally applicable law with a secular purpose is fundamentally at odds with the concept of incorporation.<sup>277</sup> Corporations and their shareholders cannot hide behind the corporate veil on the one hand and ask

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269. *Id.* at 1.

270. *Id.*

271. Gaertner, *supra* note 260.

272. *Id.*; see also Nicholas B. Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, 85 ST. JOHN’S L. REV. 1147, 1154–55 (2011); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 83 (2010) (stating that while the first use of veil piercing is unknown, reverse veil piercing first appeared in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929), when Judge Hand expressed a desire to limit the scope of the new doctrine by writing that it may be “too much to say that a subsidiary can never be liable for a transaction done in the name of a parent . . . such instances, if possible at all, must be extremely rare”).

273. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 2.

274. *Id.* at 2–3.

275. *Id.* at 7.

276. *Id.* at 12; see *Hale v. Henkel*, 201 U.S. 43, 75 (1906), *overruled in part on other grounds* by *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964).

277. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 7–8.

courts to disregard it on the other.<sup>278</sup> “One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.”<sup>279</sup>

Further explained, Hobby Lobby and Conestoga Wood want to engage in “insider reverse piercing,”<sup>280</sup> a variation of reverse veil piercing.<sup>281</sup> “The law generally does not allow the option of ‘reverse piercing’ the corporate veil when it suits the corporation’s owner.”<sup>282</sup> In addition, piercing the corporate veil would carry with it unintended consequences—making raising capital more challenging, recruiting employees more difficult, and lessening the likelihood that entrepreneurial energy will flourish.<sup>283</sup> Therefore, the concern becomes whether it would prevent a corporation from invoking religion essentially at will in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly.<sup>284</sup>

The response to reverse piercing in today’s courts has been split, with half supporting the doctrine and the other half rejecting it on the basis of potential damage to shareholders, among other reasons.<sup>285</sup> As for the proponents of reverse veil piercing, there exist two approaches: one being treating reverse veil piercing with the same requirements as regular veil piercing, and the second being enforcing additional requirements on reverse veil piercing in order to ensure a stronger protection of interests.<sup>286</sup> In addition to the brief, there have been several additional arguments opposed to reverse piercing.<sup>287</sup>

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278. *Id.* at 14.

279. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

280. *See Postal Instant Press, Inc., v. Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 101 (Ct. App. 2008) (“[A] corporate insider, or someone claiming through such individual, attempt[s] to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.”).

281. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 17.

282. *Uniboard Aktiebolag v. Acer Am. Corp.*, 118 F. Supp. 2d 19, 25 (D.D.C. 2000).

283. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 8.

284. *Id.* at 26–27.

285. Allen, *supra* note 272, at 1157–66.

286. *Id.* at 1157. For a detailed hypothetical explaining the two methods, *see id.* at 1157–63.

287. *See Floyd v. IRS*, 151 F.3d 1295, 1300 (10th Cir. 1998) (adding that there were alternative, less drastic remedies that could be afforded plaintiffs, once again disagreeing with a general acceptance of reverse veil piercing and that “[reverse veil piercing] is appropriately granted only in the absence of adequate remedies at law”); *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir. 1990) (“[T]he reverse-pierce theory presents many problems. It bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor’s shares in the corporation and not the

In contrast, Professor Stephen Bainbridge argues that contrary to the brief's arguments, basic corporate law principles strongly support the position of Hobby Lobby and Conestoga Wood.<sup>288</sup> In particular, Bainbridge argues that reverse veil piercing provides a clear and practical vehicle for disregarding the legal separateness of those corporations from their shareholders and thus granting those shareholders standing to assert their free exercise rights.<sup>289</sup> Thus, he asserts that although the brief asserts the well-established separateness of the individual from the corporation, it is not absolute.<sup>290</sup> "[T]he corporate form can be set aside . . . as a means of preventing injustice or inequitable consequences."<sup>291</sup>

Bainbridge is insinuating that the writers of the brief believe that if a person incorporates a business in order to limit liability, he or she would thereby lose his or her First Amendment protection.<sup>292</sup> However, he goes on to say that when a person, or a group of people, chooses to incorporate, it does not mean he or she sacrifices her First Amendment rights.<sup>293</sup>

In contrast, Professor Elizabeth Sepper argues that courts are relying too much on this dangerous idea of "corporate conscience" to allow profiting, secular businesses to get by without complying with government mandates.<sup>294</sup> She contends that the courts that accepted that businesses can have religious beliefs are rejecting foundational elements of corporate law.<sup>295</sup> In addition, she argues that those same courts are "misunderstand[ing] the nature of health benefits and the structure of the healthcare system in two fundamental ways."<sup>296</sup> Sepper argues that "separateness of corporations

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corporation's assets."); *see also* Allen, *supra* note 272, at 1164 (stating that some courts have simply decided to side with Judge Hand in his opinion that "outside reverse piercing is only appropriate in the rare case of a subsidiary dominating its parent," and others reject its use in cases where the plaintiff has voluntarily placed himself in the position of a creditor, as opposed to being in a position of an involuntary creditor in a tort action).

288. According to Stephen Bainbridge, the amicus brief of forty-four law professors is replete with errors, overstated claims, red herrings, and misdirection. Bainbridge, *supra* note 185, at 1.

289. *Id.*

290. *Id.* at 4.

291. *Id.* (quoting *Co-Ex Plastics, Inc. v. AlaPak, Inc.*, 536 So. 2d 37, 38 (Ala. 1988)) (internal quotation marks omitted).

292. *Id.* at 24.

293. *Id.*

294. Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 304 (2013).

295. *Id.*

296. *Id.* at 304–05 ("First, employee benefits are a form of compensation, earned by and belonging to the employee like wages. By neglecting this economic reality, courts draw incorrect conclusions about the legal and moral responsibility of employers for the contents of their employees' insurance plans and thus about the burden that any regulation imposes . . . . Second, the Affordable Care Act functions like other social insurance schemes, which require

matters in doctrine” because “Hobby Lobby is Hobby Lobby, even when the Green family no longer owns it.”<sup>297</sup> Furthermore, excusing employers from the mandate would allow business owners to impermissibly interfere with the religious beliefs of the people who work for them.<sup>298</sup> Bainbridge rejects this concern, stating that it “has no traction,” using the idiom “he who pays the piper, calls the tune.”<sup>299</sup> This seems to imply that the employer always has precedence over employees, which seems counter to the nexus of contracts approach to corporate personhood that Bainbridge supports. Bainbridge admits that reverse veil piercing has its flaws, but he still maintains that it is far less than what Sepper claims when she calls it a “blow to the foundation of corporate law” and “an enormous shift in corporate law.”<sup>300</sup> He endorses the belief that reverse veil piercing “vindicate[s] important rights.”<sup>301</sup>

However, even Bainbridge has not always taken this approach. In a 2005 article, he wrote, “Veil piercing is rare, unprincipled, and arbitrary. Such a doctrine is highly unlikely to consistently effect socially beneficial policy outcomes. Instead, veil piercing achieves neither fairness nor efficiency, but rather only uncertainty and lack of predictability . . . .”<sup>302</sup> Additionally, in his 2014 article, Bainbridge acknowledges such assertions, stating that he previously had criticized and denounced veil piercing.<sup>303</sup> He acknowledges that his analysis would have to assume that the Court would not use the *Hobby Lobby* case as a forum to adopt his “abolition proposals,” thus

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the employer to play an administrative and funding role. Courts fail to acknowledge the social insurance function of recent health insurance reforms and, therefore, do not properly situate contraceptive challenges within the doctrinal tradition of religious objections to social insurance, which have typically failed. Finally, I suggest that successful challenges to healthcare reform based on corporate conscience would destabilize the rights of employees and of women, in particular, beyond the context of contraception.”).

297. Elizabeth Sepper, *Religion, Inc., A Reply to Bainbridge*, CLS BLUE SKY BLOG (Aug. 2, 2013), <http://clsbluesky.law.columbia.edu/2013/08/02/religion-inc-a-reply-to-bainbridge/>.

298. *Id.*

299. *Id.*; see also Stephen Bainbridge, *A Corporate Conscience? I Don't Think So*, PROFESSORBAINBRIDGE.COM (July 7, 2013), <http://www.professorbainbridge.com/professorbainbridgecom/2013/07/a-corporate-conscience-i-dont-think-so.html>.

300. *Id.*

301. *Id.*

302. Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 78 (2005) (footnote omitted).

303. Bainbridge, *supra* note 185, at 7 n.28; see, e.g., Bainbridge, *supra* note 302, at 79 (arguing that the doctrine of veil piercing should be abolished in the context of LLCs); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 481 (2001) (advocating for the abolition of the veil piercing doctrine).

demonstrating his views are actually consistent with the opposition of corporate veil piercing.<sup>304</sup>

In addition to the arguments raised in opposition to allowing the Hobby Lobby corporate veil to be reverse pierced, it is important to note that such allowance would lead to a slippery slope in litigation. Stating that an employer is “substantially burdened” by the contraceptive mandate would lead to a slippery slope of letting employers voice religious concerns to providing a host of additional medical services.<sup>305</sup> If employers in charge of a corporation can choose what medical services to provide to their employees based solely on their personal religious beliefs, they would have the ability “to interfere with many intimate, personal medical decisions of their employees.”<sup>306</sup>

Justice Sotomayor raised this concern during the *Hobby Lobby* oral argument when she asked counsel for Hobby Lobby, “Is your claim limited to sensitive materials like contraceptives, or does it include items like blood transfusion, vaccines? For some religions, products made of pork? Is any claim under your theory that has a religious basis, could an employer preclude the use of those items as well?”<sup>307</sup> Justice Kagan also voiced her concern when addressing that Congress had given statutory rights to women, including contraceptive coverage: “And when the employer says, no, I don’t want to give [contraceptive coverage], that woman is quite directly, quite tangibly harmed.”<sup>308</sup>

Hobby Lobby and Conestoga Wood have taken advantage of the benefits of incorporating.<sup>309</sup> It is basic corporate law that they not be allowed to disregard the wall of separation that incorporation requires to promote their own self-dealing.<sup>310</sup> Their claims for establishing religious rights are based on arguments that are contrary to well-established principles of corporate separateness.<sup>311</sup> The majority in *Hobby Lobby* ignored corporate law when making its cavalier arguments that the corporation is a legal fiction but that it somehow is capable of possessing its owners’ religious beliefs.

In addition, these arguments harm employees and run counter to the social responsibility corporations should demonstrate to their employees. The next Part of this Article moves on from the corporate personhood and pass-through values debate to explore the con-

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304. Bainbridge, *supra* note 185, at 7 n.28.

305. Evelyn M. Tenenbaum, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 ALB. L.J. SCI. & TECH. 539, 576 (2013).

306. *Id.* (footnote omitted) (internal quotation marks omitted).

307. Transcript of Oral Argument, *supra* note 11, at 4.

308. *Id.* at 36–37.

309. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *supra* note 253, at 13–14.

310. *Id.*

311. *Id.* at 28.

cept of Corporate Social Responsibility (“CSR”). This Part argues that providing health care and contraception are a part of CSR, while taking away entitlements due to an owner’s religious beliefs, like Hobby Lobby and Conestoga Wood suggest, is actually counter to the concept of CSR.

#### IV. CORPORATE SOCIAL RESPONSIBILITY, RELIGION, AND CONTRACEPTION

This Part of the Article describes how CSR relates to the ACA Contraceptive Mandate cases and why it is an important corporate law concept to consider in this discussion. In both the corporate and academic world, there are many different definitions of CSR.<sup>312</sup> CSR has been defined as “a balanced approach for organizations to address economic, social and environmental issues in a way that aims to benefit people, communities and society,” and it encompasses many issues.<sup>313</sup> CSR is also known as “corporate citizenship” and can involve incurring short-term costs that do not provide an immediate financial benefit to the company, but instead promote positive social and environmental change.<sup>314</sup>

While not mandatory in the United States, many large corporations have started devoting substantial amounts of time and money to various CSR initiatives on a voluntary basis.<sup>315</sup> The United Nations Global Compact (the “Compact”) is currently the world’s largest voluntary corporate responsibility initiative, and it encourages corporations to align their strategies to focus on the areas of human

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312. Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, WILEY INTERSCIENCE 1, 1 (Nov. 6, 2006), [http://www.mcxindia.com/csr/newsarticle/pdf/csr\\_news45.pdf](http://www.mcxindia.com/csr/newsarticle/pdf/csr_news45.pdf).

313. Denis Leonard & Rodney McAdam, *Corporate Social Responsibility*, QUALITY PROGRESS 27, 27–28 (Oct. 2003), <http://alexandrow.pdfforms.texas-quality.org/SiteImages/125/Reference%20Library/Social%20Responsibility%20-%20Leonard.pdf> (quoting INT’L ORG. OF STANDARDIZATION, ISO/TMB AGCSR N4, PRELIMINARY WORKING DEFINITION OF ORGANIZATIONAL SOCIAL RESPONSIBILITY 1 (2002), available at [http://www.iisd.org/pdf/2003/standards\\_definition.pdf](http://www.iisd.org/pdf/2003/standards_definition.pdf)) (describing encompassed CSR issues as including human rights, workplace and employee issues that include occupational health and safety, unfair business practices, organizational governance, environmental issues, marketplace and consumer issues, and community involvement).

314. *Corporate Social Responsibility*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/corp-social-responsibility.asp> (last visited Nov. 6, 2014).

315. See, e.g., *Business Associations*, UNITED NATIONS GLOBAL COMPACT, [http://www.unglobalcompact.org/ParticipantsAndStakeholders/business\\_associations.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/business_associations.html) (last visited Feb. 12, 2015) (listing the membership of global business associations by country, including businesses from the United States); *Companies*, WOMEN’S EMPOWERMENT PRINCIPLES, <http://www.wepinciples.org/Site/Companies> (last visited Feb. 12, 2015) (providing an option to search for signatories of the CEO statement of support for the Women’s Empowerment Principle and listing twenty-two business participants from the United States).



rights, labor, environment, and anti-corruption.<sup>316</sup> Among its participants, there are a great number of business associations that represent leading companies from around the world.<sup>317</sup>

The Compact has inspired other groups to band together in support of specifically tailored causes that further the broader principles proposed in it.<sup>318</sup> The Women's Empowerment Principles are a perfect example of this, serving as a set of principles for business by offering guidance on how to empower women in the workplace, marketplace, and community.<sup>319</sup> More than six hundred companies have signed on to support women's empowerment.<sup>320</sup> This is just one example of the many causes that are included in CSR, as gay-marriage has been another area that has seen a lot of CSR support as of late, with hundreds of companies speaking out against the Defense of Marriage Act ("DOMA").<sup>321</sup>

In sum, anything that affects sustainability, best practices, social welfare, or any number of other things could be considered a CSR topic. The prevailing idea in a CSR topic is simply whether or not the topic betters the world around the company.<sup>322</sup> It is a notion of corporations considering more than just the bottom line in their business practices.<sup>323</sup> Given that CSR is almost completely unregulated at this point, nearly any topic that deals with a corporation bettering the world in some way can fall under the CSR umbrella.

Thus, the issue becomes whether the nature of the belief about the CSR issue changes the result.<sup>324</sup> For example, Tim Cook, chief

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316. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/aboutthegc/TheTenprinciples/index.html> (last visited Feb. 12, 2015); *UN Global Compact Participants*, UNITED NATIONS GLOB-

AL COMPACT, [http://www.unglobalcompact.org/ParticipantsAndStakeholders/business\\_associations.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/business_associations.html) (last visited Feb. 12, 2015) (stating that currently the UN Global Compact has over 12,000 participants, including over 8000 businesses in 145 countries around the world).

317. *Business Associations*, *supra* note 315.

318. *See, e.g., Women's Empowerment Principles*, WOMEN'S EMPOWERMENT PRINCIPLES, <http://www.wepinciples.org/> (last visited Feb. 12, 2015) (stating that the Women's Empowerment Principles are a result of a collaboration between UN Women and the UN Global Compact).

319. *Id.*

320. *Companies*, *supra* note 315.

321. *Hundreds of Companies Support Gay-Marriage*, CSRHUB (Mar. 14, 2013, 11:21 AM), <http://www.csrhub.com/blog/2013/03/hundreds-of-companies-support-gay-marriage.html>.

322. *See Dahlsrud*, *supra* note 312, at 7–11 (listing thirty-seven definitions of CSR that all reference an acknowledgement to bettering various aspects of the world, not just the company).

323. *See id.* at 6 (stating that business "does not only have economic impact" and that "the social, environmental and economic impacts should be optimally balanced in decision making").

324. *See Keith Paul Bishop, Should Corporations Conserve Water Because a Shareholder Believes It's the Right Thing to Do?*, CAL. CORP. & SEC. L. (Mar. 6,

executive of Apple, has committed the company to slash greenhouse gas emissions.<sup>325</sup> Apple has begun to curb its environmental impact, promising not only to supply all of its power from reusable sources but also to limit the use of minerals mined in the Democratic Republic of Congo, which funds war and human rights abuses.<sup>326</sup> The focus then becomes how much leeway the law provides to directors to focus on non-shareholder interests, as the object of corporate law is to produce profits for the shareholders.<sup>327</sup> Corporate directors have the protection of the business judgment rule (“BJR”) to make decisions that they feel are in the best interest of the corporation.<sup>328</sup> The BJR states that as long as the directors are adhering to their duty of care and duty of loyalty, their decisions will not be second guessed by a judge or a court.<sup>329</sup> Therefore, in the Apple example, as long as Tim Cook and the other directors are acting with care and loyalty to Apple, they are protected in their decision making, even if it is more expensive to the shareholders or not the most profit-maximizing financial decision. There is more to a director’s decision making than profits, and sometimes a reputation as an environment-friendly company, or women-friendly corporation, can reap financial benefits down the line. Thus, directors of corporations can avoid liability if

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2014), <http://calcorporatelaw.com/2014/03/should-corporations-serve-water-because-a-shareholder-believes-its-the-right-thing-to-do/> (stating that the California Public Employees Retirement System (“CalPERS”) sent a letter to its managers requesting the company take steps to conserve water). The company exclaims that taking conservation measures is the right thing to do and that it reflects its investment beliefs. *See id.* Apparently, the author is suggesting that CalPERS believes corporations have beliefs, and the corporations it invests in should behave in accordance with those beliefs. The author refers to the amicus brief written by forty-four lawyers requesting the court to reject the “values pass through theory,” in which corporations impose their religious beliefs on their shareholders and employees. *Id.* The author concludes by questioning whether water conservation is different than religious beliefs. *Id.*

325. Jessica Shankleman, *Tim Cook Tells Climate Change Skeptics to Ditch Apple Shares*, THEGUARDIAN (Mar. 3 2014), <http://www.theguardian.com/environment/2014/mar/03/tim-cook-climate-change-sceptics-ditch-apple-shares>.

326. *See id.* In response to Apple’s efforts to fight climate change, Justin Danhof of the NCPPR challenged Apple’s environmental investments and whether the benefits outweighed the cost. *Id.* Danhof and the NCPPR have accused Cook and Apple of not having the best interests of its shareholders. *Id.* They want Cook to invest only in profitable measures, and Cook, in response, said that “securing a return on investment was not the only reason for investing in environmental measures.” *Id.* Cook is dedicated to reducing Apple’s “environmental footprint” and leaving “the world better than we found it.” *Id.*

327. Stephen Bainbridge, *Can Tim Cook Ignore ROI When Deciding How to Design an iPhone?*, PROFESSORBAINBRIDGE.COM (Mar. 7, 2014, 8:46 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/03/can-tim-cook-ignore-roi-when-deciding-how-to-design-an-iphone.html>.

328. *The Business Judgment Rule*, NAT’L PARALEGAL C., [http://nationalparalegal.edu/public\\_documents/courseware\\_asp\\_files/businessLawDirectors&Officers/BusinessJudgmentRule.asp](http://nationalparalegal.edu/public_documents/courseware_asp_files/businessLawDirectors&Officers/BusinessJudgmentRule.asp) (last visited Feb. 12, 2015).

329. *Id.*

they can make an argument that the decision could lead to long-term value for the shareholders.<sup>330</sup> For Apple, the likeminded shareholders may buy more shares and sue less frequently, customers may buy more, and employee turnover may be reduced, all the while increasing profitability in the long term.<sup>331</sup> The law allows board of directors' substantial discretion to consider the impact of their decisions on interests other than shareholder profits as a consequence of the BJR.<sup>332</sup> There is case law to suggest that directors do not need to treat shareholder wealth maximization as their sole objective.<sup>333</sup>

The broad definition of CSR has stirred up much debate regarding whether or not contraception should be seen as a CSR issue.<sup>334</sup> This has become particularly relevant in light of the *Hobby Lobby I* and *Conestoga Wood I* cases.<sup>335</sup> There are many who argue that access to contraception is a fundamental component of CSR.<sup>336</sup> Contraceptive coverage benefits both the company and the world at large.<sup>337</sup> After developing a model that incorporates factors like the costs of contraception, costs of unintended pregnancy, and indirect costs, Global Health Outcomes found that it actually saves employers ninety-seven dollars per year per employee to offer a comprehensive contraceptive benefit plan.<sup>338</sup>

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330. Bainbridge, *supra* note 327.

331. *Id.*

332. *Id.*

333. *Id.* at nn.3, 5.

334. John P. Vail, *Lessons on Corporate Values from Hobby Lobby*, LAW360 (Aug. 22, 2014), <http://www.law360.com/corporate/articles/569885/lessons-on-corporate-values-from-hobby-lobby>.

335. *Id.* See generally *Hobby Lobby I*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Conestoga Wood I*, 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

336. See Francesca Rheannon, *The CSR Case for Covering Contraception*, CSRWIRE (Mar. 7, 2012, 10:13 AM), <http://www.csrwire.com/blog/posts/327-the-csr-case-for-covering-contraception> ("When access to contraception is something that is determined by one's employer, it becomes a fundamental component of corporate social responsibility to provide that access without restriction.").

337. Megan D. Richardson, Comment, *Prescription Contraceptive Coverage: Prospective Business Opportunities*, 3 HOUS. BUS. & TAX L.J. 141, 158 (2003); see *Family Planning*, WORLD HEALTH ORG (May 2013), <http://www.who.int/mediacentre/factsheets/fs351/en/>; *Guaranteeing Contraceptive Coverage in All New Health Insurance Plans*, NAT'L WOMEN'S L. CENTER (Nov. 18, 2010), <http://www.nwlc.org/resource/guaranteeing-contraceptive-coverage-all-new-health-insurance-plans>.

338. John Bertko et al., *The Cost of Covering Contraceptives Through Health Insurance*, U.S. DEP'T HEALTH & HUM. SERVS. (Feb. 10, 2012), <http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml>; see also Brief for the Guttmacher Inst. as Amici Curiae Supporting Petitioner, *Hobby Lobby I*, 723 F.3d 1114 (10th Cir. 2013) (No. 13-354), 2014 WL 333890, *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

There are numerous health benefits in the use of contraception, including healthier planned pregnancies, preventing unintended pregnancies, reducing the number of abortions, and lowering accounts of death or disability in relation to pregnancy complications.<sup>339</sup> Family planning has many health benefits for mothers specifically, as pregnancies that occur too early or late in life can have a negative effect on the health of the mother and could lead to prematurity or low birth weight in children.<sup>340</sup> As stated by the HHS, family planning is a “women’s health issue” and a “national health goal” because contraceptives assist in the prevention of both economic and social costs of an unplanned pregnancy.<sup>341</sup> It is said that the long-term benefits of the use of contraception span from increased education for women, to better health of children, to greater family savings.<sup>342</sup> Additionally, it stands uncontested that as determined by the HRSA, “contraceptive services are essential for women’s health.”<sup>343</sup>

The economic benefits of providing coverage for contraceptives under the ACA are also well documented. Making women’s contraceptives affordable without cost sharing will result in lower overall health-care costs, as it would result in healthier mothers and children and reduce the number of abortions.<sup>344</sup> Many contraceptives can cost \$50 to \$60 per month, which is not an affordable monthly expense for many.<sup>345</sup> Out-of-pocket costs for the birth control pill alone can be anywhere from \$180 to \$960 per year, which results in added annual out-of-pocket costs for office visits to the doctor ranging from \$35 to \$250.<sup>346</sup> Additionally, IUDs can cost up to \$1000 every five to ten years.<sup>347</sup> Therefore, the economic benefit conferred by no-cost sharing provisions of contraception and family planning aids as provided by employer-based insurance could be upwards of \$1200 per year, thereby including women who would not be able to afford to take such measures without such coverage.<sup>348</sup> Balancing these factors with statistics that show that the average amount for

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339. *Costs and Benefits of Investing in Contraceptive Services in the Developing World*, GUTTMACHER INST. (June 2012), <http://www.guttmacher.org/pubs/FB-Costs-Benefits-Contraceptives.html>.

340. *Id.*; *Family Planning*, *supra* note 337.

341. Karen Gantt, *Balancing Women’s Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L.J. 1, 19 (2013).

342. *Costs and Benefits of Investing in Contraceptive Services in the Developing World*, *supra* note 339.

343. John DiMugno, *The Affordable Care Act’s Contraceptive Coverage Mandate*, 35 NO. 1 INS. LITIG. REP. 5 (2013).

344. *Id.*

345. *Id.*

346. *The High Cost of Birth Control: It’s Not As Affordable as You Think*, CENTER FOR AM. PROGRESS (Feb. 15, 2012), [http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC\\_costs.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC_costs.pdf).

347. *Id.*

348. *Id.*

insurers for one pregnancy is \$10,000 demonstrates the cost-savings and economic benefit not only to women, but also to employers in general.<sup>349</sup>

Therefore, contraceptive coverage on the part of the employers would allow women to have their choice of the full selection of contraceptive care, including the most effective, yet also more expensive options. Aside from the obvious cost-effective benefits, further advantages of employer contraceptive coverage can be seen in reduced employee absenteeism and increased overall worker satisfaction.<sup>350</sup>

Some argue that the law establishes the minimum that social actors must do and for which society expects,<sup>351</sup> but CSR asks companies to do more than their legal obligation.<sup>352</sup> Justice Alito seems to ignore this concept in his majority opinion when he notes that profit is not the only motive for a for-profit corporation.<sup>353</sup> Although that may be true, unlike the CEO of Apple, the owners of Hobby Lobby are not asking to do more. They want to provide less than the required standard of the ACA.<sup>354</sup> In essence, Hobby Lobby will leave its employees without access to the contraceptive medicine afforded under federal law.<sup>355</sup> Thus, it is not whether a corporation can run its company according to its religious beliefs; the issue instead is whether a company should be allowed to do less than its competition.<sup>356</sup> If religion is used as an excuse to be exempt from legal regulations and requirements and by doing so saves on costs and gains a competitive edge, the incentives to claim religious exemptions could spring up on many issues.<sup>357</sup> Religion should not enable a company to do less than what is required; one should expect religion to do more.<sup>358</sup> The owner's individual values or beliefs should not be used to excuse corporations from compliance nor should it lower the standards for corporate actions.<sup>359</sup> Thus, it is abundantly clear that contraception is a CSR issue. In fact, providing health care in general can be seen as a CSR issue. The federal government passed the ACA with a desire to even the playing field in the health-care sector,

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349. Richardson, *supra* note 337.

350. Rheannon, *supra* note 336.

351. Anne Tucker, *More or Less?*, LAW PROFESSOR BLOGS NETWORK (Feb. 26, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/02/more-or-less.html](http://lawprofessors.typepad.com/business_law/2014/02/more-or-less.html).

352. *See id.* (stating that a corporation may take actions to support religious charities, underwrite a mission trip, close on Sundays, increase use of renewable energy sources, implement diversity programs, etc.).

353. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770–71 (2014).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

between rich and poor, and between men and women.<sup>360</sup> However, the enormity of these benefits has been lost in the vicious and partisan debate about the ACA. In the last Part of this Article, I highlight the benefits of the ACA for women's health generally, not just their reproductive health. By focusing only on the contraceptive mandate, the far-reaching policy potential of the ACA to help eliminate gender inequality in the workplace and in health care has been obscured.

#### V. ACA, GENDER EQUALITY, AND THE WORKPLACE

This Article has analyzed the arguments made in the ACA Contraceptive Mandate through a corporate law lens, examining various personhood theories, the ill-advised values pass-through theory, and CSR. This final Part takes a macro view of the ACA and highlights some of the benefits of the ACA for women beyond contraception. There are important financial and health equalizing provisions in the ACA, yet the contraceptive debate has drowned out the discussion of many of these benefits.

First, there exist several studies demonstrating that even moderate co-pays for health services, specifically with preventative care services for women, result in fewer women obtaining preventative health care, as they forego such care due to cost barriers.<sup>361</sup> The ACA levels the playing field for women in terms of insurance coverage and health-care access as the ACA provides access to important care and life-saving screenings.<sup>362</sup> With the enactment of the ACA, there are numerous health-care benefits provided that directly affect women; specifically there are eight new categories of preventative services that are available to women without a cost-sharing feature.<sup>363</sup> It is estimated that on August 1, 2012, approximately forty-seven million women gained guaranteed access to these services without paying more out of pocket.<sup>364</sup> All health plans are required to offer essential health services such as hospitalization, maternity care, and prescription drugs, in addition to providing preventative care.<sup>365</sup> The preventative care services were comprised of specific

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360. See generally *Strategic Goal 1: Strengthen Health Care*, HHS Strategic Plan, U.S. DEPT HEALTH & HUM. SERVS. (Mar. 10, 2014), [http://www.hhs.gov/strategic-plan/goal1.html#obj\\_e](http://www.hhs.gov/strategic-plan/goal1.html#obj_e) (discussing the purpose behind the Affordable Care Act and how HHS intends to accomplish those goals).

361. *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, U.S. DEPT OF HEALTH & HUMAN SERVS. (Aug. 1, 2011), <http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html>.

362. *Id.*

363. *Id.*

364. *Id.*

365. *The Affordable Care Act*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us/newsroom/politics-policy-issues/affordable-care-act-39966.htm> (last visited Feb. 12, 2015).

recommendations made by the Institute of Medicine and adopted by the HHS.<sup>366</sup> As these recommendations include several categories of essential health benefits, it is clear that the ACA makes numerous necessary services available to women and is not limited solely to contraception. In addition to the contraception coverage and contraceptive counseling, these preventative care recommendations include women's annual wellness visits; gestational diabetes screening; HPV DNA testing; sexually transmitted infections (STI) counseling; HIV screening and counseling; breastfeeding support, supplies, and counseling; and domestic violence screening and counseling.<sup>367</sup> It is worth noting that all of these preventative care services are essential in keeping women healthy.<sup>368</sup>

The overall cost of preventative health care has been a substantial barrier for many women.<sup>369</sup> The ACA subsidizes health insurance for those who lack affordable employer health insurance, which will particularly help women, who on average earn a lower income than men.<sup>370</sup> Additionally, women have previously been charged more, paying higher out-of-pocket costs and premiums than men for the same health-care coverage.<sup>371</sup> Forty-two states had previously allowed insurance companies to charge women more for health care, solely because they were women.<sup>372</sup> The largest antidiscrimination equalizer may be that the ACA bans such gender rating, as the ACA prohibits insurers' widespread practice of charging women higher premiums than charged to men of the same age, including regularly charging female nonsmokers more than male smokers.<sup>373</sup> Additionally, and for the first time, the ACA prohibits gender discrimination in federal health programs, health programs receiving federal dol-

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366. Karen Gantt, *Balancing Women's Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L.J. 1, 6-7 (2014).

367. *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, *supra* note 361.

368. *Id.*

369. Kathleen Sebelius, *How the Affordable Care Act Improves the Lives of American Women*, WHITE HOUSE BLOG (Oct. 21, 2013, 12:35 PM), <http://www.whitehouse.gov/blog/2013/10/24/how-affordable-care-act-improves-lives-american-women>.

370. Nancy C. Lee, *The Affordable Care Act: Speaking to Women's Unique Health Needs*, U.S. DEP'T HEALTH & HUM. SERVS. BLOG (Aug. 7, 2013), <http://www.hhs.gov/healthcare/facts/blog/2013/08/womens-health-needs.html>.

371. *Id.*

372. *The Affordable Care Act Helps Women*, WHITEHOUSE.GOV 1, [http://www.whitehouse.gov/sites/default/files/docs/the\\_aca\\_helps\\_women.pdf](http://www.whitehouse.gov/sites/default/files/docs/the_aca_helps_women.pdf) (last visited Feb. 12, 2015).

373. Brief for the National Women's Law Center, et. al. as Amici Curiae Supporting Plaintiffs-Respondents, *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011) (No. 10-2347), 2011 WL 670810, at \*13.

lars, and other programs, including the health insurance exchanges.<sup>374</sup>

Moreover, throughout a recent three-year period, thirty-eight percent of women who attempted to get insurance coverage were either rejected, charged an elevated premium, or sold policies that excluded certain benefits because of preexisting conditions, like having been pregnant or having cancer.<sup>375</sup> Previous specific examples of this include that some insurers deemed women to have a preexisting condition if they had before given birth by Caesarean section, were pregnant at the time they sought coverage, had survived domestic violence and received treatment related to abuse, or received medical treatment after sexual assault.<sup>376</sup> The ACA prohibits this practice and requires insurers to sell insurance to anyone who wants to buy coverage (known as “guaranteed issue”), and thus, to the benefit of women, the ACA bans such preexisting condition exclusions.<sup>377</sup> Additionally, the ACA guarantees maternity coverage for all women, because under the ACA, maternity care is an “essential health benefit” that plans must cover.<sup>378</sup> Prior to the ACA, only twelve percent of plans sold on the individual market even offered maternity coverage, which was frequently inadequate because of waiting periods or deductibles that could be as high as the cost of the birth itself.<sup>379</sup> The ACA changes that and does not allow pregnancy discrimination, and overall the ACA ends many insurer practices that largely disadvantage women in general.<sup>380</sup>

Thus, beginning in 2014, women are no longer denied health-care coverage due to a preexisting medical condition, and women can have access to preventative health services at no additional out-of-pocket cost.<sup>381</sup> Additionally, the HHS estimated that 18.6 million uninsured women would be eligible for health-care coverage, leading to fewer uninsured women and families and to an improvement in access to preventative health care.<sup>382</sup> Accordingly, the ACA makes comprehensive health insurance more available and affordable, and

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374. *Nondiscrimination Protection in the Affordable Care Act: Section 1557*, NAT'L WOMEN'S L. CENTER 1 (June 3, 2013), [http://www.nwlc.org/sites/default/files/pdfs/general\\_1557\\_factsheet\\_6-3-13.pdf](http://www.nwlc.org/sites/default/files/pdfs/general_1557_factsheet_6-3-13.pdf).

375. *The Affordable Care Act Helps Women*, *supra* note 372.

376. Brief for the National Women's Law Center, et. al. as Amici Curiae Supporting Plaintiffs-Respondents, *supra* note 373, at \*7-9.

377. *Id.* at \*9.

378. *Essential Health Benefits Glossary*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/essential-health-benefits/> (last visited Feb. 12, 2015).

379. Jessica Arons & Lucy Panza, *Top 10 Obamacare Benefits at Stake for Women*, THINK PROGRESS (May 24, 2012, 1:45 PM), <http://thinkprogress.org/health/2012/05/24/488844/top-10-obamacare-benefits-at-stake-for-women/>.

380. *The Affordable Care Act: Making Insurance Work*, NAT'L WOMEN'S L. CENTER 1 (Aug. 28, 2013), [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_aca\\_making\\_insurance\\_work\\_report\\_final\\_8-2013.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_aca_making_insurance_work_report_final_8-2013.pdf).

381. *Id.*

382. Lee, *supra* note 370.



“quite simply, reform is making affordable, quality health care more of a reality for women and their families.”<sup>383</sup>

Furthermore, there are particular groups of women that are substantially helped by the ACA.<sup>384</sup> More low-income women have access to family planning services due to the expansion of Medicaid eligibility for family planning services.<sup>385</sup> Also, unique health needs of women had formerly placed them at a disadvantage in the workforce compared to their male coworkers.<sup>386</sup> Even nursing mothers are afforded protection, as the ACA requires employers with more than fifty employees to provide breaks and a private place for nursing mothers to express breast milk, thereby making the extensive benefits of breastfeeding more widely available to mothers and children.<sup>387</sup>

Expectant parents will be provided professional parenting advice, resources, and support.<sup>388</sup> Senior women will have access to coordinated care, thereby helping to prevent dangerous drug interactions, duplicative tests and procedures, and conflicting diagnoses.<sup>389</sup> The most “egregious consequences” of the pre-ACA insurance schemes had affected low-income families and individuals.<sup>390</sup> However, under the ACA, low and middle-income families will receive tax credits, which will assist in making the health-care coverage affordable.<sup>391</sup> Thus, seven million women who did not have insurance would be able to receive assistance in covering part of the family’s health insurance premium, making family coverage more affordable.<sup>392</sup>

Additionally, more low-income adults will be eligible for Medicaid under the ACA, specifically, ten million uninsured women may be able to get health coverage through Medicaid.<sup>393</sup> Through the ACA’s prohibition of exclusions due to preexisting conditions, denials of coverage, and higher rates for people with health problems,

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383. *Why the ACA Matters for Women: Summary of Key Provisions*, NAT’L PARTNERSHIP WOMEN & FAMILIES 1 (July 2012), <http://go.nationalpartnership.org/site/DocServer/SUMMARY.pdf?docID=10001>.

384. *Id.* at 2–3.

385. *Id.* at 2.

386. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873 (July 2, 2013) (codified at 45 C.F.R. pt. 147, 156).

387. *Why the ACA Matters for Women: Summary of Key Provisions*, *supra* note 384, at 2.

388. *Id.*

389. *Id.* at 2–3.

390. Linda J. Blumberg, *The Affordable Care Act: What Does It Do for Low Income Families?*, FAST FOCUS 1, 3 (Dec. 2012), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF15-2012.pdf>.

391. *Being a Woman Just Got a Little Easier: How the Affordable Care Act Benefits Women*, FAMILIES USA 3 (July 2012), <http://familiesusa.org/product/being-woman-just-got-little-easier-how-affordable-care-act-benefits-women>.

392. *Id.*

393. *Id.*

and with the addition of financial help in obtaining coverage, the ACA increases access to medically necessary care, thus “saving lives as well as family resources.”<sup>394</sup> As a result, it is clear that the ACA facilitates an end to insurer practices that directly harm women.

#### CONCLUSION

The Supreme Court’s conclusion about corporate personhood in *Hobby Lobby* was short sighted from a corporate law perspective, as well as from a macro level view of gender and the ACA. As this Article has demonstrated, regardless of the theory of the corporation that one ascribes to, the rights of the female employees trumps the owner’s rights in the ACA context. This Article concludes that a for-profit corporation cannot and should not be able to be deemed as having religious beliefs. Thus, the majority’s position in *Hobby Lobby* does not comport with corporate law and will begin a slippery slope that will potentially harm women, minorities, and other vulnerable populations. The ACA’s contraception provisions are only a small, albeit important, part of the ACA. The obsessive focus on contraception has caused many of the other benefits of the ACA for women’s health-care coverage to be ignored. Using legal arguments counter to corporate law to escape the ACA fundamentally harms female employees. The rights of female employees are as important as the religious rights of employers and more important than the nonexistent religious rights of a corporation.

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394. Blumberg, *supra* note 390, at 6.

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